Access to Justice, Victims' Rights, and Private Prosecution in Latin America:
The Cases of Chile, Guatemala, and Mexico

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Árbol de la esperanza manténte siempre firme…

And to my mother.

Abstract

My dissertation explores how and when legal rights affect the effectiveness of the rule of law in developing democracies. Over the past two decades, many countries in Latin America have adopted far reaching judicial reforms, including criminal procedure reform. Judicial systems in the region have long been perceived as offering little recourse to common citizens, especially for marginalized groups. The new judicial reforms were designed to make these institutions more responsive and effective. One key way they attempt to do so is to introduce/enhance provisions for private prosecution of criminal cases. By giving the victim or their surviving relatives a right to participate in the criminal proceedings, private prosecution can, in theory, serve as a societal check on an unresponsive state. But does it? Through a comparative study of ordinary homicide cases (i.e., when the crime is committed by ordinary citizens) and human rights cases (i.e., when murder is committed by state officials) in Chile, Guatemala and Mexico, my dissertation examines (1) where this right came from and how it got diffused in Latin America, and answers (2) if these rights are actually used, and (3) when, how and why private prosecution makes a difference in the state's investigation and prosecution of murder. Following a nested research design, I work at two levels of analysis: countries and individual legal cases, allowing comparisons within judicial districts, across types of homicides, and across countries. I argue that the introduction/expansion of private prosecution in recent reforms has to be understood as the result of the consolidation of victims' rights in international law. However, international and ideational factors matter both for shaping choices of judicial reform, as well as for the mobilization of legal rights. Through an analysis of 520 homicide cases, 450 human rights cases, and various case studies, I also argue that the use and impact of private prosecution on judicial responsiveness depends primarily on (i) the history of the right in a country, (ii) the development of a support structure, and (iii) the socio-political context. I further argue that private prosecution can be used to build the rule of law from below when societal actors embrace it as a tool to fight unresponsive or inefficient judicial systems. My dissertation begins with an introductory chapter where the main argument, findings, and research design are explained. The next two chapters explain what private prosecution is and how this right diffused across Latin America. Then in a fourth chapter I provide the main findings of the use and impact of private prosecution in human rights cases across Latin America and in ordinary murder cases in Chile, Guatemala, and Mexico. Finally, in the last three empirical chapters I explain how private prosecution matters to judicial responsiveness through an in-depth analysis of human rights and ordinary murder cases in Guatemala, Chile, and Mexico.

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CHAPTER 1
PRIVATE PROSECUTION AND JUDICIAL RESPONSIVENESS

INTRODUCTION

On the afternoon of October 24, 2004, Orquidea J. Palencia closed the doors of her modest home in the town of Palin in Guatemala, where she ran a business selling hand-made tortillas. While closing the door, a man forced himself into her home and immediately shot Orquidea in the head. Witnesses said the man ran out of the house towards a motorcycle, driven by another man, who was waiting at the end of the road. At the crime scene only a judge, an ambulance, and the funerary services appeared. The *Ministerio Público* (MP), the state's prosecutorial organ in charge of investigating and prosecuting crimes, never showed up. No witnesses were interrogated. No detective investigated the crime scene. Not even an investigation file was opened (Mansilla 2008).

Weeks later, Orquidea's husband and their two children fled their community and went to Guatemala City where they sought the support of a non-governmental organization (NGO) named *Sobrevivientes*. They explained to the NGO workers that they feared for their life as they had received death threats from the man they suspected had killed Orquidea. Furthermore, they said, they feared to report these threats to the authorities, as they thought that doing so would make the man more angry and would kill them in retaliation. They assumed the authorities would not protect them. They felt as if they were alone and helpless and they thought the murder of Orquidea would go unpunished. And they saw in *Sobrevivientes* not only a protector but a chance for justice.

The NGO did not just take the family in and provided shelter for them, they also took charge of the case as private prosecutors and they filed a formal request to the *Ministerio Público* to open an official investigation into the murder of Orquidea (S2-M 2010). Without the work of the private prosecutors of *Sobrevivientes*, impunity would have prevailed. But thanks to the resilience and dedication of the private prosecutors, the case reached trial, offering Orquidea's family a chance to fight for justice within the courts of Guatemala.

Orquidea's story is a sad example from a country whose judicial system fails to investigate and prosecute crime, and therefore, fails to uphold the rule of law and protect basic human rights. Failure within a judicial system can be of two types, depending on whom the system is failing, the defendant or the victim. On the one hand, we can see failure in the face of wrongful convictions, which can be a symptom of tyranny; and, on the other hand, we can see the face of criminal impunity, which can also reflect democratic decay.[1] It is on this second face that this research focuses, a face that unfortunately constitutes a reality lived by crime victims and their relatives in many countries across Latin America. Specifically, this research offers a systematic empirical analysis, the first of its kind, on the role that private prosecution plays in judicial responsiveness (i.e., how the judicial system responds to a claim) in three countries in Latin America: Guatemala, Chile, and Mexico.

Before elaborating, it is important to establish just what private prosecution is. The right to private prosecution empowers victims of crime in ways that the US criminal

[1] Empirically, of course, a country's judicial system may in fact present both type of judicial failures.

system cannot conceive. As private prosecutor, the victim's lawyer has standing to intervene during the hearings and trial, and can even contradict the public prosecutor. The private prosecutor even has certain controls over the state in terms of how to conduct an investigation (e.g. sometimes by forcing the public prosecutor to follow a certain line of investigation) and when to end a prosecution (e.g., by requesting to a judge to keep the criminal investigation open or to take the case to trial).

The right to private prosecution, then, goes well beyond the victim's right to speak granted in the US[2] because the right to be a private prosecutor is a right of the victim or their relatives to have a lawyer that represents his interests and to *participate* in the criminal proceedings.[3] Whereas the public prosecutor represents the interests of the state, the private prosecutor represents the interests of the victim. Private prosecution, however, is not accessible to all victims of crime because law places on the victim or their relatives very strong requirements. For instance, they have to be represented by a lawyer. Also, it is a right that requires the victim or their family to voice their interest to "constitute as a private prosecutor" during the criminal proceedings but they have a limited time to do so, usually before the indictment, i.e., before any criminal charges are made. Although in most Latin American criminal procedure codes (CPCs) this right can only be claimed by the victim or the victim's family, some countries allow other state

[2] See the Kyl/Feinstein Crime Victims' Rights Constititutional Ammendment approved in 2003, which grants victims the rights to be notified, present, and heard at critical stages throughout their case in criminal proceedings.

[3] Throughout this dissertation I will purposely refer to victims as male, to avoid the stereotype of women as victims, unless I am referring to a specific murder victim that happened to be female. Furthermore, the sample data analyzed in this research shows that women always represent a small percentage of murder victims.

agencies and even NGOs to litigate as private prosecutors in favor of an individual victim or the collective interest.

As puzzling as this right may sound in the US and despite the scarcity of empirical scholarship referring to this right, private prosecution is actually very widespread in the CPCs of many countries around the world (Brienen and Hoegen 2000, Binder 2000, Zaffaroni 2000, Doak 2008, Kirchengast 2008). Since the 1980s, most states in Latin America have reformed their CPCs in an effort to transform their systems towards an accusatorial model of criminal justice, part of a wider judicial reform effort to improve efficiency, judicial independence, and access to justice. Against certain caricatures that have pictured these reforms as an "Americanization" of the judicial process in Latin America, the right to private prosecution stands as a quite non-US legal figure that provides procedural mechanisms for *victims of criminal offenses* to actively participate in the penal process. Despite cross-national variation in the timing of these reforms, the introduction *or* strengthening of the right to private prosecution is a similarity across countries. At least in the context of Latin America, 14 out of 17 countries in the region today offer this right to victims or their relatives.[4]

The introduction and/or expansion of private prosecution as part of the reforms towards an accusatorial system raises several questions. Where did this choice of reform come from? By introducing private prosecution legislators provided the possibility of a societal check on the state's duty to investigate and prosecute crime in Latin America.

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[4] In this research I focus only on Spanish and Portuguese speaking countries of Central and South America that are based on a civil law tradition. I generically refer to these countries throughout the dissertation as "Latin America". I exclude from the analysis all Caribbean and common law countries.

But does it work that way? To date, there has been no research on how much private prosecution is actually being used by victims nor on how it affects judicial responsiveness. One common assumption, evident in the Orquidea case, is that victims' relatives seem to believe that having a private prosecutor is better than relying only on the state to fight for justice. But is this generally true and does turning to private prosecution actually improve judicial responsiveness? What about when the crime was committed by a state agent, is the impact of private prosecution the same? And when and how do victims or their relatives have access to this right?

This dissertation addresses these questions through an empirical analysis that improves our understanding of the power and limits of the little known right to private prosecution. I show how this procedural right works in action, strengthening a victim's defense of his interests by improving judicial responsiveness to murder cases. By judicial responsiveness in this research I mean that a case file will reach a court and that the case will have some form of judicial solution (dismissal, plea bargain, or a trial). Although private prosecution may seem unnecessary in countries with a fully functioning judicial system that investigates and prosecutes crime, through a comparative empirical analysis of Chile, Guatemala, and Mexico, I show that it is actually quite important when judicial systems fail to prosecute and punish heinous crimes such as homicides, whether these are committed by state-agents or by ordinary citizens.

Throughout this dissertation I make the following main arguments. First, I argue that to understand legal reform *and* legal mobilization we must also take into account *international* and *ideational* factors. The emergence of victims' rights and a victims'

rights movement at the international level must be understood as shaping the choices that designers and reformers faced when the domestic demand for reform emerged. The rise of the victims' rights movement not only helped shape domestic legal and institutional reforms, but it also provided financial, discursive, and legal resources for the development of domestic support structures that allow victims to mobilize the right to private prosecution and channel grievances through the courts

Second, the *type of reform* of the criminal procedure code (first time inclusion of the right versus expansion of the right), as well as the *timing* of the reform matter to understand both the supply and demand of private prosecution. The use of private prosecution requires both rights' awareness and the consolidation of this right *as a right* of victims in (a) the demand side, i.e., claimants who regard law and courts as the means to channel grievances, and in (b), the supply side: reformers (who introduce the right) and providers of legal aid (who develop a support structure that institutionalizes this right through the provision of free legal aid for victims, either within NGOs or state agencies). This institutionalization of the right to private prosecution requires time and resources, and, therefore, the use of private prosecution is dynamic and it is expected to shift across time. Only rights that are known can be claimed, therefore, the history of the right in a given country matters for how institutionalized it is today. However, along with rights awareness, claimants must also have a certain degree of security to channel their grievances through the courts. Sometimes claimants need to wait for the political opportunity to channel their grievances through the courts.

Third, regarding the question of if private prosecution is actually used, I can confidently say that private prosecution is in fact used. Its use depends not only on *rights' awareness*, but also on how victims overcome the *costs* associated with accessing the courts. Costs to access the right to private prosecution come from (1) resources, and (2) security to press a claim. Across countries and across types of murder cases, when victims have the resources and the security to press a claim as private prosecutors, they are more likely to use the right. When victims either do not have the resources, and/or it is actually unsafe for them to push for justice, they will only use the right to private prosecution if there is a *support structure* in place that overcomes the costs associated with accessing the courts. In contexts where the right of private prosecution is firmly consolidated, this support structure may come from NGOs or state agencies that provide free legal aid for victims, like in Chile. In other contexts and when the willingness of the state to prosecute crime (as in human rights cases) or the capacity or willingness of the state is low (as in ordinary cases in highly violent contexts), NGOs willing to absorb the costs in terms of litigation as well as to provide protection, open windows of opportunity for victims to access the courts and use the right to private prosecution. Legal mobilization and access to justice, therefore, depend on overcoming costs, which is greatly enhanced when an appropriate support structure is in place.

Fourth, regarding the question of the effect of private prosecution on judicial responsiveness I argue that private prosecution can be a powerful right but that its powers are *bounded by the subsidiary role it plays* in the prosecution and by the same state structure it is contesting. A good prosecution depends on a good investigation conducted

by the police under the orders of the state's prosecutorial organ who is ultimately in charge of the criminal investigation and prosecution. This makes the prosecutorial organ a key gatekeeper dictating what, when, and whom to investigate. I show that private prosecution will matter most for judicial responsiveness in contexts where we see a prosecutorial organ that is unresponsive or unwilling to investigate and prosecute cases. In other words, private prosecution does work as a "control mechanism" on the state's duty to investigate and prosecute crime where and when it is needed, but with the caveat that few will actually use the right given the costs in terms of resources and security that are related to using this right. When private prosecution is actually used in contexts of high impunity, it does matter for judicial responsiveness by improving the investigation, keeping the case files open, avoiding state neglect and oblivion, and pushing the cases forward, exemplified in human rights cases in Guatemala and Chile, and in ordinary cases in Chihuahua and Guatemala. Even in contexts where the prosecutorial organ (or *Ministerio Publico*, MP) is actually doing its job, private prosecution improves the investigation, helps cases reach the courts, and improves the overall perception of access to justice by providing a sense of better "quality of service," as in the case of ordinary crimes in Chile. *Timing* also matters in terms of the impact of private prosecution on judicial responsiveness. Given that private prosecution serves as a control mechanism on the state's duty to prosecute crime, shifts in the state's criminal prosecution policies have important consequences on the impact that private prosecution may have. This is most evident in human rights cases, where the policy of the state to investigate and prosecute

this type of crimes can shift as the transition to democracy consolidates and the interests of the government change, as the cases of Chile and Guatemala show.

And finally, private prosecution operates in a context where both *beliefs* about the law and *legal institutions* interact allowing for rights to be mobilized and used. Private prosecution serves as a control mechanism when claimants believe courts are the means to channel grievances. Furthermore, private prosecution can at times reflect a bet that citizens make on their justice system, particularly evident in human rights cases when victims place claims through the courts even when they know that the chances for legal success are low. The fact that victims or victims' relatives channel their grievances through this legal institution, rather than rioting, lynching or following other forms of personal vengeance (see, for example: Godoy 2006), highlights the importance of principled beliefs regarding what the law and the courts do for citizens, and it reflects the potential role of private prosecution as a means to build rule of law from below.

In this introductory chapter I first highlight the importance of studying procedural law in the context of Latin America to improve our understanding of the rule of law, access to justice, and the politics of criminal prosecution. I argue that the rule of law should be understood both as formal institutions and as processes through which rights are being claimed. Through this process-oriented view of the rule of law we can better appreciate that the rule of law is both about rights on the books and rights in action, and that building the rule of law can be a bottom-up process. In the second section I flesh out the research questions followed by a third section that reviews the literature on which the arguments of this dissertation build. In this section I focus on a review of the literatures

that help us understand how judicial reform happens (i.e., legal diffusion), when rights are used (i.e., access to justice and legal mobilization) and how rights matter (i.e., legal effectiveness and legal adjudication). In the fourth section I explain how I answered my research questions describing my research design and methods. Then, in the last section I further develop the argument through a brief overview of the main findings of this research and conclude with an outline of the dissertation.

1.1. Rule of law and the importance of studying procedural rights

Procedural law prescribes the formal steps that each actor has to take to enforce rights throughout each stage of the proceedings. In so doing, procedural law also establishes who is considered an actor and what are her rights in the judicial proceedings. There are theoretical and normative reasons for political scientists to take procedural rights seriously. Perhaps most prominently is that when we study how and when citizens claim procedural rights, we shift our theoretical framework towards a more bottom-up and process-oriented view of rule of law.

A great concern among policymakers and scholars has been the quality of democracy and the consolidation of democracy in Latin America. In most countries in the region, after the dual transition to electoral democracy (Schmitter and Karl 1991, Huntington 1991) and market economy (Randall 1997), citizens have become very disappointed with the quality of governance. This pushed the scholarly debate towards understanding the existence of "illiberal democracies" (Zakaria 1997, Diamond 1999) or the prevalence of "brown areas" of democracy (O'Donnell 1993a). This new focus on understanding democratic quality shifted theoretical attention on the importance of the

rule of law and the institutions that sustain and enforce it (Méndez, O'Donnell and Pinheiro 1999, Cichowski 2006, Kaufmann 2004, O'Donnell 2004, Schedler, Diamond and Plattner 1999, Domingo 1999, O'Donnell 1993b). However, most of the research on rule of law has been top-down and institutional-oriented, that is, it has focused mostly on the institutions that are assumed to buttress rule of law, creating a wealth of research mostly focused on constitutional courts and judicial independence (Ferejohn 1999, Skaar 2001, Helmke and Ríos Figueroa 2011).

Furthermore, the literature on judicial reform and the judicialization of politics has given little attention to how claims make it to lower level courts, to the impact of reforms in legal procedure, and to issues of access to justice. For decades now, international and domestic actors have been highly involved in supporting and promoting judicial reform in the region (Hammergren 2002, 2001, Domingo and Sieder 2001, Dezalay and Garth 2011, 2002). These reforms have been accompanied by a rise in the importance of courts and judges in domestic politics, and in an increase of social claims pressed through courts, both evidence of a "judicialization" or legalization of social relations (Sieder, Angell and Schjolden 2005, Cichowski 2006, O'Donnell 2005). Although there are studies looking into the advances and failures of judicial reforms in general (Hammergren 2002, Hammergren 2002 b, Pereira 2003, Messick 2002, Helmke and Ríos Figueroa 2011), a weakness in empirical research has been to assess how new institutions are actually working for the individual citizen and very few have studied the impact of these reforms in terms of access to justice (Skaar 2011).

Despite the potential consequences of private prosecution in terms of access to justice and the rule of law in Latin America, scholars have neglected to study this procedural right as a dependent or independent variable. Scholars have addressed private prosecution tangentially as an intervening variable (Brinks 2008, Simmons 2009, Collins 2010) or descriptively in comparative studies of procedural rights (Brienen and Hoegen 2000, Doak 2008). But there remains no research in political science or comparative law, whether in the US or Latin America, that can help us understand how this procedural right works in Latin America. With this research on private prosecution I add to the wider debates on rule of law and judicial reform by looking into how newly introduced (or reformed) legal institutions work, how and when citizens use their rights, and the effects these have on access to justice.

The study of procedural rights in the context of Latin America not only fills gaps in various literatures, but also provides us with better analytical tools to understand the rule of law. Rule of law is defined here as the *exercise of power* based on a system of laws that is impartial, clear, prospective, general, and public, which is institutionalized in the judicial branch. The rule of law as a norm prescribes that no one, neither rulers nor ruled, is above the law and that everyone is equally treated under the law (Adelman and Centeno 2002, Bedner 2010, HiiL 2007). The emphasis here on the rule of law is both from an institutional perspective (i.e., focus on judicial institutions that theoretically buttress the rule of law) as well as a process-oriented perspective on the rule of law (i.e., on how power is exercised and how rights work in this context). From this perspective

criminal prosecution appears as a political process through which the rule of law is both exercised and can potentially be strengthened (Laplante 2010).

Therefore, a focus on procedural rights brings to the surface the politics of criminal prosecution and its effects on the rule of law and access to justice in new democracies. Because we know that rights mean nothing if there are no remedies for violations of those rights or if right bearers do not have access to those remedies (Oquendo 2006, Brinks 2008, Binder 2000: 211), studying the right to private prosecution in Latin America brings to light the structural and contextual conditions that allow victims or their relatives to access the justice system and serves as a window through which we can better understand how the rule of law works for the common citizen.

There are also normative reasons for studying how procedural rights work in action. Despite democratization in Latin America, the rule of law has been perceived as weak in many countries (Méndez et al. 1999, Brinks 2008, Prillaman 2000), and in many instances this weakness is perceived as the result of the state's failure to comply with its obligation to, first, prevent crime, and then conduct investigations and prosecute criminals. The failure of the state to fulfill these duties constitutes a violation of various rights protected by the American Convention on Human Rights, like the right to life (Art. 4) and the right to judicial protection. Article 25 of this Convention states that:

> "Everyone has 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 the Convention, even though

> such violation may have been committed by persons acting
> in the course of their official duties."

Impunity, hence, is a judicial failure that can be considered a human rights violation. The rights to judicial protection and a fair trial, perhaps the most fundamental procedural rights protected by international human rights treaties reflect an implicit contractual relationship where the state has the obligation to provide citizens with recourse to courts and ensure equality, certainty, and fairness in the process. The potential consequences of judicial failure in terms of democratic consolidation and rule of law in the region cannot be underestimated. A constitutional democracy not only entails checks and balances, but also the protection and enforcement of rights. Failures of the state to prosecute human rights violations have been widely recognized as relevant for democratic consolidation (Brinks 2008, Laplante 2010, Sanford 2008, Skaar 2011, Hilbink 2007b, Hilbink 2012). My research further suggests that failures to investigate and punish *ordinary* crime can also have consequences for the consolidation of rule of law in new democracies.

In most countries across Latin America, judicial protection is also a constitutional right that has been incorporated into domestic procedural law, like criminal procedure codes. Interestingly, after the judicial reform wave that began in the 1980s, designers in Latin America not only incorporated key rights like judicial protection, fair trial, or due process rights into their criminal procedure codes, but they also granted victims or their relatives strong participation rights through the right to private prosecution, with the aim to serve as a societal control mechanism on the state's duty to investigate and prosecute crime (Binder 2000, Binder 2000b). If we want to get a complete picture of the interplay

between citizens' rights and state's duties, we need to look into the domestic procedural rights granted to citizens and the factors that allow citizens to claim these. In this research I do this by looking at how and when private prosecution impacts the judicial response to state-sponsored murder (i.e., when the crime was committed by a state agent) and ordinary murder (i.e., when the crime was committed by an ordinary citizen). In the next section I will flesh out the main research questions of this research, as a way to introduce the literature that served as a compass and analytical toolkit for this project.

1.2. The research questions

Due to the lack of research on private prosecution, in this research I address three main questions: (1) Where does this right come from and how it has diffused across the region? (2) Is the right to private prosecution actually used? And (3), if private prosecution is used, does this right make a difference for the victim in terms of judicial responsiveness and how? I borrow from Brinks (2008) and define judicial responsiveness as the response of the judicial system to a claim of a right; i.e., in this case, the responsiveness of the judicial system to murder.

Through a comparative study of Chile, Guatemala, and Mexico, I offer an answer to all of these questions, and show how similar laws perform in different countries or how access "on the books" translates into access "in action". To do so, I first identify the conditions that allowed the introduction/expansion of private prosecution; second, I identify the conditions that allow victims to access and use the right to private prosecution; third, I identify the factors within each country that explain how and when

private prosecution affects judicial responsiveness across different types of murder cases (human rights cases versus ordinary murder cases); and, finally, I highlight the factors that explain differences and similarities regarding the use and impact of private prosecution in different socio-political contexts. I limit the scope of the research on the impact of private prosecution on the judicial response to murder cases, both "ordinary" cases, i.e., when the crime was committed by an ordinary citizen, and human rights cases, i.e., when the crime was committed by a state agent. The objective is not to understand or explain overall judicial efficiency, judicial performance, or judicial responsiveness, but rather to understand *when* and *how* private prosecution works in different contexts and across different types of crimes.

1.3. Legal reform, legal mobilization, and legal effectiveness: a literature review

This research looks at the importance of rights emergence for rights mobilization. Citizens need, first to have rights, and then awareness of such a right, but rights are not just "there" and appear out of the blue. Also, citizens need access to the justice system in order to make claims and seek remedies when their rights are wronged. This raises three broader questions. Where do the ideas or choices for legal reform come from? When will a right bearer be able to claim a right? And when will the state make effective a claim?

In this project I approached my research questions drawing on insights coming from three disciplines: political science, sociology, and legal studies. The following pages offer an overview of the various insights that I took as point of departure into

understanding the links between rights emergence and judicial reform (legal diffusion), how and when citizens claim their rights and may engage in litigation (legal mobilization), and when do states protect and adjudicate such rights (legal effectiveness). Adjudication refers to the "individualized and formal application of rules by officials in a particular litigation". Litigation, in contrast, is defined as the "pressing of claims oriented to official rules, either by actually invoking official machinery or threatening to do so." (Galanter 1974: 95) In the first section of the literature review I focus on how rights diffuse across countries, in a second section I review what we know about when rights are used, and then in a final section I focus on when the state responds to claims and adjudicates rights.

1.3.1. Judicial reform and legal diffusion: where do choices for reform come from?

As this research illustrates, rights do not appear out of nowhere. I make the argument that to understand the introduction of new rights we need to look both at the supply and demand sides of legal reform (Weyland 2005, Weyland 2008). The relationship between law and society is dynamic, and therefore we must be aware of *where* rights come from (supply side) and how this shapes *which rights* are introduced in a reform and later mobilized (demand side). The objective of this dissertation is not to explain the demand for judicial reform, but to understand where the options for reform came from and how private prosecution became part of that reform. Therefore, in this section I only explore the factors that have been noted as relevant in explaining judicial reform or change and explain how I build on this literature.

Most literature explaining the rise of judicial reform in Latin America treats the subject from a comparative politics approach that explains change either as the result of exogenous shocks (Pierson 2004, Bates 1998), or as gradual adaptation or modification of existing institutions (Thelen 1999, Steinmo, Thelen, and Longstreth 1992). The focus, however, tends to be on the *domestic* environment surrounding the time of the reform. For example, some have explained judicial reform as a response to the (il)legality of the prior authoritarian regime (Pereira 2003), or as a response of rational actors facing increasing uncertainty (e.g., an incumbent predicting a future decline) (Finkel 2004a, 2004b; Magalhaes 1999, Domingo 1999). Although there has been recognition that reforms can be promoted from within, as well as from abroad (Carothers 1999; Domingo and Sieder 2001; Hammergren 2001; Sieder et.al. 2005;) with few exceptions the literature has not really engaged *theoretically* with the *international* dimensions of the judicial reform process (Weyland 2005, Langer 2007). This neglects two crucial points. First, what we are observing is clearly neither domestic nor regional exclusively, but is a global phenomenon. For instance, foreign aid and loans to judicial reform cover all developing regions. Second, the specific normative content of the reforms has been left unproblematized, leaving out the question of why so many different countries are choosing similar reforms. For instance, what made "private prosecution" an integral part of judicial reform?

In this dissertation I thus build on insights from the historical institutionalism literature that stresses the importance of path dependency as a stabilizing mechanism that helps institutions endure the passing of time, and that stresses that change comes as a

need to "modify" institutions when facing new demands (Thelen 1999, Steinmo, Thelen & Longstreth 1992); but, following a wide literature on legal transplants and diffusion, I look at the *international* sources of the policy choices available to reformers as "the" solutions at the time of the reform. That is, I look at the interaction between a *domestic demand* for change and the *international sources* of the supply of choices of reform. In this dissertation I look, then, at the mechanisms of diffusion of the right to private prosecution.

Diffusion occurs when "government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries" (Simmons et.al. 2006). That is, international mechanisms are at work when the content of the policy or legal reform is chosen by designers of the reform based on information emanating from *other* countries. The literature has highlighted three main mechanisms of diffusion: coercion, emulation/learning, and socialization.

Some authors have stressed the role of coercion as a mechanism of diffusion where a state (a) is bluntly coerced into reforming, or (b) is indirectly forced into enacting the reforms (Gruber 2000). For coercion to be the main mechanism driving change, however, we must find evidence of two assumptions (1) that a powerful actor has an intentional motive or incentive to produce change in the weaker actor, and (2) that the weaker actor (the reformer) would prefer not to change in the absence of coercion (Simmons, Dobbin and Garrett 2006: 790).

Others, however, have stressed emulation and learning mechanisms of diffusion by stressing either principled beliefs or cognitive elements that shape how when facing

the need to change, policymakers resort to available "solutions," usually looking at what similar countries facing similar "problems" did. Those that stress cognitive elements argue that learning and emulation from foreign models usually comes from a bounded-rationality and a willingness to decrease potential losses (Weyland 2008). Facing a perceived need to reform, reformers follow causal beliefs as cognitive heuristics (DiMaggio 1997, DiMaggio and Powell 1983). The reformer uses, then, domestic or foreign models in which to base its own solution for reform. Also, principled beliefs of what is considered "legitimate" either in the domestic or the international arena can trigger diffusion. The agent chooses change due to normative or principled beliefs on what is appropriate and what is considered legitimate (rather than causal beliefs). The reformer makes the choice to reform simply to comply either with domestic or international legitimate standards of what institutions "look like" (DiMaggio and Powell 1983, Weyland 2005). Both of these emulation mechanisms, however, assume that designers and reformers "observe" and gather information of what is "out there" -the international realm- in terms of choices for reform (either as the "optimal" or as the "legitimate" solution).

In socialization mechanisms the diffusion of ideas or choices of policy reform is the product of a social interaction, where the reformer agent interacts with foreign or external actors. In this more social view of diffusion, I distinguish in the literature two different mechanisms of how socialization happens: through persuasion (Johnston 2001, Sikkink 2002, Boyle and Sharon 2000) or learning (Axelrod 1986, Simmons et al. 2006). Perhaps the most important distinguishing elements in socialization mechanisms is that

the agent of reform is considered in a social (international) context, as well as in an ideational context. Change is seen as a dynamic process where different actors interact (domestic, external), but also where the preferences and interests of these are problematized and taken seriously by looking at ideational factors. Socialization mechanisms make relevant not only the designers of the reform, but also their interaction with foreign or external "promoters" of a particular idea or policy. "Norm entrepreneurs," that create networks and diffuse ideas or norms across boundaries can shape the contents of the reform (Finnemore and Sikkink 1998, Sikkink 1993, Sikkink 2002, Sikkink 2005). These agents can be part of a transgovernmental network, where bureaucracies of different countries are interacting, sharing information, and making policy with their homologues at the bureaucratic level (Slaughter 2004a, Slaughter 2004b). Or these agents can also be part of an epistemic community, a network of professionals with recognized expertise and competence in a particular domain. Epistemic community members share a set of normative, principled, and/or causal beliefs, and their recognition as "experts" entitles them with an authoritative claim to policy-relevant knowledge (Haas 1992).

It is on these insights that I build on in this dissertation to show where the right to prosecution came from, how it got implemented in the criminal procedures codes, and how the type of reform affected later observed patterns of the use and impact of private prosecution. In other words, by looking at the history of the right and the international and ideational factors that helped introduce private prosecution as part of the criminal procedure code reform package, we can understand why some countries introduced the right for the first time, or expanded it. Private prosecution was not necessarily an obvious

choice, but emerged as a choice in great part due to the emergence of victims' rights and a victims' movement that allowed key designers to think about private prosecution, in particular, and victims rights, in general, as an integral part of the reform. The type of reform (introduction or expansion of private prosecution), which is determined by the preexisting history of private prosecution in a country, is also important to take into account to understand how institutionalized the right to private prosecution is in a given country and how actors are engaged in its mobilization.

1.3.2. When do citizens use rights: explaining legal mobilization

This section bridges two different literatures. On the one hand, in the last two decades a rich collection of socio-legal scholarship has offered various insights on legal mobilization that have improved our understanding of how the law matters or not for the struggle of causes, social movements, and contentious politics in general (McCann 1994, Sarat and Scheingold 2005, McCann 2006a, McCann 2006b, Sarat and Scheingold 2006, Sarat and Scheingold 2008, McAdam, Tarrow and Tilly 1997, Merry 2003, McAdam 2004, Halliday and Liu 2007a, Peruzzotti and Smulovitz 2006b). In more recent years, on the other hand, the democratic accountability literature has instead focused its efforts on understanding the quality of new democracies, advancing important theoretical developments that have furthered our understanding of the various factors that affect accountability, which is defined as the ability of citizens to ensure that public officials are answerable for their behavior (Magaloni and Diaz-Cayeros draft, O'Donnell 1999a, Schedler et al. 1999, Galligan 2000). From these efforts, the concept of social

accountability emerged as an analytical tool to understand the role of civil society as a vertical mechanism of social control over the state through demands for rule of law and due process (Peruzzotti and Smulovitz 2006a). Although the links between the legal mobilization and social accountability literatures are implicit in their focus on the role of civil society, in this section I highlight how legal mobilization can work *for* social accountability.

a) The barriers to legal mobilization

No legal system is egalitarian in practice. For rights to work, they must be claimed, and not everyone has the resources necessary to engage in litigation (Zemans 1983). There are several barriers that may impede a right bearer to claim a right, which can be categorized as sociopolitical, institutional, material, and ideational. The sociopolitical context can become a barrier to engage in litigation, which is most evident in contexts of political repression that may curtail attempts to bring claims of human rights abuses to the courts. For instance, there are strong incentives for victims of crime to engage in litigation only when they have an expectation that the claim will be addressed and when they do not fear for their lives. Among the institutional barriers more prominently figures the basic architecture of the legal system, which by design, creates and limits the possibilities of using the system as a means of redistributive social change (Galanter 1974, for a review of the debate also refer to:McCann 1994). The legal system shapes and constraints the incentives of all the actors involved in the legal process, from claimants to lawyers, prosecutors, and judges.

Material barriers emerge from the costs related to litigation. In the case of crime victims, given that they are one-shot players, their incentives and costs are different than those of repeat players, such as prosecutors, who have more experience and resources in litigating. For crime victims to bring a claim to the courts is costly as it requires their money and time. In this research I will show that sometimes threats to their life also raise an important cost to victims that reduces their incentives to bring claims.

Focusing only on structural or material barriers, however, offers a very narrow and static view of law. In contrast, recent constructivist approaches have shifted the focus to the interaction between law as institutions and law as legal norms, rules or discourses that structure practices (McCann 2006a). This focus on ideational factors has raised the importance of rights consciousness: "individuals have only the legal rights of which they are aware *and* which they can hope to enforce or use" (Daniels and Martin 2009: 164, emphasis added). This means that rational thinking matters as well as principled beliefs. Not only must there be rights' awareness for a right to be claimed, there must be a certain prior belief regarding how the system would work for a particular claim. However, this belief is elastic: it can be modified, adjusted, and reconstructed.

In this research I will show that citizens not only need to be aware of their rights, but their commitment to channeling grievances through the courts adjusts and responds to the overall sociopolitical context as well as to principled beliefs that individuals hold regarding the role of courts. This relationship between citizens and law is dynamic. Although structural factors, such as socioeconomic status, can also determine ideas or preferences regarding law (Young 2009: 70-71), ideational factors help explain the

constitutive relationship between law and society (Halliday and Liu 2007b, Hilbink 2007a, Hilbink 2007b, Hilbink 2008a). That is, although structural factors matter, these do not have a mechanical effect on how citizens understand and perceive law and the role of courts. Therefore, based on these insights I will argue that although rights' awareness is necessary to bring a claim, when the costs of security are high to the claimant, it is a principled belief about the role of law and courts that motivates individuals to engage in litigation. Furthermore, in contrast to more cynical views that take the courts as fully dependent on the ruling elite and the power structure (Ginsburg and Moustafa 2008), I will also argue that placing claims even when facing an unresponsive state can help build rule of law from below, as this suggests that citizens are making a bet on their own laws and judicial institutions.

b) Overcoming barriers to legal mobilization

Despite the barriers that political/institutional, material, or ideational factors may impose on legal mobilization, there are several factors that can help a right bearer to mitigate or even overcome those barriers. The eventual success of legal claims is dependent on structural, agentic, and ideational factors which have been modeled by social movement theorists into three interdependent categories: resources, context (political opportunity), and framing processes (Kitschelt 1993, McAdam et al. 1997, McAdam 2004).

Resources include not simply an individual's personal wealth but also the "*support structure*" to support litigation, consisting of a network of rights advocacy

organizations, lawyers, and financial aid (Gloppen 2005, Epp 1998, Oxhorn 2003, Andrews and Edwards 2004, Garro 1999, Daniels and Martin 2009). Networking enhances access to resources and facilitates mobilization (Andrews and Edwards 2004), and even helps improve the probability that a claim will be addressed. The creation of transnational networks must also be taken into account, as these can affect state behavior by creating pressure from below and from abroad (Keck and Sikkink 1998, Popkin 1987, Gourevitch 1978, Sikkink 2002, Sikkink 2005).

Legal aid is key when the claimant's individual resources are scarce. Lawyers, as a profession, constitute an important resource in terms of the free legal services that they may provide for the poor, either as part of their legal education (Garro 1999) or as pro bono service. It is commonly accepted that for the underprivileged to access the justice system they must rely on legal aid. In criminal law, the right to legal advice for the accused is recognized by most states in the institution of public defense for suspected perpetrators of crime. For victims of crime, however, there is no such aid from the state. Victims of crime rely on the private provision of legal advice. This privatization of legal advice, however, has the consequences inherent in circumstances when the supplier (not the demand) is in control, because "those providing the resources have their own goals and interests in supporting such services, some of which go beyond simply serving the needs of the poor"(Daniels and Martin 2009: 147). Although this may not be a problem unique to victims, this research shows that the privatization of legal aid generates a paradox in private prosecution when this aid is being offered by NGOs: as private

prosecution can improve access to justice to some type of victims, it can also close the doors for other type of victims.

The context is another key factor allowing legal mobilization to happen. *Political opportunity* is defined here as both a domestic (McAdam et al. 1997) and an international structure that provides "incentives and constraints for people to undertake collective action by affecting their expectations of success or failure" (Sikkink 2005). The importance of political opportunity is that it may open or close a space for mobilization, and thus it may also open or close a space for social accountability. It is assumed here that when traditional channels fail to make a state accountable for neglecting to enforce the rule of law (i.e., horizontal mechanisms such as intra-state mechanisms, or a vertical means such as elections) (O'Donnell 2004, O'Donnell 1999a, O'Donnell 1999b), social accountability may emerge as a mechanism to expose wrongdoing and push the state to take action and do its job. The objective of social accountability, then, is to make "governments legally accountable […] by exposing and denouncing cases of governmental wrongdoing, activating horizontal agencies of control, and monitoring the operation of those agencies, mechanisms of social accountability make a crucial contribution to the enforcement of rule of law." (Peruzzotti and Smulovitz 2006b: 11) This means that ideas or expectations about how a state should behave and what goods it should deliver, are also important for political opportunity (Hilbink forthcoming). Societal actors such as civil associations, NGOs, or social movements may pursue judicialization of a cause (through litigation) as one strategy of social accountability. This strategy can be complemented by mediatization and social mobilization, both also

strongly related to, and dependent on, the existence of a support structure and framing processes (Peruzzotti and Smulovitz 2006b).

Finally, *framing* refers to the process within legal mobilization that involves the construction of particular ideas, meanings and cognitive and moral constructions of a "problem." Claims are thus constructed, by framing issues through the use, appropriation, and even creation of different discourses, norms, and ideas. Legal mobilization involves also a struggle "not only to promote a given social or political agenda, but to establish and promote certain meanings and problem-definitions as legitimate as against those who dispute them." (Leach and Scoones 2007) How victims frame their struggle is just as important as rights' awareness. Framing an issue or grievance as a legal matter reflects both a choice and a belief in law. Furthermore, framing issues in human rights and/or victims' rights can greatly empower a claim (Donnelly 2003), and it can also help actors obtain financial domestic or international resources. But, as I will show in the dissertation, framing can also create a barrier to legal mobilization: NGOs that frame their struggle, for instance, in terms of women's rights, can close an opportunity for male victims to access legal aid and hence access justice.

The argument developed in this dissertation builds on these insights and contributes to our understanding of how rights work in practice. My argument draws on the social movements and legal mobilization literatures (McAdam 2004; Sikkink 2005; Kitschelt 1993; Epp 1998) to explain how a support structure, the context, and ideational factors like rights awareness impact a victim's access to justice. I will argue that the political context, a support structure (in the form of legal aid), and ideational factors

(beliefs in courts and awareness of rights) interact in determining the use of private prosecution. Next, I will detail the factors that are expected to impact when the state responds to a claim.

1.3.3. When does the state respond to claims or adjudicates rights

Once a right has been mobilized the legal system may or may not respond to that claim. Hence, given that I am interested in understanding how and when private prosecution works, in this section I highlight factors suggested in the literature that explain when the state responds to claims and adjudicate rights. For analytical purposes I categorize these factors as being structural or agentic factors.

a) Structural/institutional factors

It has been long assumed that the combination of both rule of law and democracy improve the protection and adjudication of rights (Risse-Kappen, Ropp and Sikkink 1999, Schedler et al. 1999, Donnelly 2003, O'Donnell 2004). However, empirical research has been less clear in explaining how this happens. Despite the recognition that legal institutions matter, the literatures of transitional justice, judicial reform and comparative criminal law seem rarely to converse with one another, a fact that hinders our understanding of *how* this happens, and *which* domestic legal institutions matter in this process. In this dissertation I argue that we need to take stock of the politics of criminal prosecution to understand how legal systems respond to claims in the form of criminal prosecutions, both of ordinary and state-sponsored murder cases.

The literature has highlighted the importance of institutional design to explain when the state responds to a claim and decides to prosecute a case. An independent judicial branch has long been noted as pivotal for rights adjudication (Przeworski and Maravall 2003, Schedler et al. 1999), and a vast research focused on criminal accountability for human rights violations has shown that independent judiciaries are important (Apodaca 2004, Camp Keith, Tate and Poe 2009, Skaar 2011). But the process through which this happens has not been fully explained.

The comparative criminal law literature has noticed other particular domestic norms and institutions that may play a bigger role in criminal prosecutions. In many countries in Latin America, judicial reform has changed the politics of criminal prosecution by introducing or reforming a prosecutorial organ. Before the reforms, in many countries the prosecution and investigation of crimes was under the control of a judge. Furthermore, beyond the institutional design or the location of the state's prosecutorial organ, in many countries in Latin America, the state's monopoly on criminal prosecution has been made somewhat porous by important CPC reforms that, as noted earlier, grant victims or their relatives standing to participate during the hearings and trial as private prosecutors.

The importance of institutional design of the prosecutorial office or Ministerio Publico (MP) has been theorized as an important factor to explain criminal accountability efforts against corrupt politicians (Van Aaken, Salzberger and Voigt 2004, Rios-Figueroa 2006), therefore, it not far fetched to hypothesize that institutional design may also play a role in the prosecution of ordinary and state-sponsored murder cases. We know that

judicial reform in many Latin American countries involved an institutional re-design of their prosecutorial organ, that in general aimed to create a more autonomous prosecutorial office (CEJA 2005). This research incorporates these insights and shows the potential theoretical importance of the institutional design of the prosecutorial office in explaining how and when claims are brought to the courts by private prosecutors, bringing to surface the politics of criminal prosecution. For instance, by incorporating the institutional design of the prosecutorial organ into our analysis I will argue that we get can better explain why states fail to investigate and prosecute human rights violations (Skaar 2011, Couso and Hilbink 2009, Helmke and Ríos Figueroa 2011, Hilbink 2007a, Hilbink 2007b, Collins 2010).

Similarly, we must also seriously engage in our studies the specific procedural rights that criminal procedure codes grant to victims or their relatives. In most countries of Latin America judicial reform also involved an expansion of procedural rights for victims, increasing their power to bring criminal claims to the courts as private prosecutors. Until very recently a few authors have noticed that criminal procedural rights like private prosecution may in fact play a role in efforts towards individual criminal accountability of human rights violations (Collins 2010, Sikkink 2011, Brinks 2008). However, a more systematic empirical approach is greatly overdue to fully understand how and when private prosecution matters.

Another important structural factor to take into account is the role of development and equality in explaining how a system responds to a claim. Some have argued that the observed positive relation between economic development and human rights is due to

how development fosters liberal (post-material) ideas that buttress democratic forms of government (Inglehart and Welzel 2005). Others have argued that it is unequal development which leads to an unequal access to justice (Brinks 2008, O'Donnell 1999b). Inequality is a very important factor to consider given that access to private prosecution requires important resources from the victim or their relatives.

In this research, therefore, I look into the interaction among those structural and institutional factors that potentially can shape the politics of criminal prosecution: judicial independence, the institutional design of the prosecutorial office, the presence of a private prosecutor, and inequality.

b) Agentic approaches

Some studies have looked at the micro-foundations of rights protections and have analyzed how agents are affected by institutional or contextual factors. Perhaps more prominent for this research is the work of Brinks (2003, Brinks 2008), who offers a static/rational account of how the legal system responds to claims, looking at how institutions shape the incentives of actors within the judicial process. In his study of police killings, Brinks found that low judicial responsiveness reflects a failure of the system to gather the necessary information to support a prosecution. He explains that this happens because the agent who is in charge of gathering this information, i.e., the police, has preferences that are closer to the accused (e.g., a policeman) than to the victim. For Brinks, a judicial system fails to respond because of "the disparity between the legal and political resources of claimants and those they oppose" (Brinks 2008: 18). In cases of

police killings this resistance is very real and leads to inefficient investigations and acquittals.

Brinks findings are crucial, and I build on these by making two additional contributions. First, by looking at how private prosecution can improve the criminal investigation across human rights cases and ordinary murder cases, in my research I found that political as well as structural factors can determine judicial responsiveness. High levels of insecurity and violence can severely affect the preference of prosecutors, judges, and victims to actually pursue justice, and when there are threats to the physical integrity of any of these actors, their preferences change regardless of who committed the crime. Hence, by looking at this wider spectrum of crimes I find that low judicial responsiveness can be the result of acts of commission (like in human rights cases, as those studied by Brinks) and acts of omission (like in some ordinary murder cases), and in any of these scenarios private prosecutions can potentially improve the criminal investigation and, hence, judicial responsiveness. Second, Brinks' focus on rational calculations leads to a static view of the law, where change appears to be limited if not impossible. In my research I found that when looking at the use of private prosecution across time and across types of crimes, rational behavior by itself does not explain the behavior that we observe in the politics of criminal prosecution. Hence, I argue that we must also take into account behavior driven by normative concerns and beliefs, such as a professional culture that emphasizes neutrality (della Porta 2001) or a conception of the role of a judge as a rights' protector (Hilbink 2007b, Couso and Hilbink 2009, Widner 2001, Hilbink 2008b, Shklar 1986), or the role of victims' advocates and lawyers who,

driven by normative beliefs, seek social change through the courts (Sikkink and Walling 2007, Lutz and Sikkink 2001, Sarat and Scheingold 2008).

1.4. Research design: case selection and methods

Empirical comparative research focused on private prosecution is nonexistent and we know very little about when this right is used or about its effects on judicial responsiveness. For this reason my research design reflects the exploratory nature of this project. I selected three countries in Latin America that grant the right to private prosecution; i.e., Chile, Guatemala, and Mexico. The cases were selected following a diverse case selection strategy (Seawright and Gerring 2008), intended to represent a full range of values on theoretically relevant variables to assess which factors, across time and across types of crimes, can help us explain the emergence, use, and impact of private prosecution across different contexts.

The countries under study here, i.e., Chile, Guatemala, and Mexico, are ideal to study how a right works in different contexts. On the one hand, these countries share a legal tradition, based on civil law (Oquendo 2006), and share similar criminal procedure codes in terms of victims' rights, which makes them comparable as they all grant victims of crime the right to private prosecution. On the other hand, these countries provide variation on variables of theoretical interest. The timing of implementation of the criminal procedure code varies: Guatemala, in 1994; Chile, in 2000 (although in the capital city of Santiago it did not begin working until 2005); and Chihuahua, Mexico, in 2007. Also, there is difference in the amount of resources given to the prosecutorial

organ, or *Ministerio Público* (MP), as well as in the institutional design of this organ. In Guatemala and Chile the MP is autonomous whereas in Mexico it is dependent on the executive branch. These countries also vary in important socio-economic variables. Guatemala is considered a lower-middle-income economy, while Chile and Mexico are considered upper-middle-income economies.[5] Similarly, there is variation in terms of how much foreign aid and foreign loans they have received for judicial reform, Guatemala being the country that has received the most.

I focused this research on the use and impact of private prosecution to only those crimes that are arguably most relevant to a state-society relationship: human rights violations committed by state agents and murder committed by ordinary citizens. Previous research had already hinted the importance of private prosecution for human rights cases (Brinks 2008, Collins 2009, Collins 2010, Sikkink 2011), however, my research also aimed to assess if private prosecution played a different role in other type of cases. Therefore, this research looks at both ordinary crimes, i.e., when the crime was committed by an ordinary citizen, and human rights crimes, i.e., when the crime was committed by a state agent.

If private prosecution aims to serve as a societal check on the state's duty to investigate and prosecute crime, human rights violations served as an ideal place to evaluate the use and impact of private prosecution on judicial responsiveness. The three countries under study here come from different transitional experiences: Mexico

[5] See: World Development Indicators 2009, at: www.worldbank.org. Economies are divided according to 2007 GNI per capita, calculated using the World Bank Atlas method. The groups are: low income, $935 or less; lower middle income, $936 - $3,705; upper middle income, $3,706 - $11,455; and high income, $11,456 or more.

transitioned to democracy in 2000 after 71 years of a one-party hegemonic system; Guatemala returned to democracy in 1986 after a long and bloody civil war; and Chile ended its military dictatorship in 1989. The previous non-democratic regimes showed different records on human rights violations: the civil war and the dictatorship in Guatemala ended with at least 200,000 death or *desaparecidos* (missing people); in Chile, the bloodiest part of the dictatorship disappeared or killed an estimated 3,200 civilians; and the one-party regime led by the *Partido Institucional Revolucionario* (PRI) in Mexico allegedly disappeared or killed fewer than 1,000 people from the 1960s to 1970s. This variation in human rights violations made it possible to compare the role that the history of repression played on the use and impact of private prosecution.

I also evaluate the role that private prosecution plays in ordinary crimes, in particular, homicides. Homicide (also referred to as murder throughout this dissertation) is a crime that should always be reported to the state and that places on the state the duty to investigate. If there is a low rate of prosecution in homicide cases, we face a state failing to uphold not only its obligation to defend public security but also its duty to offer victims' relatives judicial protection. Since the early 1990s, homicide rates in Latin America have grown dramatically, particularly in Central America and the Caribbean (PAHO 1991, WHO 1997). In 2011 the average homicide rate in the region was as high as 16 per 100,000 habitants, more than double the global average and three times the average of developed countries. Currently, homicide rates in Latin America are among the highest rates in the world, and the region accounts for one third of all homicides committed in the world (UNDP 2009, UNODC 2011). Homicide is not only considered

one of the most heinous crimes, but it is also one where the state's failure to investigate and prosecute has a stronger negative impact on society. Homicide cases, therefore, are a particularly appropriate source of information to assess the impact of a procedural right like private prosecution on judicial responsiveness in particular, and on rule of law in general.

Given that a study that included the universe of homicide cases for each country was an impossible task, for practical reasons I had to limit my research on ordinary cases to three judicial districts within my three countries. The focus on judicial districts, rather than countries, made the project feasible in terms of data gathering and also made within-country analysis of ordinary murder cases more reliable. The judicial districts that were chosen in Chile and Guatemala are the busiest and most important judicial districts in each country, covering the metropolitan areas of the capital cities: Santiago and Guatemala City. In the case of Mexico, a federal country, I chose the state of Chihuahua, the first state that introduced in its CPC the right to private prosecution. In Mexico the reform of the federal CPC and the reform of the CPC of the capital city of Mexico City, are both still pending, making it impossible to make an analysis at the federal or capital level. In the state of Chihuahua, I focused on the judicial district that covers the metropolitan area of the state's capital, the City of Chihuahua. The judicial districts within these countries face different public security concerns and how efficient their judicial systems are. In terms of public security, Chile has to deal mostly with non-violent crime. Homicides in Chile represented only 0.1% of the total reported crime in 2008. In that same year, Santiago had 11 homicides per 100,000 habitants when the national

average was of 9 homicides per 100,000 habitants (MP 2009). Guatemala City, in contrast, faces increasing violence related to gangs and drug trafficking. In 2008 homicide represented 3.2% of the total national reported crime (MP 2009). Although, the national homicide rate was of 44 homicides per 100,000 habitants, that same year Guatemala City had more than 100 homicides per 100,000 habitants (Bonillo 2009). Similarly, Chihuahua is suffering one of most violent times in its history, mostly due to the war on drugs. In 2007 Chihuahua had a homicide rate of 18.5 per 100,000 habitants. In 2008, however, this state saw a dramatic increase in violence with 47.1 homicides per 100,000 habitants, compared to the national average of 10.6 homicides per 100,000 habitants. As reference of comparison it is important to note that for that same year developed countries had a homicide rate of 4.5 per 100,000 (CIDAC 2009). In 2010 the US average rate of homicide was 4.8 killings per 100,000 habitants (FBI 2012).

Finally, these countries also showed variance in terms of how efficient their judicial systems are. The impunity rate, i.e., the number of criminal cases that are not solved from among those that are reported to the authorities, varies from country to country. Chile, for instance, has one of the lowest impunity rates in the region, where 60% of crimes are left unsolved (Neira 2009). The impunity rate in Chile is comparable to that of developed countries. For instance, in the US in 2008, 56% of all known crimes were not solved (DoJustice and FBI 2008). These numbers are in contrast to less efficient judicial systems. In Mexico, some report 90% of impunity for all known crimes (Zepeda Lecuona 2004) and in Guatemala, impunity reaches 98% (Monterroso Castillo 2008).

Furthermore, impunity rates in these countries have been reported to be worse for victims who are poor and/or female (Svendsen 2007).

The type of research design followed in this research allowed for comparison on the emergence, use, and impact of private prosecution on judicial responsiveness across countries, across type of crimes, and within countries. The variance in different key variables, then, helped bring to light important factors. On the issue of the diffusion of private prosecution, the variance across these countries showed how the history of the right was important at the time of the judicial reform as well as for the creation of a support structure that has allowed access to the right to private prosecution. Also variation in the timing of the reform was important to highlight how designers and reformers introduced victims' rights into their criminal procedure codes and other institutional reforms. The variation in the type of violence that citizens faced, the level of development and access to resources, and the role of the institutional design of the prosecutorial organ, also helped highlight different contexts in which the struggles of victims to access justice take place, and how private prosecution, regardless of context, helps overcome these. This research design, then, was important in showing how rights on books translate into law in action and access to justice.

1.4.1. The main dependent variable: judicial responsiveness

In this research I focus on if and how private prosecution matters for judicial responsiveness, the main dependent variable. Private prosecution is defined in this project as the rights of a victim of crime or their surviving relatives to participate in the criminal

proceedings, always represented by a lawyer. These rights are clearly defined by the criminal procedure code of each country, as it is the case of Guatemala[6] and Chile[7], and in the criminal procedure code of the state of Chihuahua[8], in the case of the federal country of Mexico. To date, there is no official statistical information on how many victims actually use the right of private prosecution in these countries nor their impact on the case. Hence, one crucial contribution this research makes is, through a sample of homicide cases, to offer a more accurate assessment of the use of private prosecution.

As previously mentioned, judicial responsiveness, is defined as the response of the judicial system to a murder case. To measure judicial responsiveness I focus, following Brinks (2008), on judicial outcomes. Although I do look into convictions, my emphasis is more on how far a case makes it within the judicial system, given that I am mostly interested in access to justice and how private prosecution can potentially improve it. For this reason I measure judicial responsiveness by looking at how each homicide case ended (or not), and explore the impact that private prosecution had in helping a case reach a certain stage. I make judicial responsiveness, the dependent variable, an ordinal variable that reflects how each homicide case that entered the judicial system ended, in order to test how private prosecution impacts the probability of a homicide case to go up in the "ladder of criminal process". By this I mean the probability that a homicide investigation leads to an indictment (pressing charges) or a dismissal, and if there was an indictment, whether the case then ended in either a plea bargain or a trial.

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[6] Código Procesal Penal de Guatemala (1994), articles: 116-118, 120-121, 337.

[7] Código Procesal Penal de Chile (2000), articles: 108, 111-117, 167, 169-170, 235, 258, 261.

[8] Código de Procedimientos Penales del Estado de Chihuahua (2007), articles: 119-120, 122, 218, 223, 227, 302-303, 402.

1.4.2. Data sources

The data for this research was gathered during various fieldwork trips that I realized to each city, during the summer of 2009, the summer and fall of 2010, and the spring of 2011, spending a total of four months in Guatemala, three months in Santiago, and two months in Chihuahua. During my fieldwork trips I conducted archival research and interviewed a total of 98 relevant operators and users of the justice system, i.e. reformers/designers, lawyers, prosecutors, public defenders, judges, psychologists, non-governmental organizations involved in victims' litigation, bureaucrats from international private agencies or foundations, legal scholars, and relatives of homicide and human rights victims. With some of the interviewees I met more than once, and most of the interviews lasted between 30 minutes to one hour. I also observed various hearings and trials in the three judicial districts to see the role of the private prosecutor in action. Although I tangentially mention the role of the police, in this dissertation I do not engage with the relationship of private prosecution and the police because private prosecutors deal mostly with the prosecutorial organ, rather than police agents. Hence, there were no interviews conducted with any members of the police forces.

To answer my background question of where the right to private prosecution came from and how it diffused across countries I used secondary sources (academic research papers and books) as well as interviews with key designers of the criminal reform process. To answer my main research questions of use and impact of private

prosecution I relied also on primary sources (interviews, official statistics, and original case files) and secondary data.

The data gathering for human rights cases and ordinary cases followed different methodologies. For human rights cases I am using an original database on human rights prosecutions in Latin America, i.e., the Transitional Justice Database (TJD).[9] This sample of human rights prosecutions across Latin America, based on State Department Human Rights Reports (see Annex 4 for methodology), allowed me to gather information on how many cases of human rights violations committed by state agents have reached the courts, how many of those have had victims or their relatives participating in the proceedings, and information of the current state of each case. The TJD covers only national data, based on secondary sources (not original case files), and it contains information on 1,312 prosecutorial activities against state agents for the 1980-2009 period. This is the first database in the world on human rights prosecutions that includes information on private prosecution, offering for the first time the opportunity to systematically assess the impact of this right in human rights cases across Latin America. To assess the role of private prosecution in human rights cases I also gathered information on case studies of particular relevant human rights cases, some of these based on original case files (Guatemala) and others only on secondary sources (Chile).

[9] As a team member in this project, I assisted in defining variables and coding criminal trials, including the definition of private prosecution and its measurement. This work was supported by the National Science Foundation under Grant No. 0961226. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the National Science Foundation

To obtain data on ordinary homicide cases it was necessary to construct an original database of homicide cases for each one of my research sites. To gather this information I reviewed a sample of homicide case files in the judiciary's archives of each judicial district. From each case file I collected data on the victim, like age or gender, the presence of private prosecution lawyers (distinguishing if they are NGO or private lawyers), as well as information of how and when the case ended. In the judicial districts of Santiago and Guatemala City, the case files were selected through a random sample of homicide cases (see Annexes 1, 2, and 3 for a full description of the sampling methods used in each judicial district). The data from Santiago covers the period 2006-2009 and includes 240 homicide cases, the data of Guatemala City covers the period 2003-2009 and covers information on 122 homicide cases. The difference in the sampling size between these two judicial districts not only reflects the difference in the amount of homicide cases that actually reached the courts, but mostly the institutional and bureaucratic difficulties that I faced in Guatemala to access a bigger sample size. In Chihuahua City, in contrast, due to the small size of the universe of homicide cases that were actually brought to the courts, I gathered information on all the 158 homicide cases that entered the courts for the period 2007-2009. In total, in this research I review the judicial fate of 520 homicide cases in the three judicial districts. With this data I offer for the first time comparative information on the use of private prosecution in these countries.

1.4.3. Data analysis and methods

Following this research design and a multi-method approach allowed me to assess how private prosecution diffused across Latin America, when private prosecution is used, and how and when private prosecution matters for judicial responsiveness. Following a nested design (Lieberman 2005), I used statistical analysis to find broad patterns across types of crimes and across countries that would allow me to answer if private prosecution impacted judicial responsiveness. For human rights cases, a statistical analysis was done to assess the impact of private prosecution on the initiation of prosecutorial efforts against state agents and on the number of convictions observed in Latin America. For ordinary murder cases, statistical analysis was done to compare across judicial districts the impact of private prosecution on how a case file ended. Given that the samples in Chihuahua and Guatemala threw a small number of private prosecution cases, within-judicial district statistical analysis was only possible for Santiago's judicial district in Chile. Therefore, the empirical chapters on Guatemala and Chihuahua mostly draw on descriptive statistics and a qualitative analysis of the role of private prosecution, whereas the chapter on Chile also offers the results of statistical analysis.

In the statistical analyses private prosecution was coded as a dummy variable, measured as a presence or absence of a private prosecutor in a homicide case. Judicial responsiveness to ordinary murder was operationalized by looking at how each murder case ended. The ending was coded as "0" if the case remained ongoing by the time this research was conducted, "1" if the case was dismissed, "2" if the case ended in a plea bargain, and "3" if the case went to trial. Implied in this 4-point ordinal scale lies the

assumption that the farther away a case moves in this “ladder”, the “better” is the judicial response. In human rights cases I took as a proxy of judicial responsiveness the number or count of convictions that a country has in a given year.

Whereas the findings of the statistical analyses showed *if* and *when* private prosecution matters for judicial responsiveness, through a more in-depth qualitative analysis I also explain *how* private prosecution matters and also answer where this right came from and how it diffused across countries. Therefore, quantitative analysis complemented the qualitative analysis of documents, interviews, and observation to understand the mechanisms behind the diffusion of the right, as well as the mechanisms explaining how and when private prosecution matters. To better understand the impact of private prosecution I carefully analyzed my notes on the criminal hearings that I observed, I evaluated the interventions of private prosecutors as recorded in the original murder case files, and I analyzed what others had observed on private prosecutors in other relevant secondary sources (newspapers, books, academic papers). Also, I analyzed my notes of the interviews that I conducted with the different actors involved in the judicial system (victims, public prosecutors, private prosecutors, and judges) to find trends and differences on their assessment of the role and importance of private prosecution.

Within each country, for ordinary and human rights cases, I also did in-depth case studies to improve inference (Seawright and Gerring 2008) through “causal-process analysis” (Brady and Collier 2004: 277). In these case studies I follow a causal-process analysis to find causal mechanisms through careful content analysis and process tracing,

allowing me to reconstruct the process that a homicide case goes through, to find when the right to private prosecution is most important in terms of judicial responsiveness.

1.5. Building the rule of law from above and below: argument and findings

In this dissertation I answer three questions: a background but relevant question that aims to understand (1) where the right to private prosecution came from and how it diffused across Latin America; and two main questions regarding the (2) use and (3) impact of private prosecution. My findings highlight the need to take into account the interaction between agency and structure, the domestic and the international realms, and ideas and incentives, to understand where rights come from, when they are used, and with what effects.

I argue that the (international) supply of discourses (and norms) and the (domestic) incentives that agents face both need to be taken into account to understand the normative content of judicial reforms (where the rights come from), and the later use of rights (legal mobilization). In this research I found that deep changes in the understanding of the victim in criminology and international law provided the normative and discursive resources to support the introduction of private prosecution as a key right within a "Model of Criminal Procedure Law" for Latin America. This model was successfully portrayed as "the" solution for reform by an epistemic legal network that diffused the model across the region. When the demand for reform within countries appeared, the "model" was seen as the logical "solution" to implement. Because within

this model private prosecution was introduced as integral part of the reform, the previous history of the right to private prosecution within a given country in part explains where we see this right being "expanded" or strengthened (as Chile and Guatemala), and where we see it being introduced for the first time (as in Chihuahua, Mexico). The (international) victims' discourse has also shaped the development of a support structure at the international and domestic level. The victims' rights movement and discourses have provided resources that push, support, finance, and protect legal mobilization as a strategy for pushing a victims' rights-oriented agenda.

To answer if, how, and when private prosecution matters, I explored closely the right to private prosecution in both human rights and ordinary murder cases. This research began with the simple hypothesis that if private prosecution is understood as a control mechanism on the state's duty to prosecute crime, we should expect to see a high use of private prosecution where there is high impunity for ordinary crime and a high history of past human rights violations. Based on preliminary interviews, I took as a baseline that a low use of private prosecution was when it was used in 10% or less of the cases, and a high use when private prosecution was used in more than 10% of the cases.

Table 1.1.
Expected use of private prosecution

	Human rights cases	**Ordinary cases**
Low		Chile
High	Chile Guatemala	Chihuahua, Mexico Guatemala

Therefore, for ordinary crimes I was expecting a high use in Guatemala and Chihuahua, Mexico, and a low use in Chile. For human rights cases I was expecting high use in both Guatemala and Chile for human rights cases, and no use in Mexico given the lack of

gross violations to human rights and the newness of the right at the federal level (see Table 1.1). What I found was quite an interesting and unexpected pattern that teaches us a lot in terms of access to justice for victims or their relatives.

Table 1.2.
Observed use of private prosecution

	Human rights cases	**Ordinary cases**
Low	Chihuahua	Chihuahua Guatemala
High	Chile Guatemala	Chile

In Table 1.2 I show the observed use of private prosecution across countries and across types of crimes. Chihuahua's low use of private prosecution in ordinary crime is not surprising, and yet, quite significant at the same time. It is not surprising that so very few victims are using this new right, but the fact that Chihuahua was the first state in Mexico to introduce private prosecution in the country makes its low use quite a significant finding. Its low use is explained by the recent implementation of the right (in 2007), but also by the high insecurity that victims or their relatives face to access the justice system. Given that the history of repression is low in Mexico and that the right is new and only available in a few states, it is not surprising that we do not see use of private prosecution for past human rights violations. However, I did find private prosecution being used for cases of women's killings framed by local NGOs as human rights violations. This use of private prosecution in human rights cases although still limited, it was more than what was expected (in Table 1.1).

In the case of Guatemala, where we have a history of high repression and human rights violations as well as a current high impunity rate, we might expect citizens to turn

to private prosecution in ordinary crimes. Its low use in ordinary crime reflects how costly it is for victims or their relatives to access the justice system, in terms of security and in terms of resources. Nonetheless, private prosecution is highly used in human rights cases. Perhaps more surprising is what this research found in Chile: a high use of private prosecution in both human rights and ordinary murder cases. This finding suggests, as I will demonstrate in future chapters, that when a right such as private prosecution is consolidated and institutionalized in a country, there is the rights' awareness as well as a vast support structure in place that makes it easier for victims or their relatives to exercise their right to private prosecution.

However, *how* and *when* victims are able to access the right to private prosecution is in part determined by the context and the historic time in which they are situated. Timing of the reform matters for citizens to know their rights, as well as for their expectations from the judicial system. As citizens are more aware of their rights, they are more likely to make more use of legal rights. Also, justice claims can entail personal integrity costs, meaning that they can be dangerous. Pushing for justice against a state official entails facing a strong powerful adversary, and in some contexts, common criminals have also no real barriers to threaten victims or their relatives. Therefore, to use the right of private prosecution, victims or their relatives must be in a context where personal integrity costs are low, where they find a way to feel shielded from harm, and/or where the ideational commitment to justice is higher than the threats against personal integrity. Against pure rationalist accounts of how actors behave in a judicial system (Brinks 2008), in this dissertation I also show through interviews with key actors how

normative commitments shape both the behavior and the support structure that victims have to engage in litigation.

However, private prosecution is no panacea. Its use requires resources (money, time, knowledge) as well as an appropriate sociopolitical context. Overcoming barriers to access the right to private prosecution requires an ideational push where victims are aware of their rights and also believe that it is through the courts that they want to channel their grievances. This is key to understand why in contexts where risks to litigate are high we still find committed individuals who resort to the courts, rather than other means (like rioting, lynching), even when the chances of legal success are low. It is through these acts, when citizens bet on the law and their judicial system, that rule of law can potentially be built from below. But also, overcoming barriers requires that victims have to find the way to overcome the costs involved in litigation. Across types of crimes and across countries I found that victims need to have the resources to access the justice system, either from personal wealth or from a support structure in place where NGOs or the state provide free legal aid. Also, victims need to feel secure enough to actually engage in litigation and push for justice. In human rights cases, when victims fear to press for justice and when the state is unresponsive, through a support structure offered by NGOs victims may feel less threatened to press for justice. In ordinary murder cases, the same dynamic applies. When and where it is safe, like in Chile, victims of crime will use private prosecution at a higher rate. In contexts were their safety is compromised, like in Guatemala and Chihuahua, the use of private prosecution is mostly limited to cases in which an NGO is in place and provides that security.

The effects of private prosecution on judicial responsiveness are clearly delimited by the power *and* limits of this procedural right. In other words, given that private prosecution is a control mechanism over the state's duty to investigate and prosecute crime, private prosecution has an impact on judicial responsiveness in those areas where the state is failing with its duty to investigate and prosecute crime. When a victim overcomes barriers to use private prosecution, this right improves judicial responsiveness by improving the chances that a report is actually going to be investigated, increasing the possibility to press charges, and also by improving the possibilities that the case will go to trial. But these effects are more evident where judicial institutions are weaker and impunity is higher, and less relevant where institutions are stronger and impunity is lower. This is a rather intuitive finding, but one that highlights the nature of the right as a "control mechanism". Furthermore, I also found that when private prosecution is conducted by an NGO, the impact on judicial responsiveness is higher. Framing their fight in human rights and victims' discourses and using a support structure that uses transnational advocacy networks both as sources of funding and protection, NGOs are able through shaming strategies to improve judicial responsiveness and push for social accountability from below. Either through strategic litigation or an agenda-oriented litigation, these NGOs become repeat players that acquire an expertise in litigation (Galanter 1974). Through litigation, then, NGOs open windows of opportunity for marginalized groups that, even in highly unequal societies, allow victims or their relatives to get a chance to access justice. The paradox of private prosecution, however, is that although it may be very important when the state is unresponsive, especially in human

rights cases, it is not able to fully overcome existing inequalities as it is not accessible to every victim out there. In a way, therefore, private prosecution in some contexts may also become a gatekeeper to the justice system.

1.6. Plan of the Dissertation

The rest of the dissertation is organized as follows. The first two chapters focus on the background question and aim to answer where the right to private prosecution came from and how it diffused across Latin America. In Chapter 2, I review the history of private prosecution, in particular, and of victims' rights, in general, to highlight the international and ideational factors that have shaped the normative content of the judicial and legal reforms that diffused across Latin America. In Chapter 3 I show the impact of the victims' rights discourses by looking at how private prosecution diffused across Latin America as part of a the package of criminal justice reform. Then, from Chapter 4 to Chapter 7 I focus on the questions of use and impact of private prosecution. Chapter 5 offers a comparative empirical analysis on the use and impact of private prosecution in human rights cases in Latin America, and an analysis that reviews the findings in my samples of ordinary murder cases. This chapter provides the general findings on where and when private prosecution is used and when in matters for judicial responsiveness, whereas the following empirical chapters offer a more in-depth analysis of the use and impact of private prosecution, emphasizing *how* private prosecution matters. In Chapter 5 I focus on Guatemala where I highlight that the power of private prosecution is limited by the same state structure that it is contesting. In Chapter 6, the case of Chile offers the opportunity to see how private prosecution works when the state is unresponsive, like in

human rights cases, and when the state is efficiently conducting the investigation and prosecution of crime, like in ordinary murder cases. In Chapter 7, I argue that the lack of private prosecution at the federal level and its limited availability at the state level may explain why we see fewer human rights prosecutions in Mexico, when compared to Chile and Guatemala. Furthermore, this chapter highlights the findings of the case of Chihuahua, the first state in the country to introduce the right of private prosecution. Chihuahua's case shows how a new right is being discovered and is being successfully used as a means to improve judicial responsiveness in ordinary murder cases. Finally, I offer a final review of the findings and main arguments, and offer some conclusions where I highlight the theoretical relevance of this research as well as its implications for policy.

CHAPTER 2
VICTIMS' RIGHTS AND THE RIGHT OF PRIVATE PROSECUTION

INTRODUCTION

To fully understand the implementation, current use, and impact of private prosecution, we must first take a step back and delve into the origins of this right and explore what private prosecution means in the comparative criminal law realm within the broader spectrum of victims' rights. In this chapter, therefore, I introduce the right of private prosecution through a historical analysis of the emergence of victims' rights, and show how the "idea" of the victim has evolved into a set of "rights" entrenched in international law. I will not address here the question of *how* this right diffused across Latin America, as this will be the topic addressed in the next chapter. Rather, this chapter focuses on the ideological and historical factors that shaped the emergence of victims' rights in the international and domestic spheres, and show how these have impacted the wide spectrum of rights that victims enjoy today in Latin America.

With this objective in mind, this chapter begins with a brief historical analysis of how criminal law has viewed the victim throughout history, stressing how the idea of the victim has changed. There is a strong focus on European criminal law, given that Latin America, as a colony of Spain, inherited this legal history. In this first section I explain how historically contingent changes have recently produced a "victims' discourse" that has introduced a "new idea" of the victim as a subject that requires certain legal rights and institutional arrangements, which has been preserved both in international and

domestic law. In a second section I explain how historical factors and the presence of the victims' discourse endorsed by a victims' rights movement have pushed the development of international instruments and shaped domestic institutions. In the last section I give a brief review of the magnitude of the recent judicial reforms that in Latin America have reshaped the criminal justice systems. The introduction of victims' rights in domestic procedural law emerged as part of this broader reform process and I show the impact that the victims' movement has had on domestic procedural law by explaining the many rights that criminal procedure codes (CPCs) grant to victims of crime in Latin America today, among these, the right to private prosecution.

2.1. A (brief) history (of the idea) of the victim of crime

It is commonplace to find today within legal academic narratives the following conventional story regarding the victim of crime: *the victim was, for a long time, a neglected actor in criminal law*. Then, *as a response to this undue neglect, recently the victim was recently rediscovered and acknowledged, and this* (basically) *explains the current expansion of victims'* rights (e.g., Eser 1989, Adato Green 2005). This conventional story, however, blurs the well known fact that the neglect of the victim was not the same across legal traditions nor even within legal traditions, and also it obscures that what we define today as "victim of crime" and as "appropriate" ways to deal with this "victim" are historically contingent categories.

Criminal law appeared in modern history as arguably one of the most crude legal expressions of the coercive power of the sovereign state, giving the state the right to

assign guilt and determine punishment. For centuries, societies settled their conflicts through local private means, like revenge, mediation, forgiveness, or personal reconciliation. Gradually, however, the growth and centralization of the power of the state led to the definition of some offenses as issues of public concern, with prosecution and punishment to be administered by the state. Dubber explains this process as a shift of power from the family, were the householder kept order and discipline, to the state.

> "Of all the branches of law, criminal law historically has been the one most closely associated with sovereignty […] The consolidation and centralization of power, and the eventual creation of a state, consisted of the expansion of this model of household governance from the family to the realm. Criminal law served the function of protecting the 'king's peace' -and still does in English law- by preventing and punishing 'breaches' to that peace, which were considered offences against the (macro) householder, the king, himself" (Dubber 2006: 1288-1289)

The emergence of the modern state, then, introduced crime as a social, not a private matter, making prosecution and punishment an exclusive prerogative of the state, not of the individual. But this process was slow, and not quite the same across countries or legal traditions. For example, in England, the establishment of the public prosecutor, i.e., the state organ responsible for the prosecution of crime, did not happen until 1879 (Perez Gil 1997). Before that, both private and public prosecution coexisted through 'the appeal of felony' that was in some ways similar to the type of private prosecution that persists today, where criminal prosecution was initiated and conducted by the victim, but where the punishment was imposed by the king. In the UK, private prosecution for criminal offenses was practiced from the 13th century until the 19th century (Pérez Gil 1997). With the establishment of a state prosecutorial organ, the practice of private

prosecution practically stopped. In the US, in contrast, right from the moment of independence private prosecution for criminal offenses was eliminated. Some argue this was an attempt to avoid the inequalities produced by private prosecution, given that the costs of prosecution impeded equal access to the justice system, as well as to avoid the creeping of private interests within the prosecution of the crime, which was considered a matter of the public sphere (see Pérez Gil 1997: 169). This warning on the risks of private prosecution, however, has been raised across legal systems and across time (even today), risks that as this research will show are not always without merit.

Given the gradual expansion of the power of the state in criminal prosecution, some legal scholars have described the Middle Ages as the 'golden age of the victim', in so far as the criminal system was based on the principle of restitution to the party who had suffered a loss (Schafer (1968) quoted in: Doak 2008: 3, López Conteras 2008). Whereas by the 19th century, as the state displaced the victim from the prosecution of crime, and retribution (rather than restitution) became the central principle guiding the criminal justice system. Beccaria, an influential Italian jurist of the 18th century, proposed that the criminal system was to serve the interests of society as a whole, as opposed to providing redress and restitution for the individual victim (Doak 2008, Merryman and Pérez-Perdomo 2007). In some common law systems, like the US, this was evident in the sharp separation between civil (tort) law and criminal law. A tort is a *civil* wrong, which clearly separates the *individual* damages or losses suffered as a result of a crime, from the harm that the same crime caused to *society* in general. Restitution in the US is hence considered a civil, not a criminal, concern.

Contrary to common assumptions, however, there was more variation regarding the retribution/restitution divide across continental Europe, and despite the creation of a state prosecutorial organ the victim was not entirely left out of the picture. The most ancient antecedent to private prosecution can be traced back to Roman law and the institution of "*actio popularis*" or popular action (Pérez Gil 2003). In Spain, despite the development of a state prosecutorial organ, the medieval institution of popular action survived various reforms. Popular action allows *any citizen* to initiate the prosecution of an offense, even when the citizen himself is not the victim or a relative of the victim. Through popular action the citizen places the claim in the name of the collective interest (Gimeno Sendra, Moreno Catena and Cortés Domínguez 1999). And despite heated scholarly debates and various attempts to eliminate it, this legal figure has remained in Spanish criminal procedure law and has come to be understood as an important control mechanism on the state's duty to prosecute, as a means to avoid impunity, as well as an individual right (Pérez Gil 1997).

In 19th century Germany, meanwhile, due to a general distrust of the new state prosecutorial organ, a new model of private participation in the criminal proceedings was developed by the legal scholar Julius Glaser as a way to provide certain control over the public prosecutor (Perez Gil 1997: 132). The auxiliary private prosecutor (called *Nebenklage*), instituted in Germany since the late 19th century grants the victim the right to participate in the criminal proceedings aiding the overall prosecution that is headed by the public prosecutor. Furthermore, the victim was granted the right to force the prosecution of crime when the public prosecutor refused to do so (called

Klageerzwingungsverfahren). Other criminal procedure codes (CPCs), like in Italy or France, influenced by Germanic criminal law also allowed the victim some participation as the "civil actor" (*partie civil*), where the victim is allowed to bring civil claims for restitution within the criminal proceedings (Binder 2000: 329). But like in Spain, the introduction of private prosecution was quite contested at the end of the 19th century in Germany. Some legal scholars rejected the idea of maintaining private individuals participating in the prosecution of crime, arguing that this would bring private interests in the proceedings, bias the process due to vengeance interests, and perhaps even produce a lazy public prosecutorial office. Other scholars contended that individuals should have a participation in the prosecution of crime as it reflected an individual right. Furthermore, they argued that it would also help avoid impunity and could serve as a societal tool to control the prosecutorial office (See: Perez Gil 1997).[10]

Thus, victims indeed participated in some jurisdictions and slowly, by thinking about private prosecution as an individual right, a new conception of the victim as *subject entitled to rights* began to develop in the late 19th century. The one place where the victim was legally excluded was in the power to determine and administer punishment. In both civil law and common law systems, the new model of conflict resolution in the modern state made courts a central actor of the criminal judicial system. Courts ideally follow a triad prototype, where there is a neutral third party solving a problem between two adversaries (Shapiro 1981). In reality, courts are not as neutral as the ideal triad would

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[10] Perez Gil (1997) reports that at the moment of every important judicial reform in various European countries, like in the early 20th century or the 1960s, the issue of private prosecution always generates debate. What is interesting is that the institution not only remains, but it is getting stronger due to the emergence of victims' rights, as I highlight later.

suppose, as courts are implementing the law of the state. As the state took away from victims the right of prosecution, making crime a public (not private) affair, it centralized the power of criminal prosecution, and criminal law served as a means of social control. In criminal law cases, then, courts stand between the offender and the state, but they are also in charge of making sure that the law (of the state) is enforced. In this manner the judge serves as “a social controller to enforce the law against” crime, weakening the ideal triad (Shapiro 1981: 27).

Criminal law, then, produced a power imbalance between the accused and the punitive power of the state. This power imbalance became the main concern of legal scholars since the French Revolution, what some call the “classic” school of criminal law (Chacón 1996, López Conteras 2008). Because criminal law was the reflection of this punitive power and CPCs were the “mechanisms by which we human beings put each other into cages” (Binder 2000: 19), it was comprehensible that the focus was to make sure that those accused of crimes -those who were at risk to be put into “cages”- at least were guaranteed certain rights that would limit the power of the state and that would increase their own protections against arbitrary accusation and incarceration, commonly known today as due process rights.

2.2. The (re)birth of the victim

The focus on the rights of the accused and the offender, however, has been regarded by many scholars as coming at the neglect of the victim (Adato Green 2005, Rodriguez 2007, Binder 2000). In some countries with the state’s increasing

centralization of prosecution and punishment the role of the victim in the criminal proceedings was assumed to be irrelevant beyond a role as a witness for the prosecution, or as some have crudely called it, as 'evidentiary cannon fodder' (Braithwaite and Daly (1998), quoted in Doak 2008: 35). And indeed this was the case in many legal systems, but with some caveats as already noted. Despite the centralization of prosecution and punishment in the hands of the state, some legal systems allowed the civil actor (or *partie civil*) to seek restitution within the criminal proceedings (e.g., France, Italy, or Germany), the popular action to initiate criminal prosecution (e.g., Spain), and the auxiliary private prosecutor (e.g. Germany and Austria). But even in these instances where the victim was allowed some participation, the victim was not yet fully conceived as a *subject with rights* or as a rights' bearer. When compared to the accused and the wide set of due process rights, the victim was indeed right-less.

Therefore, the neglect of the victim really came in the form of a lack of rights and protections that took into account his interests and needs. And this neglect became evident *only* because of a profound change that took place in how scholars thought about victims. In other words, 19th century criminal law could not have neglected a subject that, as such, did not exist. I do not mean by this that an "object of crime" did not exist, that homicides did not actually involve the taking of a person's life, or that women were not raped. But it was first necessary that the contemporary concept of a "victim of crime" -a subject with certain entitlements,- emerged before criminal law could "discover" it; that is to say, "it is not the emergence of a concern for crime victims, but the emergence of victims as a politically relevant category that is significant here." (Richards 2009: 310).

Fassin and Rechtman (2009) explain that an important element for the "victim" to be understood as it is understood today lies in the idea of trauma. Trauma, defined as a psychological consequence after suffering violence or abuse, did not become an accepted and legitimate condition in the second half of the 20th century. For decades, within psychiatry and psychology trauma was suspected as insincere, like when accident victims sought compensation, or was regarded as product of personal traits or dispositions, like the weakness of a soldier who did not want to return to war. Only after a long academic debate (that began in the second half of the 19th century), supported by research, did trauma eventually come to be considered "real" (Fassin and Rechtman 2009). Only after trauma came to be seen as a legitimate disorder that was the "natural" consequence that "any" individual would suffer after exposure to a stressful event did psychiatric care come to be seen as the "appropriate way" to care for those "victims" who suffered from it. Some claim that the conceptualization of the auxiliary private prosecution developed by Glaser, as well as the later debate over it among European legal scholars in the late 19th century, was more influenced by social psychology than by theoretic-legal concerns (see Pérez Gil 1997: 132)

The emergence of victimology was also important for our current understandings of the victim. Not surprisingly, when victimology emerged as a discipline it embraced similar debates dealing with the "responsibility" towards victims in close conversation with the fields of psychology and psychiatry. The term of victimology was coined in 1947 by a Rumanian penal lawyer, Benjamin Mendelsohn, in a paper presented at the annual conference of the Rumanian Psychiatric Association that was published that same

year in a French journal (Dussich 2006, Wilson 2009: 166), and with this term a new field of study was created within criminology that sought to assess *the role* of the victim in a crime.[11] This new focus on victims soon spread around the globe and was evident also in the exponential growth of theoretical and empirical victimological research, like the increased use of victimization surveys since the 1960s. In Europe, the victims' movement seemed to advance mainly in the 1970s and 1980s as a consequence of the awareness that victimology brought into the discipline. One German scholar defined this new awareness as the "rebirth of the victim" (Eser 1989: 31) Victimology also introduced "victim surveys" which had the consequence of uncovering "unseen victims;" i.e., victims of unreported of crime (i.e., those victims that for some reason or another are not counted in official crime statistics because they never reach state institutions, such as victims of rape, assault, domestic violence, robbery,…).

Victimology, then, had important consequences in consolidating the notion of the victim as an actor in the criminal justice process. Survey findings on victimization and re-victimization triggered a research and political agenda that aimed to find ways to understand and address "victims' needs" (Zedner 2002). That is: these surveys were important for practitioners and scholars to realize that the judicial system had not "really" addressed victims' needs, but rather had "used them to obtain needed information, cooperation, and services, for example, as a witness without giving them any active role,

[11] Initially victimological research focused on the culpability of the victim and his role in their own victimization. The notions of victim-precipitation and victim-proneness, developed in 1948 by von Hentig's book *The Criminal and his Victim*, aimed to highlight that the victim, once thought of as a passive actor (object of the crime), in some instances may have some blame Zedner, L. 2002. Victims. In *The Oxford Handbook of Criminology,* eds. M. Maguire, R. Morgan & R. Reiner, 419-456. Oxford, New York: Oxford University Press.. However, quite quickly the debate moved towards including victimization beyond human control.

respect, or consideration in return. In essence, it was said, the system 're-victimized' the victim" (Viano 1991:19).

The changes in psychiatry and psychology, along with the contributions of victimology within legal scholarship, nurtured what I call a "victims' discourse" that was supported by claims in trauma and victimology, mainly in two ways. First, a "marriage of convenience between social movements and mental health professionals came about not through giving clinicians the task of speaking for the victims, but on the contrary by giving the words of the victims themselves a form of clinical authority based on moral premises" (Fassin and Rechtman 2009:28). A victim could be anyone who suffered violence and abuse, and trauma became *the proof* of victimhood. Second, the awareness brought about by the issue of "victim re-victimization" also supported claims for pushing for "rights" for victims in general, and for the institutionalization of "appropriate" support for victims by states. This victims' discourse would become both constitutive and co-constituted by the so-called victims' movement, as I explain in the next section.

2.3. The victims' movement and its impact on international and domestic institutions

The victims' rights movement seems to be a somewhat misunderstood movement, perhaps because it has not been a uniform global process, and its rhetoric has been politically used by both left and right alike. In a way, it reflects a marriage of convenience between various social movements that unexpectedly benefited from the new ideas regarding victims and victimhood. Within this "movement" across countries

we can identify the presence of women's rights movements, such as those fighting against battering of women or against domestic violence, human rights movements fighting against torture and extrajudicial killings, but also common crime movements fighting against rise in insecurity. Despite the diversity of agendas and interests, "the net effect of their efforts was to highlight the plight of weaker and more vulnerable members of society on many different levels under contemporary legal and political frameworks" (Doak 2008: 8) And perhaps the most important ideological thrust behind the victims' movement came from the ideological shift within legal scholarship, among criminologists. This ideological change, some argue, was not based on a focus on retribution or revenge (Chacón 1996:36), but rather based on the "modern" school of criminal law which now recognized the victim as an active actor with needs and rights of his own.

The effects of the victims' rights movement tend to be confused with the political use of the victims' rights discourse. For example, Dubber argues that in the US the new recognition of the victim was felt, but its discourse was soon appropriated by another political agenda, the War on Crime:

> "So from the very beginning an important component of the victims' rights agenda in the United States included calls for the reform of the law of criminal evidence, to require the introduction of all relevant evidence of guilt even where its relevance was outweighed by its potential for confusing or inflaming the jury, the long-term incapacitation of repeat offenders, the reintroduction and expansion of capital punishment, the harshening of prison conditions, and every other item on an ever-growing wish list of tough-on-crime measures."(Dubber 2006:1310)

Dubber further argues that the "rediscovery of the victim elsewhere was considerably less punitive in nature" (2006: 1310-1311). This view, however, only highlights the political use of the discourse that the new view of the victim has provided, while obscuring the ideological shift within legal scholarship. It is true that in the US the victims' rights movement was used for a call for "tough-on-crime" measures, but to be fair this also happened in the UK (Doak 2008), and recently in several countries in Latin America. Furthermore, the victims' movement has included different agendas that conflates both restitution and retribution. For instance, we cannot neglect the fact that most of the momentum gained in international fora came from the victims' movement struggle against human rights violations (including, for instance, extrajudicial killings, torture, and violence against women).

Leaving aside the political uses of the victims' rights discourse, I think a more productive understanding of the victims' movement from an international perspective is to recognize that the movement has put forward five key points regarding victims' rights (1992, quoted in Doak 2008: 9):

> (1) That the criminal justice personnel –the police, prosecutors, defense attorneys, judges, probation officers, parole boards… were systematically overlooking or neglecting the legitimate needs of crime victims […];
> (2) that there was a prevailing tendency on the part of the public as well as agency officials to unfairly blame victims for facilitating or even provoking crimes;
> (3) that explicit standards of fair treatment were required to protect the interests of complainants and prosecution witnesses […];
> (4) that people who suffered injuries […] ought to receive reimbursement […];

> (5) that the best way to make sure that victims pursue their personal goals and protect their own best interests was to by granting them formal rights within the criminal justice system

Therefore, the victims' rights movement can be best described here as series of events around different regions of the world, with different timings and different characteristics, but that all shared a new view of the victim as an important actor in the criminal process, with interests and needs beyond restitution, and as such merited a formal recognition of his rights as victim. From this shared agenda, the victims' movement can be recognized to have had important impacts, especially concerning point number five, that of granting formal rights to victims.

The parallelisms between the victims' rights movement with the expansion of human rights norms and discourses after World War II cannot be denied, but whereas the human rights movement focused on a wider agenda, the victims' rights movement focused on the "victim" alone. The trauma produced by the war indeed brought the issue of victims upfront, including how re-victimization could be produced by omissions (neglect/silence) of the state (Wiesel 1982) But it took a couple of more decades for the *ideas* around the victim as a rights' bearer to develop as a set of "rights." Pushed by the victims' rights movement that gained momentum with the fight against human rights abuses during dictatorships, and buttressed in the new understandings of victimhood, the debate of the victim soon reached the international arena, and victims' rights began to be discussed at different UN fora in the 1980s. The UN Committee on Crime Prevention which gathered in Milan in 1985 (Petrovec 1997) set an important process in progress towards the recognition of victims of crime. These efforts were later crystallized in the

enactment of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 (or UN Declaration of Basic Principles), which became the major step toward the recognition of victims' rights.[12] The new understandings of the victim were evident in definitions within international instruments:

> "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (paragraph 1, UN Declaration of Basic Principles)

This international legal instrument recognized that victims of crime had traditionally been neglected and urged member states to improve their rights in their legislations, it set important rights of victims in the criminal process, including the right of access to justice, the right to be treated with basic respect and dignity, the right to protection and assistance, and the right to reparation. It also urged Member States to improve the participation rights of victims during the criminal proceedings. For instance, that same year, the Council of Ministers of the Council of Europe issued Recommendation R(85)11, which recommended that the needs of the victim would be taken into account to a greater degree throughout all stages of the criminal justice process.

It is rather interesting to note that victims of crime and victims of human rights abuses are somehow recognized in this instrument as sharing similar needs that required

[12] Adopted by the General Assembly on November 29, 1985. Resolution 40/34.

similar protections. As this research will show, the plight of the victim in practice comes from an unresponsive state that by omission or commission fails to uphold its duty to investigate and prosecute crime. In this sense, the UN Declaration of Basic Principles should be considered as quite an important achievement in recognizing in international law that victims of the state and victims of ordinary crime may face similar problems in terms of access to justice. Through this convergence of how we understand victims of ordinary crime and victims of human rights violations, victims' rights have now come to be understood under the umbrella of human rights.

And victims' rights have only further expanded since 1985. The rights to reparation and effective judicial remedy were further buttressed after the adoption in 2005 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, also known as the "Van Boven/Bassiouni Principles". In that same year, victims' rights were further expanded with the adoption of the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity adopted in 1997. In its updated version of 2005, the Set of Principles came to be known as the "Joinet/Orentlicher Principles". This time the Set of Principles included two key rights that recently emerged from the wide debate on victims' rights: the right to truth (or to know) as well as the right to justice (Rights 2005, FIDH 2007, Doak 2008: 159-206). Victims' rights, then, are now considered human rights.

The emergence of the victim as a rights' bearer has also been evident on how international criminal tribunals have evolved in incorporating victims' rights. For instance, the International Criminal Tribunals for Yugoslavia (established in 1993) and

Rwanda (established in 1994) did not offer any participatory rights for victims' and they were only allowed to intervene testifying as witnesses.[13] However, the Rome Statute that governs the International Criminal Court (which entered into force in 2002), allows victims to have legal representatives, and to have an independent voice and role, allowing them to "attend and participate in the proceedings, to question witnesses, an expert or the accused, as well as to make opening and closing statements" (Doak 2008: 137(FIDH 2007).

The impact of the victims' movement on domestic institutions was also considerable in expanding victims' rights. At the domestic level, however, the debate among legal scholars and legislators has been on which rights to grant to victims from what have become to be known in international law as the main three categories of rights' victims*: protection rights, reparation rights,* and *participation rights*. In the US, all 50 states since the 1980s have adopted over 1,000 pieces of legislation recognizing protections for victims of crime, like through the enactment of bills of rights. In other countries the effects were evident in the judicial reforms of the CPCs in continental Europe in the 1980s and Latin America in the 1990s, were legislators pushed for the introduction of mediation or restorative justice programmes as well as for the institutionalization of offices that provide assistance and support for victims (Eser 1989, Rodriguez 2007, Europe 2000).

The type of rights granted to victims does vary across *and* within legal systems. There is a widespread misconception among US observers that in common law systems

[13] Perhaps this may be partly explained by the leading role that the US had in the creation of these tribunals.

victims "are denied any form of proactive participation in the trial, since their interests are deemed to fall outside the merit of the criminal trial as a forum for the resolution of the dispute between the State and the accused" (2008: 35). However, this is mostly the case of the US, where even after the enactment of victims' rights bills, the victim has only gained some rights for protection and assistance, and traditionally his participation rights have not gone beyond the right to be heard and the right to be informed (Sidman 1975, Viano 1991).[14] But as Annex 5 shows, participation rights are actually granted to victims across civil law and common law systems either for restitution, as civil actor, and/or for retribution, as private prosecutor. For instance, the UK witnessed a reappearance of private prosecution (Kirchengast 2008), which some say was a response to the UN Declaration of the Basic Principles (Fenwick 1997). Though rarely practiced,[15] this change in the British system seems to reflect a shift towards a 'private' rather than a 'public' ordering of the criminal process, which some say is part of a broader privatization process of the criminal justice system in the UK (Fenwick 1997). In the civil law tradition, even before the victims' rights movement, as noted earlier, some criminal justice systems already provided the victim with participation rights. In Spain, for example, the medieval figure of popular action was maintained as a way to complement a

[14] It must be recognized that there is variation within the US as well: important participation rights have been established in New Mexico, Washington, and Illinois, through the establishment of "victims' service advocates", which allow a means for victims to have a representative throughout criminal proceedings, although not really allowing any further involvement in the proceedings. Also, Wisconsin, West Virginia, and New Hampshire allow victims' representatives to have an input regarding admissibility of evidence for rape and sexual assault cases (see: Doak 2008: 141)

[15] Doak (2008: 15) notes that it has been used in high profile cases including an the prosecution in 2000 of two police officers, Duckenfield and Murray, who were charged with manslaughter for the Hillsborough tragedy of 1989, where 96 football fans died. The Hillsborough tragedy was a human crush that occurred during the semi-final FA Cup tie between Liverpool and Nottingham Forest football clubs on 15 April 1989 at the Hillsborough Stadium in Sheffield, England.

public prosecution office that was distrusted and lacked resources (Pérez Gil 2003) and in many countries, as already noted, the civil action for restitution was still allowed to be introduced within criminal proceedings.

Hence, the effects of the victims' rights movement in civil law and common law systems have been felt in an *expanded* view of victims' needs and interests increasing the implementation of *explicit* protection, participation, and reparation rights. In great part, reforms have focused on pushing for the provision of protection and assistance to victims. But also, and more importantly for this research, reforms have focused on granting more rights of participation to the victim in the criminal proceedings, especially in the pre-trial stage (Ferrandino 2004:392).

The victim of crime, then, today enjoys recognition in international and domestic laws in ways that he did not receive for centuries. His place in criminal law is now more robust, as countries in both civil law and common law traditions have provided the victim with more protection rights, restitution rights, and participation rights, both at the domestic and international level. The rights that each country has granted, however, vary greatly across and even within legal traditions, but what is clear is that the victim, as a rights' bearer, has finally been internationally and domestically recognized as a subject in criminal and international law. As I will show in the next section, the emergence of the victim as a rights' bearer has also shaped the normative content of recent judicial reforms by greatly expanding the role and the rights of victims of crime, as the case of Latin America demonstrates.

2.4. The new criminal procedure in Latin America

In Latin America, the wave of judicial reforms that began in the 1980s has since targeted the entire justice sector, which includes "the courts, public prosecution and defense, police, prisons, the private bar, law schools, and various civil society groups" (Hammergren 2002:1). Judicial reforms in the region have been shaped according to assumptions about the role of the judiciary as a guarantor of the rule of law, which is at the same time considered a necessary, though not sufficient, element for the consolidation of democracy and the well functioning of the market (Thome 1998, Ansolabehere 2007). The changes introduced by these reforms are quite remarkable. Some observers claim that these reforms must not be seen as mere technical improvements to the administration of justice in the region, but as part of an explicit effort by politicians to reshape, modernize, and democratize state institutions in order to fit the demands of a well-functioning constitutional democracy works (Duce 2009).

The reforms have focused on granting more independence to the judiciary, as well as on making the judicial process more efficient and more accessible. A crucial change has come in the reforms made to the criminal procedural codes, shifting the process from an inquisitorial to an accusatorial model. To understand the radical changes that these reforms have introduced to the way the criminal process is conducted, it is important to know how the inquisitorial process traditionally worked in these countries.

An inquisitorial criminal system is a legal system where the judge is actively involved in investigating the facts of the case, as opposed to an adversarial system where the role of the judge is primarily that of an impartial referee between the prosecution and

the defense (Merryman and Pérez-Perdomo 2007). After independence, Latin American countries inherited a legal system based on civil or code law and on an inquisitorial system similar to those present in 18th century continental Europe. It must be said that the inquisitorial criminal process in continental Europe did go through a profound transformation, moving into a more mixed process that incorporated elements of the common law system. The reforms that Europe made in the 18th and 19th centuries were called for in order to reduce the abuses that were seen in the criminal procedure, and tried to incorporate elements of the English system, which some regarded as more democratic and just. But Latin America missed this transformation as their fight towards independence began in the early 19th century.

Despite variances across countries, the criminal process in the newly independent Latin America shared three main characteristics: the process was written, secret, and in some countries concentrated the judge and the prosecutor in one person. Where there was no state prosecutorial organ, as in Chile, the system was a fully "inquisitorial system". In those countries that did institute a state prosecutorial organ, like Mexico, the system is described as "a mixed system" where *inquisitorial principles* (e.g., secrecy and written procedure) were maintained.

Perhaps the most criticized aspect of inquisitorial systems has been the concentration of investigation and judging capacities in the sole person of the judge (*juez de instrucción*). This makes judges responsible for conducting investigations and providing resolution to the cases. But other characteristics of the model have been also criticized. An inquisitorial process also requires written records of all the actions and

proceedings, making it slow and rather obscure. The required secrecy of the process left crucial actors in Kafkaesque-type scenarios: unaware of the stage of the proceedings or even their role in them, for example, by not making public the identity of individuals under investigation.

These inquisitorial and mixed systems that shared an inquisitorial process have been criticized for other reasons as well. During the stage of investigation defendant's rights can be harshly affected in several ways. In an inquisitorial process the main objective is the discovery of "truth" associated with the commission of a crime, and confession is seen as a pivotal means of investigation. Also, defendants have limited rights to participation during the investigation, as well as during the judgment stage. Reviews and appeals are possible, and the actors in the process are protected through the *amparo* or writ of protection, but the process tends to be so slow and obscure that fundamental rights, like judicial protection, are often violated. Finally, in most criminal procedure codes (CPCs) the "rights of the victim", as such, were limited or nonexistent (Duce 2009, Monterroso Castillo 2008), in some countries only limited to participation rights such as civil action or private prosecution.

Table 2.1
Key differences between the inquisitorial and accusatorial models in Latin America

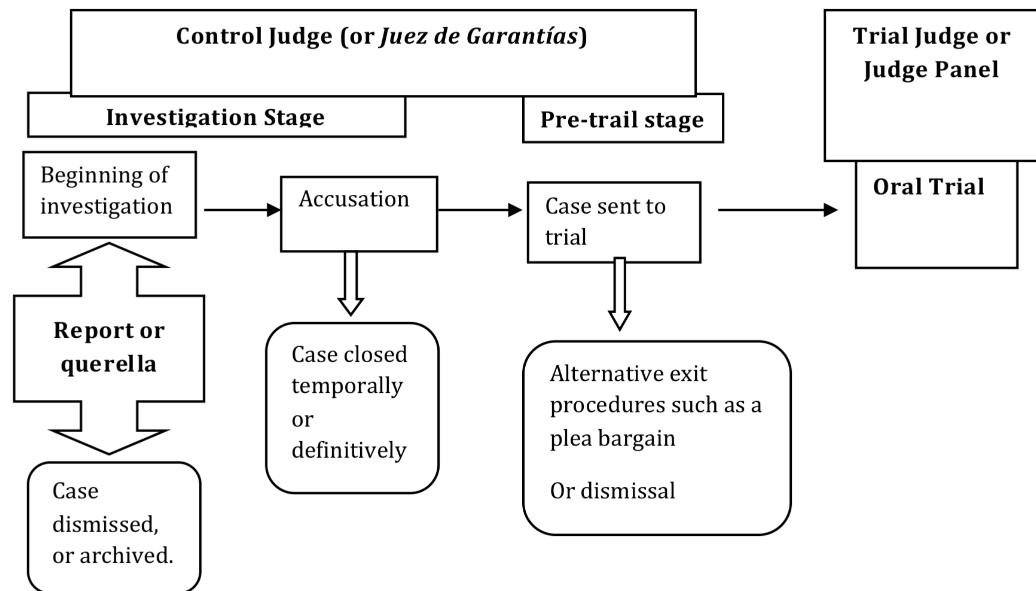
Inquisitorial criminal system	Accusatorial criminal system
Written proceedings. Judges are not necessarily seen by defendants or victims during the whole process.	Oral proceedings. Pre-trial hearings and trial are public and always mediated by the presence of a Control Judge (*Juez de Garantías*). The trial is mediated and decided by a Judge Panel (*Tribunal de Sentencia*)
Confession is taken as sufficient evidence for conviction	Confession is not sufficient for conviction, and more evidence is usually required
Defendant usually has to prove his innocence	Burden of the proof lies on the prosecution. Presumption of innocence guides the process.
Preventive detention is common. Defendants can spend years in prison without a conviction.	Due process rights enforce a speedy process. Preventive detention is limited.
In purely inquisitorial systems, the Instruction Judge investigates, prosecutes, and convicts.	The judge is only an intermediary between defense and prosecution.
In mixed inquisitorial systems, the public prosecutor presents evidence that is not questioned in court.	The evidence introduced has to be presented before a judge, who decides if it is accepted or not.
Judicial decisions are submitted in writing to the parties involved.	Judicial decisions are rendered in a public oral hearing.

Reforms introduced to the CPCs in all these countries since the 1980s, have radically changed the criminal process by moving towards a more accusatorial model, which in contrast to the inquisitorial model, is characterized by publicity, the principle of orality, and a clear separation of investigation and judgment, as explained in Table 2.1.

Two institutional changes have been crucial in this process. Perhaps the most important change occurred in those countries with a fully inquisitorial system, as they took away from the judge the burden of investigation. By creating a prosecutorial organ, the *Ministerio Público* (MP, public prosecution office), and endowing it with the power to investigate and conduct the criminal prosecution, reformers left the judge with the sole role of implementing the law. The second most important change, which has been shared in both inquisitorial and mixed systems, has been the introduction of oral trials, making

the criminal process more open and less secretive. Furthermore, with the introduction of the presumption of innocence as a principle guiding the process, the nature of investigation has also changed. The result has been not a pure accusatorial process, but a mixture of both models, resembling more the type of criminal process existing today in continental Europe (Merryman and Pérez-Perdomo 2007).

CHART 2.1. Stages in the Criminal Process



In the new accusatorial model the criminal process follows three stages: an investigation stage, a pre-trial stage, and the oral trial, as Chart 2.1. shows above. First, a case enters the system as the result of a *denuncia* or report of a crime, or it can also enter as the result of *querella* or claim brought by a victim. The difference between the claim and the report would be that the claim is presented by the victim or offended party himself, whereas the report is given by any person who knows about the crime, like a witness or the police. At that point, the MP has to decide if the report or claim actually

constitutes a crime and he needs to initiate an investigation, or to dismiss the case if it does not constitute a crime.

If the MP decides there is a crime, the stage of investigation begins. The MP, after investigation, has to decide if the prosecution should continue and to “formally press charges” through an indictment, or to close the case temporally or definitely (this can be done for several reasons, such as lack of evidence to find a suspect, little evidence to accuse a suspect, or evidence of no crime). The case reaches the judiciary at the investigation stage, once the MP requests to a court an arrest warrant, a search warrant, or when a defendant is detained. In contrast to the inquisitorial system, where an Instruction Judge (*Juez de Instrucción*) was in charge of every stage within the criminal process, in the accusatorial system the investigation stage and the pre-trial stage are conducted under the supervision of a Control Judge (*Juez de Garantias* or *Juez de Control*) through a hearing process. Once an indictment is made, the pre-trial stage begins. The pre-trial stage ends either through dismissal, alternative exit procedures such as the plea bargain or conciliation, or by sending the case to an oral trial. The oral trial is conducted and decided by a Judge Panel (*Tribunal de Sentencia*) or by a trial judge in those few countries that allow for a jury.

Therefore, through the introduction of new institutions and procedures, judicial reforms are changing the structure, substance, and legal culture of these legal systems (Duce 2009). The changes introduced by these reforms not only have changed the way the criminal process is conducted. It has also changed the role of all the actors involved in the process, including the role of victims. The changes regarding the victim reflect the

impact of the emergence of the victims' movement in two ways: first, by granting explicit rights to victims within the CPCs, the reforms recognized the victim *as a rights' bearer* subject in the criminal process; and second, by introducing new protection, restitution, and participation rights reformers of the CPCs aimed to conform to *international standards* of what victims' rights should look like.

2.4.1. The rights of the victim in Latin America today

A reading of the current CPCs of Latin America makes evident the impact that the victims' movement and the victim's discourse have had in the recent reforms to domestic procedural laws. The more recent a CPC is, the more explicit and specific are the rights that are granted to victims. In this section I focus on a review of the current CPCs in 17 Latin American countries. Note that for the cases of Argentina, Brazil, and Mexico, the three main federal systems in the region, I sometimes refer to CPCs at the state or provincial level. From this review it becomes evident that the victims' rights granted by CPCs fall in the three broad categories already recognized in international law: right to protection, right to reparation, and right to participation (see Annex 6).

a) Right to protection.

The right to protection has come to mean both protection from victimization, as well as protection from re-victimization (Doak 2008: 37-114). The first meaning of the right to protection is based on international human rights law and constitutional law, and on the notion that states have acquired the duty to protect life, and therefore, to provide

security to its citizens. However, given that when cases reach the courts a crime has already been committed, it follows logically that criminal procedure codes deal mostly with the second type of right to protection, that is, when CPCs refer to a victim's right to protection they focus in providing rights and mechanisms that aim to avoid that victims suffer a "secondary victimization", i.e., any additional suffering incurred by victims as a result of *the institutional response* to an offence (Ibid: 38).

To avoid this second victimization legislators have followed the already established international trend in granting a voice to victims. The right of the victim to be heard throughout the criminal proceedings and, more importantly, at the moment when key decisions are made (like dropping the prosecution, or engaging in a plea bargain with the accused), figures prominently across the CPCs of many countries.[16] As part of this intention to give victims a real voice, in most countries legislators have also provided victims with the right to appeal a public prosecutor's decision to close an investigation or to drop charges.[17] Some have even made explicit that victims' can file a complaint to the *Ministerio Publico* if the public prosecutor in charge of the case is delaying its prosecution as they have the right to an efficient and fair investigation (Buenos Aires-Argentina). Related to this emphasis on taking the victim into account, legislators have also included the right to information. This right requires the *Ministerio Publico* to inform the victim or their relatives in a timely manner about the state of the criminal proceedings; for example, how the investigation is going, if the case is going to be closed

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[16] Bolivia, Chile, Costa Rica, Colombia, El Salvador, Honduras, Chihuahua (Mexico), Panama, Paraguay, Peru, and Venezuela.

[17] Buenos Aires (Argentina), Bolivia, Chile, Costa Rica, El Salvador, Guatemala, Honduras, Chihuahua (Mexico), Nicaragua, Paraguay, Peru, andVenezuela.

and why, and also information about the time of hearings or trial. This right, along with the right to be heard, has been one of the rights pushed more forcefully by the victims' rights movement, in their attempt to make institutions treat the victim with respect and dignity.

The right to protection has also entailed the inclusion of provisions that require the state to provide adequate security and protection for victims, their relatives, and witnesses throughout the criminal proceedings. Some CPCs make explicit the right to medical and psychological attention (Panama and Chihuahua-Mexico), and the right of the victim to have their "privacy" (*intimidad*) protected (Buenos Aires-Argentina, Brazil, El Salvador, and Paraguay). But Latin American legislators have also made explicit other rights that show how far the idea of the victim as bearer of rights has gone. Furthermore, in some CPCs the victim is granted the explicit right to be treated with respect and dignity (Paraguay and Peru). Some have gone as far as stating that the proceedings should incur "minimum annoyances" (*molestias minimas*) to victims (Buenos Aires-Argentina).

b) Right to reparation.

As noted earlier the civil actor or *partie civil* was already a legal right granted to victims in some countries in Latin America. However, this right to restitution (or reparation) has expanded across the region and most criminal procedure codes in the region now offer the victim the possibility to participate as a civil claimant (or *actor civil*), a right that is present for victims in Germanic, Romanistic, and Nordic jurisdictions

if they want to receive compensation from the offender in the course of the criminal proceedings. The civil action works this way:

> “The victim's presentation of the claim before the criminal court is a civil action for compensation which is integrated into the criminal proceedings, with the aim of providing the victim with a relatively easy, fast and cheap procedure for recovering his losses from the person who may be held liable for causing the damage under private law, i.e. the offender […] An advantage for the victim in assuming the role of civil claimant rather than going to the civil court to claim compensation is that he profits from the burden of proof which lies with prosecution service" (Brienen and Hoegen 2000).

From a US perspective, understanding this right may be difficult given the sharp separation between tort law and criminal law that persists in this country. Consider for example the trial of O.J. Simpson (*California* vs. *Orenthal James Simpson*), who was accused of the 1994 murder of Nicole Brown Simpson and Ronald Goldman. In the criminal trial (which ended on October 3, 1995) he was found *not guilty* of two counts of murder. A year later, a civil trial began which ended in favor of the plaintiffs in February 4, 1997. Given that in civil proceedings in the US the burden of proof is far less than the criminal standard of “beyond reasonable doubt,” the jury found O.J. Simpson *liable* and awarded the plaintiffs more than $8 million dollars in compensatory damages. In the US, therefore, the family of the victim had to go through a civil court to claim damages. Therefore, in countries that allow a civil action within a criminal proceeding there are advantages for the victim in having the right for civil action as it avoids the costs of going through two different channels to find reparation for the same offense or crime.

There are, however, some variations on how the civil action works across countries. Most CPCs in Latin America require that the civil complaint has to be brought to the criminal court at the beginning of the proceedings, either at the investigation or pre-trial stages. Furthermore, in some jurisdictions no civil claim can be brought simultaneously to the civil courts until the criminal proceedings have been resolved (like in Chile, El Salvador, Peru), which some have criticized as potentially affecting the interests of the victim when, for instance, the criminal proceedings get stalled for some reason (Stephens 2001). And finally, although some link the criminal verdict to the judicial decision regarding the civil claim (like Venezuela), other jurisdictions, like Buenos Aires, Brazil, or Chile, do allow for judges to resolve separately criminal and civil claims.

All the countries of Latin America that were reviewed here provide the right for the victim or offended to become a civil actor in the criminal proceedings, except for Ecuador, Mexico, and Panama. In Mexico this is true both at the federal level, as well for the state of Chihuahua, which is the state under study in this research. This does not mean, however, that reparation rights are totally excluded. Interestingly, although in the CPCs of Chihuahua and Panama victims are not allowed to introduce a civil action within the criminal process, these codes do protect the victims´ right to reparation prescribed as an obligation of the state. This means that the public prosecutor (not the victim) has to request for payment of damages as part of their prosecution. Ecuador is also interesting in that it requires a guilty verdict in the criminal court in order to file a civil claim for damages within a civil court.

c) Right to participation.

The new awareness of victims' rights has raised the idea that victims should participate in the criminal proceedings. At the international level there are no rules as to what this entails, though there is a shared perception that this refers to "being in control, having a say, being listened to, or being treated with dignity and respect" (Doak 2008: 115). In civil law and common law countries, the traditional participatory role of victims or their relatives in the criminal proceedings has been as witnesses. As noted earlier, however, some countries have offered other ways for victims to participate despite the centralization of the investigation and prosecution of crime in the hands of the state. Many countries in Latin America for a long time provided some degree of participation rights for victims, such as the popular action, where citizens could *initiate* the criminal prosecution of an offense. In some countries, victims or their relatives were allowed to help the state in the investigation and prosecution, but their role was limited and, therefore, considered auxiliary. The "re-birth" of the victim and the emergence of victims' rights, however, have had the overall effect of introducing participation rights either for the first time in some jurisdictions (like in Mexico), or in a more forceful manner in those jurisdictions that already offered some sort of participation to the victim in the proceedings (like in Chile or Guatemala).

Today we find in the CPCs various ways in which the victim is allowed to participate in the criminal process beyond reporting a crime or being a witness. Many CPCs in Latin America now give the victim, just because of his condition as victim, the right to appeal

some important decisions such as when the *Ministerio Publico* decides to drop an investigation or drop charges, or when the judge dismisses of a case. The extent of prosecutorial and judicial decisions that a victim may appeal, however, is limited, and in some countries the right to appeal is not granted unless the victim is acting as a private prosecutor. In common law countries, the right of the victim to appeal is much more limited. A great advancement in victims' rights in the US after the Crime Victims' Rights Act, for instance, has been to introduce in some states the requirement that victims *are informed* of an appeal and its outcome (e.g. Wisconsin's Victims' Rights Amendment of 1993). Also, only when the victim have exerted his right to be heard, can he can petition the court of appeals for a writ of mandamus, which is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion.

Another important way in which victims can participate today is through their right to private prosecution. Most criminal procedure codes in Latin America grant this procedural to the victim, which allows them to participate at every stage of the criminal proceedings, that is, in the investigation, the pre-trial, and the trial. The variations of this right across countries are important and will be better explained in the next section.

2.4.2. The right to private prosecution

This research focuses on a particular participation right of the victim, i.e., the right to private prosecution. The names or labels given to this procedural right do vary across jurisdictions in Latin America. In this research, however, I explicitly include under

the name of "private prosecution" similar legal figures that all share one key characteristic: they provide the victim with procedural means to participate *actively* in the different stages of the criminal proceedings.[18] In this section I detail the different procedural rights that victims gain with the right to private prosecution and show how much this figure can vary across countries in terms of the strength given to the victim in the criminal process.

Before detailing the different procedural rights of private prosecutors, it is important to establish who has the right to exercise this right. The victim, as it is defined by each criminal procedure code, is granted the exclusive right to become a private prosecutor. All jurisdictions define "victim," as a minimum, as the person(s) directly offended by the crime. However, victims can also be family members, like the parents, the spouse or children, and in some jurisdictions even siblings. Interestingly, some countries also define as victims those associations or organizations that focus their work on "collective interests". [19] This allows associations, such as NGOs, to constitute themselves as private prosecutors for those cases where the crime violated a human right related to their work. For example, in the case of a homicide of a woman, an NGO working on women's rights has the legal standing to constitute as private prosecutor for that case. Or, in the case of an extrajudicial killing, an NGO working on human rights could also become a private prosecutor for the case.

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[18] Buenos Aires, Argentina: particular damnificado; Bolivia: querellante; Brasil: querelante; Chile: querellante; Costa Rica: querellante; Ecuador: acusador particular; El Salvador: querellante; Guatemala: querellante adhesivo; Honduras: acusador privado; Chihuahua, Mexico: acusador coadyuvante; Nicaragua: acusador particular; Panama: querellante coadyuvante; Paraguay: querellante adhesivo; Venezuela: querellante.

[19] Formally these "indirect" victims are referred to as "offended parties". For simplicity in this dissertation I refer to these parties as "victims".

Most of the CPCs reviewed here allow private prosecution (see Annex 6) except for Colombia, Peru, and Uruguay. Mexico, a federal country, has some states that do allow for private prosecution and others that do not. From all the countries that do have private prosecution, only Chile, Honduras, and Paraguay do not include in their definition of victims those associations that work on "collective interests".

Furthermore, the CPCs reviewed for this chapter establish three requirements for victims to be able to exercise this participation right. First, there is the requirement that the victim must be represented by a lawyer. In Honduras the CPC establishes that if the victim has no resources to pay for a lawyer, the state will assign one for him from the *Ministerio Publico* to represent the victim. Second, all criminal procedure codes require that the victim constitutes as a private prosecutor before a certain point in the criminal process. Most codes in Latin America require that the victim makes this decision before the indictment, but Nicaragua allows the victim to constitute as private prosecutor at any time in the process. Finally, the petition to constitute as private prosecutor must be reviewed and accepted by the judge.

The criminal procedure codes of Latin America grant various faculties to private prosecutors. Although these are not granted equally across jurisdictions, the following list shows the spectrum of powers that private prosecutors may have. Private prosecutors may have the right:

i. **To initiate the criminal prosecution.** In those cases where the state has not initiated the investigation, either because of an omission, or the public prosecutor did not find enough evidence that suggested there was a crime, or because the

prosecutor thought that the case did not merit public prosecution, the private prosecutor can force the initiation of the criminal prosecution and push for the investigation to begin (e.g., Buenos Aires in Argentina, Brazil, Chile, Chihuahua in Mexico, Nicaragua, Panama).

ii. **To participate in the investigation.** By bringing evidence, or suggesting lines of investigation, the private prosecutor has an important auxiliary role in the investigation (Costa Rica, El Salvador, Chihuahua in Mexico, Panama, Venezuela). Also, in some jurisdictions the private prosecutor can oblige, with approval from the judge, the public prosecutor to follow a certain line of investigation even when the public prosecutor did not want to do so initially (e.g., Buenos Aires in Argentina, Guatemala. Honduras). These participation rights may in fact resemble the informal role that sometimes privately hired lawyers and detectives play in the US criminal system. The difference, of course, lies in on the appeal rights granted to private prosecutors, as well as in the following participation rights that will be next mentioned.

iii. **To participate in the pre-trial and trial hearings.** The victim represented by his lawyer sits next to the public prosecutor during every hearing. During the hearings the private prosecution is considered another party and is allowed, just like the public prosecutor, to bring evidence, interrogate witnesses, provide statements, and object the defense or the public prosecutor.

iv. **To press charges.** The CPCs give different rights to private prosecutors regarding the indictment. In some countries the private prosecutor may only adhere to the

charges made by the public prosecutor, and only allow them to highlight flaws in the public prosecutors' accusation or indictment in an effort to modify the charges (e.g., Guatemala, Chihuahua in Mexico). In other countries, however, the private prosecutor may file his own indictment, filing different charges, which means providing a different definition of the crime as well as asking for a different punishment (e.g., Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Panama).

v. **To force the accusation.** Following the German tradition, when after some investigation the public prosecutor does not want to continue because he did not find enough evidence to take the case to trial or does not want to press charges because he did not find evidence of crime, the private prosecutor, with the approval of a judge, can force the accusation and keep the case open to move into the pre-trial stage (e.g., Chile, Nicaragua).

vi. **To convert the public criminal prosecution into an exclusive private criminal prosecution.** If after the preliminary hearings the public prosecutor does not wish to take the case to trial, the private prosecution may request the judge to allow the case to reach trial continue the prosecution by himself, converting *de facto* a public criminal prosecution into an *exclusive* private criminal prosecution. Very few countries allow for this conversion and in those few that allow it, there are limitations. Some establish that this conversion can only be requested for some types of crimes (e.g., Bolivia), or for those cases that are not considered of public interest (e.g., Costa Rica). Other countries, however, allow this conversion for

every type of crime (e.g., Buenos Aires in Argentina and Chile). When the prosecution is "privatized" in this manner, the private prosecutor has all the burden of the proof and all the burden of the costs of the prosecution during the rest trial

vii. **To appeal.** Private prosecutors have the right to appeal every decision made that finalizes the process.

It must be noted that these different procedural rights granted to victims as private prosecutors are not all present in every country at the same time. The configuration of these rights make up the three different types of private prosecutors that we find in comparative criminal law: the exclusive private prosecutor, autonomous private prosecutor, and auxiliary private prosecutor (Brienen and Hoegen 2000, Binder 2000b). Briefly, I will explain each one of these next.

The exclusive private prosecutor. In this type of private prosecution victims bring a claim or *querella* and the burden (and costs) of the prosecution falls exclusively on them. The prosecutorial organ or MP does not participate in this type of prosecution. Contrary to the other two types of private prosecutors, few crimes are included in this direct form of private intervention in the criminal proceedings. Those countries that do allow it restrict it to be used only for crimes such as fraud and crimes against the honor or reputation of the individual, where the public interest is low. Argentina, Bolivia, Costa Rica, El Salvador, Guatemala, Nicaragua, Paraguay, and Peru, allow for the exclusive

private prosecutor for certain crimes.[20] In Mexico, the Estado de Mexico in 2008 introduced this right as well.

The autonomous private prosecutor. This legal institution "refers to the situation where, in principle, the offence falls within the domain of the public prosecutor, but if he decides to refrain from prosecution, a private prosecution may be initiated" (Brienen and Hoegen 2000). In other words, the autonomous private prosecutor has an individual standing next to the public prosecutor and has the same rights as the public prosecutor. Once the judge accepts the private prosecutor's petition to participate in the prosecution, both the MP and the autonomous private prosecutor push the prosecution. The autonomous private prosecutor has the right to press charges, which may be different than those of the public prosecutor. In some countries, as noted earlier, the extent of the rights of the autonomous private prosecutor is such that in the face of the MP's denial to continue with the case, he can request the judge to convert into an exclusive private prosecutor (e.g. Chile). In these cases, the private prosecutor is allowed to continue with the prosecution in the trial stage, with the burden of the proof as well as with the burden of the costs.

The auxiliary private prosecutor. This type of private prosecutor "stands next to the public prosecutor. He has a position comparable to that of the public prosecutor, but at the same time, he may leave the burden of proof in the professional's hands and profit from his expertise" (Brienen and Hoegen 2000). As an auxiliary to the MP, the private prosecutor helps with the investigation providing evidence and suggesting lines of

[20] Called "*querellante particular*" (Argentina) or "*querellante de acción privada*" (Bolivia, Costa Rica, El Salvador, Nicaragua, Peru) "*querellante exclusivo*" (Guatemala), "*querellante autónomo*" (Paraguay).

investigation. He also has the right to speak during hearings and the trial. The auxiliary private prosecutor can only adhere to the charges pressed by the public prosecutor. The only influence he may have in the indictment can be in requesting a revision of the indictment based on legal or factual flaws, which the judge ultimately decides. That is, an auxiliary private prosecutor is given certain "cooperation" rights, but the MP remains as the main prosecutor (Eser 1989: 24). Through appeals, however, the auxiliary private prosecutor may still exert a considerable amount of pressure to make the victims' interests taken into account.

Both the autonomous private prosecutor and the auxiliary private prosecutor are allowed for every type of crime. Therefore, this research focuses mostly on the use and impact of these two types, which I generically refer to as ¨private prosecution¨.

CONCLUSIONS

The aim of this chapter has been to highlight how ideas regarding the victim of crime have evolved into conceptualizing the victim as a rights' bearer within criminal and international law. Also, I showed how this new understandings on the victim provided the necessary normative and discursive resources that have buttressed the creation of new rights and institutions both at the international and domestic level. Through a review of the current state of victims' rights in the criminal procedure codes in Latin America this chapter further shows how far victims' rights are now being considered and integrated in domestic procedural law. In short, the main theoretical objective is to show that ideational and international factors need to be taken into account to fully explain state choices of legal and institutional change. The impact of the emergence of the idea of the

victim as a rights' bearer will be again made evident in the following chapter where I explain how, within the judicial reform process, victims' rights were introduced in Guatemala, Chile, and Mexico.

CHAPTER 3:
THE EMERGENCE AND DIFUSSION OF PRIVATE PROSECUTION IN LATIN AMERICA

INTRODUCTION

In the previous chapter I showed the impact that the victims' discourse and victims´ rights movement had in the emergence of victims' rights in the international sphere as well as on procedural criminal law in Latin America. It is evident that today the victim of crime cannot be described as being "neglected" or "forgotten". Since the 1980s, the victim of crime has been granted numerous explicit rights in the criminal procedure codes of countries all across Latin America. Although there is variation in the amount of rights granted to victims across countries, what these events reflect is that the victim in Latin America has been recently recognized as a right-bearer in the criminal process. In this chapter, I now explore the mechanisms through which this diffusion of victims' rights happened. In other words, here I look at *how* victims' rights, among them private prosecution, became part of the "choice" or "solution" for reform and came to be implemented in domestic procedural law in Latin America.

In this chapter I explain the diffusion and implementation of private prosecution as a procedural right in the recent reforms to the criminal procedural codes (CPCs) in Latin America. As noted earlier, in some countries, like Chile, the office of the public prosecutor or *Ministerio Publico* (MP) was established as part of the recent judicial reform process. Even in those countries that already had the office of the public prosecutor, like Guatemala and Mexico, legislators have sought to strengthen the public

prosecutor's office in order to adapt it to the new adversarial or accusatorial model of criminal process. Against certain perceptions of criminal procedure reforms in Latin America as an "Americanization" of their judicial systems (Hafetz 2002), the introduction of private prosecution as a key part of the reform certainly stands out as a non-US institution.

To introduce, or maintain and even strengthen private prosecution in this context of judicial reform seems even more surprising when we realize that these reforms were taking place in the middle of a heated scholarly debate, in which even some Latin American legal scholars had argued against any form, weak or strong, of private prosecution. These "abolitionists" saw private prosecution as a medieval, unnecessary figure, and instead proposed to limit victims' participation only for restitution purposes, allowing victims to claim for damages within the criminal process as civil actors (Zaffaroni 1986).[21] And yet, despite the fact that some legal scholars rejected the idea, in the last wave of reforms to the CPCs in Latin America we can observe that the victims' discourse won: private prosecution was strengthened in those places where a "weaker" version of private prosecution existed before, like in Guatemala and Chile, or it was introduced for the first time in those places where this legal institution did not exist, as in Mexico. Furthermore, besides private prosecution legislators granted as well another quite non-US institution, i.e., the right to participate as civil actors, as noted in the

[21] As noted earlier, the idea of private prosecution, on any of its forms, has always been a contested issue among legal scholars. The debate in Latin America seems comparable to that described taking place in Germany, Italy, Spain, and France in the late 19th, the early 20th century, and the 1960s (See Chapter 2 and refer to: Perez Gil 1998).

previous chapter and as Annex 6 shows. Therefore, victims' participation rights, in general, were greatly expanded, both for retribution and restitution purposes.

In this chapter I examine the ideational, structural, and agentic factors that help explain the mechanisms of diffusion of this right in the CPCs. Here I do not explain the demand for judicial reform, but only look *at the context* in which such demand for reform took place in order to understand how private prosecution became an integral part of the "solution" chosen by designers and reformers of the CPCs of Guatemala, Chile, and Chihuahua, Mexico. I argue that the seeds for the right to private prosecution took hold in Latin America as the outcome of a process of colonial legal diffusion. This way the civil law tradition -that already contained certain participation rights for victims, as noted in the previous chapter- spread all over the region through the mechanism of coercion. These "seeds" later had a path-dependent effect in the way that key designers thought about private prosecution and victims' rights in future reforms.

The role of an epistemic network diffusing a model code of criminal procedure, where victims' rights were understood as an integral or "organic" part of the proposed reform, is key to understand how similar victims' rights got implemented in different countries. Therefore, I also argue that it is necessary to take into account the ideational shift that consolidated the victim as a rights' bearer (as described in Chapter 2) to fully understand why similar victims' rights and similar victim-oriented institutions have been understood by both legal entrepreneurs and reformers as necessary. This change in legal thought and its impact on international law served as a supply of ideas and choices for reform that allowed designers to argue in favor of the strengthening of victims′ rights in

the new CPCs. The shock of recent gross human rights violations is also an important factor in shaping how key designers framed the need to expand victims' rights. In Guatemala, Chile, and Chihuahua, Mexico, this epistemic network played a key role as a "legal" entrepreneur in the design of the new CPCs. Through an analysis of the reform experiences in the three countries under review here, I will argue that when reformers where looking for "solutions" to how to reform the justice system, the same model that appeared as "the solution" diffused through persuasion (Guatemala), or a combination of emulation and learning (Chile and Chihuahua).

This chapter is organized as follows. First I offer a brief overview of the historical antecedents to private prosecution in colonial Latin America, i.e., the *Nueva España*. Then, I follow the judicial reform process that began in the 1980s and I explain how these "seeds" had an important role in shaping how key designers thought about victims' rights, and therefore, gave way to pushing for the stronger participation rights that today we see in most countries in Latin America. Finally, I look at the experiences of judicial reform in Guatemala, Chile, and Mexico, to highlight the actors, the context, and the factors that explain the mechanisms of diffusion behind the implementation of new CPCs with expanded victims' rights.

3.1. Colonialism: implanting the "seeds" of private prosecution in Latin America

As the new world was undertaken by European imperialism in the 16th century, conquered societies suffered massive changes. Some indigenous institutions were somehow respected, or strategically merged with Spanish ones, such as religion. Others,

like the legal systems, were totally dismissed by the *conquistadores* and were replaced by new laws and institutions. The colonies controlled by France, Portugal, or England, suffered similar fates. In the case of Spanish colonies, current laws that regulated the Spanish criminal system, called "*Las Siete Partidas,*" were imported into the colonies and, in that manner, imposed. Within this body of law, criminal law and criminal procedure were defined following inquisitorial principles developed in Spain in the 13th century (Duce and Riego R. 2007).

In the *Nueva España*, it was soon established that the prosecution of criminal offenses would be in charge of state magistrates or prosecutors, as the *Recopilación de Indias* of 1626 and 1632 mandated (Castro 2008). This coincided with the process of centralization of criminal prosecution into the hands of the state that was taking place in Spain and in other European countries[22]. In 1787 the *Real Cédula* established in Spain that the public prosecutor had to always be participate in the proceedings (Pérez Gil 1997). Interestingly, with this transfer of Spanish criminal law into the new world, important "seeds" of participation rights for victims were implanted as well. The institution of "*actio popularis*" or popular action, which had been part of Spanish criminal law since the Middle Ages, diffused into the colonies (Gimeno Sendra, Moreno

[22] It must be said that the inquisitorial criminal process in continental Europe did go through a profound transformation, moving into a more mixed process that incorporated elements of the common law system. The reforms that Europe made in the 18th and 19th centuries were called in order to reduce the abuses that were seen in the criminal procedures, and tried to incorporate elements of the English system which they regarded as more democratic and just. Latin America missed this transformation as they embarked on decades of civil war after gaining their independence in the early 19th century (and Spain reformed its CPC in 1882 towards a more accusatorial system after the independence of its colonies)

Catena and Cortés Domínguez 1999). In Latin America, however, it is said that popular action was rarely, if ever, used (Horvitz Lennon and López Masle 2002: 281-305).

This transfer of legal norms and legal institutions through raw imperial coercion explains, then, that Latin America came to share a legal system based on civil or code law. By the early 19th century, after the revolutions for independence spread throughout the region, the new independent nations inherited legal institutions imposed by Spain. Independence, however, did not bring any major changes in procedural criminal law as the new Latin American leaders maintained the legal system that the *conquistadores* had imported. For many countries it took almost a century of turmoil and civil war to actually consolidate a state that could maintain peace and stability in the land. Changing criminal procedure was the least of the worries of legislators at the time.

What is interesting is that as the newly independent states managed to design and create new criminal procedure codes during the late 19th century, all of them did so recreating inquisitorial principles to various degrees. Whereas some countries, like Mexico, did create a MP office, introducing a ¨mixed model¨ that separated prosecution from judging but that was based on inquisitorial principles (i.e., weak rights for the defendant and following a written procedure), other countries introduced a fully inquisitorial model, where Instruction Judges (*Jueces de Instrucción*) investigated, prosecuted, and judged (see Chapter 2). Some authors argue that the lack of innovation in the new CPC introduced by the new independent states responded to a conservative impulse among legislators who saw criminal law as a tool to maintain the status quo (Duce and Riego R. 2007: 47, Salvatore, Aguirre and Joseph 2001).

For example, in the case of Chile, it was in 1894 that a new CPC was finally sent to Congress, but did not enter into force until 1906, establishing an inquisitorial criminal system (Duce and Riego R. 2007: 44). Guatemala offers an interesting example of the turmoil of the time. In 1837 Congress introduced the *Livingston Code*, which followed an accusatorial model, but the government was soon overthrown and the colonial legislation was restored. It was not until 1877 that a new CPC was implemented, reformed again in 1889 and in 1973, but all of these new codes established a mixed model that introduced an MP but followed inquisitorial procedural principles (Figueroa Sarti 2009: xxi-xxii). Mexico offers a more complicated story, being a federal state, but also followed similar trends. An MP was already in place after the independence, an institution that later reforms only strengthened in its powers to investigate and prosecute crime. The first CPC in Mexico was enacted in 1880, reformed in 1894 (García Cordero 2005), and new CPCs were enacted in 1908 and 1934. In Mexico, despite the presence of an MP, strong inquisitorial principles were also maintained.

So even though the new independent countries drafted and implemented new CPCs, some following a mixed model and others a fully inquisitorial model, inquisitorial principles guided the criminal procedure, leaving defendants and victims with weak rights. However, beyond popular action and civil claims, the rights of victims were not as extensive as they are today. For example, before their reforms in the 1990s, Chile and Guatemala had "weaker" versions of the auxiliary private prosecution, with certain participation rights that allowed the victim to at least be considered as part of the process (other than as a witness). With judicial reform Chile and Guatemala have both switched

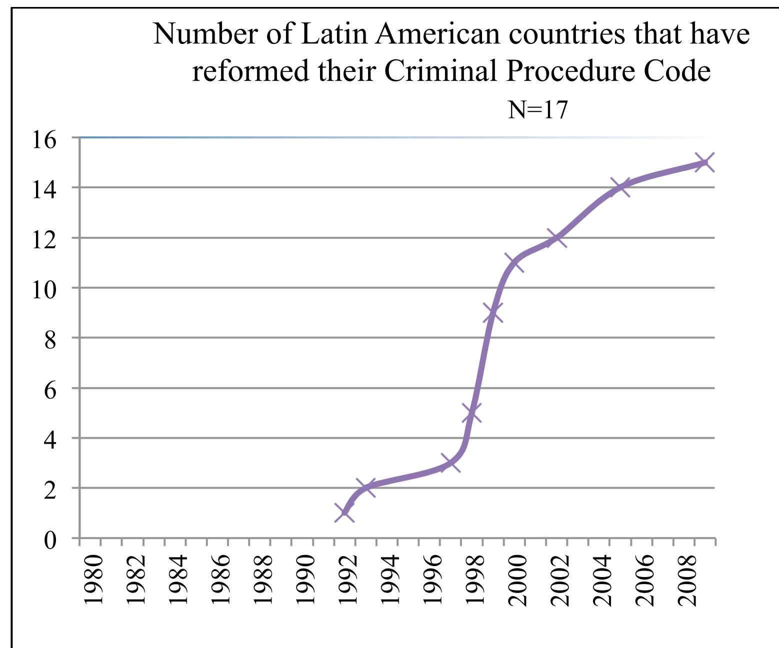
from an auxiliary to an autonomous private prosecution, and the state of Chihuahua in Mexico has introduced for the first time in the history of the country, rights for auxiliary private prosecution.

3.2. Expanding the rights of victims: path dependence and contingent factors

In this research I have found that four factors played important roles in the expansion/introduction of private prosecution in Latin America. The first important factor is the timing in which the new CPCs were being drafted. The design and reform efforts took place in every case *after* the third wave of democratization was well underway, and when victims' rights were already institutionalized in international instruments. Transition to democracy opened up a political space to redefine state-society relationships and international victims' rights provided a normative and legal framework that influenced key designers. Second, the impact or shock that the memory of recent gross human violations produced a sense of urgency to demand an increase of victims' rights. There are two other important factors that shaped the choices or solutions for reform. First, the normative content of the judicial reforms was highly influenced by the ideational shift that the victims' movement had introduced among legal scholars. And finally, the success of an epistemic network in portraying a model code as "the" solution to how to reform the judicial system, where victims' rights became an integral part of a "package" of reform.

The diffusion of the CPC reform in Latin America has been a relatively fast process that has taken less than two decades to evolve. When legal or policy diffusion happens three characteristics are present (Weyland 2005): temporally, diffusion appears as a wave that yields an S-shaped pattern; which we can appreciate in Graph 3.1. in the next page. Spatially, it tends to appear in a region of the world, which in this case is Latin America. And substantially, it entails the adoption of the same policy framework in diverse domestic settings, which here is the adoption of very similar criminal procedure codes.

Graph 3.1.



The question is: how did this diffusion happen? The diffusion of the CPCs is impossible to understand without taking into consideration the role of a legal epistemic network. This network has already been identified by Maximo Langer (2007), who in

great detail has described the origins and expansion of this network in the region to explain the introduction of the accusatorial model across Latin America.[23] Langer, however, focuses on explaining the introduction of an accusatorial procedural system, but the changes introduced by the CPC reforms not only have changed the way the criminal process is conducted. As already mentioned, these reforms have granted *explicit* rights to victims within the criminal procedure codes.

Building on Langer's findings, I have found that legal entrepreneurs within this network introduced victims' rights as part of "the package" for CPC reform. These legal entrepreneurs took this decision in part influenced by the ideational shift that the victims' movement consolidated within criminology and international law. The re-birth of the victim in the scholarly debate provided the "framework" in which reformers and designers pushed for expanding the rights of victims. As designers in Latin America drafted their new CPC, they found it logical, even necessary, to expand victims' rights, including the right to private prosecution.

So, who were these "legal entrepreneurs"? The story of this legal epistemic network necessarily has to start with Julio Maier and Alberto Binder, two Argentineans. Both were law scholars. Maier, however, was the mentor and Binder, the student who with time became the most important entrepreneur of the network, pushing for the

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[2323] Langer argues that this network cannot be described as an epistemic network because Haas Haas, P. M. (1992) Introduction: Epistemic Communities and International Policy Coordination. *International Organization,* 46**,** 1-35 , who coined the term, defines epistemic communities as sharing causal and principled beliefs. Langer argues that this network does not have this characteristic of "shared causal beliefs" because the network is composed by lawyers and scholars with "expertise about their knowledge of positive law and their ability to make normative claims, not causal ones" (p. 651). I do not agree with his interpretation. I see these "legal entrepreneurs" as pushing for reform because they believed that making such changes would lead to a better criminal system, hence, their normative beliefs led them to believe that changing the criminal procedure code would cause a better judicial system.

diffusion of the normative contents of the criminal reform in Latin America. But, what shaped their legal thought? Maier had completed graduate studies in Germany (at the University of Munich), later taught in Argentina as a faculty member of the University of Buenos Aires, where Binder was schooled. Maier's studies in Germany in great part shaped his understanding of what a criminal justice system should look like and the participation that a victim ought to have in the proceedings. In particular, it is important to recall from Chapter 2 that it was out of distrust in the state prosecutorial organ that in Germany the institution of the auxiliary private prosecution was first conceptualized and instituted in the 19th century. Maier's legal thought was later shared by his mentee, Binder. However, their legal thought seemed to be also deeply affected by the dictatorship in Argentina (1976-1983) and their strong commitment to democracy and liberalism.

For these key legal entrepreneurs, the democratic transitions in Latin American could not be complete unless the criminal judicial system was transformed as well (Langer 2007: 641). To consolidate democracy, they thought, countries were required to reform the judicial criminal system towards an accusatorial model of criminal process. Therefore, although they were indeed influenced by foreign models, these actors also made discriminating judgments of what aspects of a system would work best for the context of Latin America. Their ideal criminal process was crystallized in Maier's Model Criminal Procedure Code of Iberian America. Maier developed the model code, with the assistance of Binder, in 1984 (D6-C 2010). However, it was until 1988 when they finally presented their final version in the 11th conference of the Iberian American Institute of

Procedural Law. This model was endorsed that same year by this institute as the "Model Code" for the region.

A previous version of the Model Code, that has become known as Maier's Draft of 1986, provides evidence that very early on in their work, victims' rights were important for these two legal scholars. The only significant difference between the Draft and the Model Code was that the in the final version Maier and Binder decided to incorporate the following:

> "a few alternate versions of specific regulations, designed to allow different countries to choose solutions appropriate to their needs. The issues dealt within these regulations included the scope of victim's participation as a private prosecutor during the trial process, the possibility for non-profit organizations to act as private prosecutors in cases affective collecting interests, and the question of whether to allow either mixed trial courts or juries composed exclusively of lay individuals" (Langer 2007: 643).

From Binder's writings it is easy to appreciate the strong normative commitments that these legal entrepreneurs had regarding victims' rights. His words even suggest that they strategically pushed for stronger participation rights for victims in their Model Code as a way to support democratic institutions and strengthen the protection of human rights. For example, Binder thought that having a human rights ombudsman or similar human rights institutions are important but, for him, these were not to be fully trusted as these institutions may fail to uphold their mandate and become absorbed by "the system". Similarly, he distrusted the public prosecutor's office, and believed that a CPC should avoid having a public prosecutor's office that does not have any controls from the victim (Binder 2000b: 130). Hence, a CPC should ensure different judicial mechanisms that

"opens many channels of participation to the victim, and in particular, to victims' organizations and victims' advocates organizations" (Binder 2000b: 225). Doing so, he has argued, helps to make investigation more efficient, helps to provide a stronger control on the public prosecutor's office, and deepens the principle of contradiction, which is necessary in any accusatorial system (Ibid: 234). His democratic commitments are also evident in how he has framed the change from an inquisitorial to an accusatorial criminal process as a change from an "authoritarian process" to a "democratic process". His awareness of international treaties on human rights (and victims' rights) has been also important in his conception of criminal law (Binder 2000b).

Both of these scholars, but in particular Binder, actively pushed and promoted their ideas all over Latin America. They did so, however, not only among the scholarly community. They also strongly lobbied governments and the policy community, pushing for changes in the justice system in general, and in the criminal process in particular. For Langer, Binder became the most important network member in the 1990s, not only because of his *direct* participation in the drafting of several CPCs in the region[24], but mostly because of his advocacy efforts as legal entrepreneur (Langer 2007: 653). The success of their efforts is evident in the diffusion of the CPC reform across the region, as Table 3.1 (below) shows.

[24] Binder personally participated in the drafting of the CPC in, at least, the following countries: Bolivia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Paraguay, and Venezuela.

Table 3.1.
Number of countries that have reformed based on Maier & Binder's Model Code

Year	Criminal Procedural Code
Year of 1st reform	1992, Guatemala
Pre-1990	0
1990-95	1
1996-00	**9**
2001-today	**4**
No reform implemented	Mexico (Constitutional reform in 2008, gradual reforms at the state level)
No reform	Brazil Uruguay

N=17

Although Guatemala was the first country to reform following the Model Code, there were two important previous efforts of criminal procedure reform in the region. At the provincial level, the province of Córdoba in Argentina, reformed its CPC in 1939 towards a more accusatorial process, following mostly the Italian CPCs of 1913 and 1930. The Córdoba Code was for some time regarded as a model by legal scholars in the region. In 1978 Costa Rica reformed following the Córdoba Code of 1939, but later, in 1998 made another reform following the Maier and Binder's Model Code. What is interesting in the case of Costa Rica is that one of the most important changes introduced, based on the Model Code, referred to the introduction of an auxiliary private prosecution right.

Next I will show the mechanisms that allowed these legal scholars and their epistemic network to diffuse criminal procedure reform, and will explain how the right to

private prosecution was expanded or introduced in the CPCs of Guatemala, Chile, and Mexico. In my three cases the factors mentioned before are present: a strong demand for reform, the memory of social trauma produced by gross human rights violations, and the diffusion of CPC reform. Hence, in the next section I offer three stories of reform, where we find different reformers, different designers, different timings, and even different socio-political conditions where strong demands for reform emerged, but where we also find the presence of the same epistemic network pushing for Model code as the solution to reform. These stories of reform share the presence, in one way or another, the two key Argentinean legal scholars who revolutionized criminal law thought in Latin America: Julio Maier, and his student, Alberto Binder.

3.2.1. Guatemala: a frontrunner in the reform process

Guatemala faced a very bloody civil war (1960-1996) and a very repressive dictatorial regime (1954-1986) that took the lives of approximately 200,000 people. After the 1985 Constitution entered into force, in 1986 Vinicio Cerezo became the first elected president since 1966. An impulse to reform the judicial system, including the CPC, emerged from within the government, reflecting a spirit of recent democratic transition, and an aspiration to help pacify the country. In this context, the president of the Supreme Court, Edmundo Vázquez Martínez, became the key promoter of the criminal procedure reform, as he thought it was necessary given the new democratic context in Guatemala. Furthermore, he thought that moving towards an oral process would be more appropriate for his country, which had (and still has) a high illiteracy rate and strong (indigenous)

oral traditions (D3-G 2009, I2-G 2009, 2010). Vázquez Martínez, as president of the Supreme Court, took the reform project seriously, inviting advisors and promoting conferences on the topic. As part of his efforts, then, he contacted ILANUD (the UN's Latin American Institute for Crime Prevention) for advice. As a coincidence, Maier had previously visited ILANUD in Costa Rica for conferences on his latest book on criminal law. Through mutual acquaintances in ILANUD, he met Maier and invited him to Guatemala to provide advice on how to reform the judicial system (D3-G 2009, D6-C 2010).

By the end of the 1980s, Binder and Maier were actively working in Guatemala in order to design a draft of the new CPC. Their efforts of reform had support from the Cerezo administration, from the top echelons of the Supreme Court, as well as from members from the left, who saw in the return to democracy and the rule of law a way for them to participate in the politics of their country (I2-G 2009, 2010). Also, USAID was an important player in the reform process, as the agency was funding great part of the judicial reform efforts in the country. Binder and Maier, through persuasion, gained the support of the relevant actors regarding the normative contents of their project, even those of USAID, whose top officials "liked the idea that Latin American jurists [were] making their own diagnosis and proposals for Latin American criminal justice systems; thus nobody could accuse USAID of imposing the US model" (Langer 2007: 649-650). And actually, that is how local people involved in the reform perceived the whole process: as a truly Guatemalan effort applying the most "modern" principles in Latin American criminal law adjusted to the new democratic Guatemalan reality (D3-G 2009).

As it would become common in CPC reform experiences throughout the region, the only true opposition to the reform came from bar associations: lawyers and judges who would have to radically change the ways they thought and practiced law. However, they counted with strong support from the left, who was part of the Peace Accord process and judicial reform was part of the government's commitment to improve democracy, rule of law and human rights.

On March 1989, Maier and Binder presented their final draft to the president of the Supreme Court. They said they modeled the Guatemalan code *on their own* Model Code and Draft of 1986. This final draft, obviously, was then revised by a Guatemalan technical commission within Congress, which had the technical support of USAID. However, the commission was directed by Alberto Herrarte, a liberal criminal law professor, and Cesar Barrientos, a left-wing lawyer. The new Guatemalan CPC was passed into law in 1992, and entered into force in July 1994. In terms of victims' rights there were no substantive changes from the draft to the CPC that was passed into law. It is not surprising that the CPC was passed relatively easy into law. At the time, the Peace Accords were underway, and the CPC was seen as part of the government's commitment to reshaping institutions to improve democracy, human rights, and rule of law. With this, Guatemala became the frontrunner in Latin America in the wave of reforms based on the Maier and Binder's Model Code.

The changes made in terms of victims' rights, however, were radical. From the previous Guatemalan CPC of 1978, victims not only gained important explicit rights like rights to protection, fair treatment, restitution and reparation. But, their participation

rights in the process were greatly improved. Before, the 1978 CPC offered a weaker version of private prosecution (*acusador particular*), which only allowed the victim, by his own, to be included as a party in the process. And, as in Guatemala there was no public prosecutor's office in charge of conducting the criminal investigation previous to the 1992 reform, the victim relied only on the judge who had the concentrated functions of investigator and judge. Moreover, the victim had no real voice in the process because his appeals were made against the same person that was investigating the crime. The new CPC, in contrast, provided for a much stronger autonomous private prosecutor (*querellante adhesivo*), because the victim, represented by a lawyer, could now prosecute next to the public prosecutor, and in certain cases could even prosecute by himself (through a "conversion" mechanism by which a judge transfers the prosecution from the public prosecutor to the victim, see Chapter 2)[25]. Furthermore, the victim has voice during every important stage of the process (pre-trial and trial) and has the right to appeal decisions made.

Why did designers expand the rights of victims' this way? For designers in Guatemala the rationale for keeping and strengthening the right of private prosecution seemed to be closer to the ideologues behind the reform, Maier and Binder. In my interviews with designers involved in the process, most describe the ideational change within criminal legal thought as the impulse behind the expansion of rights of victims. But, they also highlighted the need to create a new CPC that reflected the new democratic context and saw themselves as part of this new "school of Latin American criminal

[25] CPC 1992, Art. 345 Quater.

thought” (D1-G 2009, I3-G 2009). Maier and Binder, through training, lectures, conferences, seemed to have socialized all the designers involved into the benefits of the reform, and victims’ rights were part of this “package” of necessary changes that had to be included in the final text. The role of these entrepreneurs, however, will be different in later reform processes, as the next two cases suggest.

3.2.2. Chile: the expansion of the epistemic network

In contrast to Guatemala, where the impulse of reform came from within the government and where external actors (Binder and Maier) drafted the CPC; the impulse and design in Chile began from below. Academics and NGOs initiated the debate as well as the design of the Chilean CPC. Like in Guatemala, transition towards democracy was recent. In 1990, Patricio Aylwin became the first elected president since the coup against Allende in 1973. In this new democratic context, a group of young legal scholars from a private university, the Universidad Diego Portales, began debating on the imperative need to reform the CPC. They thought the criminal process reflected key characteristics of a government, and for Chile to consolidate its democracy it had to reform its criminal judicial system accordingly (A3-C 2009, D1-C 2009). And for this new generation of legal scholars, it was also a matter of “keeping up with regional trends” of reform. From this group of scholars, those that later became key players in the reform process were all below the age of 35 and had graduate studies either in the US (e.g. University of Wisconsin and Stanford University) or Germany. They did not study with Binder or

Maier, but they clearly knew their work and recognized that they were deeply influenced by it (Duce and Riego R. 2007).

By 1991 these scholars were very organized and had a very clear strategy: they had to create "technical knowledge" to persuade the public *and* the government of the need for the type of criminal process they proposed (Duce 2004). This way they became the local legal entrepreneurs. Some of them define this initial process of research and debate as necessary to "sell the idea" of the need to reform (Duce and Riego R. 2007). Among the key actors in this process, Cristian Riego, the director of an NGO from the left called Corporación de Promoción Universitaria (CPU), used his NGO to support research and conferences on the topic. By 1993, this group of legal entrepreneurs had become the most relevant actor in the debate of the reform, and had even achieved a crucial coalition with an important NGO from the right, *Fundación Paz Ciudadana*. This NGO was directed by Agustin Edwards, the owner of *Mercurio*, an influential conservative newspaper in Chile, who got involved in the judicial reform debate in great part as a response to the kidnapping of his son in 1991. In this civilian alliance between right and left, an agreement was made to begin drafting a new CPC. What is important to highlight is that the reform was pushed from below, with a coalition from both the left and the right. Also, again in this case the reform cannot be characterized as a pure "technical reform" because for those designing and pushing the reform, the changes were normatively grounded on what they thought a criminal process should look like within a constitutional democracy. Influenced by Binder and Maier's legal thought and sharing the same normative/legal commitments, they acted as legal entrepreneurs.

In 1994, the Minister of Justice, Soledad Alvear, made a pact with these organizations, and transformed this civilian initiative into an executive's initiative (D2-C 2009, A1-C 2009, A3-C 2009). This reflected the new administration's policies of the new president Eduardo Frei (1994-2000), who embraced judicial reform was an important part of the agenda. From that moment on, a "technical team" was formed, consisting of four "specialists" (all legal entrepreneurs members of the original group of scholars) and the government later incorporated another legal scholar into the team. For one year they worked on this draft. They presented a final draft in 1995, and then a legislative commission took charge of the reform. Some of the key "entrepreneurs" from the reform movement were kept in this legislative commission as "experts". It was not until 2000, however, that the Congress finally passed the new Chilean CPC, which entered into force in October of that year. The designers have explained that the norms they included in the text are influenced by various sources,[26] but have said to be particularly influenced by the Model Code (Horvitz Lennon and López Masle 2002: 23). Although the norms included within the text of the CPC seem to have diffused through a process of emulation, I will argue that Chile also shows some socialization processes through learning. Binder was in fact contacted as an advisor, but mostly for "providing general guidelines for the reform process and for the development of a work methodology for the team" (Duce 2004: 209).

The victims' rights that the designers initially suggested were kept in the final CPC, which changed substantially the role of the victim in the criminal process. Chile

[26] They also mention the German code of 1877, revised in 1987, the Italian code of 1988, the Córdoba code of 1992, the Peruvian code of 1991, the Guatemalan draft code of 1991, and the 1993 draft code of El Salvador.

had a very old CPC that had not been reformed since 1906. In this old CPC the victim did have some participation rights such as popular action. Like in Guatemala, the institution of the *querellante particular* already existed, but it was a rather weak version of an auxiliary private prosecutor that had few remedies or means to object to decisions. It was this reform that introduced the subsidiary private prosecutor, with very strong rights and remedies, and also with the right to request a judge to change the prosecution into an exclusive private prosecution. Why did the designers introduce such strong rights for victims? Some explanations seem to suggest a degree of emulation. Victims' rights, some argue, were modeled after the German Code of Criminal Procedure (*Strafprozessordnung* or StPO of 1877, revised in 1987).[27] Some of the ideas regarding participation rights, therefore, where taken from the StPO model, like the right of the private prosecutor to force the public prosecutor to press charges (A3-C 2009). Others have explained that the need to expand victims' rights responded to the rise of the victims' movement and the rise of victimology (Horvitz Lennon and López Masle 2002: 309). But more interestingly, some suggest a path dependency element: as victims already had some participation rights in the old CPC, "they could not take away a right already acquired or given previously"(D3-C 2009, D1-C 2009).

[27] The StPO allows for an auxiliary private prosecutior as well as for civil claims to be brought within the criminal proceedings. An English translation of the Criminal Procedure Code was consulted at the German Law Archive (http://www.iuscomp.org/gla; consulted on 05/12/2012.

3.2.3. Mexico: late-reformer and the case of Chihuahua

Mexico is a federal system that has witnessed a very interesting pattern of judicial reforms, perhaps product of its late transition to democracy in 2000 (relative to the rest of the region), but also because of the different experiences at the federal and state level. In June 2008, a constitutional reform was passed making mandatory an accusatory and oral system at the federal and state level, and introducing a large expansion of victims' rights, including the right to "collaborate" with the public prosecutor which could lead to an interpretation to implement any form of private prosecution in the CPCs at the state level. Much earlier, however, some victims' rights were already included in a constitutional reform in 1994 and in 2008.

Through these constitutional reforms victims were granted the constitutional right to appeal the MP's decision not to investigate a crime (Adato Green 2005: 24), as well as the right to participate in the investigation of the case (Castro 2008). The constitution is not clear as to what this participation of the victim should look like (only by being heard, or if through private prosecution). What is clear is that these reforms came both as a response to domestic demands for victims' rights and the standards imposed by new international instruments regarding victims of crime. Furthermore, according to one legal entrepreneur from Chile, the 2008 constitutional reform regarding victims' rights reflects the influence of Chilean advisors on the importance of expanding victims' participation rights in Mexico (D2-C 2009, D3-C 2009). The implementation of this new constitutional reform, however, has been slow and will take until 2014 for all the states in the Mexican

federation to change to an accusatorial system. At the federal level, the criminal procedure code has not yet been reformed. But at the state level we observe some variation. Interestingly, some states reformed even before the 2008 constitutional reform, which makes them really interesting cases to study diffusion as it cannot be claimed that the norms within the CPCs were imposed by the federation. Here I will only focus on the experience of the state of Chihuahua, a frontrunner within the Mexican federation in terms of reform.

Chihuahua is an interesting case in three respects. One of these is that Chihuahua was one of the first states in Mexico in which the PRI lost state level elections. The PRI maintained a one-party system in the country from 1929 until 2000. But it was in 1992 when an opposition party from the right, the PAN, won the government in Chihuahua, beginning the democratic transition within this state. Another interesting element is that the impulse for the reform of the criminal justice system came much later after this state-level "transition to democracy", but coincides with the timing of the democratization of the country. Furthermore, it coincides with the emergence of a local victims' movement that emerged fighting for justice for the massive killing of women that took place in that state in the 1990s, where thousands of women disappeared and the impunity of which were considered gross human rights violations. And finally, Chihuahua followed a top-down process of reform, where the impulse came from the government itself. However, at the time of drafting, the government allowed societal input into the reform.

In 2004 the PRI recovered the government at the state elections and Jose Reyes Baeza Terrazas took office. Since his political campaign, Baeza Terrazas had a strong

agenda of judicial reform, and in particular, of criminal justice reform. The reform was needed, as it was framed in some public events, to achieve the following objectives: to *democratize* the system and regain the public's trust in the judicial system, to modernize Chihuahua and follow *international trends*, as well to make criminal justice more efficient and more transparent (Rivas and Fierro 2008). In an interview, however, one reformer also explained it in reputational terms: several people in government thought it important to reform the justice system in the state after the government of Chihuahua had been the object of international criticism due to the high rates of killings of women during the 1990s in the city of Juarez. In this wave of criticism, the interviewee said, "the state of Chihuahua was somehow seen as responsible" for the femicides, ie., the killing of women given their condition as women (D2-M 2010). This is important to keep in mind because this suggests that there was a preoccupation with "victims' rights" from very early on in the reform process.

The process of reform was very fast, from draft to implementation due to the consensus among all political actors from the three branches of government. With a PRI majority in the state Congress, the *priista* governor Baeza Terrazas, easily achieved an "inter-institutional" agreement (between the executive, legislative, and the judiciary). The two main parties in Congress, PRI and PAN, shared this interest in criminal justice reform that allowed a coalition between the incumbent party and the main opposition party in the state. Very soon after taking office, in May 2005, a drafting team was established by the government. The team was composed of two legal technical advisors from the legislative branch, one advisor from Pro-Derecho (a USAID-funded

organization), and four other representatives from Congress, the Department of Justice, and from the judicial branch. It seems, however, that the actual writing was made by the two technical advisors (D1-M 2010). Besides these government agents, the participation of a local NGO, CEDEHM, was also allowed during the drafting process. This NGO achieved that an awareness of gender issues were incorporated into the new criminal code and the new CPC of Chihuahua (S2-M 2010). It is also important to note that this NGO was also advised by a Chilean legal scholar, Patsili Toledo, who was well aware of the criminal justice system reforms in Chile (CEDEHM 2010).

The team worked rather quickly and six months later, in January 2006, this team presented its CPC draft to Congress. In Congress, a new “Technical Drafting Sub-Commission” was established. In this legislative commission the previous technical advisors and the Pro-derecho advisor were also present for the final CPC draft. Four months later, in May 2006, by unanimous vote, the necessary constitutional reforms to implement the adversarial process, as well as the new CPC of Chihuahua, were approved by the Congress. All these reforms entered into force in June, 2006, though the CPC was established to begin working in January 2007. In September of 2006, a second package of reforms was approved; and by November of that same year, a third package of reforms. In just one year, Congress revised and approved a total of 8 different laws, including the CPC, making a total integral reform of their criminal justice system.

Among the many changes made, victims’ rights were crucial. The earlier CPC of 1987 only provided the victim rights that were equivalent to the right to be heard or be taken into account, but just as in Guatemala and Chile, the victim had no remedies or

means to object key decisions in the process. The designers of the new CPC chose to provide the right to auxiliary private prosecution (*acusador coadyuvante*), a legal figure that no any other state in the federal republic had had until then. Interestingly, today there is an initiative in the Congress of Chihuahua that would further strengthen private prosecution rights by establishing, *de jure*, the equivalent of a subsidiary private prosecutor.

Why have designers in Chihuahua expanded the rights of victims, including the right to private prosecution? The designers mention the importance of the victims' movement as key in the decision to consider an expansion of victims' rights while they were drafting the CPC (D1-M 2010, D2-M 2010). The recent trauma produced by the massive killings of women created a strong demand among the citizenry for an expansion of victims' rights. But it terms of the actual rights offered, similarly to Chile, they seem to have included private prosecution due to emulation. They mention the Model Code as the main source of the norms included in the text within the CPC.[28] Also, it seems that some learning was involved from the technical advice they received form Pro-derecho (USAID). The one aspect regarding victims' rights that seems to be local in nature, and actually unique in comparative law, was the awareness of gender issues within the criminal process, which were suggested by CEDEHM and were incorporated into the new CPC of Chihuahua (S2-M 2010).

[28] They also mention to have reviewed the following codes: the draft of Panamá; a draft of Neuquén, Argentina; the criminal procedure codes of Bolivia (1999); Chile (2000); Chubut, Argentina (2003); Costa Rica (1999); Guatemala (1992); Honduras (1999); Paraguay (1998); República Dominicana (1999); Venezuela (2001). All of these, interestingly, were influenced by Maier & Binder's Model Code. However, they also claim to have reviewed the Spanish criminal code, the CPC of Nuevo León, Mexico, and the code drafts of Oaxaca and Zacatecas, Mexico.

CONCLUSIONS

The close examination of reform processes in Guatemala, Chile, and Chihuahua highlight the importance of two main factors influencing how reform designers, when facing strong demands for reform, decided to strengthen victims' rights as an integral part of the criminal procedure reform: the availability of a victims' discourse and a victims' movement (that in part responded to massive human rights abuses) and the presence of legal entrepreneurs successfully portraying the Model Code as the solution for reform.

It seems evident that the expansion of victims' rights was highly influenced by changes in legal scholarship, in particular, the rise of the victim in criminology. This new view of the victim was reflected in the commitments that Binder and Maier, as legal entrepreneurs or founders of the Latin American "school of criminal law" shared, but also in the way the designers and reformers justified the victims' rights they included in their texts. However, Binder and Maier's thoughts, as well as those of many reformers, went beyond that ideational change in criminology, as they were also influenced by normative ideas regarding democracy, human rights, and rule of law, many of these already materialized in international instruments. In this way the changes in the CPCs of these cases cannot be seen as mere technical reforms, as they were driven and built by normative beliefs regarding how a criminal system should look in a democratic system.

Also, in these three different contexts although reform came at different times and with the impulse from very different domestic actors (from within government in the case of Guatemala and Chihuahua, and from civil society in the case of Chile), designers in all

three countries arrived to the same “solution” for solving their problems in their criminal justice systems. As Langer suggested, the success of this epistemic network has been to frame the Model Code as “the” solution for the criminal justice system problems in the whole region. Also, even though the direct role of legal entrepreneurs seems to have decreased over time, the consolidation of the norm they were diffusing (the Model Code, and the inclusion of victims’ rights as part of the “package”) is implied in how it seems to have become “the” model to emulate. As other scholars have already noted (Risse and Sikkink 1999), these cases suggest that the more “consolidated” a norm is, the less persuasion it needs for it to become diffused, hence the more likely it will be emulated without much thought. Finally, these cases also suggest that the participation of civil society in the process of reform was important for the success of the CPC reform.

In the following chapters I move on to address if private prosecution has been used, and if and how it impacts judicial responsiveness. As the chapters will show, the type of reform (introduction or expansion of the right to private prosecution) and the previous history of the right will be important in understanding the use of private prosecution. The role of civil society in the design of CPCs will also help understand the later use of private prosecution. The emergence of victims’ rights and discourses have been important in shaping domestic institutions, but also in supporting legal mobilization. To fully understand both legal mobilization and its impact on judicial responsiveness it is necessary to understand where these rights came from and the broader international and ideational contexts in which these emerge.

CHAPTER 4
PRIVATE PROSECUTION AND JUDICIAL RESPONSIVENESS IN COMPARATIVE PERSPECTIVE

INTRODUCTION

By design, as explained in Chapter 2, private prosecution emerged as a procedural right that aims to serve as a mechanism of societal control over the state's duty to investigate and prosecute crime. But for rights to work, they must be first mobilized. With this chapter I begin to address the questions of the use and impact of private prosecution. Here I review some of the main findings across human rights cases and ordinary murder cases, and highlight the interrelationship between legal rights, institutions, and structural factors to explain *when* private prosecution is used and *when* private prosecution impacts judicial responsiveness. This chapter also serves as an introduction to future chapters that will explain in more detail the mechanisms explaining *how* private prosecution is used and *how* it matters.

In this chapter I make the following arguments. First, regarding the question of if private prosecution is actually used, I can confidently say that private prosecution is in fact used across Latin America, as data on human rights cases in Latin America demonstrate, and across types of murder cases, as data drawn from samples of ordinary murder cases suggest. Second, regarding the question of the effect of private prosecution on judicial responsiveness, in this chapter I will argue that private prosecution will matter most for judicial responsiveness in contexts where we see a state that is unresponsive to investigate and prosecute cases. In other words, private prosecution does act as a "control mechanism" on the state's duty to investigate and prosecute crime where and when it is

needed. Private prosecution, across types of crimes, matters in improving the investigation and help cases reach the courts, avoid dismissals, and reach trial.

The chapter is divided in two sections. First, I offer the first systematic analysis ever conducted on the use of private prosecution in human rights cases in the context of Latin America. I show that indeed private prosecution is widely used across the region and I also show that when and where private prosecution is available as a right, we are more likely to see more prosecutions initiated against state agents and, eventually, more convictions. In the second section I move on to explore the use and impact of private prosecution in ordinary murder cases through the analysis of three case studies: Guatemala, Chile, and Chihuahua, Mexico. Throughout the chapter I will show that private prosecution matters for judicial responsiveness across time, across countries, and across types of crimes.

4.1. Private prosecution in human rights cases

If private prosecution serves as a control mechanism on the state's duty to investigate and prosecute crime, as designers intended, we should see private prosecution being used in human rights cases where the incentives of the state to prosecute can be assumed to be low. Complete information on all human rights cases across the region that includes information on victims' participation through private prosecution is obviously nonexistent. However, the Transitional Justice Database (TJD, henceforth) offers one of the most comprehensive comparative datasets on human rights prosecutions to date, providing information for human rights prosecutions for countries that underwent

democratic transition and countries that did not (refer to Annex 4 for description of dataset).[29] Here I focus on the data for Latin American countries only.[30] When information is available, the TJD also includes data on the type of prosecution that participated in the case: the state alone or when there was also a private prosecutor participating in the proceedings. The TJD does not distinguish between types of private prosecutor (i.e., autonomous or auxiliary) and it includes within the category of private prosecution a few civil actions (i.e., claims for damages).

Perhaps the most interesting and unique information that the TJD offers is that in fact private prosecution has been *widely used* across Latin America since the early 1980s. In Graph 4.1 we can see the year in which one or more prosecutorial activities began, disaggregated by type of prosecutor. A prosecution was defined as having initiated after an arrest and/or an indictment was made. This graph shows that private prosecution has been actively engaged in these prosecutorial efforts and that there is a rising and continuous trend towards pressing claims for individual criminal accountability in human rights cases, which some have defined as a "justice cascade" (Lutz and Sikkink 2001, Sikkink 2011). But what Graph 4.1 also clearly shows is that this justice cascade has been very much a process where private prosecution has been an active participant.

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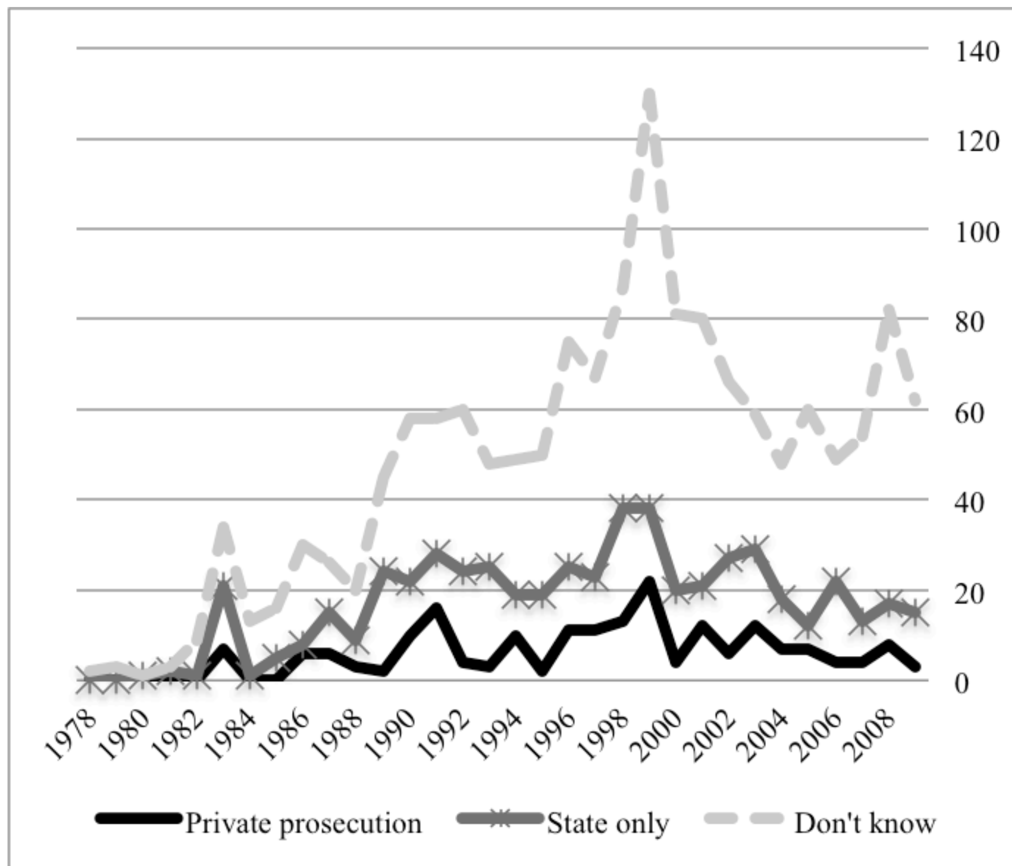
[29] Based upon work supported by the National Science Foundation under Grant No. 0961226. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author and do not necessarily reflect the views of the National Science Foundation.

[30] This includes 17 countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

Graph 4.1.
Prosecutions initiated by year against state agents for human rights violations in Latin America, 1978-2009 (disaggregated by type of prosecutor)



Sources: Transitional Justice Database. N=1,526.

The graph plots the numbers or counts of prosecutorial activities *initiated* in a given year in Latin America against one or more defendants, which may or may not have ended in trial. From the 1,526 recorded prosecutorial activities that have taken place in this region during the period 1978-2009, the TJD only offers complete information on the type of prosecutor that participated in the criminal proceedings for about one third of the cases

(i.e., 543).[31] In Graph 4.1, "state only" prosecutions reflect the number of prosecutions initiated by year that were prosecuted only by the state. Private prosecutions are those prosecutions initiated against state agents where relatives of victims and/or non-governmental organizations (NGOs) participated in the criminal proceedings.

Of the 543 prosecutorial activities in Latin America for which we have data on the type of prosecutor, 194 cases have had some actor engaging as private prosecutor (i.e., victims, their relatives, or non-governmental organizations). That is to say that in *approximately one third* of all prosecutorial efforts in Latin America (from those on which we have information on the type of prosecutor), private prosecutors have been actively engaged in seeking criminal accountability for human rights violations. This is certainly not the complete universe of human rights cases *with* private prosecution, but in this sample of 543 cases we can already see that private prosecution is a *key actor* that has been missing in our studies of human rights criminal accountability efforts. This is a *very* conservative estimate based on the TJD that offers the first attempt to record the use of this legal institution in a systematic comparative way.

The fact that private prosecution is clearly involved in human rights prosecutions already suggests that victims or their relatives are indeed interested in criminal justice, and that they are not relying solely on the state to achieve that. That victims are using private prosecution in human rights cases seems to be an appropriate response when considering that, in general, governments have either low incentives to prosecute and

[31] Even for Latin America, a region of the world that is usually widely covered in information outlets, finding information on the type of prosecutor that has participated in these criminal prosecutorial efforts is a daunting task as this information is not always reported on the sources from which the TJDP coded (State Department reports or newspapers).

convict their own agents (Brinks 2008), or no will to go around legal rules that limit prosecution when amnesty laws implemented after democratic transitions (Lessa and Payne 2012).

Table 4.1.
Prosecutions initiated against state agents in Latin America by type of prosecutor, disaggregated by time of the crime in relation to democratic transition (1978-2009)

	Before democratic transition	After democratic transition	No transition	Total
Only state	152	135	62	349
Private prosecution	92	57	40	189

Source: Transitional Justice Database Project. N= 538. I do not include here the 975 prosecutions for which we do not have information on the type of prosecution that participated in the proceedings.

But private prosecution is being used across different types of political contexts. Table 4.1 shows that although most prosecutorial efforts were initiated in countries that had a democratic transition (as they were dealing with crimes that occurred before or during the transition to democracy), there are many prosecutions initiated in contexts of no transition.[32] A democratic transition does seem to have an impact on what types of crimes seem to attract more private prosecutions: in transitional countries most of the private prosecution efforts have gone towards human rights violations that occurred *before*, rather than after, democratic transition.

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[32] In the TJD we do not consider as transitional countries Costa Rica, Colombia, and Venezuela. We focus on the period 1970-2009 and define as transitional countries those countries that have major and minor democratic transitions as defined by Polity IV. A major democratic transition is a six point or greater increase in the POLITY score over a period of three years or less, and a shift from an autocratic POLITY value (-10 to 0) to a partial democratic POLITY value (+1 to +6) or full democratic POLITY value (+7 to +10), or a shift from a partial democratic value to a full democratic value. A minor democratic transition is a three to five point increase in the POLITY score over a period of three years or less, and a shift from autocratic to partial democratic or from partial to full democratic value.

Private prosecution, then, seems to engage in more "difficult" and "ambitious" cases. This is quite evident when we look at the rank of the defendants, disaggregated by type of prosecutor. Table 4.2 shows how each type of prosecution (i.e., state only versus private prosecution) has targeted their efforts.

Table 4.2.
Prosecutorial efforts disaggregated by rank of defendant and type of prosecutor in Latin America (1978-2009)

	Rulers	Officers	NCOs	Footsoldiers	Police or guard	Bureaucrat	Grand Total
State	20 (7%)	95 (32%)	7 (2.4%)	34 (11.7%)	120 (41%)	14 (5%)	290 (100%)
Private prosecution	10 (6%)	68 (40%)	4 (2.4%)	10 (6%)	71 (43%)	3 (2%)	166 (100%)

Source: Transitional Justice Database Project. N= 456. There are some cases for which rank of the defendant was not available, hence, the total does not equal the total number of cases for which we have type of prosecutor.

At first impression it would seem that prosecutions where only the state is present do not distinguish themselves from prosecutions where we have a private prosecution. However, a closer look at the rank of the defendant against which each type of prosecutor has targeted its efforts shows interesting trends. As a percentage of their overall efforts (shown as percentages in parentheses), state and private prosecutions show an important difference in two areas: states have a higher percentage of prosecutorial efforts against footsoldiers, compared to private prosecution cases; and private prosecutors show a slightly higher percentage of prosecutorial efforts against high ranking officers. This seems to suggest that private prosecutors tend to grab more complicated and more important cases, as prosecuting for human rights violations a high ranking official is more difficult than prosecuting a footsoldier.

The TJD data also demonstrates that private prosecution is not only being used, but that it also has an important effect on judicial responsiveness or how the state responds to human rights cases, as the statistical analyses show. Given that we do not have complete information on the type of prosecution participating in every prosecutorial effort, I found that a count model proved to be more appropriate as a preliminary exploration on the role of private prosecution in human rights cases. Count models take as their dependent variable the number or count of events, in this case, the number of prosecutorial efforts initiated and the number of convictions achieved (refer to Annex 7 for an explanation of the statistical analysis and to Annex 8 for a description of the variables). Hence, to assess the relationship between private prosecution and judicial responsiveness in human rights cases, I tested if a country having the right to private prosecution in their criminal procedure code has any impact on the number of prosecutorial efforts observed in that given country in a given year. Also I tested if the presence of the right to private prosecution impacts how many convictions a country will have.[33]

In the count model I included structural variables such as GDP and regime type, as well as institutional variables: the independence of the judiciary, the institutional design of the state's prosecutorial organ (if it is autonomous or it depends on the judiciary), and the reform of the criminal procedure towards an accusatorial system. In a larger version of this model I also included two additional rule of law variables: one that

[33] The TJD has been recently coded and is still in a very raw format that makes it difficult to conduct statistical analysis in a more disaggregated manner. Hence, at this stage it was not possible to test case by case the impact of private prosecution.

measures the unfairness of trials (Hathaway 2002) and another one that measures law and order (ICRG). This larger model, although it reduces the number of observations considerably, shows that even when controlling for other rule of law variables, the most important predictors are still statistically significant, including private prosecution (refer to description of variables in Annex 8).

The findings, detailed in Annex 9, are rather interesting. Even when taking into account how democratic a country is (measured by Polity scores), or how developed a country is (measured by lagged GDP), how much repression a country experienced (measured by PTS scores), or even how independent the judiciary is, countries that in a given year have the right to private prosecution are expected to have *a higher count* of prosecutions initiated against state agents. It is important to remember that Colombia, Peru, and Uruguay, countries with high levels of past repression, do not have the right to private prosecution. Among those countries that have had at least one prosecutorial effort, having the right to private prosecution *increases* the rate of prosecutorial activities by a factor of 1.5. That is, these countries are expected to have *one and a half times more* prosecutorial activities when private prosecution is present. Furthermore, having an autonomous prosecutorial organ or *Ministerio Público* (MP) also increases the rate of prosecutorial activities by a factor of 1.25, holding all other variables constant.

For better interpretation of the count model results, and to better understand the impact of these legal (private prosecution) and institutional (prosecutorial organ) factors, in Table 4.3 I show the expected counts among those countries that have had at least one prosecutorial activity in a year when a country has the right to private prosecution and

when a country has an autonomous prosecutorial organ which is not dependent on the executive nor is located within the judiciary. It also shows the odds of a country of always remaining in the "no prosecutions" category, depending on the presence/absence of private prosecution and of an autonomous/or not MP.

Table 4.3.
Impact of Private Prosecution and the Autonomy of the MP on the expected counts of prosecutions

Expected number of counts (or number of prosecutions)	Private prosecution right present	No right to private prosecution	**Odds of always being without a prosecution (in percentages)**	Private prosecution right present	No right to private prosecution
Autonomous MP	5.5	2.52	Autonomous MP	0.19	0.31
MP within the judiciary or dependent on executive	3.49	1.6	MP within the judiciary or dependent on executive	0.25	0.41

Private Prosecution and Autonomy of the MP are dummy variables. All other variables set at their mean value.

Table 4.3 shows that when private prosecution is present as a right in a country, we should expect to see a higher number of prosecutions. A country with the right to private prosecution is expected to have 5.5 prosecutions initiated where there is also an autonomous MP, compared to those countries that in a given year do not have the right to private prosecution or an autonomous MP, where we would expect to see only 1.6 prosecutions initiated against state agents. Even when the MP is not autonomous, countries with the right to private prosecution are expected to have a higher number of prosecutions compared to those countries that do not. Also, having the private prosecution right significantly decreases the odds of a country to remain without prosecutions when there is an autonomous MP. When an autonomous MP is present and

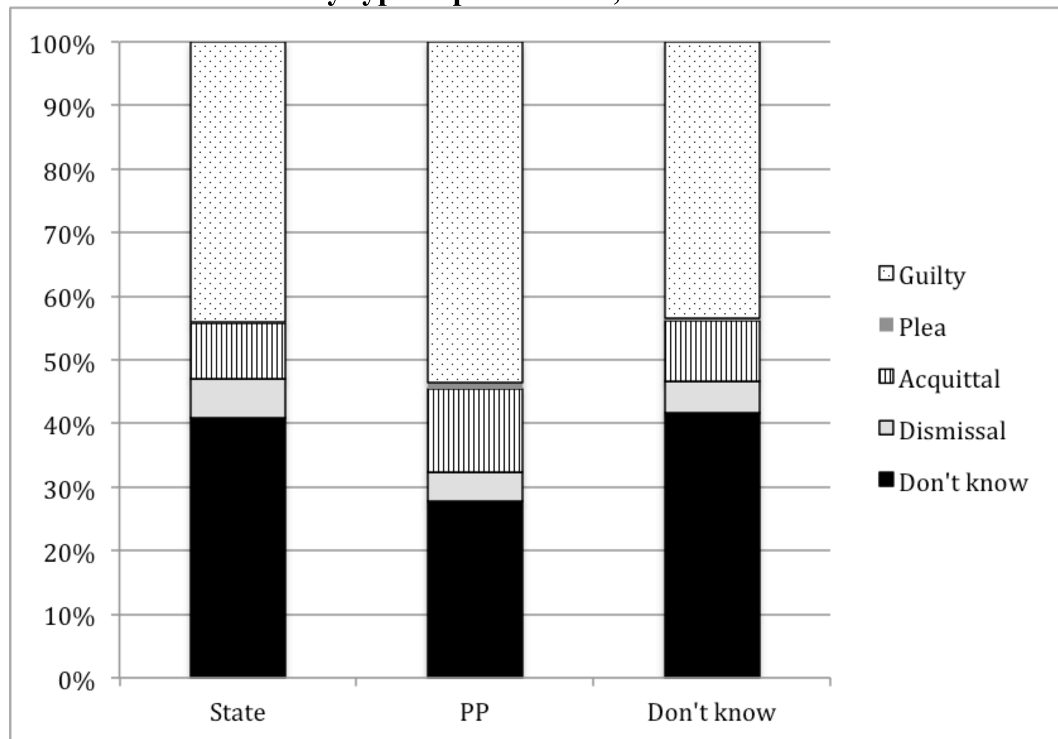
the right is of private prosecution is offered, a country has only a 20% chance of not seeing any prosecutions initiated. In contrast, in those countries that have an MP that is within the judiciary or that is dependent in the executive and where the right to private prosecution is not offered, a country has a 40% of not seeing any prosecutions initiated.

Although private prosecution has the highest impact in terms of the factor change in the expected number of prosecutorial efforts, followed by the autonomy of the MP, these are not the only statistically significant predictors of counts or number of prosecutions. Level of development is quite important, which may not be that surprising given that justice can be an expensive endeavor. But there are two other factors that at first sight seem counterintuitive predictors: judicial independence and having reformed the criminal procedure code. These are counterintuitive because their impact on the number of counts is on the opposite direction that one would assume. Among those countries that have had at least one prosecutorial activity, a country where the judiciary is considered *less* independent and has *not* reformed towards an accusatorial system, is expected to *increase the rate* of prosecutorial activities initiated against state officials, holding all other variables constant. Furthermore, the more democratic the country, the *lower the odds* of not having any prosecutorial efforts initiated against a state official. The findings in part reflect that most judicial reforms took place in the 1990s (see Chapter 2). But these findings seem also to suggest another point that I will argue and illustrate throughout the dissertation: placing claims through the courts reflects a bet on the judicial system, a belief on what the courts are for, a bet that I argue can help build the rule of law from below. But there has to be an appropriate context for these claims to

be introduced in a court, like the safety provided by a more democratic political context. That is, although certain institutional and political requirements need to be in place for prosecutions to actually take place, principled behavior is also important: the choice of courts as a means to channel grievances requires a certain belief on the role of courts in society.

Having the right to private prosecution also has an important impact in terms of how successful claims are. In Graph 4.2 I show that private prosecution cases are slightly more likely to get a conviction, as well as slightly less likely to face a dismissal, when compared to prosecutions where only the state is in charge. Graph 4.2 also shows that in those cases where only the state is in charge of the prosecution, around 40% of the cases are still pending any type of resolution, compared to 28% of those cases with private prosecution. This does not necessarily mean that the case is still ongoing, as it could also mean that we could not find information on how the case ended. However, it does suggest that private prosecution may have an impact in preventing cases from "lingering" in the system without resolution, therefore, improving the investigation. It must be noted that, in general, about half of all prosecutorial efforts at some point have ended in a conviction, regardless of the type of prosecutor participating in the proceedings, but private prosecution cases do seem to do better.

Graph 4.2.
Disaggregation of human rights cases by stage of the proceedings (in percentages), by type of prosecution, 1978-2009



Source: Transitional Justice Database.

And the potential impact of private prosecution on the success of a prosecutorial effort was also suggested by statistical analysis. When and where there is the right to private prosecution, countries are more likely to have a higher number of convictions (see Annex 10). The statistical analysis on the determinants of the number of convictions shows that even when controlling for rule of law, level of repression, regime type, and economic development, among those countries that have had at least one conviction the counts of convictions is expected to be higher where the right to private prosecution is present.

Along with private prosecution, the other key variables affecting the number of convictions (among those countries that have had at least one) are regime type, level of

past repression, and level of development. That is, when and where repression used to be higher, but the regime is more democratic, the right to private prosecution increases the rate of number of convictions by 1.19, all other variables held constant. The level of development seems to be quite important for convictions, as it also reduces the chances, along with regime type, of a country always being without convictions (controlling for the fact that there were previous prosecutorial efforts initiated).

To better interpret the main findings, in Table 4.4 I show the expected count or number of convictions that a country is predicted to experience when we have the right to private prosecution. Past level of repression was shown to have the biggest factor change among all statistically significant variables, hence I also show how past level of repression impacts the number of convictions a country is expected to have. The table shows that countries where past repression used to be higher and the right of private prosecution is present are expected to have about 3 convictions, compared to only one in those countries where there is no right to private prosecution and the repression was lower in the past. Also, the odds of a country to remain without convictions are lower when private prosecution is present, regardless of the amount of repression experienced in the past. For instance, a country has a 21% chance of remaining always without convictions when there is the right to private prosecution present in the country and there was higher repression in the past. But where repression was lower and there is no right to private prosecution, the chances of a country are 45% to always remain without a conviction.

Table 4.4.
Impact of private prosecution and history of repression on the expected counts of convictions

Expected number of counts (or number of convictions)	Private prosecution right present	No right to private prosecution	**Odds of always being without a conviction (in percentages)**	Private prosecution right present	No right to private prosecution
Lower past repression	1.6	1.12	Lower past repression	0.35	0.45
Higher past repression	2.97	2.07	Higher past repression	0.21	0.29

Private Prosecution is a dummy variable. Past repression is a lagged variable of the Amnesty (PTS) variable (for one period, i.e., n-1), which measures in a 1-5 scale countries from no repression to political terror. All other variables are set at their mean value.

It is worth noting that whereas the autonomy of the MP was statistically significant for predicting the number of prosecutions initiated against state agents, this variable was *not* relevant for predicting the number of convictions. This suggests that having an autonomous prosecutorial organ is important for initiating investigations and prosecutions against state officials, but it is *not sufficient* to achieve convictions. In other words, symbolic prosecutions may be initiated by the prosecutorial organ but they will not end in convictions. As mentioned earlier, the *Ministerio Publico* (MP) is the state's main institution in charge of the criminal investigation and prosecution. This prosecutorial organ serves to implement the criminal prosecution policy. The politics of criminal prosecution and criminal accountability thus also reflect the interests of the ruling elite. Depending on the incumbent government and the context, criminal prosecution policies vary across time. Therefore, a criminal prosecution policy may be focused only on common crime at one time at the expense of prosecuting human rights

violations, and at another it may include prosecuting human rights violations. The relationship of private prosecution with the MP was found to be important also in my qualitative research and will be explained in more detail in future chapters.

We know that not every prosecutorial effort initiated against state agents in Latin America has had the participation of a private prosecutor, but the fact that having the right to private prosecution is important for both the number of prosecutorial efforts initiated as well as for the number of convictions achieved suggests a point that I will highlight throughout the dissertation: private prosecution does work as control mechanism when facing an unresponsive state towards human rights cases. How exactly private prosecution can have such an important role on criminal accountability efforts will be explained in more detail in the rest of the dissertation. For now it is sufficient to establish that private prosecution matters, but that it role must be understood within a broader institutional and political context. That is, to understand the use and impact of the right to private prosecution we need to also take into account the interplay between legal rights and the institutional and political settings in which fights for accountability take place. And this is not limited to human rights cases. When facing an unresponsive state to ordinary murder cases private prosecution also matters. To better understand the politics behind the use and impact of private prosecution we now turn to an examination of the three case studies that have served as a lens to examine more closely the right to private prosecution in action in ordinary murder cases.

4.2. Private prosecution in ordinary murder cases

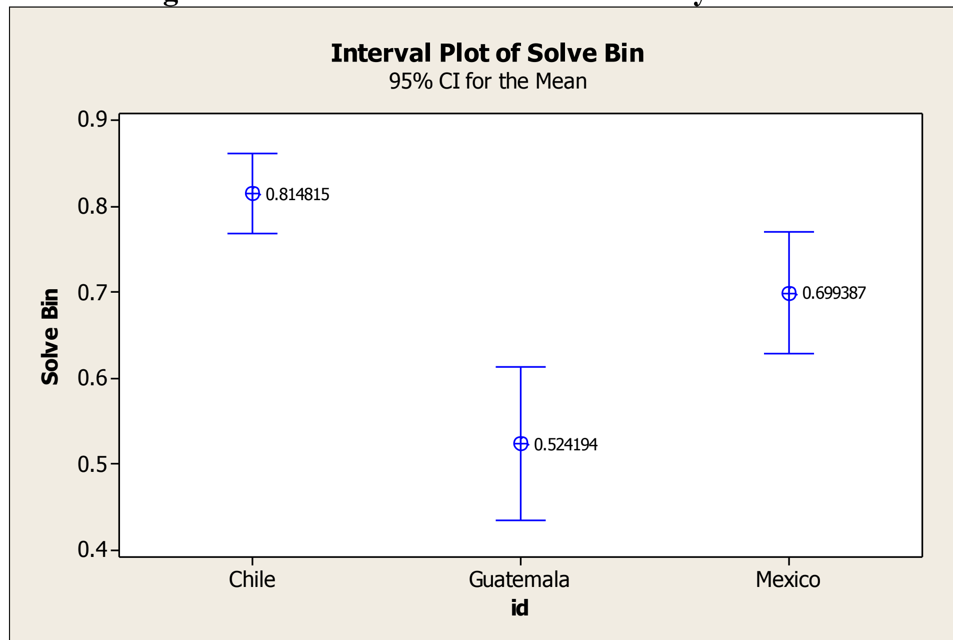
If data on the use of private prosecution for human rights cases in Latin America is limited, there is just no comparative dataset available that explores the role of private prosecution in the case of ordinary murder cases across the region. To overcome this limitation I gathered data on the use and impact of private prosecution in murder cases from three judicial districts in three different countries in Latin America: Guatemala, Chile, and Mexico. In this section, through a cross-country comparison of the findings on ordinary murder, I show how context matters and begin to highlight the relationship between private prosecution and the state's prosecutorial organ, which was suggested as being relevant for human rights cases.

Chile, Guatemala, and Mexico are countries that, despite sharing similar colonial histories and having very similar legal systems (see Chapter 3), differ in key factors such as economic and political development. Overall judicial responsiveness, without a doubt, is in part explained by these "big" structural factors. The objective of this research is to show how private prosecution works in these different contexts, and the story told through the lens of private prosecution is far more complex than just saying that a poor state will have poor judicial institutions and a rich country will have good ones. We must, then, take into account the context in which private prosecution's struggles for justice take place. In other words, we need to look into the politics of criminal prosecution to understand the role that private prosecution plays in these politics.

Guatemala, Chile, and Mexico, as already described in Chapter 1, are quite different countries in terms of the crime and violence they face, as well in terms of the

efficiency with which their judicial systems are able to respond to crime. And the three judicial districts under study here, i.e., the city of Guatemala, the city of Santiago, and the city of Chihuahua, in Mexico, clearly reflected these differences in terms of judicial responsiveness.

Graph 4.3.
Percentage of homicide cases that were solved by Judicial District



Solve is a dummy variable where solve=1, otherwise=0. Numbers reflect the percentage of cases that fall within that interval. N= 560. Data covers information from the databases on murder on Santiago, Guatemala City, and the city of Chihuahua.

Graph 4.3 plots the distribution of the homicide cases from my samples that, *after* entering the courts, "ended" or were "solved", disaggregated by judicial district. "Solved" here is defined as all those cases that ended in dismissal, conditional probation, plea bargain or trial. Unsolved cases or those that, in contrast, the investigation is still ongoing, there is a pending order of arrest, there is no suspect, or the case was sent to the archives. I focus for now on any type of "judicial solution" to a case as a proxy to measure judicial responsiveness to a murder. In other words, by looking at if a case was

“solved” or not, I assume that this shows that the prosecutorial office did a certain amount of investigation which provided sufficient evidence for a dismissal or to move the case up to more advanced stages of the criminal process (like a plea bargain or a trial).

Graph 4.3, then, shows that most ordinary homicide cases that eventually reach the courts get some kind of judicial solution in the city of Santiago (more than 80%), followed by Chihuahua (70%), and finally Guatemala City (52%). The interval line informs the margin of error when predicting the probability that a case would reach an end. Hence, in Chile and Chihuahua the probabilities of having a case solved are higher than in Guatemala, where the margin of error is wider. I must explain that in Guatemala the bigger margins of error must in part reflect that from my original sample size of 210 cases, I was only able to find information 120 case files, considerably decreasing the sample size and increasing the sampling error (see Annex 3). Not being able to find 90 case files reflected a lot of how the judicial system works in this country and how this affects access to justice: case files are misplaced, mislabeled, lost, forgotten, or hidden. Chihuahua’s data must also be regarded with caution: most homicide cases in this judicial district actually do not reach the courts in the first place (see Chapter 7), but once the case reaches a court it is likely to be solved. Explaining these patterns is not the objective of this research, but they must be recognized as the context in which private prosecution operates. Briefly, then, I will highlight some factors that seem to influence these huge differences in judicial responsivenes.

As mentioned before, the violence that citizens of Guatemala City and Chihuahua encounter every day is huge (see Chapters 5 and 7). Chile has also seen a dramatic

increase in crime, but not in violent crime. Despite these differences, in all three countries we observed the emergence of a "citizens' security" discourse that, rhetorically, does not differ that much from country to country. All over Latin America the issue of every day security has become politically relevant. Judicial reform in these countries emerged in the midst of this rise in crime and of a victim's discourse focused on security. As explained earlier (Chapter 3), a crucial part of these reforms involved either the creation or the re-structuring of the MP (CEJA 2005). These renewed efforts in the "provision" of security and justice, were also reflected in the improved budgets for both the judiciaries and the prosecutorial organs. Therefore, recent judicial reforms aimed not only to "modernize" and "democratize" the justice system, but also to change the capacity of the MP to deal with crime.

Capacities can be analytically categorized as exogenous (resources) or endogenous (institutional design). In terms of resources, both Mexico and Chile are considered Upper Middle Income (UMI) economies by the World Bank. In terms of GDP per capita, the three *cities* under study here actually qualify as UMI economies, although Guatemala as a country is in fact a lower middle income economy.[34] However, these countries face very different domestic contexts that impact, in very obvious ways, their criminal prosecution policies. Different types of crimes, different rates of crimes, clearly affect how a state allocates its resources.

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[34] The Word Bank categorizes countries by income in the following way: low income, $1,005 or less; lower middle income, $1,006 - $3,975; upper middle income, $3,976 - $12,275; and high income, $12,276 or more.

Table 4.5.
Comparison of the capacities of the Prosecutorial Office by Country

	Prosecutors per 100,000 habitants (2004)	MP budget in millions of USD (2004)	Budget as % of GPD (2004)	Autonomous MP (outside the executive or judiciary)	Cases per public prosecutor in a year (2004)	Homicides per 100,000 hab. at national level (2009) *(cities of Santiago and Guatemala are in parenthesis)*
Chile	4.2	89.8	0.10	Yes	759	1.7 *(3.3)*
Guatemala	6.9	56.3	0.21	Yes	291.8	52 *(152)*
Mexico (federal)	5.1	537.4	0.07	No	n/a	15
Chihuahua	15.1 (2000)	40.6	0.18	No	n/a	93

n/a= Not available. Sources: CEJA "Desafios del MP Fiscal en America Latina" 2006. Info Budget MP for Guatemala is for 2005. Data for budget expenditure in Chihuahua: Procuraduria General del Estado de Chihuahua, INEGI. Budgets were converted to dollars using the average exchange rate for the year. Data on prosecutors per 100,000 for Mexico and Chihuahua from Zepeda Lecuona (2004).

In terms of the budget provided for the investigation and prosecution of crime, it is not clear that more resources equals more judicial responsiveness. The data on the MP budget in Table 4.5 for Chile and Chihuahua predates the enforcement of the judicial reform. Nonetheless, for comparative purposes it is interesting to note that, Chihuahua and Guatemala assign more or less the same amount of resources (relative to their GDPs). But of course, Chihuahua's budget reflects the amount of money allocated for a state's prosecutorial organ that covers a population of 3 million people, while the budget for Guatemala is for a whole country of 11 million people approximately. Therefore, relative to its GDP, Guatemala is allocating a lot of resources to the MP, but relative to its population size and to its violent crime, it is not. Compared to Chile's national budget for an MP that has to serve a 17 million population, Chihuahua's budget is pretty remarkable, though the budget is less than half of that of Chile's it is for a population five times smaller. So despite the fact that Guatemala and Chihuahua seem to spend considerable

resources on their prosecutorial organs, they are not quite doing the job as noted in Chapter 1. From this data it would seem that state resources are not clearly correlated to judicial responsiveness in my three countries.

Some of my interviews in Guatemala and Chihuahua suggested that one of the main reasons the MP fails to investigate and prosecute crimes lies in the caseload (A5-G 2009, M8-G 2009, M14-M 2010). A review of the data on the number of prosecutors per 100,000 habitants and on caseload suggests that this may not be the explanation. At 6.9, Guatemala has more prosecutors per 100,000 when compared to Chile, similar to the proportion observed in developed countries. In Canada, in 2000, the number of prosecutors per 100,000 habitants was 6.2. While in the US, for that same year, the national average was 9 (see Duce N/D, p. 7; Zepeda Lecuona p. 160). Chihuahua, stands out as having quite a large number of public prosecutors (15.1) per 100,000 habitants. And nonetheless, Chihuahua is gradually losing its efficiency in dealing with a rise in violence. Also note that the number of cases per public prosecutors per year is significantly lower in Guatemala than in Chile, and yet, Guatemala does a worse job in investigating and prosecuting crime, which suggests that fewer cases are investigated given the fact that Guatemalan and Chihuahuan public prosecutors face more complex (violent crime) cases than Chilean prosecutors. This is further aggravated by the fact that public prosecutors in Guatemala and Chihuahua have fewer incentives to actually perform their work, given the threats that they often encounter.

In contrast to what was found to be the case in human rights cases in Latin America, the institutional design of the MP does not seem to correlate well with judicial

responsiveness to ordinary murder in these three cases. In Chile and Guatemala, the MP was born during the judicial reform process. In Mexico, in contrast, the MP had been in place for most part of the 20th century. The creation or reform of the MP implied adjusting the prosecutorial function to an adversarial criminal justice system that functioned according to more democratic principles of governance. By design, the MP in Guatemala and Chile was created to be more autonomous from political interference, because after the reform it was established as an institution outside of the other branches of government. In Mexico, despite the reform of the MP to adjust it towards a more accusatorial criminal procedure system, the MP was left as an organ within the executive branch. Despite the MP's autonomy, judicial responsiveness to murder cases in Guatemala is quite low.

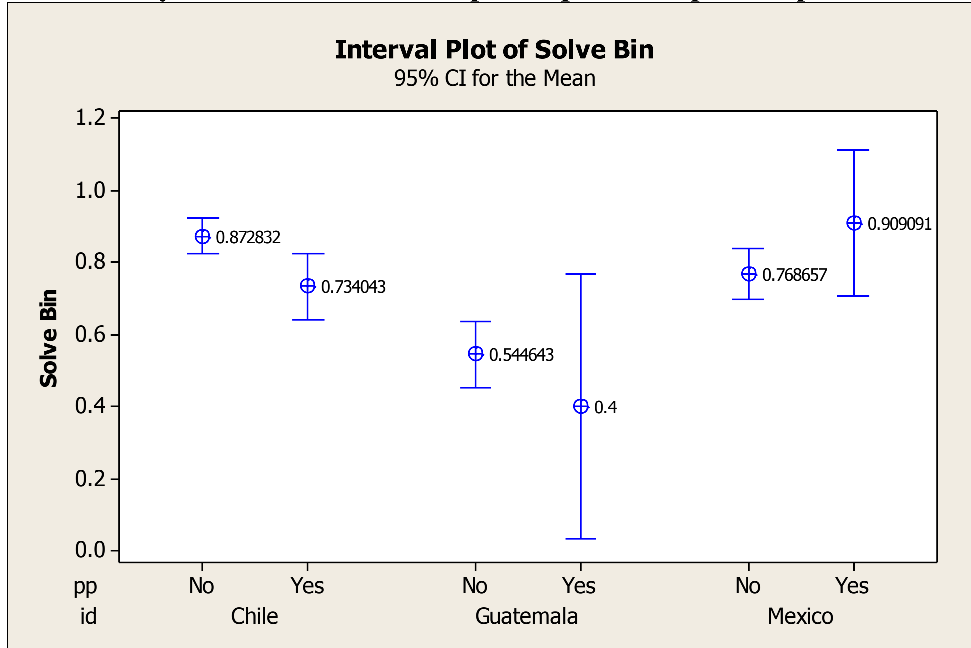
Hence, the judicial responsiveness observed in the three countries herein studied suggests that *formal autonomy* of the prosecutorial organ is not enough for the MP to efficiently investigate and prosecute ordinary murder. For instance, in Guatemala and Chihuahua (see Chapters 5 and 7), almost every actor involved in the criminal proceedings, including victims or their relatives, may be threated and/or bribed to curtail the investigation, drop the prosecution, or acquit a criminal. Those that fail to comply are likely to face death or lose their job. In Guatemala this is more evident at every stage of the criminal proceedings in both ordinary and human rights cases. In Chihuahua, the threats against actors in the judicial process are most evident at the investigation stage of ordinary murder cases, most of them linked to organized crime violence, which explains why so very few murder cases actually reach the courts. In other words, in Guatemala

there seems to be an attempt to prosecute but eventually the case falls through the cracks of threats and corruption. In Chihuahua, if a case is "not safe" it won't even make it to the courts. Hence, in Chihuahua although few murder cases reach the courts, most of those that do (those that are "safe"), are successfully prosecuted and convicted. In Chile, in contrast, judicial actors are supported both by resources and a strong autonomy from external political forces (see Chapter 6).

I must add as well that when comparing judicial responsiveness across types of crimes in these three very different countries I found that the state will investigate, prosecute, and punish homicides when there are the pertinent resources, the adequate incentives, but also the political will. The judicial system at the end is a complex set of institutions run by individuals, and although the incentives these individuals face in part explains if these agents do their jobs or not (Brinks 2007, 2008), principled behavior and political will also matter; and many times judicial responsiveness actually is a response to claims from below, particularly from private prosecutors, as I will further explain in the rest of the dissertation.

So, does private prosecution impact judicial responsiveness to ordinary homicide cases in contexts such as these? In Graph 4.4, I show the percentage of cases that were "solved" or had some kind of judicial ending distinguished by judicial district and by the presence or absence of a private prosecutor.

Graph 4.4.
Percentage of homicide cases that ended,
divided by Judicial District and participation of private prosecution



Solved is a dummy variable where solved=1, otherwise=0. Numbers reflect the percentage of cases that fall within that interval. N= 557, n for Chile= 270, n for Guatemala=124, n for Mexico= 163.

Most cases in Chile, regardless of the presence/absence of private prosecutors, are investigated, reach the courts, and are solved, which may not be surprising. What is interesting to note, however, is that cases *without* private prosecutor in Chile (87%) are a little more likely to be solved compared to those with a private prosecutor (73%). From my fieldwork data, as I will explain in more detail later, I think this reflects the fact that private prosecution in general, across countries and across types of crimes (i.e. human rights or ordinary murder cases), tends to participate in more complex cases.

In Chihuahua, it is clear that in those few cases where private prosecution participates most of these got some type of judicial resolution. However, the state by itself is not doing such a bad job in investigating and prosecuting those homicide cases

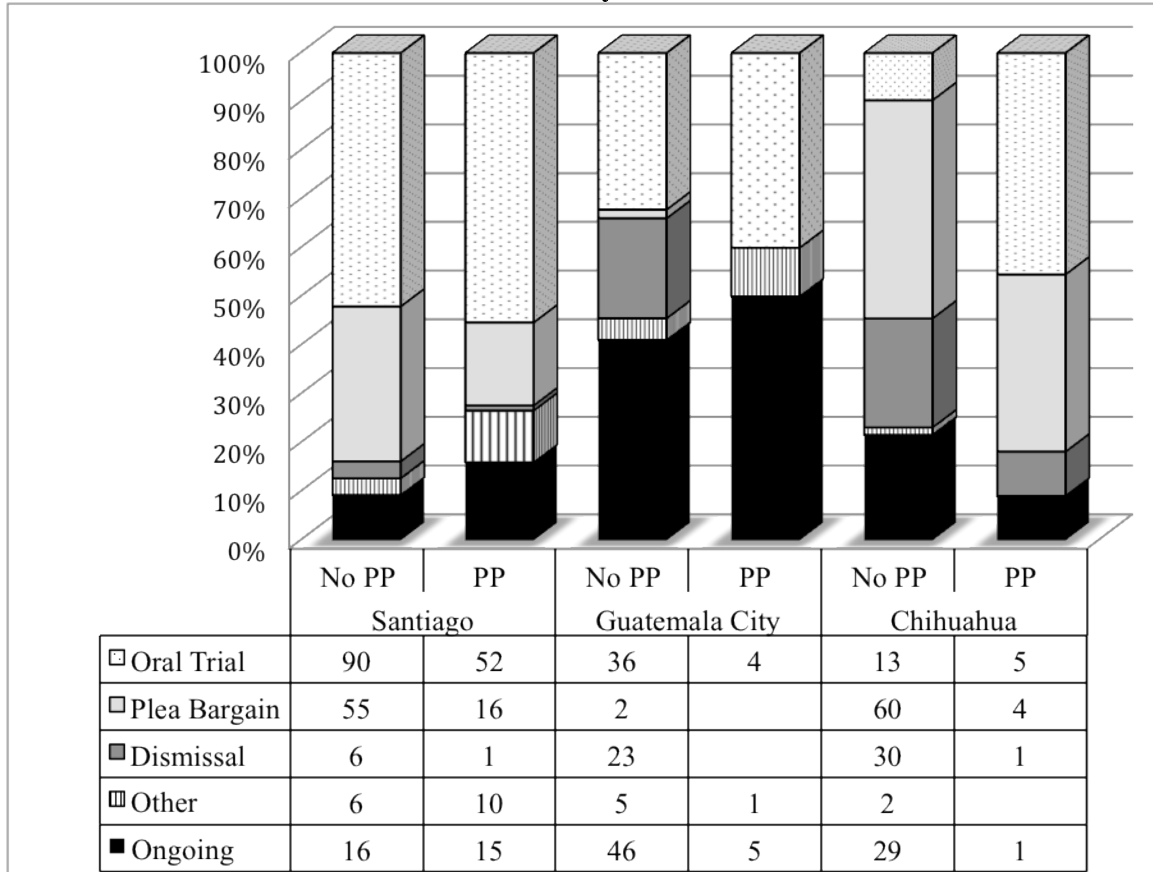
that *actually reach the courts* because, as mentioned earlier the state of Chihuahua does leave an enormous number of homicides cases without investigating them at all. Again, this reflects that the state in Chihuahua investigates and prosecutes mostly “easy” or “safe” cases (meaning those that are usually not linked to organized crime). In Guatemala, from those files that I found and are included in the sample, about half were solved (54%), and private prosecution had a slightly smaller success rate of 40% (though the margin of error is pretty considerable as to know if the cases would be solved or not). In Guatemala, therefore, from my sample it was possible to infer that not only very few cases reached the courts, but from those very few that got there, about half remained unsolved.

Looking at the sample of ordinary murder cases in such an aggregated manner seems to convey that private prosecution does not really affect judicial responsiveness to murder cases. However, this does not mean that private prosecution does not matter at all. Annex 12 shows the results of an ordered logit regression model to test the probability that a case will move “forward” in the criminal process when private prosecution is present (see Annex 11 for description of variables). In other words, I tested for the impact of private prosecution on the probability of a murder case to remain ongoing, or be dismissed, or to end in a plea bargain or a trial. Using such a model, however, I am assuming that these endings are qualitatively different, and that a case ending “higher” in the scale reflects “better” response from the judicial system. The statistical analysis shows that when controlling for Chile, private prosecution has a statistically significant impact on judicial responsiveness or how a case ends once the case reaches the courts.

Also, worse crimes tend to go higher in the judicial proceedings once they enter the courts, which in fact may reflect that in Guatemala and Chile the state is not allowed to offer plea bargains in first degree murder cases, so these are obviously going to go "higher" in the criminal process "ladder". Similarly, when a defendant has a private lawyer, the case will more likely be "higher" on the scale, which may reflect that when defendants face a tough prosecution they are more likely to get private legal defense.

In Chile, as it had already been suggested by the descriptive statistics, having a private prosecutor slightly decreases the chances of going "higher" in the ladder, although in general in Chile a murder case has a strong probability of being solved. The data suggests that only in contexts with higher impunity (Chihuahua and Guatemala), does private prosecution have a statistically significant impact on improving the probability of a case moving forward in the criminal process. But these statistical results must be read with the outmost care. Although my qualitative research found that private prosecution does matter in contexts where it may be needed the most, as I will demonstrate in the following chapters, in the statistical analysis most of the impact was shown to come from private prosecutors in Chihuahua. In a second model (also shown in Annex 12), when controlling for Guatemala and Chihuahua, the impact of private prosecution is only statistically significant in Chihuahua. This may be the result of the less reliable sample size that I gathered from Guatemala, but it also reflects that getting justice in that country, in general, is just a difficult endeavor. Data shown in a more disaggregated manner, in Graph 4.5, shows some indication that, even in Guatemala, private prosecution matters to judicial responsiveness.

Graph 4.5.
Private Prosecution in Ordinary Murder Cases by Judicial District, distributed by outcome



	Santiago		Guatemala City		Chihuahua	
	No PP	PP	No PP	PP	No PP	PP
Oral Trial	90	52	36	4	13	5
Plea Bargain	55	16	2		60	4
Dismissal	6	1	23		30	1
Other	6	10	5	1	2	
Ongoing	16	15	46	5	29	1

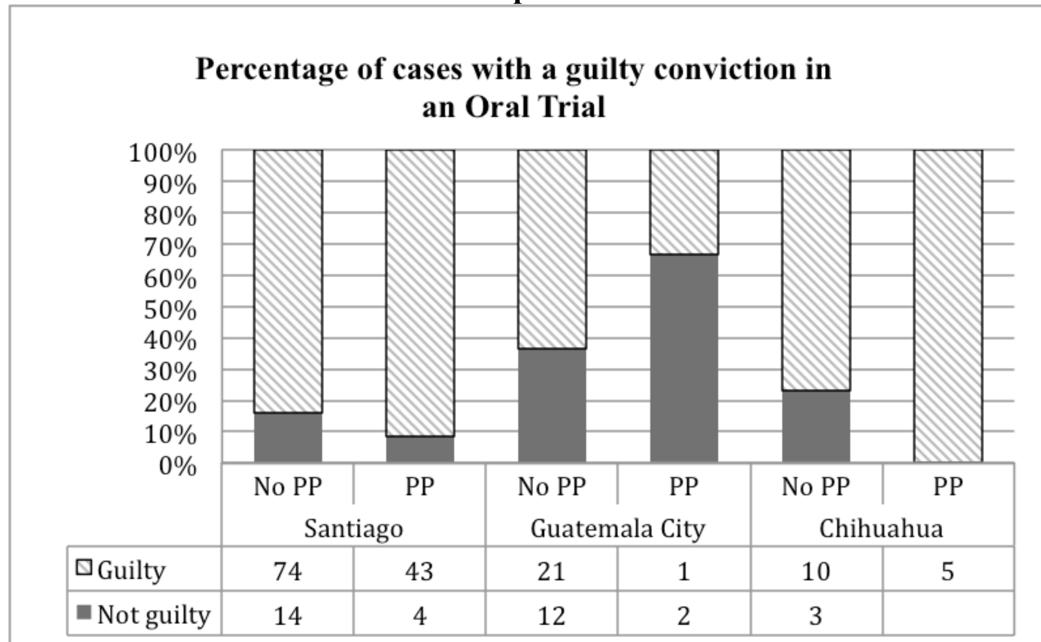
Santiago n= 270, Guatemala City n= 124, Chihuahua City N=163

Graph 4.5 disaggregates murder cases by type of judicial ending and the presence or absence of private prosecution by judicial district. Although the number of private prosecutors in the samples of Guatemala and Chihuahua is quite small and does not allow for big inferences, this data already does suggest something about the impact of private prosecution on judicial responsiveness. This graph already highlights something that I found throughout my fieldwork research across countries and across types of crimes: the real impact of private prosecution in homicide cases comes in pushing the case towards a

trial and avoiding the case to remain ongoing or getting a dismissal. In my samples, in the three judicial districts, we see fewer murder cases ongoing or being dismissed when they have a private prosecutor, compared to cases where only the state is prosecuting. This is important because it reflects that private prosecutors push for the victims' (or their relatives') interests in retribution and the feeling of "justice" that emerges from the trial experience (Wade, Lewis and Aubusson de Cavarlay 2008, Beloof 2007, Joutsen 1988).

The murder samples in these judicial districts also provide some indication of the impact of private prosecution in guilty convictions. In Graph 4.6, below, I show that in Chile and Chihuahua, almost all cases that reach trial achieve a guilty verdict. Although cases where private prosecutors are present seem to have a slightly higher percentage of convictions, private prosecution has no statistically significant impact on the guilty verdict in the three judicial districts (see Annex 13). It is worth noting, however, that as will be further explained in Chapter 7, for those few cases where private prosecution is being used in Chihuahua and actually reach trial, the case has always reached a guilty verdict.

Graph 4.6.



Source: databases of homicide cases in Santiago, Guatemala, and Chihuahua.

Guatemala is the only country in this research where judges granted more acquittals according to data from my sample, and as the statistical results show, where cases are less likely to achieve a conviction. This is very rare given that the new criminal justice systems in Latin America place a high burden of proof for prosecutors, hence, they are designed in a way so public prosecutors take to trial only those cases where they have very strong evidence (hence, the high conviction rates in Chile and Chihuahua). But in Guatemala, the lower conviction rates reflect not only the poor job of the prosecution, but the structural conditions that allow evidence to "disappear" (like by killing or threatening witnesses and even prosecutors), the formalism of judges, the vulnerability of judges to both corruption and threats, as well as the relatively efficient work of defense lawyers (M4-G 2009). This does not mean, as the Guatemala chapter will demonstrate, that in

many cases where private prosecution does intervene, it does not make a huge difference in judicial responsiveness, especially in cases of marginalized victims or in human rights cases.

Private prosecution plays another important role that goes beyond retribution. Private prosecutors take the victims or their surviving relatives as their client, and as such they push for their interests throughout the criminal proceedings. An obvious and very important way in which private prosecution matters, then, is in fighting for the interests of the victim, not only for retribution, but also in terms of restitution (see Table 4.6, below). This is important in terms of access to justice, because the fact that law grants victims or their relatives the chance to claim for damages within the criminal proceedings saves them time and resources. In Santiago (except one case) and Guatemala, in every single homicide case where damages were requested, they were requested by a private prosecutor. Chihuahua shows a clearly different pattern regarding damages, because here it is an *obligation* of the public prosecutor to file that claim. The public prosecutor requested damages in 61 cases (out of 97), which reflects that the District Attorney's office is taking retribution *and* restitution seriously as part of their prosecutorial effort. By comparison, in only 8 cases (out of 10) where private prosecutors participated in Chihuahua did they request damages.

Table 4.6
Homicide cases where damages where requested, divided by judicial district

Damages requested	Santiago	Guatemala	Chihuahua	Total
No	46	1	0	26
Yes	25	5	69	97
Total	71	6	69	146

Source: databases of homicide cases in Santiago, Guatemala, and Chihuahua.

This comparative review of the findings in the response to ordinary homicide cases shows that the impact of private prosecution on judicial responsiveness depends on the context in which this legal right is being mobilized. In contexts where the vulnerability of actors and impunity is higher, the number of cases that reach the courts will be lower (as in Guatemala and Chihuahua). From those that actually reach the courts, if the conditions of vulnerability spread to more key actors (judges, witnesses) then the likelihood that the case will be left unsolved, be dismissed or have an acquittal will be higher (like in Guatemala). It is in these contexts where private prosecution plays an important role in improving judicial responsiveness, as I will show in the following chapters. The fact that private prosecution is being used in such contexts already suggests the importance of principled behavior. In the face of an unresponsive state and real threats, individuals committed to the idea of law and courts as a means to channel grievances are helping victims access justice, as the emerging use of private prosecution will demonstrate in the case of Chihuahua and the more consolidated support network that has been established in Guatemala for victims of ordinary crime and human rights violations will also show.

CONCLUSIONS

This chapter shows that private prosecution is indeed a right that victims or their relatives use. Perhaps the most important finding this chapter offers is that across countries and across types of crimes, the role of private prosecution seems to be mostly felt at the investigation stage, by avoiding dismissals and keeping the case files open, and in helping cases reach trial. In human rights cases this was suggested by the fact that private prosecution cases have a lower percentage of cases that have not ended, also, have slightly fewer dismissals, and they have achieved more guilty convictions, when compared to cases where only the state is prosecuting the case. In ordinary murder cases, sample data from the three judicial districts in Guatemala, Chile, and Chihuahua shows as well that cases with private prosecution are less likely to have dismissals. But in ordinary cases it seems that it is in contexts of high impunity where private prosecution has a bigger impact as it seems to improve the chances that a case reaches trial, like Chihuahua and Guatemala. This comparative analysis across types of crimes already suggests the importance of private prosecution at the investigation stage: when investigations are strong, a case will not be dismissed and are more likely to reach trial. In this way is how private prosecution serves as a check on the state's duty to investigate and prosecute crime, and offers the victim a chance to access justice. This will be further demonstrated throughout the empirical chapters.

But this chapter also highlights the importance of taking into account the context that victims face to understand the use and varying impact of private prosecution on

judicial responsiveness (i.e., the judicial response to a claim). The analyses on human rights cases indicated that we can expect to see more claims on the courts (i.e., initiating prosecutions against state agents) when different factors are in place: availability of private prosecution, the institutional design of the MP, weak judicial independence, but an appropriate or more democratic political context and more economic development. That is, placing claims initially does not require a perfect institutional (judicial) context, but at least some guarantees that a more democratic environment provides, which suggests that rule of law can be built from below, by betting on the idea of what role courts should play in channeling grievances. The importance of the political environment was also highlighted by when we should expect to see a higher number of convictions: when private prosecution is present, when the country had higher past repression, and when democracy is stronger. In ordinary crimes the context also seems to be important. We saw how in terms of economic development and institutional strength, Chihuahua has more in common with Santiago, than with Guatemala City, and yet, in terms of judicial responsiveness, Chihuahua is increasingly looking more like Guatemala City. This finding made evident that the use and impact of private prosecution on judicial responsiveness also rests on how victims interact with such environment.

In the following chapters I will highlight how both incentives created by the context and principled beliefs regarding law and the role of courts to channel grievances play key roles in explaining when and how victims may access the right to private prosecution and get a chance for justice, specially when facing an unresponsive state. Also, I will further explain how the use and impact of private prosecution on judicial

responsiveness across types of crimes and across time, depends in great part on both the state's criminal prosecutorial policies and on its capacity to uphold its duty to prosecute and investigate crime. Although legal rights matter, the context in which these legal rights are exercised defines *when* and *how* these rights matter. Therefore, legal rights have power but we must recognize it is a bounded power.

CHAPTER 5
PRIVATE PROSECUTION IN GUATEMALA

INTRODUCTION

Of the three countries under study in this research, it is perhaps in Guatemala where the power *and* limits of private prosecution are most clearly exposed. In Guatemala, the power of the right to private prosecution to contest state prosecutorial decisions is at the same time limited by the state structure that it is contesting. As intended by design (see Chapter 2 and 3), private prosecution does serve as a control mechanism for citizens to use against the state with the aim of pushing for some degree of accountability in the state's *duty to prosecute crime*. Across types of crimes and across time, this chapter shows that private prosecution in Guatemala improves the criminal investigations and helps cases reach trial, opening a door for victims to get justice. But in Guatemala this right is severely hindered by various obstacles that limit access to this right and by a system that neglects first, to protect citizens, and second, to uphold its duty to investigate and prosecute both ordinary and human rights homicide cases.

Despite the fact that Guatemala was the first country in the region to reform its criminal procedure code and enhance private prosecution rights, structural conditions limit the use of private prosecution to only a few privileged victims or their relatives. Barriers to access private prosecution emerge from the costs associated with using this right: economic costs and, mostly, security costs, i.e. the risks victims or their relatives face for pursuing justice. In Guatemala, across types of crimes, threats and intimidation from perpetrators are common, decreasing the incentives of *both* state agents and victims'

relatives to investigate and prosecute homicides. Those few victims or relatives that venture to seek justice either have the resources to pay for a lawyer or they find their way into non-governmental organizations that take their case for free and absorb the costs (economic and security costs) involved in demanding criminal accountability. The most interesting finding in Guatemala is that in a context where legal rights seem not to matter, a procedural right like private prosecution can actually make a huge difference. In Guatemala NGOs have been most successful in litigating cases, greatly improving judicial responsiveness by strengthening the investigation of a case, by keeping case files open, and helping cases reach the courts. Private prosecution provides a chance for victims to access justice, and in the process, and against all odds, is helping build the rule of law from below.

In this chapter I explore how rights on the books matter in real life to common citizens in a country where laws and legal institutions appear to be ineffective. This chapter begins with a brief overview of victims' rights and the right to private prosecution in Guatemala. In the rest of the chapter I focus on explaining the use and impact of private prosecution across time and across type of crime. First, I offer a section on the use of private prosecution for human rights cases, i.e., homicides committed by state agents, and then move to a section on the use of private prosecution in ordinary homicide cases today. In the process, I also show the varying impact of private prosecution on the responsiveness of the state to human rights and ordinary cases.

5.1. The right to private prosecution in Guatemala

In Chapter 3 I explained that after decades of civil war, the impulse of the democratic transition that began with the implementation of a new Constitution in 1985 and the subsequent peace process that began with the negotiation of the Peace Accords, pushed judicial reform as a policy priority. The new Guatemalan Criminal Procedure Code (CPC-1992) was passed into law in 1992, and entered into force in July 1994. A very important institutional change introduced in the reforms came with the introduction of the District Attorney's Office (*Ministerio Público,* referred to as MP hereafter) established in 1994 with the *Ley Orgánica del Ministerio Público* (LOMP, decree 40-94). Before the reform, judges performed a dual role of prosecutors (conducting the criminal investigation) *and* judges (implementing the law), and although a state prosecutorial organ was in place, in practice its role was accessory to that of the judge who relied on the police to carry out the investigation (Monterroso Castillo 2008: 22-52). Furthermore, for decades criminal investigation was used by the state as a tool of social control, relying heavily on military intelligence to repress those considered "enemies of the state", following an overall criminal prosecution policy designed for political purposes that generated a culture of repression and impunity within the police forces. As one police officer bluntly stated to the Truth Commission in 1994: "Why would I arrest a *guerrillero*? [...] It is better to have him killed because if he remains alive there is a chance that a court will set him free" (quoted in *Ibidem*: 26). The repressive nature of the criminal prosecution policy was also made evident with the establishment in 1982 of

special tribunals (Tribunales de Fuero Especial), used as part of their counter-insurgency measures (FAR 1983).

Therefore, the overall judicial reform and the creation of the MP in the context of the Peace Accords, not only took away from judges the investigation and prosecution of crimes, in resonance with an accusatorial model of criminal justice, but it was redesigned with the aim that it would operate in a more democratic fashion. Hence, the MP was designed as an autonomous institution and was given authority over the criminal investigations conducted by the national police, the *Policía Civil Nacional* (PCN).

Although the change towards an accusatorial system and the creation of the MP were pivotal reforms for the judicial system, the changes made in terms of victims' rights were also radical. Compared to the previous CPC of 1973 (CPC-1973), victims gained important explicit rights like rights to protection, fair treatment, restitution and reparation. Also, their participation rights in the proceedings were greatly improved by modifying the weaker version of an auxiliary private prosecutor (*acusador particular*) that was previously established in the CPC-1973, and instead instituting a stronger version with the implementation of an autonomous private prosecutor (*querellante adhesivo*).

The CPC-1992 introduced a definition of "aggravated party" that includes: the victim directly affected by the crime, their relatives, and organizations whose work relates directly to those rights that a crime has affected (Art. 117). The interesting aspect of this definition is that the organization *itself* is considered an "aggravated party" or victim, and as such can constitute as private prosecutor and participate in the criminal

proceedings. That is because *any* aggravated party is granted legal standing to present a criminal complaint (*querella*). And through a *querella* the aggravated party formally requests permission from the judge to be considered a private prosecutor in the case (Art. 116). Therefore, in Guatemala an NGOs lawyer can either represent a victim by providing a lawyer, *or* claim standing as victims and represent themselves.

After the judge accepts the criminal complaint or *querella* (Art. 121), the aggravated party, always with the aid of a lawyer who acts as private prosecutor, is able to prosecute the case alongside the public prosecutor. In Guatemala, few judges reject this petition as they consider this to be a crucial victim's right (M4-G 2009, M10-G 2009b). In the few cases where the petition is rejected, it is mostly due to legal/procedural reasons, like when some key information is missing in the written petition (e.g. proof of kinship to the victim). The only time when the *querella* is always rejected is when the complaint is submitted outside the legal timeframe, i.e., if it is submitted after the state requests the opening of the trial (*apertura a juicio*) or requests an acquittal (Art. 118).

Remember that while the public prosecutor represents the state, the private prosecutor represents the victim or aggravated party. The private prosecutor has the right to intervene during every stage of the criminal process (pre-trial and trial) and has the right to appeal any key decisions made. At the pre-trial stage, the private prosecution has the right to help the public prosecutor with the investigation, and even to request to the judge to have certain criminal investigations made, when the MP has refused to do them. During the indictment, the private prosecutor can adhere to the charges made by the state, can reject them explaining to the judge, in writing, the formal legal errors of the state's

indictment that require a revision, or he can present an indictment by himself. During the trial, the private and state prosecutors have equal rights to introduce evidence, and question witnesses. And perhaps most important, the private prosecution can reject or appeal any decision that ends the case, such as a decision to drop charges, to dismiss the case, or to offer a plea bargain. However, the role of the private prosecutor, as that of the public prosecutor, is always mediated by the judge, i.e. every appeal and request the private prosecutor makes has to be judicially approved or disapproved.[35] At the same time, every judicial decision that the judge makes, can be appealed by the private prosecutor to the Appellate Court.

These are the rights of private prosecution on the books in Guatemala. In the next section I explain how this right works in practice, and show why it is in the pre-trial phase, i.e., the investigation stage, where private prosecution has its strongest effect. In Guatemala private prosecution has been used in both human rights cases and ordinary cases. In both types of homicides, when the state has failed to provide justice, very resilient individuals have found ways within domestic law to at least access the justice system, and in some occasions even to find justice. The fight against impunity and to improve judicial responsiveness always stems from individual struggles for justice. Throughout the narrative of the chapter I will highlight some of the individual stories that have had important consequences in the overall fight against impunity in the country.

[35] Art. 116 and 121 of the 1992 CPC.

5.2. Private prosecution in human rights cases

In contrast to Chile and Mexico, Guatemala experienced a transition from dictatorship to democracy, *followed by* a transition from civil war to "peace". The 36 years long civil war began after the coup d'état that overthrew the democratically elected president Jacobo Arbenz in 1954. With Colonel Carlos Castillo Armas in power, the military began a crude repression that eventually fueled a civil war that lasted from 1960 until 1996, with a brief return to civilian government from 1966-1969. During this period Guatemala experienced a succession of military governments supported by right-wing paramilitary groups (called *Patrullas de Autodefensa Civil*, or PACs) that fought against leftists rebels, mostly Mayan insurgents. With time the repression only worsened. The bloodiest period of this civil war took place after General Efrain Rios Montt seized power in 1982 in yet another coup. Although he only lasted 17 months in power, he became infamous for the terror he spread across the country with his anti-guerrilla efforts.

The instability of the country led General Mejía Victores to stage a revolt. Mostly due to international pressures, he opened the door for the democratic elections that brought Vinicio Cerezo to power in 1986. The return of democracy, however, did not end the repression, nor were there any real attempts to stop human rights violations. On the contrary, after Cerezo took power he offered members of the military an amnesty, protecting them from prosecution for any prior human rights violations. His successor, Jorge Serrano, unsuccessfully attempted to prosecute human rights violations. It was during Serrano's administration, however, when the CPC-1992 passed into law, which involved a total restructuring of the justice system.

The end of the civil war cannot be understood without the relationship that developed between domestic activists and the international human rights community. Perhaps the most prominent figure in the international arena in the 1980s was Guatemalan human rights activist Rigoberta Menchu. Her struggle was quite personal, as she lost her father to the war. In January 1980, a delegation of peasants from the region of Quiché, protesting the state of terror in which their communities lived, occupied the Spanish Embassy in Guatemala City. They were seeking a dialogue with the government. The response was a brutal repression that ended with the burning of the embassy and the killing of 37 Guatemalan and Spanish citizens. No relative of the victims actually sought justice through the courts[36] and the investigation of the case led to the same fate human rights abuses had in those days: total impunity. The official investigation of such a prominent case only lasted 36 days (Menchu 1999). And no one has been charged for these killings to date. After the death of her father, Menchu spent years in exile conducting a strong campaign aimed to raise international awareness on the human rights atrocities that Guatemalans suffered, an effort that gained her the Nobel Peace Prize in 1992.

With the UN serving as mediator, peace negotiations finally began in 1994 between the government and the guerrilla umbrella organization named URNG (*Unidad Revolucionaria Nacional Guatemalteca*[37]), and concluded in 1996 with the signing of the Peace Accords (*Acuerdos de Paz*). It is estimated that during the 36 years of civil war,

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[36] Court documents show that the only intervention of victims' relatives was to gather personal belongings or to identify the bodies of the victims.

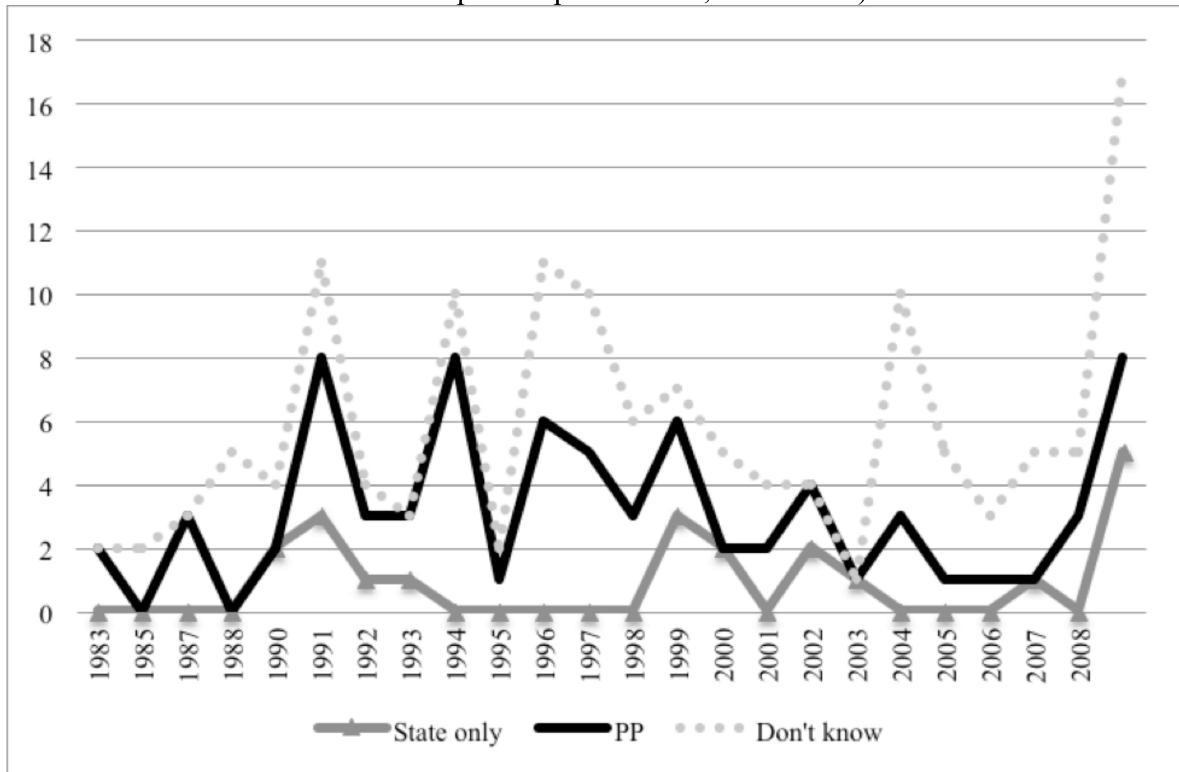
[37] The URNG consisted of four guerrilla groups: the EGP, ORPA, FAR, and PGT.

approximately 200,000 civilians were arbitrarily executed or disappeared. With the passage of the National Reconciliation Law (NRL), which was part of the peace agreement process between the military and the Guatemala National Revolutionary Unity (URNG), the government granted an amnesty to both military personnel and guerrilla groups. The NRL authorized amnesty for political crimes and certain related common crimes against the state committed by the insurgency during the internal armed conflict. The amnesty, however, explicitly excluded acts of genocide and certain crimes against humanity. The transition to democracy *and* peace opened up a window of opportunity for criminal accountability on human rights cases. These efforts mostly began in the 1990s, and would come from below, not from within the government.

5.2.1. The use of private prosecution in human rights cases

Based on data from the Transitional Justice Database, Graph 5.1 shows the number of cases per year in which a prosecution against state agents was initiated with and without private prosecution. Private prosecution has been used since early in the 1980s, but it shows a sharp increase in its use in the 1990s that correlate mainly to three factors: the end of the conflict and the Peace Accords of 1996 that opened the political space for claims for accountability, judicial reform and the introduction of the CPC-1992, and the strengthening of domestic NGOs.

Graph 5.1.
Trends of prosecutorial activity in human rights cases in Guatemala
(number of cases initiated against state agents with
and without private prosecution, 1980-2009)



Source: Transitional Justice Database. N=139. Covers all human rights cases against state officials, for crimes committed before and after the transition to democracy and the peace agreements.

The graph shows that the state has not been as involved in prosecuting state agents when compared to private prosecutors (annotated as "PP"). In 1992, in part responding to domestic and international pressures, the state eventually began prosecuting some state agents. Most cases with private prosecutors where NGOs litigating as private prosecutors, such as ODHAG (*Organizacion de Derechos Humanos del Arzobispado de Guatemala*), the Mack Foundation, the Menchu Foundation, the *Asociación de Familiares Detenidos y Desaparecidos de Guatemala* (Famdegua), the *Grupo de Apoyo Mutuo* (GAM), and the *Asociación Justicia y Reconciliación* (AJR). The prosecutorial efforts of private

prosecution shows three peak years with the highest activity: 1991, 1994, and 2009, and I will argue these trends respond in part to “safer” political climates for victims to press claims, but also to the demonstration effect that key human rights cases have had on other potential claimants, by shaping how actors perceive and evaluate the risks and benefits of their context. These cases were the Mack case, which began in 1990, the Carpio case in 1994, and the Rios Montt case in 2009. By far, the most important case has been the Myrna Mack case.

The Mack case occurred after the democratic transition and during the transition to peace and judicial reform, and it is an important case not only because it became the first prominent human rights trial recorded in the country, but also because this was the first successful human rights case in Guatemalan legal history where someone from the military was accused and sentenced for human rights violations, and where the role of the private prosecution was pivotal in the investigation, in keeping the case open, and in achieving a conviction. The case involves a crime that occurred before the Peace Accords were signed, but its prosecution endured over time despite various attempts to curtail the investigation and prosecution of those responsible. Furthermore, this case and its success in the public eye had a very important demonstration effect showing other citizens how justice could be pushed from below.

Myrna Mack was a young Guatemalan social anthropologist who by the end of the 1980s was conducting research on the impact of the armed conflict on displaced communities and refugees. Her work showed how rural indigenous communities were being destroyed by the government fight against the guerrilla. On September 11, 1990,

her body was found on a street in downtown Guatemala City. After leaving her office in a research institution, AVANCSO, she was stabbed numerous times and was left dead. The initial police report suggested this was a "politically motivated" murder and implicated military intelligence officers. The chief of police that submitted this report would pay a high price for his investigation: he was murdered one year later.[38] Therefore, efforts to investigate and prosecute the case were severely discouraged by constant threats against prosecutors and witnesses, many of whom fled the country. This left Helen Mack, Myrna's sister, as the main force behind all the efforts to seek justice (Lynn 1998, Wiesel and Corillon 2003).

The Mack case may be regarded in many ways as unique. It soon became a prominent human rights case that very quickly caught the eye of the international community, which was already focused on the atrocities that were happening in the country, and inevitably showed outrage at the news of the death of a prominent anthropologist. Myrna Mack, as an academic, had close ties to foreign universities, as well as with the local and international human rights communities as she worked as a consultant to the Inter-American Commission on Human Rights (IACHR). Her sister, Helen, vociferously sought international pressure for justice and only a week after her sister's death, on September 17, 1990, she filed a claim at the IACHR. Perhaps less known, however, are her efforts in pushing justice domestically, using domestic law to her advantage.

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[38] He was murdered before he was scheduled to give testimony before the Inter-American Commission on Human Rights at the Organization of American States (Lynn 1998: 3)

Helen Mack was recognized as a party in the criminal proceedings right from the beginning (which at the time were still regulated under CPC-1973). Although she did not yet have the right for an autonomous private prosecution, she could, as "*acusadora particular,*" gain some rights to participate in the investigation and prosecution. Early on, she relied on lawyers from the ODHAG, an organization within the Catholic Church that was founded in 1990 and that, under the leadership of Bishop Gerardi, was already involved in the struggle to improve human rights in the country and was a strong advocate for the victims of the civil war.[39]

The private prosecution, conducted by ODHAG lawyers, took a heavy part of the burden of conducting the investigation and achieved the conviction, in February 1993, of one of the material authors of the crime, Noél de Jesús Beteta. Beteta was a member of the intelligence branch of the Presidential High Command (*Estado Mayor Presidencial*). In 1993, financed by foreign aid, Helen decided to create an organization, the *Fundación Myrna Mack*, which took charge of the case. The success of the private prosecution also responded to their resilience, and the use of their right to appeal. When the defense appealed the conviction, they still had to fight those appeals all the way to the Constitutional Court, which finally ruled in favor of Myrna Mack in 1995. Five years after her death, at least the material author of the crime was jailed for 25 years. In 1997 the defense issued another appeal claiming that the defendant was covered under the amnesty law. The role that the public prosecutor, Mynor Melgar, played in supporting the prosecutorial effort was also relevant in this case, as he provided the argument claiming

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[39] From the Myrna Mack case file, at ODHAG.

that the amnesty did not apply to Mack's case as this was not the product of the war because the victim was not a guerrilla member (Popkin 1996). Judge Delgado agreed with the argument of the prosecution and rejected the appeal arguing that this murder was not a crime subject to amnesty (Roht-Arriaza and Gibson 1998: 882-883)

More interestingly, however, is that the Mack case lived through the transition from the CPC-1973 to the CPC-1992 that entered into force in 1994. The law provided that all criminal cases for which the opening of the trial had not yet occurred would be tried under the new code. This meant that the trial of Beteta, the material author of the crime, was tried under the old CPC-1973. But, the proceedings against Beteta's superior officers, considered the intellectual authors of the murder, have been investigated and prosecuted following the procedures set by the new code. This granted new rights to the private prosecution, which, Helen Mack argues, made a huge difference in how she could keep the fight for justice open in her sister's case (S2-G 2009a). As private prosecutor, she gathered all the evidence that the state was avoiding to gather against state officials, which she then presented in courts. She received threats, which she publicly denounced by using the media and the presence of transnational advocacy networks. Using these international networks she shielded herself from harm by exposing the threats. Despite intimidations, she never quit.

The Mack case is still not over, but it has been one of the most successful (albeit long) human rights cases in Guatemala. Helen Mack has relentlessly fought for the punishment of the intellectual authors of her sister's murder. The private prosecution managed to gather all the evidence against Colonel Juan Valencia Osorio, and after four

long years fighting appeals, they finally succeeded in getting the case to go to trial in 1998. In 2003, this man was sentenced to 30 years in jail, although he remains a fugitive to date. Regarding the failure of the state to implement the conviction, in 2009 the Inter-American Court of Human Rights urged the Guatemalan state to capture Valencia Osorio. Today, the Mack Foundation continues working on the prosecution of two other intellectual authors of Myrna's murder, Retired General Edgar Augusto Godoy Gaitan and Colonel Juan Guillermo Oliva Carrera.

Perhaps the most important byproduct of the Mack case has been its "teaching" effect in other actors on the possibilities of justice in human rights cases and on the power of private prosecution. While Helen Mack became a public advocate for her sister, she inadvertently also became an advocate for private prosecution. As one of the most publicly known human rights cases in Guatemala, the Mack case turned out to be an important example for future victims or their relatives on how to fight impunity in Guatemala, according to various interviewees (M1-G 2009a, S5-G 2009a, I2-G 2009, 2010, S3-G 2009, S1-G 2009, S2-G 2009a).

The case of a massacre in El Quiché serves to illustrate this last point. Two cases of private prosecution that appear in the previous Graph 5.1 in the year 1983 refer to the prosecutorial activities conducted against military commissioner Candido Noriega and Juan Alesio Samoya, a former PAC leader. The *Patrullas de Autodefensa Civil* (PAC) were civil patrols that, organized by the government, worked as paramilitary units around the country and were responsible for various massacres and other human rights violations, including a gruesome massacre that took place in a little town in El Quiché in

1982. In this case initially no private prosecution participated, and the public prosecutor conducted the investigation and charged Noriega and Samoya for the murder of 35 villagers and other human rights violations committed against 150 civilians. Alesio was the first to be charged and his arrest was ordered in 1983. However, he reportedly was flown by the military to Boston, Massachusetts to avoid his arrest and the charges against him. The investigation was stalled for years, until 1992, when villagers who had been intimidated from pursuing justice finally gathered the courage to file a criminal complaint. This move in part was inspired by the courage observed by the private prosecution in the Myrna Mack case (S5-G 2009b), but also because they knew they now faced a more favorable political context. In their litigation efforts they were supported by the *Confederación de Religiosos de Guatemala* (CONFREGUA), whose efforts successfully reopened the case against the other defendant, Noriega. The first trial against Noriega took place in 1997, but Noriega was originally acquitted. This generated public outrage and NGOs all over the country and abroad initiated a strong campaign against the decision. The judiciary decided to suspend the presiding judge and an appellate court ordered a retrial. In the April 1999 retrial, the court found Noriega innocent once again, citing insufficient evidence. CONFREGUA, as private prosecutor, appealed the decision. Again, an appellate court annulled the lower court's decision and ordered a third trial. The new trial began on September 20, 1999: many witnesses, fearing reprisals, refused to testify and so Noriega was retried for fewer crimes. These crimes included 11 killings, 7 abductions, rape, breaking and entering, arson and various threats. On November of that year, Noriega was finally found guilty on six charges of murder and two charges of

manslaughter, but due to lack of evidence he was absolved of the other charges. The defense appealed the decision and in August of 2000 the Supreme Court rejected the appeal and upheld the conviction and Noriega was sentenced to 220 years in prison.

Furthermore, the Mack case served as a training space for future lawyers to specialize in criminal investigation *and* criminal litigation. Given that criminal investigation is not a natural specialty for criminal lawyers, these individuals have had to learn about it. Lawyers from ODHAG that worked in the investigation of the Myrna case, recall that they took with them important lessons in terms of "how to investigate" and "push for the prosecution" of a case (S5-G 2009b, S2-G 2009b), lessons that later they put to good use in their subsequent cases. For instance, the lessons on how to conduct a criminal investigation learned during the Mack case were soon put to practice by ODHAG lawyers and investigators in the Carpio and Gerardi cases (S5-G 2009a, S8-G 2012). In 1993, Jorge Carpio, a prominent human rights activist, politician, and newspaper publisher, was assassinated along with other three members of the National Centrist Union (*Unión del Centro Nacional*) while traveling on a rural road in Northern Quiche. The Carpio family, supported by ODHAG as private prosecutors, eventually were able to achieve convictions of some of those responsible in 1997, although these were later absolved by an Appellate court in 1999.[40] From the Mack case lawyers knew

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[40] Surviving witnesses reported that they were intercepted by a PAC unit and then fired. Four defendants were arrested on 1994 during a joint military and police operation, but a judge later released all four, citing insufficient evidence. The ODHAG appealed this decision and criticized the government for failing to carry out arrest warrants of 6 other PAC members wanted in the case. Eventually four PAC members were convicted in 1997. On April 28, 1999 an appeals court absolved them citing a lack of evidence. In December 2009 Guatemala's Supreme Court ordered a new investigation. The investigation remains ongoing.

the importance of international pressure, so the family filed a claim at the Inter-American Court of Human Rights (IACHR) which found the state of Guatemala responsible of failing to guarantee judicial protection to the victims and ordered to reopen the case, in 2009 the Supreme Court ordered a retrial and the case remains ongoing. In another relevant human rights case, the ODHAG saw one of his most prominent leaders assassinated in 1998: Bishop Gerardi. Gerardi was killed for his work in the project Recovery of Historical Memory (REMHI), which focused on documenting human rights violations during the armed conflict and culminated in the publication of the report "Never Again", released a few days before his assassination. Their work as private prosecutors was more successful in a country that has had very few guilty verdicts on human rights cases, perhaps because of the international pressure that generated the killing of a bishop. In 2007 they achieved the conviction of several high-ranking officials. Today, ODHAG lawyers keep fighting to see the intellectual murderers of Gerardi in jail.

An important point to highlight is that timing matters. The Carpio and Gerardi cases were both politically motivated, but one had stronger international appeal than the other, opening some room for some justice to be achieved. But the Carpio case shows that sometimes the political context to push for justice is just not appropriate. During the investigation of that case the first public prosecutor had to flee the country after receiving death threats, and the first police chief investigator was killed during the first year of the investigation. Also, various pieces of evidence suddenly disappeared. The threats were so great that without a private prosecutor in the case it is likely that the case would have been dropped by the public prosecutor. After the Supreme Court's retrial ruling of 2009,

the investigation seems to slowly be making progress, but obviously the political climate is different (S8-G 2012). What private prosecution allows, then, is for victims to wait for a better timing to push for justice.

The new wave of prosecutorial efforts that Graph 5.1 showed in 2009 reflects this last point. In 2009, the NGO called CALDH (*Centro para la Acción Legal en Derechos Humanos*) introduced a criminal complaint to reopen the investigation of perhaps the most important case in Guatemala today: the act of genocide committed in the community of Dos Erres in 1982, ordered by former dictator Efrain Rios Montt. Previously, another NGO, AJR (Asociacion de Justicia y Reconciliacion) had already introduced a criminal complaint in 2001 without much success given the various appeals introduced by Rios Montt's lawyers. CALDH decided to join this effort given in part because they realized that Rios Montt was getting older and could die without a trial (S8-G 2012). The strategy worked as they revitalized the case. Initially, the defense appealed the new criminal complaint through various dilatory tactics, in part claiming that the former dictator was in poor physical condition. Recently, in January 2012, Judge Carol Flores decided that there was enough evidence to continue with the proceedings and it is quite likely that Rios Montt will face trial soon.

Change in political context clearly shapes how private prosecutors perceive their context. Lawyers and activists report a considerable decrease in threats since the mid-2000s, compared to those they have received in the 1990s. But also, NGOs have noticed a considerable change in how "receptive" judges are now to their requests (S8-G 2012). This perception has then triggered the increased amount of prosecutorial efforts that we

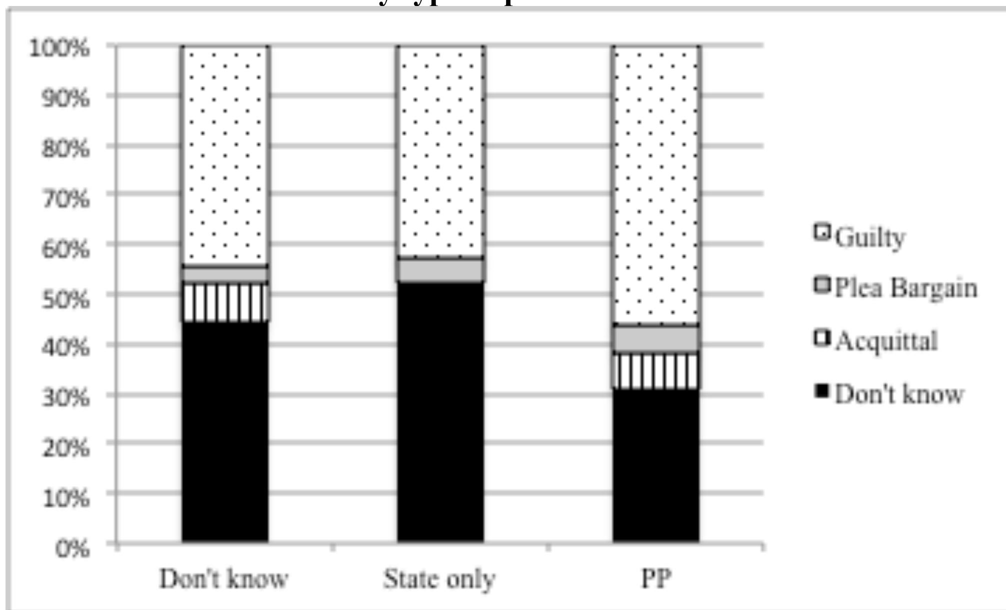
observe since 2009, and private prosecutors are getting bolder targeting top officials. For example, the Spanish Embassy case of 1980 was regarded as doomed to impunity given the political context in which it took place. The case did not show any activity for almost two decades. In 1999, Rigoberta Menchu, as the daughter of a victim, requested the case be reopened. Given the lack of response, they also presented a criminal complaint in the Spanish Audiencia Nacional, where the judge accepted the complaint based on universal jurisdiction. However, the domestic fight was not abandoned: supported by NGOs (CJA and the Menchu Foundation) in 2005 and 2010 two new criminal complaints were introduced, accusing former dictator Rios Montt and various of his aides as guilty of homicide and other human rights violations. Private prosecutors in this case have fought the defense's appeals that have stalled the process and the case remains ongoing. But passing of time, nonetheless, has considerably improved the context in which efforts for individual criminal accountability of human rights abuses are taking place.

What is interesting to note is that whereas time has somewhat decreased the resistance of state actors to human rights cases, it has not diminished the interest of activists in using the courts. Throughout time these NGOs have thought of the courts and the law as the appropriate means to channel their grievances. Little by little, their efforts seem to be paying off. Private prosecutors seem to have another important impact in Guatemala: by keeping investigations open and not giving up on the law and courts, these actors are contributing to building the rule of law from below.

5.2.2. Impact of private prosecution: resilience against state oblivion

Private prosecution in human rights cases has had a strong impact in improving the criminal investigation of a case and in helping cases reach trial, as Graph 5.2 below suggests. Data for the period 1988-2009 from the Transitional Justice Database[41], shows that among the 139 instances of prosecutorial activity, about 55% of private prosecution cases get to trial and eventually get a conviction compared to 45% of cases where only the state prosecutes (see Graph 5.2). Private prosecution also does better at avoiding cases that "linger" without any resolution. Clearly, private prosecution keeps the cases open, pushes the investigation, and helps a case reach trial.

Graph 5.2
Disaggregation of human rights cases in Guatemala by stage of the proceedings (in numbers), by type of prosecution



Source: Transitional Justice Databse. N=139

[41] This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

But in a context such as Guatemala, improving the investigation and reaching a trial does not suffice. As the various examples showed before, perseverance and resilience are also necessary. Those cases that actually make it to the trial stage, even when they achieve convictions, are later threatened by annulments in appellate courts. Reversal of convictions in this way is not rare in Guatemala, and the private prosecutor has to keep pushing the case as it goes back and forth through trials and retrials. A great part of the job of a private prosecutor, then, is to finish a race of resistance, rather than a speed race.

In a very concrete manner private prosecutions in human rights cases improve judicial responsiveness by undertaking tasks that state agents refused to do, particularly when the risks to their lives or jobs are great. Therefore, private prosecution has its highest impact at the investigation stage by absorbing many of the costs of conducting an investigation. In the Mack case, for example, the lawyers at ODHAG were crucial in helping improve the investigation of the case (Goldman 2007, M1-G 2009b, M9-G 2009, S2-G 2009b, S5-G 2009b). As noted earlier, a good prosecution relies on a good investigation, and the impact of private prosecution in improving the criminal investigation is a constant across all private prosecution efforts in human rights cases, particularly when NGOs are involved. NGO lawyers report that cases are more likely to see progress when they are actually conducting the investigation themselves and then pass their information to the MP (S5-G 2009b, M1-G 2009b, S8-G 2012, S1-G 2009, S2-G 2009a, L1-G 2009).

Another important indirect effect of private prosecution on judicial effectiveness has been on bringing attention to atrocities that the state wants to forget. As some

observers note about the convictions in the Mack case: "the truth about a specific time in Guatemalan history has been judicially confirmed¨ (Mack 2010). Symbolically, then, litigation has been used by NGOs to bring "truth" about state atrocities and to use the judicial system as a way to uphold historical memory.

As is also the case for Chihuahua and Chile, however, the impact of private prosecution is limited by the lack of resources within the NGO community. Because NGOs do not have unlimited resources they mostly engage in strategic litigation. That is, NGOs strategically choose to litigate cases that they believe reflect the structural conditions that enable human rights violations and that sustain impunity, and through litigation they aim to impact public policy (CELS 2008). Although this means that strategic litigation leaves out most cases and may achieve justice for only a few, its ulterior goal is to have a broader policy incidence and improve overall judicial responsiveness. This clearly suggests that they are aware of the potential impact they have in building the rule of law from below.

An example of an NGO focused *only* on strategic litigation of what they call "paradigmatic cases", is that of the *Instituto de Estudios Comparados en Ciencias Penales de Guatemala* (ICCPG). This NGO is a very renowned research institute that has focused its work on the area of criminal justice and human rights, and its researchers are lawyers, sociologists, and political scientists. They mostly produce quality research on the criminal justice system in Guatemala, and offer training and technical advice to other civil society organizations, as well as to governmental agencies. Although not the main

mission of this NGO, this research institute suddenly became involved in litigating in favor of a rape victim, Juana Mendez.

Juana Mendez had all the attributes of what would seem to be a perfect victim of criminal impunity: she was an illiterate, poor, indigenous Quiché woman, preventively imprisoned facing charges of complicity for not denouncing to the authorities that the cultivation of marihuana was taking place next to her land. In 2005, after one month of being in preventive custody in the local jail of the town of Nebaj, the night before her first testimony in court, she was raped by two drunken police officers in her jail cell. She reported the rape to the judge the next day, but the judge did not believe the allegations. For fortuitous reasons, a researcher of ICCPG was in town and heard of Juana Mendez's rape. The institute very soon decided to constitute as private prosecutor in the case because they saw this as a golden opportunity: the case of Juana Mendez could become the first time in Guatemalan legal history that an agent of the civil national police, the *Policia Nacional Civil* (PNC) was accused of rape. They complemented their litigation work with a media campaign that informed the public of the horrors of sexual abuse during preventive imprisonment. They published a report that explained that 75% of women in preventive prison in Guatemala acknowledge that they have been victims of sexual abuse during their detention. Of these women, only 43% reported the crime to a judge or another authority, and yet only one case had reached the public prosecutor's office (ICCPG 2005). Thanks to the ICCPG work, the case of Juana Mendez became the first case of rape by a PNC agent that reached a court. After a long process, not free of

threats against the ICCPG lawyers, the oral trial took place in 2008, where one policeman was sentenced for 20 years.

As the Mendez case shows, NGOs seem to have found that a key ingredient in making private prosecution effective is to increase reputation costs for two other actors involved in the criminal process: public prosecutors and judges. Through the mediatization of the case (Peruzzotti and Smulovitz 2006), that is, using the media and the domestic and international network of human rights advocacy organizations to achieve visibility of state wrongdoings, successful private prosecutors create enough public awareness of each case to raise the costs of not prosecuting a case. In a way, therefore, the MP is pushed to prosecute and judges to rule, but with a caveat: very few actually reach trial. And sometimes the shame produced by media attention can be less costly than the death threats that prosecutors and judges sometimes face.

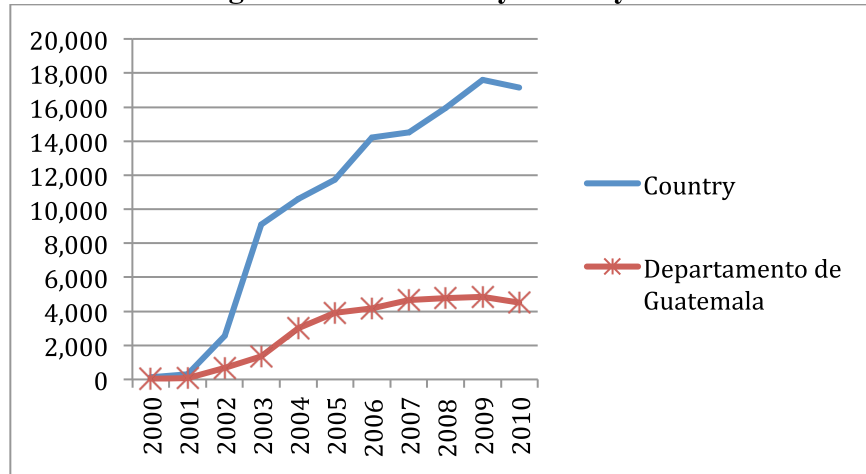
5.3. Private prosecution in ordinary murder cases

Neither the transition to democracy nor the end of the civil war brought real tranquility to Guatemalans. After the formal signature of the Peace Accords in 1996 between the government and the URNG, a new wave of violence swept all over the country. A rise in common crime, gang violence, and drug trafficking in the last decade has made Guatemala one of the most violent countries in the world (WHO 2002, WHO 1997, Waiselfisz 2008).

Since the 1990s the homicide rate has more than doubled. [42] The total number of crimes against life and bodily security in the country rose from 127 in 2000, to 17,140 in 2010, which in a country of 13 million inhabitants is shockingly high (see Graph 5.3, below). In 2008 homicide represented 3.2% of the total national reported crime (MP 2009). The national homicide rate was 44 homicides per 100,000 habitants, and the capital, Guatemala City, had more than 100 homicides per 100,000 habitants (Bonillo 2009). In that same year in the US, by contrast, there were an estimated 5.4 killings per 100,000 habitants (DoJustice and FBI 2008), and the average in the developed world was of 4 killings per 100,000 habitants (CIDAC 2009).

[42]It may be pertinent to add that since the early 1990s, homicide rates all over Latin America have grown dramatically, from an average of 16.7 homicides per year (per 100,000 habitants), to an average of 30 homicides per year by the turn of the new millennium, a rate three times higher than the world average PAHO. 1991. Word Health Statistics. Washington DC: Pan-American Health Organization, WHO. 1997. Word Report on Violence and Health. Geneva: World Health Organization.. Currently, homicide rate is higher in Latin America than in any other region of the world UNDP. 2009. Fast Facts: Latin America and the Carribbean. Washington DC: Bureau for Crisis Prevention and Recovery, UNDP.. But still, the homicide rate in Guatemala is higher than the average of the Latin American region.

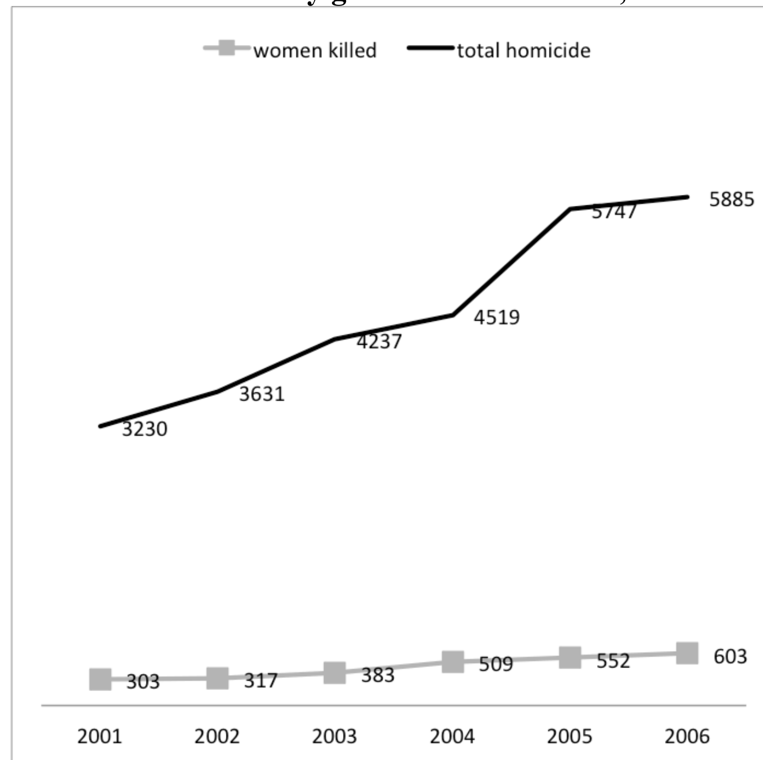
Graph 5.3.
Trends in crimes against life and bodily security in Guatemala 2000-2010



Source: Ministerio Público. The Departamento de Guatemala covers the City of Guatemala and surrounding suburbs.

This rise in violence has imposed a very high social cost: in Guatemala City alone more than 30,000 Guatemalans have been killed within the period 2000 to 2010, which represents more than one fifth of the total amount of those killed during the 30 years of internal armed conflict. On average, 10% of these victims have been women (see Graph 5.4, below). Some have suggested that this rise in violent crime is another form of social cleansing that has roots in decades of violence (Sanford 2008). Others only blame this rise of violence on the inability of the government to respond efficiently to the rise of organized crime in the country. Whatever the reason, there has been a sharp rise in victimization.

Graph 5.4.
Trends in homicide by gender in Guatemala, 2001-2006



Sources: Official data from Policía Nacional Civil, Guatemala.

The state "solutions" to this problem have been legal and institutional. In part due to international and domestic pressures, mostly coming from the women's and victims´ rights movements, the governmental response has been to improve the legal framework to protect victims of gender violence.[43] The government has also made efforts to improve

[43] Guatemala is a treaty member of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW, ratified in 1982); the Optional Protocol to CEDAW (2000, ratified in 2002); and the Convention of Belem do Para (i.e., the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, ratified 1995). Also, the government has created important legal and institutional instruments concerning gender violence. In 1996, Congress passed the *Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar* (Law to Prevent, Punish, and Eradicate Violence within the Family). Its main objective was to provide security and safety measures, like restraining orders and alimony, for women who file criminal complaints. But soon this law was criticized for lacking teeth Author. 2007. Rights Guatemala: Impunity Fuels Violence Against Women. *Inter Press Service News Agency*.. In 1999, Congress passed the *Ley de Dignificación y Promoción Integral de la Mujer* (Law for the Dignification and Integral Promotion of Women), and in 2001 the executive created a

the services provided for victims of all crime, following many of the recommendations that emanated from international instruments. For example, in 1995 Guatemala was one of the first countries in Latin America to create an Office of Victim Services within the public prosecutor's office, though this was not fully operational for year and the code that regulates its function was not implemented until 2004 (MP 2008). Also, the MP created specialized prosecution units; for example, a unit that deals with homicide (*Fiscalía de Delitos Contra la Vida*), and another one with crimes against women (*Fiscalía de Delitos Contra la Mujer*). But, most of the resources for investigation and prosecution are concentrated in the capital area, leaving most of the country without adequate institutional infrastructure, like resources and training for the police to process a crime scene (MP 2007, Monterroso Castillo 2008).

Furthermore, the Guatemalan government increased the MP budget almost 60% from 2003 to 2007, an increase that placed the country above the mean across the region (Monterroso Castillo 2008), and the budget was also increased for every institution within the judicial system (see Table 5.1 below).

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new secretary post, the *Secretaria Presidencial de la Mujer* (the Executive's Office for Women). Perhaps the most important effort, however, came in 2008 when Congressed passed the *Ley Contra el Femicidio y Otras Formas de Violencia Contra la Mujer* (Law Against Femicide and Other Forms of Violence Against Women).

Table 5.1.
Budget by year in the Judicial System in Guatemala
(in millions of dollars)

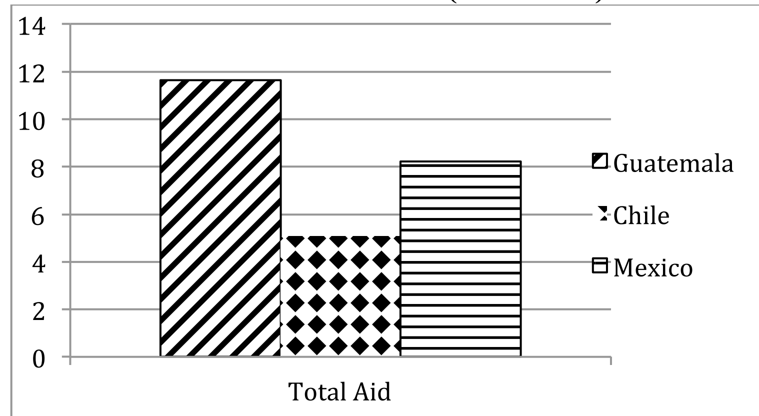
	2003	**2007**	**2008**	**% increase**
Judiciary	91,795	122,597	133,333	45.25
MP	51,925	82,875	81,453	56.86
Public Defense	7,447	12,906	13,786	85.12
Police	172,413	221,430	243,998	41.51
INACIF (forensics)		5,208	11,333	117.60

Source: Monterroso (2008: 89) with data from the Guatemalan Congress

Guatemala's government, however, is not alone in its efforts to improve the judicial system. Guatemala relies on very strong support from international aid to perform its work (see Graph 5.5 below). From the three countries under study here, Guatemala is the country with the largest share of foreign aid. International aid and private agencies have helped Guatemala not only restructure the judicial system, but also finance the everyday work of its judicial system. For instance, USAID has a strong presence in the judicial system, providing training to judges and other public officials, and also resources for basic necessities such as computers used in the judiciary. The resources provided by USAID are such that in Guatemala City when a defendant is first brought to a judge after his arrest, while entering the courtroom the first thing she sees is a USAID logo placed next to the *Organismo Judicial* shield painted in the crystal door.[44]

[44] The support of foreign agencies is evident in various ways. At the investigation stage, aiding the criminal investigation of the MP, the *Fundación de Antropología Forense*, for example, is an international NGO that conducts forensic work in relevant human rights cases related to the armed conflict, and also works in helping the MP with current homicide cases. In Guatemala City, *Medicins sans Frontiers* has doctors working almost every day in the MP's office of Victims of Domestic Violence. When victims come to the MP to file a claim, it is usually a doctor funded by humanitarian aid who conducts the medical report of his/her injuries. Also, rape victims are offered new clean clothes that are donated by Spain's main aid

Graph 5.5.
Total Foreign Aid in Chile, Guatemala, and Mexico, in millions of dollars (2000-2007)[45]



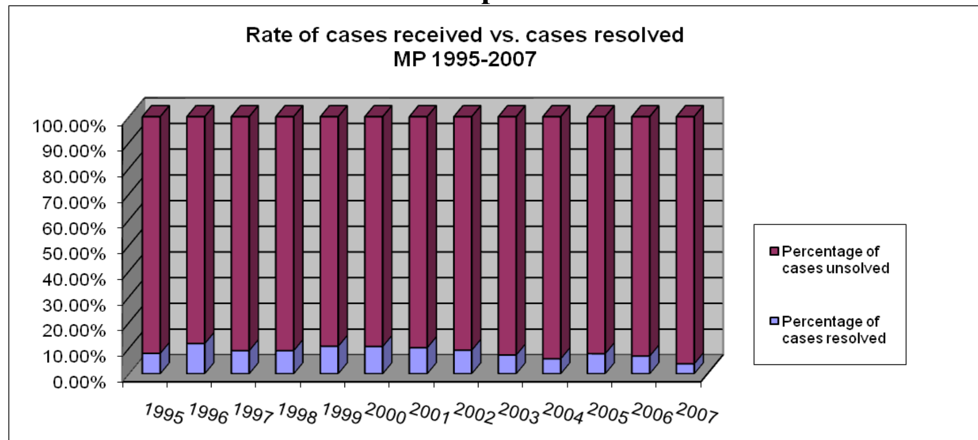
And yet, despite judicial reform, increased budgets, and a huge influx of foreign aid aimed to improve the rule of law and the judicial system in Guatemala, the efficiency of the judicial system to respond to homicide has actually decreased. As noted earlier, Guatemala faces today a very high impunity rate, as 98% of all criminal cases remain unsolved. Over the past 15 years, it has never been lower than 90%. In Graph 5.6, I show how many criminal cases are solved from all those that are received by the *Ministerio Publico*. The graph shows that since the new criminal procedure code began operating in 1994, most crime has gone unpunished. Actually, most crime is not even investigated. Some Guatemalan researchers define the investigation phase as the "birthplace" of

agency, the *Agencia Española de Cooperación Internacional*.

[45] Amounts are in millions of dollars. Data covers information until 2007 and includes information from the World Bank data (only the Rule of Law projects), the Inter-American Development Bank (Judicial Administration and Reform projects), USAID data for each each country refers to Life of Project Funding for the area of Administration of Justice by FY2000, and the Ford Foundation data includes only those projects that cover "access to justice" efforts.

impunity in Guatemala (Monterroso Castillo 2008), because if the case does not go through the investigation phase, it will never reach the courts. As in human rights cases, this is where private prosecution has the most potential to improve judicial responsiveness.

Graph 5.6.



Source: ICCPG (2007) "Observatorio de Justicia Penal: Primer Informe" In *Revista Centroamericana: Justicia Penal y Sociedad*. Guatemala: Instituto de Estudios Comparados en Ciencias Penales de Guatemala.

Violent crime faces a similar fate. I did not find data that would allow me to compare how many violent crimes are solved in the same period of years as reported in the previous graph. However, the data I found allows me to compare two years, by looking at how many cases of crimes against life and bodily security were cleared by arrest and reached the courts, compared to the amount of cases that should have been actually solved.[46] The clearance rate for these crimes demonstrates that violent crimes face a similar fate as crime in general. Crimes against life, which arguably constitute crimes

[46] I followed the same methodology used by ICCPG to get the impunity rate numbers, so these are in fact comparable impunity rates.

with the highest social impact (given the domestic context, but also given the social effects such crimes have in a society), should reflect higher clearance numbers. In Table 5.2, below, I show official statistics on crimes against life and bodily security (as defined by MP) as a proxy to determine the state responsiveness to homicide cases.

Table 5.2.
Percentage of cases solved in Guatemala
among crimes related to the right to physical integrity (2006 and 2008)

	2006	2008
Violence against women (excluding homicide cases)	8,493	5,412
Percentage of cases that remain unsolved	*96.73*	*97.38*
Crimes against life and bodily security (both genders)	3,104	2,283
Percentage of cases that remain unsolved	*90.85*	*89.97*

Data for the table was gathered from national data of the Ministerio Publico "Memoria de Labores" 2006 and 2008. In the category of crimes against life and bodily security the MP included homicides (intentional and reckless), abortions, battery, and injuries

The efficiency of the MP, at the national level, to solve cases is astonishingly low. In average, only 10% of these cases were cleared. This country seems to be, then, a killer's paradise (Portenier 2007). And it seems like a misogynist´s paradise as well, as violence against women shows an even lower judicial responsiveness. Victims of crimes such as rape, domestic violence, and other type of abuses committed against women, face a smaller likelihood to see justice. On average, only 3% of these cases are cleared by arrest. When compared to more efficient judicial systems, this is a very grim picture. In 2008, in the US 63.6% of all murder cases and 40.4% of all rape cases were cleared by arrest (DoJustice and FBI 2008).

Findings from my fieldwork in Guatemala City show a more optimistic recent trend. Table 5.3 shows the total number of homicide investigations that reached the courts of Guatemala City for the period 2008-2010 (i.e. the homicide investigations that reached the courts either because an arrest was already made or because a request for an arrest and/or search warrant is being made). Although in 2008 the number of homicide investigations that reached a court represented only 10% of the total homicides reported in Guatemala City, in 2010 23% of all homicide cases reached the courts. This data, however, does not distinguish the year in which the crime was committed, but only the year in which the state brought the case file to a judge and entered the courts. Although this suggests a slight improvement in the prosecution of homicide cases, the state is still failing to respond effectively to almost 80% of all homicides in Guatemala City.

Table 5.3.
Homicide cases in the courts of
Guatemala City 2008-2010

Total Reported Homicide in Guatemala City			
	2008	**2009**	**2010**
Murder	2950	2994	2781
First degree murder	117	150	156
Parricide	0	2	1
Femicide	11	10	10
Total	**3078**	**3156**	**2948**
Total of Homicide Cases that Entered the *Juzgados de Primera Instancia Penal*			
	2008	**2009**	**2010**
Murder	264	294	408
First degree murder	53	122	245
Parricide	7	4	9
Femicide	3	11	21
Total	**327**	**431**	**683**
% of total reported crime	***11***	***14***	***23***

Sources: Data on reported crimes is from Ministerio Público and covers the whole Departamento de Guatemala. Data of cases in the courts is from Centro de Informática y Telecomunicaciones, Organismo Judicial de Guatemala.

Thus, the context in which private prosecution operates for cases of ordinary murder is, to say the least, quite violent. Lawyers, policemen, prosecutors, judges, and human rights activists all face constant threats from the criminals they are actually trying to investigate. In the absence of a strong state to provide security, death threats are often assumed to be death sentences. And many times they are. For instance, from 2005 to 2009, 21 prosecutors, judges, and judges' clerks were killed, and 19 lawyers working as private prosecutors or public defenders were also killed in Guatemala. All these cases remained in impunity (Stramwasser and Wemp 2010, Foundation N/D). The vulnerability of judicial actors to threats is not new in Guatemala, as noted in the human rights cases

during the dictatorship it was quite common for lawyers, judges, and prosecutors to be threatened or killed if they actually pursued justice (Villasenor 1994). The issue is that this problem persists today. In an effort to confront this problem the Guatemalan government and the UN signed an agreement that created the International Commission Against Impunity in Guatemala (CICIG) in 2006. The CICIG was created as an independent international organ with the aim to support the MP in the investigation and *prosecution* against "illegal security groups and clandestine security organizations", which includes links between state officials and organized crime (Garita 2009). Furthermore, the CICIG was granted standing to constitute as private prosecutor in cases of organized crime, and since it became operational in September 2007 it has been a private prosecutor in eight high profile cases. By taking the role in the public eye as "the" prosecutor of the case, the CICIG aims to shield other state agents from threats.

In this context that brings to mind the image of a lawless state where life is nasty, brutish, and short, a formal legal institution such as private prosecution has nonetheless offered a window of opportunity for a very few citizens to push the state to meet its obligation to investigate, prosecute, and punish murderers. This window of opportunity has been recognized by some within civil society who have proved to be very creative actors in their efforts to improve judicial responsiveness to homicides. Similar to what happened in human rights cases, when the state fails to uphold its duty to prosecute crime, individuals struggling for justice seize the opportunities that domestic law opens to them.

5.3.1. The use of private prosecution in ordinary murder cases: the experience of two courts in Guatemala City

In Guatemala there are no official statistics on the use of private prosecution, therefore, to assess who uses private prosecution and if it has any effect on judicial responsiveness I constructed a database that covers the information of all the homicide cases that entered two courts in Guatemala City. During the data gathering process, more than 90 case files were not found in the courts: case files are easily lost or misplaced, by commission or omission, a fact that already suggests how difficult it is to fight for justice in this country. My sample, then, only covers information of 123 cases of homicide that reached these two courts for the period 2003-2009 (for a full description of the sample methodology, see Annex 3).

Litigation and legal mobilization involves costs in any country, therefore, access to an expensive right such as private prosecution is inevitably limited in a poor and unequal country such as Guatemala. From the viewpoint of prosecutors, lawyers, and judges, the use of private prosecution in homicide cases is rare, and most interviewees suggested that one in every 10 cases would have a private prosecutor. Furthermore, they said, when it is actually used by victims or their relatives, it is usually a right accessed through the legal aid provided by NGOs (M10-G 2009a, M10-G 2009b, M8-G 2009). My sample data suggested that private prosecution is in fact rarely used in cases of ordinary murder, as Table 5.4 shows below.

Table 5.4.
Total number of cases with and without private prosecutor in two courts in Guatemala City, disaggregated by type of homicide, 2003-2009

	Private Prosecution		
CRIME	**No**	**Yes**	**Total**
Murder	65	2	67
First Degree Murder	34	6	40
Unintentional murder	2	0	2
Attempted murder	8	1	9
Attempted, first degree	2	0	2
Total	111	9	120

Source: Database of Homicide Crimes. From the 123 case files, there was missing information on three case files that reduced the number of total cases with complete history to 120.

From all 123 cases, complete information was available for only 120 case files. From these, 7.5% of all cases had a private prosecutor, i.e., only 9 cases. What is interesting to notice is that private prosecution is mostly used by the relatives of victims of first degree murder. Also, only in three cases where there is a private prosecutor was there a female victim. All of the private prosecutors in this sample, it must be said, were privately hired. Most of the relatives that hired a private prosecutor came from middle class neighborhoods, except for one who came from a lower-income neighborhood but who eventually dropped the prosecution. And to my surprise, two of these nine private prosecution cases in my sample were actually human rights cases that had been reopened by relatives of the victims. One was the 1980 Spanish embassy case, which reopened in 2005 after the husband of a victim filed a criminal complaint (*querella*) against various state officials. Another one was the murder of Fernando Valle Flaquer and the

disappearance of her mother Marina Flaquer Zurdia in October of 1980. This finding highlights the point I made in the previous section: the importance of recognizing domestic legal tools as a venue used by societal actors to seek accountability for past human rights violations.

With the gross amount of violent crime that this country has experienced along with the low judicial responsiveness to homicides, the small percentage observed in the use of private prosecution may not be as negligible as is sounds because any attempt to seek justice entails a huge risk for victims or their relatives. For example, the one case of private prosecution in my sample where the crime was an *attempted* murder the case remained unsolved. Very early on the criminal proceedings the private prosecutor in this case requested the dismissal of the case but for procedural reasons the judge did not approve the request. And yet, neither the victim nor the private prosecutor ever appeared in court again. Similarly, in the case of a bus driver that was killed by an extortionist gang whose wife hired a private prosecutor, by the time the case reached trial, the private prosecution stopped appearing in court. In interviews with judges they say that this behavior is common for two reasons. First, if the victim or their relatives are poor, they may stop having resources to pay for the lawyer. And second, and more likely, victims and their lawyers sometimes get threats from their own aggressors that dissuade them from pursuing justice. In such cases, if the state does not take any interest, the file just lingers indefinitely in a drawer of the court as an ongoing case.

Even when victims or their relatives decide *not* to participate in the proceedings, it is not unusual that they will face threats from the perpetrators, and are left feeling

helpless and without any credible protection from the state. This in part explains the lack of interest from victims' relatives to help with the investigation. This is supported by some findings from my sample cases. Within my sample of 120 case files, I found ten explicit requests to the judge made by the victim's relatives *to end* the criminal investigation. The grandmother of a murdered bus driver said "I do not seek justice. I leave this issue in God's hands." In Guatemala City, almost one public transportation driver is killed every day as a reprisal for not paying in time "tax money" on time to gangs that operate in the city. From my sample, eight murder cases were clearly related to this type of extortion. Therefore, it is not surprising that few victims will seek justice, as they know that in the process they are also fighting a whole social structure that makes their efforts dangerous.

It is for this reason that NGOs in Guatemala play a pivotal role in terms of access to justice. Given that my sample did not include private prosecution cases with NGOs, I assessed the role of private prosecution by analyzing the work of the most important NGO litigating ordinary murder cases in Guatemala: an organization called *Sobrevivientes* (Survivors), founded by Norma Cruz. After Norma Cruz's daughter was raped in Guatemala City in 1999, she began a fight for justice. During her struggle she faced what she calls a "wall of impunity" that made it impossible for her and her daughter to find justice (S3-G 2009). In her bitter experience with the justice system, where she says she only encountered indifference and misogyny, she realized that many other women, victims of crime and victims of domestic violence, also had no access to justice. She then became a women's rights activist who for five years fought to improve the

rights of women. Her personal experience with the legal system pushed her to become one of the most important women activists in the country fighting to end violence against women. From this work of activism, in 2006, *Fundación Sobrevivientes* (Survivors Foundation) was born. The name was chosen, as explained on their webpage, because it reflects that victims and their families are survivors "not only of the crime itself, but also of the aggressions they suffer from the justice system and from society's discrimination against them." The foundation's mission is to prevent, punish, and eradicate violence against all women, as well as to improve access to justice for victims. Since 2006, the work of the NGO has focused on three areas: education and socialization of women's rights, psychological assistance to victims, and legal assistance in civil and criminal cases. They also offer a shelter when victims need it. The funding of the organization has exponentially increased in the last three years, in part due to their success in improving access to justice to marginalized victims and in improving state responsiveness to crimes. Today, the NGO receives some money from the federal government, through the Executive's Office for Women, but most of their funding comes from the European Union, USAID, the Swiss aid agency, UNPD, and other international aid agencies.

Although most of their litigation efforts focus on cases related to civil and family law, *Sobrevivientes* has increasingly expanded its work to criminal cases as well. Initially, *Sobrevivientes* did not engage as private prosecutor bringing claims of "collective interest." Rather, it only helped victims or their families providing free legal aid in criminal cases: i.e., providing lawyers that represented the victims as private prosecutors. Through this legal aid, the NGO has improved access to justice providing

legal representation for poor victims who want to exercise their right to private prosecution. Also, *Sobrevivientes* has improved rights awareness by teaching victims or their relatives their rights as aggravated parties, including the right to private prosecution, and by providing legal advice to help victims push the criminal investigation and keep their cases open.

Starting in 2008, however, *Sobrevivientes* began litigating criminal cases as *the* "aggravated party", not as lawyers representing a victim or their relatives as they did before. As noted earlier in this chapter, the CPC-1992 also defines as an "aggravated party" those organizations whose work relates directly to those rights of collective interest that a crime has affected, and as an organization working for women's rights, this NGO can be considered an "aggravated party" on murder cases of women. This change in strategy, they argue, came after they realized that breaking the "wall of impunity" was not a risk-free business (S3-G 2009). As mentioned earlier, victims and their families tend to be threatened by their own aggressors when they pursue "justice". Sometimes constituting as private prosecutors in the process exposes them to further threats, as they are clearly seen as part of the prosecutorial efforts. Therefore, the NGO decided to take on murder cases claiming standing as "the victim", absorbing the potential risks. The threats, then, now go to the organization and its members, not the victims. And the NGOs strategy to deter aggressors has been to make public these threats. Media exposure has become their shield.

As the case of *Sobrevivientes* suggests, in the last twenty years Guatemala has seen the emergence of individuals that, when facing an individual struggle to find justice,

they eventually exploited their legal rights in order to access the justice system and find justice; and, in the process, created NGOs that have specialized in criminal private prosecution. The story is similar to that of Helen Mack and the Mack Foundation, which had a strong influence in Cruz's strategies in her fight against impunity (S3-G 2009). But now newer NGOs are following the same strategies followed before to prosecute human rights cases, applying these to fight impunity in cases of violent ordinary crime. *Fundacion Sobrevivientes* is not entirely alone in this effort: the International Justice Mission and the ICCPC have also worked as private prosecutors in cases of rape.

5.3.2 The effects of private prosecution in ordinary violent crime

From my sample of homicide cases in the two courts in Guatemala City, it is difficult to draw strong inferences mostly due to the sample size that turned so few private prosecution cases. But the data clearly shows patterns that are similar to those found in human rights and ordinary cases across countries, i.e., that private prosecution improves the investigation of a case, that it reduces the chances of dismissals, and that helps push cases towards trial.

Table 5.5.
Homicide cases in two courts of Guatemala City
disaggregated by type of outcome and presence or absence of private prosecution, 2003-2009

	Private Prosecution		
Type of outcome	No	Yes	Total
Case remains ongoing	48	4	52
Other judicial endings	5	1	6
dismissal	22	0	22
plea bargain	1	0	1
oral trial	34	3	37
Total	110	8	118

Source: Database of Homicide Crimes. From the 123 case files, there was missing information on how the cases ended reducing the number of cases to 118.

Table 5.5 shows that about 44% of all cases without private prosecution remain ongoing (in an investigation stage), whereas half of the cases with a private prosecutor remain ongoing as well. Two of these private prosecution cases that remain ongoing, it must be noted, are the 1980 human rights cases that were reopened. Similarly, about 30% of all murder cases went to trial without a private prosecutor, whereas three cases of eight cases went to trial with a private prosecutor. Finally, only about 5% of all cases without a private prosecutor faced other types of judicial endings (i.e., when the case was closed or the charges were dropped). So it would seem that private prosecution does not make a difference in the final outcome of the case, if we only look at those few cases with private prosecution that entered the two courts that were studied to construct this sample.

Notice, however, that in the sample there is no case with private prosecutor that faced a dismissal, compared to 20% of the cases that did not have a private prosecutor. In Guatemala, a plea bargain is only offered for less grave crimes, such as unintentional

murder. Therefore, the one plea bargain that was observed in the sample which did not have a private prosecutor was an unintentional murder case. The sample data suggests, therefore, that at least private prosecution helps to avoid dismissals and also keep cases from state oblivion, as the reopening of the two human rights cases suggest.

Furthermore, a closer look at the work of *Sobrevivientes* offers another view of how private prosecution can impact judicial responsiveness to ordinary murder cases when an NGO is present. After the NGO began enforcing its right to be considered an aggravated party and litigate as private prosecutor in criminal cases in 2008, its impact on improving the prosecution of a case cannot be underestimated. In 2007 they reported that in those cases where the NGO was providing only legal representation for victims they achieved only 2 guilty verdicts in courts. After 2008, in contrast, as private prosecutors the NGO participated in 12 oral trials, of which they achieved 12 guilty verdicts, and they were still working on 109 open cases. This supplemental data clearly suggests that private prosecution does have an impact, especially when conducted by an NGO.

The impact of the work of this NGO is not negligible when one considers how very few homicide cases actually make it beyond the investigation phase and actually get to court. In 2008 only 58 cases related to crimes against women went to trial (MP 2008). These crimes include cases of rape and domestic violence, and any other crime committed against women. In that same year, the NGO reported that they participated in 4 trials where they obtained 4 guilty verdicts in cases of rape (Sobrevivientes 2009). This means that from all trials in 2008 concerned with crimes against women, the NGO played a key role in the successful prosecution of almost 7% of all these cases.

In murder cases, *Sobrevivientes* has had an even more crucial effect. According to data from the judiciary, in 2008 in Guatemala City there were only 30 sentences in murder and first degree murder cases.[47] *Sobrevivientes* reports that in that same year they participated in 5 trials and achieved 5 guilty verdicts on those homicide cases (Sobrevivientes 2009). This means that *Sobrevivientes* participated in 16% of all trials that ended that year with a verdict, and they contributed to making this a guilty verdict. This comparative exercise is important, as it reflects that a small, but important percentage of cases in Guatemala is successfully being prosecuted with the aid of an NGO, not by the state alone.

As mentioned earlier, the role of private prosecutors in the success of a claim is most important at the investigation phase. When the MP and the police are not doing their job in piecing together the evidence to make a successful prosecution on a homicide case, it is the victim's family who has to do this job. In Guatemala, then, when relatives participate as private prosecutors the burden of the proof falls on them, not the state. Of course, the private prosecutor's job in the investigation phase is always mediated by the magistrate (*juez de garantias*) who then places the investigation requests made by the family into the public prosecutor's hand. But, as some Guatemalan judges recognize, without this push from the private prosecution the investigation is rarely done (M4-G 2009, m9-G 2009, 2010), because the MP looses interest in the case or because they are overwhelmed with hundreds of cases in their hands (M10-G 2009a). Although some judges feel the private prosecutors slow down the process by always "nagging" about the

[47] Data provided by the Centro de Informática y Telecomunicaciones, Organismo Judicial de Guatemala.

MP's job (M4-G 2009), most judges seem to see the role of private prosecutors as a means to "strengthen" the prosecution (M10-G 2009b, m9-G 2009, 2010), because sometimes public and private prosecutor work together to present better evidence and better legal arguments. It seems, however, that the quality of the relationship between the MP and the private prosecution does depend on the individual character of the public prosecutor in charge of the case. Lawyers from *Sobrevivientes*, for instance, claim that some cases are just easier to investigate and litigate because a public prosecutor is just willing to work with them in the case (S3-G 2009, S7-G 2009).

However, just as in human rights cases, access to NGO legal aid or legal representation is limited by the very own resources of the organizations. Sustained by an industry of international aid that wants to promote human rights, victims' rights, and/or women's rights, NGOs such as *Sobrevivientes* have also learned that in order to keep receiving funding, they have to prove to be successful in their job. This need for funding and the need to make the best use of their limited resources has forced NGOs to develop strategies in their litigation work. *Sobrevivientes*, for example, recognizes that they can only handle a few criminal cases at a time as "it requires having people working full time in solving the crimes" (Sobrevivientes 2009: 22). This means that some of the resources required for the criminal investigation are partly absorbed by the NGO. Therefore, limited resources and high costs force NGOs to strategically represent victims when they think the chances of success are higher, but also, when they think the characteristics of the case will hit at the core of the "impunity monster" (S3-G 2009, A5-G 2009). Hence, despite opening doors for some victims to access justice, the paradox of private

prosecution is that it also closes the door for others. In a way, NGOs are become also gatekeepers.

CONCLUSIONS

The case of Guatemala shows that when crime victims or their relatives face such an unresponsive state, most abandon the idea of justice either forced by threats imposed by their aggressors, or by a general distrust in the justice system. In Guatemala, fighting for justice is costly. Those who pursue justice in human rights cases, are intimidated, harassed, and sometimes even killed by former or current state agents. Those who lost their loved ones at the hands of private citizens, are also victims of threats and intimidations from their aggressors. Even actors within the judicial system are subject to those threats, leaving them with few incentives to actually do their job and investigate, prosecute, and punish crime. In such context, NGOs have emerged willing to absorb these costs and in the process they have slightly improved victims' access to justice and judicial responsiveness.

What is perhaps more interesting about Guatemala, is that in a context where the state is inefficient and unresponsive to heinous crimes such as homicide, a formal mechanism like private prosecution offers a window of opportunity for some victims and their families to pursue justice through legal channels. That is, in a country that appears to be in a state of lawlessness, law actually matters. Without private prosecution, it is

very likely that citizens would not be able to fight for criminal accountability of human rights cases or even ordinary homicides.

In Guatemala private prosecution offers a societal check on the state that can potentially improve the rule of law and strengthen democracy. However, the existence of a support structure for legal mobilization is a necessary condition. That is, NGOs need to be willing to act as private prosecutors and have the resources to be effective to have an impact on the responsiveness of the legal system. Yet, at the same time, the effects that private prosecution may have on judicial responsiveness are severely hindered by the same structural conditions that make impunity so pervasive. Therefore, private prosecution remains only a window of opportunity for accessing the justice system.

CHAPTER 6

PRIVATE PROSECUTION IN CHILE

INTRODUCTION

In this chapter I show that in Chile the power and limits of private prosecution, as shown previously in Guatemala, are bounded by the state structure it is contesting. I argue that in Chile this legal right does work as a control mechanism whenever victims as facing an unresponsive state. The case highlights that even when low judicial responsiveness is the result of a political choice rather than weak (like in Mexico) and/or poor institutions (like in Guatemala), private prosecution can have a positive impact on improving judicial responsiveness. As in Guatemala and Mexico, legal mobilization across human rights and ordinary murder cases depends not only on rights' awareness and the history of the right in the country, but also on how victims overcome the costs related to litigation. Therefore, as in other countries, the presence of a support structure makes access to this right possible. Also, across types of crimes, in Chile private prosecution shows an important impact on judicial responsiveness, particularly by improving the criminal investigation and helping a case reach a court.

Chile, however, shows certain particular patterns in the use and effects of private prosecution. This is a country that developed a strong sense of legalism and strong judicial institutions that with time have become more assertive in adjudicating rights (Couso and Hilbink 2009, Helmke and Ríos Figueroa 2011, Hilbink 2007a, Hilbink 2007b, Hilbink 2008), and it is a country that despite having more efficient judicial

institutions, shows quite an extensive use of the right to private prosecution in both human rights and ordinary crime murder cases. I argue that the wide use of private prosecution in Chile responds in great part to the long history of the right in Chilean procedural law as well as to the legalistic culture of the country. But mainly because in Chile a vast support structure has been developed that allows victims, either through state-funded agencies or NGOs, to access the right to private prosecution. Furthermore, the use of this right in both ordinary and state-sponsored murder cases shows how citizens view the use of private prosecution as a "normal" means to bring grievances to the courts. Like in Guatemala, the impact of private prosecution on the judicial responsiveness to human rights cases has been mostly felt on keeping cases open and improving the overall investigation and, as the political context and the government's policy on human rights prosecution have changed, private prosecution has been able to increase its prosecutorial efforts against state agents. In ordinary murder cases the impact of private prosecution has been on improving the chances that a case will reach a court, and also in providing victims with a better "quality of service". This finding suggests that private prosecution, in contexts such as the Chilean, can have an impact beyond improving a prosecution as it works by providing citizens with means to fill in various spaces of state inactivity, improving the overall *perception* of access to justice.

This chapter begins with a brief description of the right to private prosecution in Chile. Then, I focus on explaining its use across time and across type of crime. For this reason I begin with the use and effects of private prosecution in human rights cases. In this section I do not go in depth into explaining the transitional justice history in Chile,

which can be found elsewhere (Payne 2008, Collins 2009, Collins 2010), but rather focus mostly on the use and effects of private prosecution. In the last and third section I explain the current use and effects of private prosecution in ordinary murder cases. In the process, I will show the varying impacts of private prosecution on judicial responsiveness, i.e., the responsiveness of the judicial system to a crime.

6.1. The right to private prosecution in Chile

In Chapter 3 I explained that in Chile the right to private prosecution already existed in the Criminal Procedure Code of 1906 (CPC-1906). Actually, the CPC-1906 also allowed for popular action, an obvious inheritance from Spanish colonial times, which granted any Chilean citizen the right to file a criminal complaint or *querella*, a right that has been interpreted more as a means to strengthen the efficiency of prosecution, rather than a sincere concern with the victim of crime or his relatives (Horvitz Lennon and López Masle 2002a: 285). The new CPC-2000 eliminated popular action, but maintained the right of victims to participate as an autonomous private prosecutor in the criminal proceedings (see Chapter 2). The CPC-2000 introduced a definition of victim that includes only those directly affected by the crime or their relatives (Art. 108), and also limited standing to present a criminal complaint (*querella*) to those considered victims and to those state institutions that have an explicit faculty to file *querellas* in their internal laws or mandates. Anyone can file a criminal complaint, however, if it involves a crime that affects public interests and was committed by a state agent (Art. 111), which opens the door for NGOs to have standing in the criminal

proceedings. The ability of state institutions to participate as private prosecutions is similar to what we find in Guatemala (see Chapter 5), but in Chile it has been used more widely which has introduced interesting politics into the prosecution of crime, as I will show later.

As a consequence of the victims' discourse and victims' movement that emerged in the 1980s (see Chapter 2), the new CPC granted explicit rights to victims. Victims' rights must not be mistaken for the rights that a private prosecutor has during the criminal proceedings. The new Criminal Procedure Code (CPC-2000) improved the recognition of the victim in the criminal process and, accordingly, expanded the rights of victims. For instance, in the CPC-1907, the word "victim" appears only 12 times and the word "offended" 15 times, but many of these references regarding rights of protection and information for victims were introduced by reforms to the code made in 1999 and 2000. In sharp contrast, in the new CPC-2000 the word "victim" appears 21 times and the word "offended" 32 times. The new explicit rights for victims include rights for protection, reparation, and also participation (Art. 109, 2009a).

The rights of the private prosecutor were also expanded. As explained before, when using this right the victim can intervene at every stage of the legal proceedings under the legal advice of a lawyer, who acts as an autonomous private prosecutor. The private prosecutor has several rights, such as: to request investigations, to have access to the investigation files, and the right to appeal. But the CPC-2000, following the German tradition (see Chapter 2) also expanded the rights of the private prosecutor by granting her the right to force an accusation (Art. 258). When the public prosecutor wishes to

dismiss the case or drop the charges, the private prosecutor can request that the judge asks the public prosecutor to reconsider his decision. The private prosecutor may also reject a plea bargain between the state and the defendant, a petition that is considered by the judge to decide if it will proceed or not (Art. 408). The private prosecution can also appeal to the judge, when the state does not wish to continue to trial, to ask the public prosecutor to reconsider his decision. Furthermore, if the Office of the Public Prosecutor (*Ministerio Público*, MP) rejects the petition, the private prosecutor can ask the judge to convert his role from an autonomous private prosecutor into an exclusive private prosecutor. If this is granted, then the private prosecutor can continue as an *exclusive prosecutor* and take control of the prosecution by herself and go to trial. Finally, the private prosecutor has the right to introduce a civil action to request restitution for damages (Arts. 59-61).

6.2. Private prosecution in state-sponsored murder cases

The military coup that ended the Chilean democratic regime and the presidency of Salvador Allende on September 11, 1973, marked the beginning of a dictatorship that would last until 1989, when the regime negotiated its exit and allowed democratic elections to resume. The most violent and repressive period took place in the early months of the dictatorship, when at least half of all the disappearances and killings took place (Collins 2010: 61-64). The dictatorship led by Augusto Pinochet (1973-1989) systematically disappeared and killed at least 3,197 civilians, and illegally detained and tortured over 28,000, as it was officially recognized later by the Commission on Truth

and Reconciliation (aka Rettig Commission, which worked for 9 months in 1990 and published its results in 1992)[48] and the National Commission on Political Imprisonment and Torture (aka First Valech Commission, which began working at the end of 2003 and published its report in 2004).[49]

And to push for individual criminal accountability of those gross human rights violations, private prosecution indeed has served as an invaluable tool. In Chile almost every human rights case began as a "*querella*" or a victim's complaint, and every human rights case that has remained opened has done so due to the work of a private prosecutor (Interview S1-C 2009). In short, it is not an exaggeration to say that the struggle for justice and for accountability regarding human rights violations committed during the dictatorship era has taken place on the private prosecution's desk.

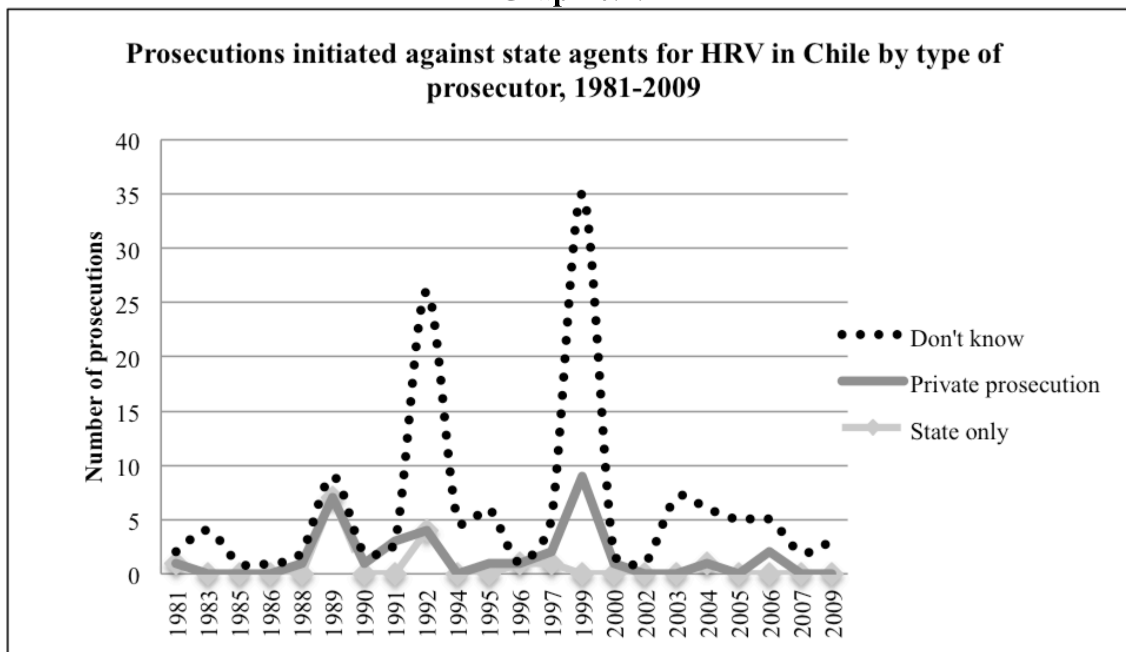
Data for the Transitional Justice Database does not cover the universe of human rights cases in Chile, but still shows interesting trends on how victims are using this right. Graph 6.1, below, shows the number of prosecutorial efforts against state agents for human rights crimes committed before and during democratic transition (i.e., crimes committed between 1973-1990) that were initiated in a given year. The information gathered in the Transitional Justice Database, is based on the State Department Human Rights reports and supplemented with newspaper articles, hence, it was not always

[48] The Rettig Commission in its final report accounted for 2,115 victims. In February 1992, the *Corporación Nacional de Reparación y Reconciliación* was formed to continue investigations and remained operational until 1996. It was from the work of this organization that the official total is now considered to be 3,197 deaths and disappearances (See: Hilbink, L. 2007b. *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press., p.181)

[49] In February 2010, the Valech Commission was reopened, adding more cases to the original report. This has been named as the Second Valech Commission.

possible for all cases to determine the presence of a private prosecutor. From interviews I know that most of these efforts were conducted by private prosecutors, and most of these did so under the umbrella and protection of an NGO. So it may be safe to assume that the majority of the cases labeled as "don't know" in Graph 6.1, were litigated by private prosecutors.

Graph 6.1.



Source: Transitional Justice Database. N= 133.

Graph 6.1 shows two peaks of prosecutorial activity against state agents: one post-democratic transition, and one post-1998. The post-transition peak clearly suggests that when citizens *perceive* a more favorable climate, in this case brought by democratic transition, they may be more willing to bring claims to the courts (as Chapter 4 also suggested). And as I will explain below, several events collided for the peak of 1998 to occur, which again signaled a more favorable environment for NGOs and victims' relatives to make another push for justice. Today all ongoing cases of human rights

violations committed during the dictatorship are "ongoing" as a result of the efforts initiated decades ago by private prosecutors and the groups of victims' relatives. But, as I will explain next, it has been a slow process, and it has been a struggle that, contrary to most countries in Latin America, eventually aimed to include all victims of the repression.

Contrary to Guatemala, the fight for justice using the law and courts in Chile began while the dictatorship *was still in place*. But similarly to Guatemala, relatives of victims organized and supported their struggle through an international and domestic community of human rights and victims' rights advocacy organizations. Initially, this organization took place under the umbrella provided by the Catholic Church, especially after the creation in 1976 of its own NGO, the *Vicaría de la Solidaridad* (Vicaría, hereinafter). During the first years of the dictatorship, legal activists from the Vicaría recall that citizens were afraid to file criminal complaints or *querellas*. Therefore in the early years after the coup, most relatives of victims went to the police only to report that their loved ones were "missing". Eventually thousands of *habeas corpus* writs were filed in courts by relatives that knew or assumed their loved ones had been detained (S1-C 2009), although the courts systematically dismissed these (Roht-Arriaza and Gibson 1998: 877, Collins 2010: 69, S1-C 2009).

Also in contrast to Guatemala, the dictatorship did not repress attempts to bring claims to the courts given their concern to "keep up the appearance of legitimacy and institutional functionality" (Collins 2010: 65). Therefore, risks for legal activists were much lower than those experienced by Guatemalan activists when they decided to bring a

criminal complaint to the courts. The first important criminal complaint was organized, written, and filed by the Vicaría, which always thought the battle for justice needed to be legal. This organization of the Catholic Church for years gathered information from the victims' families, and in 1978 decided to present, in the name of 70 victims, the first collective *querella* "that had a name and last name [of the perpetrator], and was against General Manuel Contreras Sepúlveda, head of the DINA" (*Dirección de Inteligencia Nacional,* i.e., the National Intelligence Service) (S1-C 2009). After this act of defiance, more criminal complaints were filed, and the majority of the human rights violation cases that eventually went to trial were initiated though *querellas*.[50]

The illusion of the courts being open to victims claims would be fully broken when the military enacted a self-amnesty law in 1978 that precluded prosecution for crimes committed between 1973-1978, unless they were already in trial or had been convicted (Collins 2010: 68). Courts, in compliance with the regime (Hilbink 2008, Hilbink 2007b), were hesitant to pursue any investigation and readily applied amnesty to most cases or submitted them to military jurisdiction were amnesty was also automatically applied (Collins 2010).

Despite the evident fact that legal claims or *querellas* faced a low likelihood of gaining legal victories, victims and their lawyers continued to press for justice in the courts. Nelson Caucoto, a prominent Chilean human rights lawyer, explains that in Chile "the defense of human rights took place mostly in the courts –which did not mean that the

[50] Collins mentions that some few cases started because of police initiated investigations; however, "these tended to be Kafkaesque affairs where victims or potential witnesses were accused of terrorist crimes." Collins, C. (2009) Human Rights Trials in Chile during and after the 'Pinochet Years'. *The International Journal of Transitional Justice,* 4, 67-76.

cases were solved promptly and successfully […]. The goal of human rights advocates was to keep the cases open." (DPLF 2007: 4) And so they did. With no real legal successes, a handful of human rights lawyers, who acted as private prosecutors representing hundreds of victims, fought for decades just to keep their cases open. From the hundreds of case files that were accumulated during the 1970s and 1980s, by the end of the dictatorship only 100 or so still showed some activity, because civilian courts had suspended most of the investigations or had referred them to military jurisdictions (Collins 2009: 70).

After the transition to electoral democracy the Vicaría decided to close its doors in 1994. Their open caseload was divided between two organizations, the CODEPU (*Corporación de Promoción y de Defensa de los Derechos del Pueblo*), that was left in charge of the cases related to political disappearances, and FASIC (*Fundación de Ayuda Social de las Iglesias Cristianas*), with all the cases related to extrajudicial executions. The return to democracy, however, did not mean any improvement for these cases. On the contrary, the negotiated way in which transition to democracy took place, made any real progress almost impossible. The focus was set on truth, rather than justice, as evidenced in the 1991 report of the Rettig Commission (*Comisión Nacional de Verdad y Reconciliación*). Although the courts did allow some justice, as evidenced in the conviction of Manuel Contreras in 1995 for the assassination of Orlando Letelier in Washington D.C. The amnesty, however, did not apply for this case as it was already at an advanced stage when the amnesty passed into law, and also because U.S. interest and pressure in this particular case of a violation on U.S. territory (Hilbink 2007b: 196). But

justice was the exception rather than the rule, as the courts kept sending cases to military courts where amnesty was automatically applied.

By the end of the 1990s, a new environment began to take shape that would allow efforts for criminal accountability of past human rights abuses to find a more receptive judiciary (Hilbink 2007b). Early in the 1990s, president Aylwin had already signaled a change in political will by emphasizing the importance of discovering "truth" of past human rights violations. For instance, in 1991, after the publication of the Rettig report the president stated that amnesty could not limit the criminal investigation of a case, which later came to be known as the "Aylwin doctrine." This meant that the crime had to be investigated, and if the investigations found that those responsible of the crimes were covered by the amnesty, then the case would be closed. Although the emphasis of this doctrine was set on truth, obviously it signaled at least the recognition that the state had the obligation to investigate.

Of the outmost important were the judicial reforms that began to be discussed during the Aylwin administration, but that were passed into law in 1997, during the Frei government. Judicial reform in Chile was quite comprehensive, and aside from reshaping the criminal procedure, it also created specialized judicial benches (or Salas) in the Supreme Court and changed appointment procedures, improving judicial independence. By 1998, four out of 21 Supreme Court justices were from the Pinochet era (Collins 2010: 81). After the reform, "the doctrinal commitment to automatic application of the amnesty law began to crumble" (Hilbink 2007b: 198). But, contrary to Guatemala where cases of human rights that had not had a trial were processed under the new CPC, in

Chile human rights cases remained under the old CPC, keeping judges as the key gatekeepers to legal justice. Hence the role of the judge, who investigates, prosecutes, and rules, has remained quite important in Chile, as later trends demonstrate.

The year of 1998 marked a watershed for the issue of transitional justice. In the domestic arena, in January 1998, the first-ever criminal complaints or *querellas* against the former dictator Augusto Pinochet were filed by the Communist Party in Chile for the disappearance of several of their leaders, and by a group of victims' relatives. The *querellas* aimed mostly to signal their disapproval of the prospect of Pinochet becoming a lifetime senator, a post to which he was entitled after his retirement as army commander-in-chief according to the 1980 constitution (Collins 2009: 76). Against most expectations, however, the Supreme Court assigned Judge Juan Guzmán to re-open investigation of these cases, including the "Caravan of Death" case that involved the crimes of disappearances and extrajudicial killings (S1-C 2009).

The Caravan of Death was a military unit, headed by General Sergio Arellano Stark, which between September and October 1973 went from town to town with the mission to arrest and execute political opponents of Pinochet. As a result of this military operation 97 people were killed in cities around Chile. Once amnesty was in place in 1978, it appeared that any attempts for justice were futile. In 1986, however, the development of a new strategy to circumvent amnesty began to take shape. The mother of a victim of the Caravan filed a criminal complaint for the premeditated kidnapping and first degree murder of her son Jose Gregorio Saavedra. The private prosecutor for the family argued in the complaint that kidnapping was excluded from amnesty law as it

remained an ongoing crime until the person was either released or a body found. Initially, the lower court judge accepted to investigate the case and refused military jurisdiction. At the end the Supreme Court upheld a military's challenge on the case and sent the case to a military court.[51] The legal argument of kidnapping was followed by various private prosecutors, but it would take more than a decade for this logic to take hold among *judges*. Moreover, the eventual success of this legal argument would be the result of yet another private prosecutor who was litigating the case of Caravan of Death victim Enrique Poblete Córdova. After a long battle in military and civil courts, the lawyer for the family, Sergio Concha, brought an appeal to the Supreme Court challenging a renewed attempt by military courts to permanently close the case (Collins 2010: 83). In September of 1998 the new Supreme Court criminal bench argued that when no bodies were returned to the families the crime involved was that of kidnapping, which remained ongoing and, therefore, was not covered by amnesty.[52] After this groundbreaking ruling, the kidnapping argument would open the door for future cases to circumvent amnesty. This case highlights that developments in prosecutorial efforts against state agents for human rights violations in Chile depended also on changes in the receptivity of the *private prosecutors' claims* and *legal arguments* within the judicial bench. As a result of Poblete-Cordova ruling, 74 cases related to the Caravan of Death were reopened in military courts.

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[51] See: Avenues and Obstacles to Justice, at http://www.memoriayjusticia.cl/english/en_avenues.html, last consulted in April 12, 2012.

[52] It must be noted that from the Supreme Court in its ruling also used the argument that the Geneva Conventions invalidated amnesties for disappearance cases. However, this argument did not take hold as precedent among judges.

Another important event on the international front also played a role in making 1998 a turning point for criminal accountability efforts in Chile. The arrest of Pinochet in the UK in October of 1998 brought the issue of accountability back into the debate. After his arrest, various human rights activists took advantage of the momentum created by the conjunction of international and domestic factors (i.e., judicial reform and the changes in the Supreme Court, the first Pinochet *querellas* and the Poblete-Cordoba ruling, and the subsequent arrest of Pinochet) and by the end of 1998 a new wave of approximately 60 complaints hit the courts, which came to be known as "the *querellas* against Pinochet".

The change in the political climate had a considerable impact on prosecutorial efforts against state agents. According to data from the Human Rights Observatory in Chile, from 2000-2003 around 400 state agents had been "processed"[53] or indicted. By July 2010, a total of 788 agents of the state had already been processed or charged, and 296 of these had been found guilty (Boletin Observatorio, July 2010) In a very short time, Chilean judges moved from keeping cases at the margins, struggling against private prosecution efforts to keep the cases alive, towards a more receptive view for criminal accountability of past abuses.

Two important changes within the courts contributed to the speed in which this happened. First, the reforms within the judiciary, that led to the designation of "full time" judges to human rights cases (*jueces de dedicación exclusiva*). In 2002, the Ministry of Justice authorized twenty judges to work exclusively on cases of disappearances and fifty-one judges to give preference to such cases. Second, and perhaps more important,

[53] In the old system is a more advanced stage than the investigation and has the consequence of linking the accused to the criminal process.

the Poblete-Córdoba Supreme Court ruling set the precedent for judges to interpret the 1978 self-amnesty as inapplicable to unsolved cases of disappearances, which are designated as kidnapping and, therefore, "continuing crimes" (Tiede 2004). In great part due to the creation of the kidnapping argument in the private prosecution's front, later picked up by more receptive judges, according to data of the Human Rights Observatory Chile has observed as well an increase in convictions: in the case of 210 victims of disapperances, one or more defendants have been found guilty (Boletin Observatorio, Julio 2010). The courts evidently, have taken a different stance regarding human rights cases. Some explain that this change within the courts can be attributed to a mix of factors, like sincere persuasion or belief in justice, a judge's perception that his career does not depend anymore on the government in turn, and international pressure generated by human rights organizations (Jose Zalaquett, at: Various 2010). Others, however, claim that this shift responds more to a tendency among Chilean judges to respond to overall changes in national political will and describe the judiciary as a "sunflower", following perceived sociopolitical change, and yet others attribute it more to the structural changes of reform that made this a more independent judiciary (Collins 2010: 135-138 (Hilbink 2012, Couso, Huneeus and Sieder 2010).

And there indeed were obvious changes in the state policy regarding human rights cases. In 2000, for instance, the *Consejo de Defensa del Estado*, the government's legal agency, adhered as a private prosecutor in the Caravan of Death case, and other key cases. This agency clearly signaled a change in policy regarding accountability when in the Caravan the *Consejo* argued in favor of stripping Pinochet's immunity (Collins 2010:

112, Hilbink 2012). More recently, another state agency has also been granted authorization to participate as private prosecutor. The Human Rights Program of the Interior Ministry (*Ministerio del Interior*) was granted this faculty relatively recently, in 2009 (Ley 20,405 2009b). In January 2010, the Program presented its first 23 criminal complaints or *querellas*. Before this new law, the program only had the formal power to assist in investigations, although some claim that in practice some judges allowed them to exercise the same rights as if they were private prosecutors in the case (M9-C and M10-C 2010). To date, the program participates in 278 cases (see Table 6.1).

Table 6.1.
Human Rights Cases where the Ministerio del Interior participates

Total ongoing cases	455
Ongoing cases where the HRP participates	278

Source: Boletín estadístico al 31 de Julio de 2010, Programa de Derechos Humanos, Ministerio del Interior, Chile

The participation of the Interior Ministry as private prosecutor highlights the political use of private prosecution *by the state*. When the program presents a criminal complaint, they do so not in representation of the actual victims, but rather as a private prosecutor in representation of the state of Chile filing a claim based on crime that affects the collective interest. This is done not always without contradictions. For instance, Collins reports that in the Sandoval case[54] the *Consejo* was acting as private prosecutor in the criminal case, at the same time that the agency was defending the state on a civil court for the same offense (2010: 112). Also, it is important to remember that human rights violations

[54] The Sandoval case involves the 1975 disappearance of Miguel Angel Sandoval. This case was the first criminal case to reach sentencing stage after the Poblete-Cordoba ruling of 1998. In 2003 the trial ended with a conviction of up to 15 years, including Manuel Contreras (see Collins 2010: 92).

committed during the dictatorship continue to be processed under the old CPC system, where there is no MP or public prosecutor, but only Instruction Judges. As private prosecutor the Human Rights Program acts autonomously from the *Juez de Instrucción* (Instruction Judge), who is in charge of the investigation and prosecution of the cases, although in practice the two offices do cooperate (M9-C and M10-C 2010). In a way this practice may be confused with a public prosecution *de facto*, but we must remember that *de jure* the role of the Human Rights Program is limited by the rules that regulate private prosecution.

Using private prosecution this way, as noted earlier, has served as a means for the government to signal political messages. For instance, the 23 complaints presented in January 2010 signaled president Bachellet's commitment to justice for past human rights abuses. However, being a political tool the strength of the program is hence limited by the executive's agenda. The program has not presented any other new complaints under the new government of Sebastián Piñera. After the *Agrupación de Familiares de Ejecutados Políticos* (AFEP or Group of Family Members of the Politically Executed) presented the new wave of almost 350 complaints, the leader of the NGO severely criticized the program for not fulfilling its obligation to participate as private prosecutor in these cases (Ansa 2010).

The use of private prosecution as a tool by the state is not unique to Chile. It is important to recall that in Guatemala the CICIG has used private prosecution to signal a commitment to prosecute high profile cases as well as to improve the overall prosecution of difficult cases (see Chapter 5). But whereas in Guatemala the main objective of this

use of private prosecution has been to provide protection to those state agents involved in the prosecution, in Chile its emphasis has been more on signaling political will. The (Machiavellian) genius behind the Chilean use of private prosecution as a political tool is that the executive can signal concern for the prosecution of a crime without necessarily relying on the actual performance of the judicial system. A lawyer of the Human Rights program justified the work of the program with these words:

> "when the state does not fulfill its obligation to prosecute crime, [the resolution of cases] becomes discretional and huge injustices are committed, because the state is not behaving according to expected standards. [...] To leave the burden of the prosecution in the hands of victims is beyond unfair, that is why the efforts have to be supported by the state as well" (Karinna Fernandez, Ministerio del Interior, at: Various 2010)

Despite the vast improvements that Chile has witnessed in the past 12 years in terms of judicial responsiveness, it is also important to note that victims' organizations remain unsatisfied. They argue that most of the victims of human rights violations remain without a legal process, and hence without a recourse to investigate and punish those responsible. A little more than one third of all victims, 1171, have an ongoing criminal process. These victims are represented in 455 open cases of disappearances, executions, and torture, according to statistics of the Human Rights Program, of which only 6% of all victims have obtained a guilty verdict (see Table 6.2).

Table 6.2.
Victims of human rights abuses in Chile (1973-1989)

Victims with an ongoing criminal process	Victims without an ongoing criminal process	Victims that obtained a guilty verdict	Total of victims
1171 (455 cases)	1805	210	3186

Source: (2010) Boletín estadístico al 31 de Julio de 2010, Programa de Derechos Humanos, Ministerio del Interior

The new wave of *querellas* filed in 2010 reflect this sentiment among many within civil society and in their strategy to fight impunity. After judge Sergio Muñoz made public in 2009, as part of his role as coordinator of human rights cases in the Supreme Court, that there were more than 1,000 victims of the dictatorship for which there had never existed a legal claim (ODDHH 2010), AFEP began a strong campaign entitled "Never impunity". As part of this campaign, AFEP began extensive legal work. In June 2010 the NGO presented 100 *querellas*; in August, 103; and in October, AFEP presented 141. In total, AFEP has presented around 350 *querellas* (Ansa 2010, L.A.C 2010). The goal of AFEP is to present a criminal complaint for every victim of the dictatorship who has been left out of the legal fight for justice.

This new wave of *querellas* highlights important changes. First, the leadership of the NGOs take the legal fight as the "only way to achieve something." If they do not take the cases to the courts through a complaint, then "the victims will be forgotten and there will be more impunity" (S3-C 2010). In contrast to previous efforts, which aimed only to keep the cases open, this time there is an expectation that "something" can happen. Second, there is more trust in the judicial institutions and less cynicism. Although they recognize that "some judges" are still in favor of impunity, they know that there are

others that sympathize with their fight. A reflection of this is that in their *querellas* AFEP provides the basic information on the victim, and they expect the police and the judge to do most of the investigation (S3-C 2010). And finally, beyond seeking to fight impunity and find justice, the aim of these complaints is also to achieve a "political reparation", where society acknowledges that these victims were "men, women, with family, working people, students… that they were ordinary people" (S3-C 2010).

These changes suggest, therefore, that the use of private prosecution expands when appropriate political conditions exist; that is, when the political context is perceived as more appropriate for channeling grievances through the courts (like in Guatemala). However, before these ideal conditions are met, private prosecution is used as a powerful tool of contestation aimed to secure "legal memory" of the atrocities and avoid total impunity by not leaving a trace of what happened (Interview D6-C 2010). Through legal mobilization, victims' organizations in Chile have helped build the rule of law from below by using legal means to channel social grievances.

Like in other countries, NGOs working in human rights cases seem to be more efficient as private prosecutors. In Chile there have been a few cases of victims' relatives that filed a complaint through the use of an individual private lawyer rather than through an NGO. Although I could not find statistics on the issue, my impression from fieldwork was that those few cases that lacked the resources, protection, expertise, and support of an NGO have had lower probabilities of remaining open or getting to trial, in part because of the costs involved in litigation. For example, in September 2010, a conference was held at the Museum of Memory that focused on the state of the human rights trials in

Chile. During the Q&A, a victim's wife made the following point that illustrates an obvious weakness of hiring a private lawyer for a human rights case:

> "I would only like to ask if there are first, second, or third class victims, because we had found the killer of my husband, and our lawyers did not appeal the acquittal […] and they told us many ugly things, that we had not paid and that they could not defend our case because they had many other cases to attend. So I wanted to publicly denounce this here, because this was very painful for us " (Victim's relative at:Various 2010)

Private prosecution, as noted, is an expensive right and this means that some victims are left without access to justice. Some suggest that so many victims and victims' relatives avoided presenting criminal complaints precisely because lawyers are expensive, or because some victims' relatives did not know of the NGOs efforts in the courts (S3-C 2010). Most human rights cases have been able to get to the courts because a support structure was in place, represented by a handful of lawyers working for NGOs. The latest goal of AFEP to represent all victims that have had no legal recourse will certainly bring into the legal fight many victims that perhaps did not file a *querella* earlier for economic or informational reasons, a goalthat seems to be quite unique when compared to other transitional countries.

The effects of private prosecution on judicial responsiveness cannot be underestimated. Every ongoing human rights case remained open due to the work of private prosecutors. As Collins briefly mentions, private prosecutors reduce the power of "gatekeepers" (Collins 2009 see footnote in: 69). In human rights cases in Chile, a *querella* first of all kept reminding the judicial system of crimes that the state was not

willing to recognize, by maintaining cases open they were able to keep a window open for future justice. Some argue that private prosecution in human rights cases may also have an important *healing* effect on the victims:

> "These efforts also heal the relatives of victims, because they were denied an investigation that would tell them what happened to their loved one. And then, when they least expect it, this is given to them, something that was owed to them [...] Hence, the process heals them too." (S3-C 2010)

In the next section, I will show that the use of private prosecution in ordinary murder cases in Chile is also determined by an awareness of the existence of the right, the long history of the right, and the existence of a vast support structure that makes access to this right easier when compared to Guatemala and Mexico. Also, I will show that its impact on judicial responsiveness is most important at the investigation stage.

6.3. Private prosecution in ordinary murder cases

Although there has been rise in non-violent crime and a drastic increase in public demands regarding public security in the last decade, violent crime in Chile has remained quite low, as Table 6.3 shows. In 2008 homicide represented only 0.11% of the total reported crime in the country. That year, the capital city of Santiago had 11 homicides per 100,000 habitants, a bit higher than the national average of 9 homicides per 100,000 habitants (MP 2009).[55]

[55] Although this number is twice the average homicide rate in developed countries, which is 4.5 per year

Table 6.3.
Homicide as a percentage of crime in Chile and the Metropolitan Region (MR)

Homicide	2001	2002	2003	2004	2005	2006	2007	2008	2009
As a % of all crime	0.11	0.10	0.08	0.07	0.07	0.08	0.07	0.06	0.06
Total in numbers	290	296	281	272	301	312	318	271	285
MR	142	112	109	87	132	152	176	130	145
% of MR	0.11	0.09	0.07	0.05	0.08	0.08	0.09	0.06	0.07

Data reflects crime reported to the police (i.e, Carabineros and Policía de Investigaciones de Chile).
Source: División de Seguridad Pública, Ministerio del Interior

Moreover, in the area of ordinary violent crime, Chile has one of the lowest impunity rates in the region, where about 60% of all homicide cases are solved, a rate that is comparable to that of the US (DoJustice and FBI 2008, Neira 2009). Given that most killings in Chile are solved and punished (Justice 2003) and given the low impunity rate that prevails in Chile in general, one might consider this country a least-likely case for the use of private prosecution for this ordinary murder cases. And yet, in this chapter I will show this has not been the case. On the contrary, the use of private prosecution in Chile is quite remarkable and, perhaps, unique.

per 100,000 this rate is way below the Latin American average of 30 homicides per year per 100,000 habitants. See: CIDAC. 2009. Indice de Incidencia Delictiva y Violencia 2009 Mexico DF: Centro de Investigación y Desarrollo.; PAHO. 1991. Word Health Statistics. Washington DC: Pan-American Health Organization, WHO. 1997. Word Report on Violence and Health. Geneva: World Health Organization, UNDP. 2009. Fast Facts: Latin America and the Carribbean. Washington DC: Bureau for Crisis Prevention and Recovery, UNDP.

6.3.1. The use of private prosecution

From fieldwork research, I found that there was a common perception among academics, defendants, lawyers, judges, and prosecutors that at the most 10% of all cases of crime have a private prosecutor (L1-C, D1-C, A2-C, A3-C). This low presence of private prosecution was also suggested in the only empirical study I found on the use of private prosecution in violent crime cases in Chile.[56] My research, that only looks at homicide cases, found quite a different pattern.

Table 6.4.
Cases of Homicide with Private Prosecutors in FRMS

	Homicide	**With PP**	**% with PP**
2005	120	10	8.33
2006	236	13	5.51
2007	199	5	2.51
2008	195	6	3.08
2009	225	9	4.00
		Average	4.69

Source: Fiscalía Regional Metropolitana Sur

As table 6.4 shows, it is indeed the case that homicide cases with a private prosecutor constitute a small percentage when the case is at the investigation stage and the case files are still at the MP´s office and have not yet reached the courts. I have no information at the national level or for the city of Santiago, but the data on Table 6.4, based on

[56] The study was conducted by Fundación Paz Ciudadana and analyzed a sample of cases that entered three metropolitan *Fiscalías* in Chile for all violent crimes (robbery, battery, assault, rape, and homicide). The study found that less than 1% of the cases had a private prosecutor. Furthermore, analyzing those cases with a private prosecutor it reached the conclusion that the role of the private prosecutor was meager, as it rarely participated in hearings. In this research, given that I focus only on murder cases and my methodology was different (I focused on cases that were already in the judiciary), I arrived at different conclusions. See: Ciudadana, F. P. 2008. El estado actual de la víctima en el proceso penal chileno. Santiago: Fundación Paz Ciudadana

information from one sub-metropolitan MP of the city of Santiago (the *Fiscalía Regional Metropolitana Sur*, FRMS), clearly demonstrates this point.

However, once a case file moves to *the courts*, because an arrest warrant was issued or a search warrant is needed (that is, when the investigation actually moves the case forward and requires judicial review), the percentage of homicide cases with private prosecutors increases considerably. From those homicide cases that actually reach the courts, almost a third of them had a private prosecutor, at least in the initial stages of the process (see Table 6.5 below). This suggests that private prosecution does improve the investigation of a criminal case and helps a case reach the courts.

Table 6.5.
Cases of crime against life that reached the courts that cover the jurisdiction of the FRMS

	Crimes against life	Admission of PP	%
2006	208	62	29.81
2007	264	79	29.92
2008	273	97	35.53
2009	284	68	23.94
		Average	29.80

Data covers all cases that entered the following courts: Juzgado de Garantia 10, 11, 12, 15, and Puento Alto. Source: Corporación Administrativa del Poder Judicial

The previous findings, based on information from the Judiciary's own statistics office, were mirrored in my sample of homicide cases. I built a Database of Homicide Cases for the city of Santiago that consists of a sample of murder cases that entered the courts for the period 2006-2009 (see Annex 1 for an explanation of the sample methodology). In my sample I found, again in contrast to the "10% assumption," that a third of homicide

cases that reached the courts of Santiago had a private prosecutor. Similarly to what was found in human rights cases in Chile and similar to what was found in Guatemala and Mexico, private prosecutors *at the very least* help improve the investigation and help cases to move forward.

Table 6.6.
Number of prosecutions by type of homicide and presence of a private prosecutor in Santiago 2007-2009

	No PP	**PP**	**Total**	**% of cases with PP**
Homicide	136	49	185	26.20
First degree homicide	27	25	52	47.17
Homicide during robbery	8	15	23	65.22
Parricide	3	2	5	40
First degree with aggravations		1	1	100
Total	**174**	**92**	**266**	**34.44**

Source: Database of Rape and Homicide Cases in Chile. With a 95% confidence level, and a sampling error of ±3. These reflect the number of accusations (rather than cases), data was coded this way to reflect when one or more defendants had a different ending in the case

The use of private prosecution in Chile is quite extensive when compared to Guatemala or Chihuahua, in part due to the long history of this right, but in contrast to the other two countries, access to the right to private prosecution is greatly improved by the vast support structure that has developed allowing victims to use the right. Private prosecution, without exaggeration, can be regarded as a consolidated institution of its own right in Chile. There are several means for a victim or their relatives to access the right to private prosecution in Chile, in part the result of a state policy to improve access to justice in the country. Similar to the policy established in Guatemala and in Mexico, when a victim of a violent crime comes to the police or MP they may be referred to a network of state and civic organizations that offer assistance for victims. The quite

striking difference in Chile is that most of these are state-sponsored or state-related agencies, and among the many services they provide is legal aid, providing a lawyer to serve as private prosecutor representing the interests of the victim during the criminal proceedings.

The *Corporación de Asistencia Judicial* (CAJ), for instance, is an institution that depends on the Justice Ministry (which also oversees the work of the Public Defense Office) and was the first to offer such a service for victims of scarce resources since 1994.[57] In the year 2010 the CAJ was involved in 848 cases of violent crime as private prosecutor in the Metropolitan Region (M8-C 2010). CAJ has even litigated as an exclusive prosecutor (M8-C 2010).

In 2006, in part as a response to the rise of public security demands among the citizenry, the Interior Ministry implemented Units for Victims of Crime (*Centros o Unidades de Asistencia a Victimas de Delitos Violentos,* aka CAVDs) across the country. These CAVDs offer legal and psychological information as well as a "reparation service" that is focused on helping victims of crime to improve their well-being by helping them overcome the trauma suffered by the crime. The legal aid they offer is somewhat biased toward helping victims of crime get restitution for damages. In my sample, only 24 cases from 92 that had a private prosecutor filed a request for damages (i.e., a civil action). From these 24, ten were solicited by a CAVD and seven from private lawyers.

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[57] Before that, there was an Assistance Center for Rape Victims that depended on the police and that was created in 1987. See: Ministerio de Justicia, Ministerio del Interior, Ministerio de Defensa, *Informe Final Programas de Atencion a Victimas*, enero-julio 2008.

Other state agencies that offer similar legal aid services are the National Service for Minors (SENAME, *Servicio Nacional de Menores*), which deals with cases where the victim is a minor, and the SERNAM (*Servicio Nacional de la Mujer*), which focuses on cases where the victim is a woman. In my sample, only one case was supported by legal aid of SERNAM. However the work of SENAME is quite extensive, especially for cases of sexual abuse. This institution has a very large program called Program of Legal Intervention (*Programa de Intervención Jurídica*), through which SENAME offered legal representation to 3,500 cases in the country between 2000 and 2005. Furthermore, SENAME funds NGOs to offer legal representation for victims. SENAME currently funds seven different projects of legal representation in four regions of the country, including the Metropolitan Region.[58] These projects are run by private organizations. In the Metropolitan Region SENAME also funds Prodeni, that runs different programs like the "Defensa Niños/as Maltratados", the *Centro Atención Jurídica Especial del Instituto Chileno de Estudios Humanísticos*, and *Fundación Tierra Esperanza* (Projecto Umbrales) (SENAME 2008). Municipal governments also sometimes offer legal aid, as well as university clinics at Law Schools. Hence, as table 6.7 shows below, there are many ways in which victims can access the right to private prosecution.

[58] The other three regions are Valparaiso, Biobio, and Los Lagos.

Table 6.7.
Private prosecution cases in Santiago's homicide sample, disaggregated by type of private prosecutor and type of murder (2007-2009)

Type of PP	Homicide	First degree	Murder during robbery	Parricide	First degree and other charges	Total
Private lawyer	23	14	4	1	0	42
CAJ (Ministry of Justice)	2	2	2	0	0	6
State agency	0	0	0	1	0	1
Institutional prosecutors	2	2	0	0	0	4
State as PP and CAJ	1	0	0	0	0	1
NGO	3	0	0	0	0	3
University clinic	0	2	0	0	0	2
CAVDs (Interior Ministry)	9	3	9	0	0	21
Municipal free legal aid	8	1	0	0	0	9
Private lawyer and CAJ	1	0	0	0	0	1
Private lawyer and institutional prosecutor	0	0	0	0	1	1
Total	**49**	**24**	**15**	**2**	**1**	**91**

Source: Database of Homicides Cases in Santiago

Table 6.7 shows the distribution of the murder cases in my sample, disaggregated by type of murder and by type of private prosecutor. It is evident, that victims do not rely only on NGOs. Only six cases in my sample were litigated by private prosecutors from an NGO. Furthermore, as noted earlier, in Chile a judge can allow many different private prosecutors in one case. Hence, it is not that unusual to have more than one private

prosecutor in a case, specially on high-profile cases. For instance, there was one case where CAJ participated in a case alongside a private lawyer.

The case of *State et.al. vs. Ruz and Pérez* will help to illustrate how various types of prosecutors can enter a case. On November 2008, Diego Schmidt-Hebbel was brutally killed outside his girlfriend's home. Diego used to always drive Belen, his girlfriend, to work on his way to the university. But as Belén opened the door one morning, a man stood behind Diego with a gun, pushing them to go back into the house. Diego reacted and struggled with the man trying to kick him out of the house and, at the same time, he yelled to Belén to lock herself in the house with her parents. From inside her house Belén saw when the man shot Diego in the neck, then she saw the killer take a knife and stab Diego again in the neck, after which he fled. Diego died later in the hospital. He was 25 years old.

One year after Diego's murder, the public prosecutor indicted two persons that were held in custody: the killer, José Mario Ruz, and Pilar Pérez, Belén's aunt. The prosecution accused Pérez as the intellectual author, and Ruz as the material author of various crimes. They were accused of the murder of Diego and they were also accused of the attempt of murder of Belén, her two parents, and her grandmother, whom were all at the house that November morning, and according to the prosecution were the main target. But Pérez and Ruz were also accused of the until then unsolved murder of her ex-husband, Francisco Zamorano, and his partner, Héctor Arévalo, who were shot to death in their home earlier, in April of 2008. The motive driving Pilar Pérez, a middle-class woman with a degree in architecture, was vengeance. The prosecutor argued that she

resented her husband for revealing his homosexuality after they separated; and that she resented her sister, Belén's mother, for the terms of the will that their father left for them after he passed away ten years earlier. The media soon nicknamed Pérez as *La Quintrala*, after a 17th century Chilean landowner who remains famous in Chilean popular culture for her extreme cruelty with her tenants, and who was accused and convicted for over 40 murders. Diego, then, was seen as a hero for saving a whole family from being massacred by Ruz who was working under the orders of Pérez.

Not surprisingly, the media crowded the courtroom when the *Quintrala* trial began in September of 2010. The first day of the trial I was sitting in that room, and the first thing that caught my eye was the visual difference between the defense and the prosecution. In the desk of the accused were sitting six individuals: Pérez and Ruz, their lawyers, who were both public defenders and who were accompanied by a couple of aids. In contrast, the desk of the prosecution sat twelve lawyers. Two lawyers were from the Office of the Public Prosecution, representing the public prosecution. The other ten lawyers were representing four different private prosecutions presented against Pérez and Ruz. The victims represented in these four claims were: 1) the parents of Diego; 2) the daughter of Pilar Pérez, who was presenting a private prosecution against her own mother for the assassination of her father and his couple; 3) Belén and her family; and 4) the Municipality of Providencia, where the murder took place. Given its complexity, the *State et.al. vs. Pérez and Ruz* case became, according to some observers, the most important trial since the reform of the judicial system. The case indeed ended in 2011 with the conviction of both Pérez and Ruz to 60 years in jail.

Therefore, access to private prosecution in Chile is easier and not only reserved for the rich, or for those few that get their case to be litigated by an NGO. In two thirds of all the cases with private prosecution in my Homicide Database the victims lived in neighborhoods of medium to medium-low socioeconomic status. Rather than socioeconomic status, the only statistically significant predictor of the likelihood of having a private prosecutor is the severity of the crime: first-degree murder, rather than other types of homicides in the sample (i.e, simple homicide, homicide during robbery, and parricide), is more likely to push victims' relatives to seek a private prosecutor as Table 6.8 shows (see Annex 14 for summary of regression model).

Table 6.8.
Predicted probabilities of having a private prosecutor depending on type of homicide

Has a private prosecutor?	First-degree homicide	Not a first-degree murder
Yes	52% (0.40, 0.65)	25% (0.18, 0.31)
No	48% (0.35, 0.60)	75% (0.68, 0.82)

All other variables set at their mean value. 95% confidence intervals in parenthesis. N=225.

There is another important type of private prosecution that deserves a more detailed discussion. And that is when it is used as a political tool *by the state*. Earlier I mentioned that in Chile the law allows state institutions to have standing to file a criminal complaint or *querella* if their internal laws establish that faculty as part of their mandate. When the state participates as a "victim" in the criminal process, the right to private prosecution becomes a political tool. Some refer to these type of *querellantes* as "institutional prosecutors" (refer to Table 6.7 above).

As noted earlier this is being used in human rights cases but it is also common in ordinary murder cases. There are several institutions that have, as part of their mandates, the faculty to file a criminal complaint and participate as private prosecutors in representation of the state. Some of these are SENAME, SERNAM, the *Ministerio del Interior*, and certain local governments or municipalities. For instance, in the case of *State et.al. vs. Pérez and Ruz*, the Municipality of Providencia was one of the four private prosecutors participating in the case. This is not a very uncommon strategy for municipalities: when facing a high profile crime in their jurisdiction, they file a criminal complaint to signal their outrage at the crime and their true commitment to see the perpetrators behind bars (L3-C 2010).

Compared to Guatemala and Mexico, therefore, victims of crime in Chile do have many ways to access justice. Nonetheless, outside the courts victims' rights have been the focus of a heated political debate. Although no observer could deny that victims' rights are stronger on paper and that there are many state institutions that aim to support victims, in recent years there have been vociferous calls for a further expansion and strengthening of the right to private prosecution. Triggered by an increased *perception* among the citizenry of higher insecurity, higher criminality, and higher victimization (a trend also observed in most countries in Latin America), in 2007 the newly reformed justice system came under attack and was severely criticized from the political Right for failing to protect and address the needs of victims. Under the leadership of Senator Alberto Espina, a conservative politician from the RN, a group of senators presented a bill to Congress for constitutional reform that entailed the creation of a Victim's Defense

Office (*Defensoría de las Víctimas*). The reform, they argued, would end the "inequality" that prevails between victims and the accused, by securing legal advice and legal defense to all victims of crime during all stages of the criminal process (Espina Otero 2007). The victims' debate did gain some popular support, despite open criticism by academics and the designers of the CPC (Duce, Riego R. and Vargas 2007, Marín Verdugo 2008), but the bill has not been passed into law.[59]

6.3.2 The effects of the use of private prosecution

As already noted, one very important effect of private prosecution in terms of judicial responsiveness to ordinary murder cases is that, when private prosecution is present, there is a higher likelihood for the case to move the investigation forward and actually bring the case to the courts. But as already noted in Chapter 4, *once in the courts*, the impact of private prosecution on the judicial responsiveness to ordinary murder cases is actually quite minimal in Chile.

In general, most homicide cases in Chile go to trial or end in a plea bargain. In Table 6.9, below, I show the distribution of my sample of murder cases disaggregated by type of outcome and the presence or absence of private prosecution. The Table shows

[59] In March, 2008, President Michelle Bachelet sent another bill to Congress, where she proposed the creation of a National Fund for the Representation of Victims of Crime Bachelet, V. M. 2008. Mensaje No. 76-356 con el que se inicia un Proyecto de Ley que Crea el Fondo Nacional Para la Representación de Víctimas de Delitos. ed. P. d. l. R. d. Chile., but these still languished in Congress in 2011. Several issues, like the earthquake and the miners' disasters in 2010, have put victims' rights at the bottom of the lists of priorities for the Piñera administration. However, its most fervent proponents are confident that this issue will return to the agenda of debate in the near future S4-C. 2010. Interview. In *Interview (politician) Chile*. Santiago.. Without question, the victim's rhetoric sells, so it is not unlikely that a conservative administration may actually pass such a bill.

that cases with private prosecution have a lower percentage (16%) of ending in plea bargain, which may reflect the fact that private prosecutors tend to participate in first-degree homicides, rather than simple homicides, precluding the possibility for defendants to get a plea bargain. Also, a higher percentage of private prosecution cases remained ongoing (16%) when compared to those where only the state participated (9%).

Table 6.9.
Percentage of cases disaggregated by type of judicial ending in Santiago, 2007-2009

Presence of a PP?	Ongoing	Other	Dismissal	Plea Bargain	Oral Trial	Total
No	9%	3%	3%	32%	52%	174
Yes	16%	11%	1%	16%	55%	92

Source: Dataset of Homicide Cases in Santiago. N=266.

It is not surprising, then, that private prosecution is not statistically significant in improving the odds of a case to move from ongoing to having a plea bargain or a trial (see Annex 14 for regression results). In Table 6.10 I show the predicted probabilities on how a first degree murder case would end, when a private prosecutor is present or not. As the table shows, once a case reaches the courts of there is no difference in how a case would end with or without private prosecution. In Chile, the severity of the crime (i.e., if it is a first-degree murder) is the best predictor for going to trial.

Table 6.10.
Predicted probabilities of how a first-degree murder case ends depending on the presence of a private prosecutor in Santiago

	No PP	PP
Ongoing	2%	2%
Other judicial ending	1%	1%
Dismissal	1%	1%
Plea Bargain	14%	14%
Oral Trial	83%	83%

All other variables are set at their mean value. N= 221.

Also, contrary to what could be assumed and contrary to what critics of the right to private prosecution have claimed (see Chapters 2 and 3), private prosecution does not necessarily mean higher punishment for the accused, at least in a context such as the Chilean. In my Homicide Database I found only a few instances where judges convicted with the higher sentence requested by the private prosecution. In general, judges gave actually lesser sentences than the ones requested by both the public and, when applicable, the private prosecutor. From this sample of murder cases it would seem that judges try to strike a balance between the demands of the prosecutions (public and private) and the claims of the defense giving lesser sentences than the ones requested. This is a surprising finding, given that Chile's "efficient" system has also been portrayed as a "grinding machine of human flesh" that only sends poor people to jail. Indeed judges do send to jail those that are found guilty, but they tend to do so following legal principles and considerations (e.g., the defendant's previous criminal record or age at the time of the crime) that result in softer punishments.

Although, in general, private prosecution in Chile may not impact how a case ends once the case reaches the courts, the *type of private prosecutor* does matter in terms of how well she represents the victims' interests and how well she litigates the case, strengthening the overall prosecution. From interviews with various actors (M2-C 2009, M3-C 2010, D1-C 2009, L1-C 2010), there was a shared perception that lawyers, when hired privately by victims, do very meager work, similar to what I found to be the case in Guatemala and Chihuahua. In my sample I found as well some indication of this criticism to private lawyers. From all the types of *private prosecutors* (NGOs, state agencies, institutional prosecutors, and privately hired lawyers), private lawyers did indeed appear to be the least engaged in the litigation of a case. This was evident in that private lawyers, when compared to other types of private prosecutors, did not actively participate in the prosecution of the case. For instance, most cases with private lawyers adhered to the public prosecutor's indictment rather than present a private accusation. More importantly private lawyers in my sample were the least likely to appear in court once the trial began. This could be explained by economic reasons: when at the trial stage victims' relatives are unable to continue paying the fees. And finally, private prosecutors filed less civil claims requesting for damages when compared to other type of prosecutors. Some argue that the reason for this is that most of those accused of crime are of very scarce economic means, hence for most lawyers there is no point for filing a civil claim for obtaining reparation that the accused would never be able to pay (L1-C 2010, L3-C 2010).

Not all my interviewees shared this perception, and some actually had quite a negative view of private prosecutors in general, regardless of their type (NGOs, state

agencies, private lawyers, or institutional). For a few cynical judges, private prosecution is seen as a time consuming hindrance because they make every hearing slower, as they have to be heard but rarely add anything to what is said by the public prosecutor (M3-C 2010) (M6-C 2010). Some even argue that, overall, there is no difference in the quality of the private prosecutor's performance regardless of whether the lawyer works for an NGO, a legal aid government agency (e.g. *Corporación de Asistencia Judicial*), or if she is a privately hired lawyer. This negative view of their work, is actually felt by some lawyers who work as private prosecutors themselves, who complain that sometimes the judge forgets their presence in the hearings and neglects to ask them if they want to speak (M5-C 2010, L1-C 2010).

The fact is that the system is quite new. And even though private prosecution existed before the CPC reform, it worked under the inquisitorial system, which required no real public litigation skills. It is not surprising, then, that those that are considered "good" private prosecutors are also those that have been better trained to litigate in an accusatorial system. Judges and prosecutors recognize that in Santiago there are "no more than ten good private prosecutors", and they are all young lawyers who were closely related to the criminal procedure reform process (M1-C 2009, M7-C 2010). These handful of lawyers are hired privately, or they may work on behalf of the Legal Clinic from the Universidad Diego Portales. In these rare occasions where private prosecutors do make a difference, their importance is felt at every stage of the process. During the investigation, they request and propose lines of investigation. During the accusation or indictment, they usually offer a more thoughtful "theory of the case", and most of the

times present a private accusation rather than adhere to the indictment of the public prosecutor. During the trial, they add to the overall prosecution by providing better legal argumentation and stronger evidence for the case (L1-C 2010, D1-C 2010). On these rare occasions, even public prosecutors claim that they "pay careful attention and listen" as they know they will be learning good litigation strategies (M1-C 2009, M5-C 2010, M12-C 2010).

However, I found that there are good lawyers within state-sponsored agencies that have been able to "grasp" what it takes to be an effective private prosecutor under the new accusatorial system. In CAJ I interviewed committed lawyers that actually did a very good job in representing their victims. As explained earlier, in CAJ I found the only case of a private prosecutor requesting to continue alone as the exclusive prosecutor. This was a very complex case, a case of intra-marital rape and domestic violence. The public prosecutor in this case had no interest in going to trial, as she thought that proving the crimes were too difficult given that the victim and defendant were married, and instead wanted to dismiss the case. The CAJ lawyer, following the request of the victim, asked the judge to continue as an exclusive prosecutor. Despite the complexity involved in demonstrating intra-marital rape, the lawyer from CAJ was successful and they won the case (M14-C 2010). Therefore, I think that as lawyers practice and get used to the skills required in oral litigation, in the future we may see that private prosecutors may have an impact on the outcome of a case in Chile.

In Chile I found that private prosecution matters as well in another important way: the *perception* of access to justice. This perception, I argue, comes from dynamics

generated by the various factors contributing to the expansive use of private prosecution in Chile, besides the vast support network that allows it. First, there is a higher knowledge among citizens regarding their rights as victims of crime in general, and the right of private prosecution in particular, which has such a long history in the country. This generates higher expectations from the citizenry on their institutions. Second, there is an impression, not grounded in how the judicial system actually works nor on the probabilities of how cases in Chile actually end, that private prosecution improves how the victim "relates" to the justice system, and that it "improves" access to justice. And finally, and relatedly, the failure of the MP to demonstrate to the public that the state does take the victim into account. I will elaborate more on the two last points, which I think require more explanation.

Regarding the second point, most of the judges I interviewed claimed that the most important role of private prosecutors, regardless of their type, was in making the victim feel "closer" to the process (M11-C 2010, M2-C 2009, M3-C 2010, M6-C 2010) The private prosecution may not change the outcome, but these interviewees think that in cases where the family comes from a low-income background, there can be an improved sense of access to justice and to feeling that the courts are more sensitive to their needs and claims. Private prosecution, by voicing the victims' needs in the court, can provide victims with a sense of justice that goes beyond restitution and retribution. As the private prosecutor of the mother of a lynching victim said: "she doesn't want money, just truth and justice" (Case 88-2007, Sample Chile).[60] The mother of the victim saw the trial as a

[60] Her son was murdered close to his home one night when a girl shouted claiming that he was touching her and was going to sexually abuse her. Her friends and boyfriend, who heard her shouting, ran after the

means to clear the name of her murdered son, who had been lynched for allegedly having sexually abused a girl. The victim's emphasis on truth was incorporated in the judge's ruling and in the sentencing hearing, while reading the reasoning of the conviction, the judge emphasized the role of truth as a means to justice. In doing so, the judge recognized the victim's needs beyond retribution and restitution, a point voiced by the private prosecutor.

Regarding the third point, the use of private prosecutors is also pushed by the perception among the citizenry that the newly created MP does not take into account the interests of the victim. This perception is in part the result of the few years that the office has been functioning, but in the most part it is the consequence of an ill-conceived campaign by the national Public Prosecutor. In an effort to create an image of impartiality of the newly created office, the national Public Prosecutor through internal memos and general instructions established that the "Office of the Public Prosecutor" was not the victims' legal representative or lawyer, as these are different actors in the criminal process with their own particular interests" (Piedrabuena Richard 2009). The discourse this policy created, that "the public prosecutor is not the victim's lawyer", created a widespread perception among the citizenry that if they wanted their interests to be heard, they needed to have a private prosecutor in the process (S4-C 2010, D1-C 2010).

In addition to the discourse that created the idea of a defense-less victim, there is also a real failure on the part of the Office of the Public Prosecutor to respect and make

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alleged abuser. In front of the neighborhood security guards, various people beat him severely while he was on the floor until he died. Various witnesses said that the Carabineros failed to intervene and stop the lynching that lasted at least 30 minutes.

valid perhaps the most fundamental right of the victim: the right to information. This is a failure recognized by scholars, lawyers, and prosecutors themselves (Duce et al. 2007, Marín Verdugo 2008, L1-C 2010, M5-C 2010). Although the public prosecutor may be invested in the case and may be doing the appropriate investigations, the public prosecutor often fails to inform the victim of the status of the case. This makes the victim feel alienated and defenseless. Furthermore, it is not uncommon for the prosecutor to fail to inform the victim of important decisions and the reasoning behind such decisions, like the decision to drop charges or to negotiate a plea bargain with the defense. The failure of the MP to provide prompt and accurate information to the victim is also present in Guatemala and Chihuahua, and perhaps even in a greater scale, but given that Chileans are less cynical about their rights and actually place higher demands on their institutions, the consequences of this failure are different. In Guatemala and Mexico, this failure of the MP apparently only leads victims to confirm their beliefs that the system does not work at all. In Chile, the failure seems to make victims get a private prosecutor.[61]

Therefore, although private prosecution in ordinary cases has its strongest impact at the investigation stage and in helping cases reach the courts, it can also help mitigate other failures of the state, like its failure to provide a good "customer service." A private prosecutor can potentially shield the victim or their relatives from any secondary or institutional victimization, as it is the private prosecutor who spends the time in the MP's office requesting information for the case and it is also the one that receives any potential

[61] This role of improving access to information is similar to that performed by victims' lawyers in countries that do not have the right to private prosecution. In countries like the US, providing information and sometimes helping in the investigation are the key roles that lawyers can play in criminal cases.

mistreatment, shielding the victim from this poor “service”. Also, the private prosecutor greatly improves access to information, explaining to victims the decisions that have been made or the stage of the proceedings. This has the effect of making the legal system *feel* more accessible to the victim, and it helps the victim *feel* that he has some degree of “control” in the process (L3-C 2010, L4-C 2010, D5-C 2010, S2-C 210, S4-C 2010).

CONCLUSIONS

Across types of crimes and across time, private prosecution has been widely used in Chile, demonstrating its status as a consolidated right. Across types of crimes private prosecution has its biggest impact in improving the investigation and helping cases reach the courts. Furthermore, the case of Chile highlights two areas of state failure in which this control mechanism works. The most obvious one is the area of impunity. Impunity is a function of both institutional capability and political will. It can be a state’s choice to punished some type of crime, and leave others unpunished. The case of Chile offers an example of such a state, one that has tended to have strong institutions that condemn and punish violent “ordinary crime;” and, at the same time, one that for years fostered impunity in “state-sponsored murders” until the state policy changed. When the state fails on its duty to prosecute crime, the right to private prosecution can sometimes help to amend this failure by making public those crimes that the state refuses to recognize. In the case of Chile, this was most evident in the case in state-sponsored crimes. But the limits of private prosecution come to light, similar to Guatemala, as its struggle takes place within a state structure that is greatly shaped by the political context. In Chile, for

decades the main victory of private prosecution was to keep case files open and investigations ongoing. As the political context shifted and there was political will to move towards criminal accountability, the judicial bench changed its own stance regarding human rights cases, which then lead to actual convictions. Therefore, the story of private prosecution in human rights cases in Chile showed that even when impunity is a political choice, rather than the outcome of weak institutions or lack of resources, at the very least private prosecution can serve as a constant reminder that the state allows impunity to exist, and in doing so, strengthen the rule of law. Also, by keeping the cases open, private prosecution kept a window open for victims' relatives to access justice in the future, when a better political context allowed it.

The other area of state inactivity where private prosecution works, is whenever the state fails to satisfy victims with the quality of the "service" it provides. This is a rather interesting finding that suggests that as citizens become aware of their rights, their expectations from the "service" that the state delivers grows higher. Also, private prosecution is clearly a consolidated right, evident in the wide array of institutions that allow victims to access this right. The emergence of state-sponsored institutions and programs that offer legal aid for victims have flourished in Chile, there are NGOs and university legal clinics providing aid, and also, victims can hire private lawyers. And all these developments occur despite the fact that, at least for ordinary murder cases, the MP does do its job for seeking retribution for these crimes. The failure of the new legal system in Chile has not been in punishing crime, but rather in not demonstrating to victims that the judicial system is working for them. The long history of the right in the

legal culture and the vast choices that victims have to access the right to private prosecution, along with the controversial discourse that emerged from the own MP saying their only job was to represent the state, are perhaps the most important factors explaining the use of private prosecution. In Chile, private prosecution then helps cases reach the courts and it also has an impact in improving access to justice by making the victim feel that the system takes their interests more seriously.

CHAPTER 7

PRIVATE PROSECUTION IN MEXICO

INTRODUCTION

The analysis of Chihuahua provides a unique opportunity to see how a procedural right, previously unknown in domestic criminal procedural law, is discovered and mobilized by societal actors. From the three countries under examination in this research, Mexico is the only country where there were no immediate antecedents to private prosecution and where the *Ministerio Público* (MP) had traditionally maintained an absolute monopoly on the investigation and prosecution of crime. Therefore, the case of Mexico allows us to compare how the absence of private prosecution may affect judicial responsiveness in human rights cases at the national level, as well as how and when this new right is being used in Chihuahua and how it affects judicial responsiveness in ordinary murder cases.

In this chapter I show that in human rights cases, judicial responsiveness has been lower when compared to Chile and Guatemala, which I suggest may be attributed to the absence of private prosecution at the federal level and in the majority of the states in Mexico. But in ordinary murder cases in Chihuahua and despite the newness of the right to private prosecution, the right once again seems to serve as a control mechanism when the state fails to uphold its duty to investigate and prosecute crime, improving the investigation, avoiding dismissals, and helping a case reach trial. Like in the other two countries, the case of Chihuahua shows that it is within civil society where this right is

discovered and used as a tool to fight impunity and help victims of crime access the justice system. Facing an unresponsive state that is overwhelmed by an increasing violence product of the war on drugs, victims or their relatives are often left without any judicial protection. In this context an NGO has emerged with the aim of channeling its struggle against violence and impunity by resorting to the law and courts. But Chihuahua also shows that the type of reform that this country had, i.e., the introduction (rather than expansion) of private prosecution, explains in part why so very few victims are using the right. Not only is the right new and not yet quite known, but an appropriate support structure, either from the state (as in Chile) or from NGOs (as in Guatemala and Chile) is not there, which greatly reduces the scope of victims that can potentially access the right to private prosecution. The small support structure that has developed in Chihuahua, focused on women´s rights, has opened a window of opportunity for women or their relatives to push for cases of gender-violence, but at the same time it has left out the great majority of murder victims who happen to be male.

This chapter begins with a brief description of victims' rights and the right to private prosecution in Chihuahua. In the second section I briefly mention the lower judicial responsiveness Mexico has had in human rights cases, when compared to Chile and Guatemala, and I argue here that the lack of private prosecution should be considered as a factor explaining this low criminal accountability in human rights cases. In contrast to the chapters of Guatemala and Chile, in the case of Chihuahua I focus mostly only on ordinary murder cases, i.e., when murder was committed by ordinary citizens. Hence, in the third section I focus on describing the type of violence that the state of Chihuahua has

experienced in the last twenty years to highlight the context that victims in this state of Mexico are facing. In the last two sections of the chapter I focus on explaining the use of private prosecution and on its varying effects on criminal prosecution.

7.1. The Right to Private Prosecution in Mexico: the case of Chihuahua

As mentioned in Chapter 3, Mexico is a federal state constituted by 31 states and a Federal District. Although the constitutional reform of 2008 established that criminal procedure had to be reformed at the federal and state level, as of January 2012 only 7 states have actually reformed their CPCs. Of these, only one has not included private prosecution provisions.[62] Among these states, Chihuahua is the frontrunner in terms of timing of the implementation of the reform, and can be considered as well the most advanced in terms of the legal framework designed to buttress an accusatorial system and the progress of its implementation.

The use of private prosecution in Chihuahua cannot be understood without also taking into account the context in which the judicial reform took place. It is important to remember, as noticed in Chapter 3, the key role played by the local women's movement. This movement, which will be explained in more detail later, emerged as a response to the systematic disappearances and killings of women throughout the 1990s in the state of

[62] Chihuahua reformed its CPC in August 2006 (entry into force or eif.) was in January 2007); Oaxaca in September 2006 (eif. September 2007); Zacatecas in September 2007 (eif January 2009) Baja California in October 2007 (eif. February 2010); Morelos in November 2007 (eif. October 2008); Durango in December 2008 (eif. will be gradual, starting in December 2009); Estado de México in February 2009 (eif. October 2009). Nuevo León made a partial reform towards an accusatorial system in 1990, but fully transitioned through a recent reform in July 2011 (eif January 2012), and is the only state that has not included private prosecution provisions.

Chihuahua, in particular in the border town of Ciudad Juárez (see Annex 15 for a map). The domestic and international outrage generated in 2001 after the discovery of 8 female bodies in Ciudad Juárez, the so-called "Cotton Field Murders", set in motion an impressive array of local, domestic, and international pressures for criminal accountability in Chihuahua. In Chihuahua, the women's killings led to the creation and expansion of a women's rights movement that initially was framed as an "anti-violence" or "victims' rights" movement. Esther Chavez Cano in Ciudad Juárez became the vociferous activist who, in 1993, first drew attention to the disappearances and killings of women. Along with 11 women's organizations, she created the "8 de Marzo Group" in 1994, whose efforts focused on denouncing the lack of investigation surrounding these crimes (Braine 2010), through social mobilization and a strong "mediatization" of the issue (i.e., using mass communication media such as newspapers, television, and the internet).

This early mobilization that demanded criminal accountability soon took shape as a women's movement. Framing the problem as a gender issue responded to the fact that the problems that were highlighted were the killings of women, not men. However, this initial framing would have important consequences because the support structure that developed domestically and internationally would consist of a network of local NGOs, international organizations, discourses, norms, and resources, that focused on gender violence exclusively, not on victims of crime in general. Given that the disappearance and killing of women surpassed the boundaries of Ciudad Juárez, the local women's movement eventually developed into a state-wide movement as various organizations

from Ciudad Juárez and the capital city of Chihuahua networked for a common cause: justice.

The judicial reform at the state level, therefore, took place in a quite unique context, where women's and victims' rights issues took center stage. The direct participation of the women's movement in the discussion and design of the judicial reform is in part responsible for the incorporation of gender-sensitive mechanisms and language in the new legal structure (CEDEHM 2010). At the same time, the participation of activists in the reform process raised their own awareness about the new legal structure that was being designed and about the new rights that victims gained. As a recognition of the importance of civil society in the reform process, the government of Chihuahua granted permission to lawyers of a very active NGO, called CEDEHM (*Centro de Derechos Humanos de las Mujeres*), to receive the same training and education that every actor in the judicial system was given to transition to the new accusatorial system. The importance of this training will be evident in the next section that explains the use of private prosecution. For now, it is important just to remember that the context and process of judicial reform had an important impact on the trends of use of private prosecution that I found in Chihuahua.

As noted in earlier chapters, the key purpose of private prosecution is to serve as a control mechanism on the state's prosecutorial decisions. Therefore, the most important gains in terms of victims' rights relate to the right to judicial review of every key decision that the state makes (for example, dropping the charges or closing the case). In contrast to Guatemala and Chile, an MP already existed in Chihuahua as the state's institution in

charge of criminal investigation and prosecution, and it is dependent on the executive power.[63] Given some inquisitorial characteristics that prevailed in the old judicial system in Chihuahua, the MP had virtually no checks or external controls during the investigation stage; it was the main gatekeeper to the justice system. In the new system established in Chihuahua after 2007, however, the MP was renamed the *Fiscalía General del Estado* (District Attorney's office or MP), and although it remains dependent on the executive power, its actions and decisions regarding the investigation *and* prosecution are now subject to judicial review (Art. 227 CPC-2007). And this is where the rights of the victim play a key role as societal check on the MP's job.

The CPC-2007 distinguishes between the "victim" and the "offended" (Art. 119). The victim is defined as (a) the person directly affected by the crime; (2) associations or organizations that focus their work on "collective interests" (like labor unions or human rights organizations, whose work focuses on a "common good") when the right that was violated is directly related to the area of work of the organization; and (3) indigenous communities for those crimes that involve discrimination or genocide. The "offended" party, in contrast, refers to those persons related to the victim when he dies. Victims or the offended party have several rights (Art. 121): to have access to all the case files, to help the MP with the investigation (a right that was already present in the previous CPC), to be informed of any key decision that ends the criminal prosecution, to be heard during

[63] The office of a public prosecutor was originally introduced by Spain during colonial times. In Mexico, regulated by the Constitution of 1917 (Art. 21), there has been an MP in charge of investigating and prosecuting federal crimes (*delitos federales*) (e.g., organized crime, tax evasion), and every state has had its own MP that deals with crimes that fall under the state's criminal law (*delitos del fuero común*).

the trial.[64] The victim or offended party may also constitute as private prosecutor, always represented by a lawyer (*acusador coadyuvante*), which in comparative law is an equivalent to an auxiliary prosecutor (see Chapter 2).

The private prosecutor is another actor in the criminal prosecution, and as such, she has further participatory rights, such as the right to a voice during every hearing at every stage of the criminal process (pre-trial and trial), to cross-examine witnesses, and to request that the judge reject any MP's decision that terminates the criminal prosecution, such as a plea bargain or even a summary dismissal. Perhaps more importantly, during the indictment hearing, the private prosecutor can present a written auxiliary accusation that is adhered to the accusation (or bill of indictment) made by the state or that requests to correct some formal or substantive errors in the state's accusation. In contrast to Guatemala and Chile, however, victims are not allowed to bring a civil action in the criminal proceedings. However, this does not mean that the restitution rights of victims were totally excluded, as explained in Chapter 4. The law establishes that it is the duty of the MP to protect the reparation rights of the victim and therefore, it is mandated by the CPC that the MP request damages in the name of the victim.

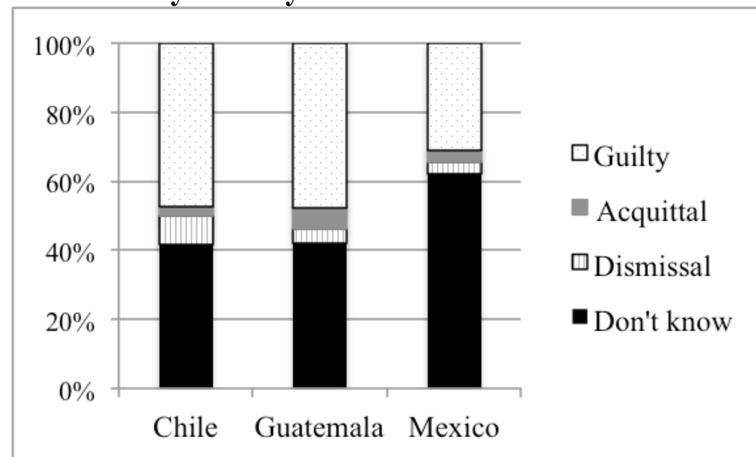
7.2. The absence of private prosecution and judicial responsiveness in human rights cases

As noted in the previous section, in Mexico only a few states have introduced the right to private prosecution, and Chihuahua was the first state to do it in 2007. The

[64] The victim or offended party that does not constitute as private prosecutor does have the right to appeal decisions. But given that it is not considered a "party" in the criminal process, its presence is not required in every hearing. Also the victim or offended party does not have the right to press charges adhering to the MP's indictment, which the private prosecution has.

absence of the right to private prosecution, I will argue, explains some of the differences we see in prosecutorial efforts against state agents for human rights violations in the country. Graph 7.1 compares, by outcome, all the prosecutorial efforts initiated in Chile, Guatemala, and Mexico.

Graph 7.1.
Comparison of human rights prosecutions,
by country and outcome 1980-2009



Source: Transitional Justice Database. Chile, n=156, Guatemala, n=143, Mexico, n=119.

Mexico has had fewer prosecutorial efforts initiated against state agents, compared to countries like Chile and Guatemala where private prosecution has had a longer history. In Chile, a total of 156 prosecutorial efforts were initiated against state agents in the period 1980-2009, and in Guatemala, 146. According to data from the Transitional Justice Database, Mexico has had in the same period of time 119. More suggestive is that in Chile and Guatemala about 50% of the human rights prosecutions recorded in the TJD have reached trial and eventually got a guilty verdict (which may or may not have been later annulled, as the Chapter of Guatemala explained). In contrast, in

Mexico only about 25% of the human rights prosecutorial efforts have ended in trial and with a guilty verdict.

One explanation for this lower judicial responsiveness may be the less repressive past that Mexico experienced. In various aspects Mexico has been *sui generis* among Latin American countries. Mexico successfully institutionalized a one-party hegemonic regime after 1929, when the military elite institutionalized a corporatist machinery that efficiently assured the rule of the official party - the PRI - for 71 years. A series of economic and political crises that unfolded in the 1980s, eventually led to reforms and the successful transfer of power to an opposing party, the PAN, in the 2000 presidential elections. Once again, Mexico distinguished itself from the rest of the region by achieving a "peaceful," nonetheless slow and difficult, transition from a one-party hegemonic regime to a competitive multiparty system. Although the *Priato* never undertook coercion as some other Latin American regimes did, even though it got the nickname of the "perfect dictatorship,"[65] it was nonetheless a semi-authoritarian and sometimes quite repressive regime. Throughout the *Priato*'s regime history, perhaps the most notorious act of repression against political dissidence was what became known as the Tlatelolco Massacre, where hundreds of students were killed and disappeared in October 1968. The Tlatelolco Massacre was followed by a decade-long "dirty war" against urban guerrillas (such as the *Liga Comunista 23 de Septiembre*) characterized by the systematic torture, killing, disappearance, and imprisonment of those who were

[65] Given the peculiar characteristics of the Mexican regime, where elections where held but real political and civil rights were systematically curtailed, the *Priato* was described as the "perfect dictatorship", a term coined by the Peruvian writer Mario Vargas Llosa (see: "Vargas Llosa: Mexico es la Dictadura Pefecta", *El Pais*, 01/09/1990).

considered “threats” to the regime. Although repressive at times, during the *Priato* it is reported that about 1,000 civilians were extrajudicially killed or disappeared from the 1960s to 1970s. The 1990s were also marked by episodes of repression, especially targeted against indigenous communities and human rights activists, more prominently the Zapatistas, an indigenous guerrilla movement that emerged in 1994 and that was quickly repressed. And since the transition to democracy in 2000, the gravest challenge the country has face relates to the rising power of organized crime, and the failure of the last two PAN administrations to conduct a war on drugs free of human rights abuses on behalf of their security forces. Despite these episodes of repression, however, these in no way compared to level of human rights abuses experienced in other Latin American countries, like the chapters of Guatemala and Chile showed.

I argue that history of repression may play an important role in judicial responsiveness, but that a complete explanation for the lower judicial responsiveness observed in Mexico in human rights prosecutorial efforts has to include the role of private prosecution. As Chapter 4 showed, countries with an autonomous prosecutorial organ or MP and countries that had private prosecution were more likely to have higher numbers of prosecutions initiated against state agents. Furthermore, countries that in a given year had the private prosecution right and repressive past were also more likely to see higher numbers of convictions. Hence, I think that the absence of private prosecution in the federal criminal procedure code of Mexico, as well as its absence in the CPCs of the majority of the states in the country has to be taken into account to explain both the lower

number of prosecutions initiated and the lower number of convictions of Mexico, when compared to Guatemala and Chile.

In Mexico, an MP dependent on the executive has been insufficient to push for the investigation and successful prosecution of human rights cases. It is the responsibility of the *Ministerio Público*, dependent on the *Procuraduría* (PGR), to investigate and prosecute crimes. The judicial police, also dependent on the *Procuraduría* and working always as an auxiliary to the MP, conducts the investigations. Since the 1990s, human rights reports from Amnesty International and the US State Department have consistently blamed the judicial police and the agents of the MP as the main violators of human rights.[66] The judicial police has been held responsible for 69% of the known cases of torture, followed by the PGR (11%), and the military (7%) (Hernandez and Lugo 2004: 25-31). For more than twenty years State Department reports have consistently reported that two of the gravest problems that affect the respect for human rights in Mexico are impunity and corruption. Furthermore, when the defendant is a member of the military, the cases are sent to military jurisdiction, where according to various reports judges have also systematically failed to provide effective judicial remedy to victims by neglecting to investigate and prosecute fellow members of the military (Watch 2009, Watch 2011). Hence, the incentives of public and military prosecutors to actually conduct the investigation against their own agents are quite low (Brinks 2008), and human rights

[66] This claim is supported in a qualitative review of all Amnesty International and State Department reports from 1980-2009.

reports have shown that within civilian and military jurisdictions state prosecutors have systematically avoided investigating their own state agents.

The absence of private prosecution at the federal level severely curtails the possibility of victims of human rights violations to push the investigation of the case and avoid dismissals. Without any political will coming from the Executive power, or without any push from below from private prosecutors, human rights cases in Mexico seem to be condemned to oblivion or to be transferred to military jurisdiction. But even in contexts where the MP depends on the executive, the potential of this right as a control mechanism on the state's duty to investigate and prosecute crime, even in countries that have had no previous history with the right, will be once again demonstrated in the following section with the case of private prosecution in the state of Chihuahua.

7.3. Private prosecution in ordinary murder cases: the case of Chihuahua

The state of Chihuahua, and especially the city of Ciudad Juarez, has become infamous for its rising violence in the last two decades. From 1993 to 2005, at least 379 women were found dead, and 4,456 were reported as disappeared (PGR 2006) in the state of Chihuahua. In the 1990s, strong domestic and international criticisms emerged as a response to the high rate of killings of women. As noted earlier, judicial reform was the main but not the only response of the state of Chihuahua to criticisms from below and abroad about the lack of criminal accountability for women's killings.[67] In 2003, the state

[67] In part due to international and domestic pressures, the Mexican federal government created a Special Prosecution Office for the Homicides of Women in Juárez, and collaborated with the state government with

reformed its criminal code to make the killing of a woman an aggravated murder, establishing a punishment of between 30 to 60 years in prison. Although the 2004 report from CEDAW urged the state to define this crime as "femicide" (i.e., the killing of a woman for being a woman), the state of Chihuahua has not included "femicide" as such in its laws. The criminal code that entered into force in January 2007, however, did maintain the killing of a woman as an aggravated murder with the 30-60 year prison term, one of the harshest in the criminal code. Also, in the several supplementary laws that were passed in the judicial reform of 2007, the legislators included various provisions to raise gender awareness in the investigation and prosecution of crimes.[68] Furthermore, also in 2007, the state of Chihuahua passed into law the State Law of the Right of Women for a Life Free from Violence, which was the first one of its kind in Mexico.

The issue of gender violence, however, was soon surpassed by an incredible rise in organized crime. By the 2006, the drug war initiated by president Felipe Calderón (2006-2012) quickly transformed the security landscape of the whole county: since Calderon took office in 2006 until June 2012, approximately 55,000 people have been killed (Notimex 2012). Among the states where this violence is concentrated, Chihuahua

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the criminal investigations. From this federal and state effort, in 2006 an official federal report was issued on the topic of women's killings in the state of Chihuahua. The federal government also implemented laws aiming to provide a stronger legal framework to protect women. Mexico was a member of the Convention on the Elimination of Discrimination Against Women, which was ratified on 1981; but in march 2002, Mexico also ratified the Optional Protocol of CEDAW. Furthermore, in 2007, the Mexican Congress passed the General Law on Women's Access to a Life Free from Violence.

[68] Ley Orgánica del Ministerio Público, Ley Orgánica del Poder Judicial, Ley de Justicia Especial para Adolescentes Infractores del Estado de Chihuahua, Ley de Atención a Víctimas u Ofendidos del Delito, Ley de Ejecución de Penas y Medidas de Seguridad, Ley de Justicia Penal Alternativa del Estado de Chihuahua, Ley Estatal de Protección a Testigos, and Ley Estatal por el Derecho de las Mujeres a una Vida Libre de Violencia.

has ranked between first and second place.[69] The drug war, therefore, severely transformed this rich northern state, once famous for its *maquiladoras* and a buoyant agricultural economy, into one of the most violent places in the world, reaching 115 killings per 100,000 habitants in the year 2009, a rate almost ten times higher than the national average of 17 killings per 100,000 habitants, and more than twenty-five times the average rate in developed countries.[70] Even in the capital city of Chihuahua and other surrounding counties (*municipios*), the homicide rate has increased dramatically in recent years reaching an astounding rate of 80 killings per 100,000 habitants (see Table 7.1 below).

Table 7.1.
Homicides in the state of Chihuahua and the city of Chihuahua, 2005-2009
(*the rate of crime per 100,000 habitants is in parenthesis*)

CHIHUAHUA	**2005**	**2006**	**2007**	**2008**	**2009**
Total reported crime	73,293	73,059	72,350	58,802	68,615
Homicide	**1,191** *(37)*	**1,175** *(36)*	**1,192** *(37)*	**2,395** *(74)*	**3,732** *(115.1)*
City of Chihuahua					
Total reported crime	21,343	20,977	17,674	19,450	23,050
Homicide	**277** *(36)*	**238** *(31.4)*	**267** *(35.2)*	**480** *(63.2)*	**600** *(79.1)*

Source: Unidad de Información de la Fiscalía General del Estado de Chihuahua. The rates of victims of crime per100,000 habitants were estimated using population data for the state of Chihuahua and the city of Chihuahua from census data (*Censo General de Población y Vivienda, 2005*). Crime data for the City of Chihuahua actually covers the whole judicial district of Morelos.

[69] The most violent states in the 2006-2011 period have been: Chihuahua, Nuevo León, Tamaulipas, Coahuila, Zacatecas, Durango, Veracruz, and San Luis Potosí. See: “El PRI gobierna los estados más violentos y también los más seguros” CNN, Martes 1 de mayo de 2012 at: http://mexico.cnn.com/nacional/2012/05/01/el-pri-gobierna-los-estados-mas-violentos-y-tambien-los-mas-seguros, last consulted on May 27, 2012.

[70] For instance, in 2008, in the US there were an estimated 5.4 killings per 100,000 habitants (DoJustice and FBI 2008), and the average in the developed world was of 4 killings per 100,000 habitants (CIDAC 2009; Bonillo 2009).

In the midst of this widespread violence, victims and their relatives both in the state and in the city of Chihuahua have faced a low probability of seeing their executioners behind bars. Impunity in violent crime is widespread and increasing. Table 7.2, below, reports the total number of homicides reported in the state and in the City of Chihuahua for the 2005-2009 period. Also, it shows the number of homicide cases that actually reach the courts. Criminal cases first make it to a court because the MP requires an arrest warrant or search warrant, but this does not reflect how a case ended (e.g., dismissal or trial).

Table 7.2
Homicide cases that reach the courts in Chihuahua, Mexico

Homicide	**2005**	**2006**	**2007**	**2008**	**2009**
Chihuahua	1191	1175	1192	2395	3732
Only the City of Chihuahua	277	238	267	480	600
Homicide in the City of Chihuahua as a % of total homicide in the state	*23.3*	*20.3*	*22.4*	*20*	*16.1*
Cases that reach the courts in the City of Chihuahua (according to the MP)	116	47	52	54	61
Cases in the courts as % of the total homicide in the city	***41.9***	***19.7***	***19.5***	***11.3***	***10.2***

Source: Unidad de Información de la Fiscalía General del Estado de Chihuahua. Data on the City of Chihuahua actually covers the whole judicial district of Morelos, which includes the capital city as other sorrounding counties.

Table 7.2 shows that impunity for homicide cases has increased rapidly in a very short period of time. In 2009, only 10% of all homicide cases in the city of Chihuahua reached the courts, compared to 42% in 2005. The toll of the drug war in Mexico, therefore, has not only been felt in the shocking death toll, but also in the lack of criminal accountability for these crimes. When compared to more efficient judicial systems, this is

a very grim picture. In 2008, in the US 63.6% of all murder cases were cleared by arrest, which is similar to the rate observed in Chile (DoJustice and FBI 2008).

Although Chihuahua is a wealthy state, in terms of impunity it looks more like Guatemala (see Chapter 4): very few cases actually reach the courts and therefore, very few receive punishment. But in sharp contrast to Guatemala, once a case reaches the court it is quite likely to get solved, like in Chile. In Table 7.3 (below), data from the judiciary of Chihuahua shows that most of those cases that actually reach the courts do have some sort of judicial resolution (dropping charges, provisional archive of the case, dismissal, plea bargain, or trial); that is, the case file is not left as an ongoing case. The problem in Chihuahua in terms of judicial responsiveness is that very few homicide cases reach the courts. In Table 7.3 I also report the amount of unsolved cases as a percentage of the total amount of homicides reported in the capital city of Chihuahua, which in 2009 reached a staggering 94% of all homicides. It suggests that in Chihuahua the state is not only failing in its duty to protect citizens and prevent homicide, but it is also failing utterly in its duty to investigate and punish crime.[71] The data suggests that in Chihuahua we find evidence of a judicial system that is clearly being overwhelmed by the rise in homicides, most of them the product of the war on drugs.

[71] The average impunity rate in Mexico is as high as 96% for all crimes (Zepeda Lecuona 2004: 13). The most worrisome aspect of Chihuahua is that in this research I find similar rates for crimes of higher social impact like homicide.

Table 7.3.
Unsolved homicide cases in the City of Chihuahua, 2007-2009 [72]

	2007	2008	2009
Total homicide in the City of Chihuahua	267	480	600
Cases that reach the courts (according to Judiciary)	46	54	57
As a % of total homicide	*17.23*	*11.25*	*9.50*
Total of cases that had some judicial ending (from those that entered the courts)	35	40	35
As a % of those in courts	*76.1*	*74.1*	*61.4*
Cases that remained unsolved	232	440	565
As a % of total homicide	***86.9***	***91.7***	***94.2***

The response of the state of Chihuahua to the rising public demands for security included drastic legal reforms. The state Congress of Chihuahua introduced the punishment of life in prison for the crimes of kidnapping, extortion, and mass murder as a response to the most common crimes committed by organized crime in the state, and it introduced life imprisonment for the killings of journalists. This recent reform, made in October 2010, placed Chihuahua as the first state in Mexico to explicitly have life imprisonment as a punishment in its penal code.[73]

[72] Sources: data for the statistics was taken from the Homicide Dataset constructed with information provided by the Departamento de Estadística, Coordinación Administrativa de Tribunales de Juicio Oral y de Garantía de Chihuahua in January 2010. The discrepancy of ten more homicide cases reported in the courts by the MP (in Table 6.2) and the Judiciary's data (reported here) may be due to differences in what type of murder they included in the report. Data covers the judicial district of Morelos.

[73] The first life sentence was issued on December 21, 2010, convicting an18 year old man who pleaded guilty to kidnapping. It must be noted that the 2003 reforms that made a woman's killing an "aggravated homicide" (*supra*, p. 8) had already introduced the possibility of life imprisonment by stating that if both kidnapping and murder where committed, the accused had to be punished for each one of them, even if that exceeded the maximum term of imprisonment. A small group of members of the state Congress questioned the constitutionality of the reform and requested its review by the federal Supreme Court (Suprema Corte de Justicia de la Nación, SCJN). The request of judicial review was based on previous SCJN´s rulings on the unconstitutionality of life imprisonment in 2001. Some of these rulings came in response to extradition requests by the US, and stated that the US had to commit not to punish with life imprisonment those that

Despite legal reforms, actual results in judicial responsiveness have been meager. The lack of investigation and prosecution of homicides in Chihuahua seems to be clearly related to the type of crimes that the state is facing. Homicides related to organized crime in theory fall within federal jurisdiction. However, prosecutors repeatedly reported to me (in a manner of complaint) that the federal MP (called *Procuraduría General de la Nación*, or Procuraduría) requires the MPs at the state level to demonstrate that a case is actually linked to organized crime. Most view this procedure as futile and counterproductive as it increases the risks that state prosecutors and police detectives face while investigating such a case (M1-M 2010, M10-M 2010, M11-M 2010, M14-M 2010). Several prosecutors have been killed for doing this, and even the brother of Patricia González, at the time the District Attorney of the state, was kidnapped and killed in 2010 for the efforts of her office in investigating organized crime. The risks that every actor in the judicial system faces, then, are real, and the effect of this is that cases are not investigated or defendants are acquitted. When I asked a public prosecutor the criteria he used to decide when to investigate cases, considering the enormous risks they face, he bluntly replied: "It is like when you see a dog: if it looks like a dog, walks like a dog, barks like a dog, then you know it is a dog" (M14-M 2010). At the end, the Procuraduría and the federal government deserve a lot of blame for the low judicial responsiveness to

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were extradited from Mexico as this form of punishment was unconstitutional in Mexico, according to art. 22 of the Constitution, that forbids the death penality as well as other unusual, cruel or inhumane punishments in Mexico. In 2005, however, the SCJN upheld the constitutionality of the reform in Chihuahua, opening up the door for the reform made in 2010 that explicitly imposed life imprisonment. See: Ydalia Pérez Fernández (2007) El Cambio en la Jurisprudencia de la Suprema Corte de Justicia de la Nación, *Revista Jurídica-Facultad de Jurisprudencia y Ciencias Sociales y Políticas,* Jesús Aranda ¨Revira la SCJN sobre la cadena perpetua" La Jornada, 7 de septiembre de 2005.

these homicides, as they are very well aware of the risks involved in investigating these crimes.

Another problem related to this low response from the state, which has been surpassed by the power of drug cartels delivering credible threats to all those involved in the justice system, is that common criminals have become aware of this weakness in the state. Even among public prosecutors there is the recognition that common criminals, not related to organized crime, have learned that if they "mimic" the *modus operandi* of the drug cartels, it is unlikely that their crime will be investigated. For example, leaving a note with threats aimed towards the state seems to be a common strategy for criminals to cover up their own crime under the façade of drug war. This shows therefore that public prosecutors may sometimes commit the error of assuming one case is linked to organized crime when it is not. The drug war has also created biases in how state agents view murder victims, as victims' relatives often complain that homicide victims have become stigmatized. I found some evidence of this stigma among some public prosecutors who thought that if you get killed in Chihuahua it "is because you are involved in something suspicious" (M11-M 2010, M14-M 2010).

Immersed in such a violent context and facing a quite unresponsive state, some human rights activists have found in private prosecution a tool to fight impunity. Like in Guatemala and Chile, the role of NGOs is of the upmost importance when victims face a high stake in bringing claims to the courts. Unlike Guatemala and Chile, the fact that in Mexico private prosecution is such a novel right has made its use quite surprising, at the

same time somewhat limited given that its use is dependent on the development of a support structure that helps victims access the right.

7.3.1. The use of private prosecution in Chihuahua

On the afternoon of September 6th, 2007, Lolita was working alone when two men rang the bell of her business office in the city of Chihuahua, the capital city of the state of Chihuahua in Mexico (see map in Annex 15). The two men inquired about a job offering and requested to fill out job applications. After the men confirmed that Lolita was alone, the aggression began. Lolita recalls she immediately knew this was the materialization of her ex-boyfriend's threats:

> "I felt a strong pain in my back, and I thought: he finally did it, he sent someone to kill me! And then I thought I wouldn't let myself die! When I felt the knife, I tried to look back to see what was going on, but the man hit me in the chest with a closed fist, then, he hit me again with what I thought was a piece of wood. I later realized it was the handle of the knife. Then I screamed: help, they want to kill me! And I repeated to myself that I was not going to die, that I had to survive."(Villalobos 2009: 13)

Lolita, by mere luck, was saved by her brother, who happened to arrive at the office at the time of the attack. She was soon taken to a hospital severely injured, with the blade of the broken knife inside her back.

Lolita's case became emblematic in Chihuahua not only because it was portrayed as another example of the prevalence of gender-based violence in the state of Chihuahua, but for two other reasons, as well. First, Lolita's case was the first case filed in Chihuahua's newly reformed justice system (and actually in Mexico) in which there was

a private prosecutor. And second, the private prosecution was litigated by a lawyer from an NGO dedicated to women's rights, called CEDEHM. With Lolita's criminal case, the power of the right to private prosecution was discovered, tested, and exploited in Mexico for the first time by this NGO.

Although private prosecution is quite a new right in Mexico, victims and their relatives are becoming familiar with the right, and some observers argue that more claimants seem to be willing to use it due to the notoriety that the private prosecution of Lolita´s case gained in the local press (S1-M 2010). This seems to be suggested in my sample data. The Dataset on Homicide Cases in Chihuahua was constructed with information provided by the Statistics Office within the Judiciary in the City of Chihuahua. This dataset covers *all* 157 homicide-related cases that were brought to the courts during the period 2007-2009 (see Annex 2 for methodology). For some cases, there is missing information on some variables that the judiciary was either not able to find or willing to provide, which explains why in the following pages the number of total cases sometimes changes.

Table 7.4.
Cases that entered the courts of Chihuahua
by type of prosecutor, 2007-2009

Type of Prosecutor	2007	2008	2009	Total
Only state	40	43	46	129
Private prosecution	1	5	3	9
Don´t know	5	4	9	18

Source: Database of Homicide Cases in Chihuahua. N=157.

Table 7.4 shows the cases related to homicide that entered the courts, per year, disaggregated by type of prosecution participating in the case. From interviews with prosecutors, judges, and lawyers, there was a shared perception that it is a right rarely used. And they were correct. From all 157 cases that entered the courts in the period 2007-2009, only 9 had a private prosecutor, which means that roughly about 6% of the cases had a private prosecutor working on the case. Also, six out of these nine cases were litigated by private lawyers and the other three cases were litigated by an NGO, CEDEHM, the only NGO that currently litigates in the city of Chihuahua as a private prosecutor.

Yet, as observers have noticed, after the first year of implementation of the right to private prosecution, there has been an increase in the number of cases with private prosecutors. In 2007 the case of Lolita, litigated by an NGO (CEDEHM), was the only case related to homicide (i.e., attempted murder) that entered the courts with a private prosecutor, compared to the following years that showed a higher (albeit still low) number of murder cases with private prosecution.[74] The impact of the private prosecution in Lolita's case has been to raise awareness of the right to private prosecution. The high public profile of the case of Lolita in 2007 in great part explains why by 2008 there was an upsurge in the number of private prosecutors, where we find 5 cases with private prosecution, four of these litigated by private lawyers. In 2009, there were only two private lawyers litigating victims' cases and one NGO, i.e., CEDEHM.

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[74] This does not mean that for other crimes there may have been more victims using this right. For instance, in 2007 there were two cases of rape with private lawyers acting as private prosecutors.

The low use of private prosecution in Chihuahua is explained by different factors. First, is the issue of rights' awareness. Private prosecution is a fairly new right and most people are not aware of it. Second, a lack of trust in the newly instituted judicial system may also play a role. This reduced trust in the new system has been aggravated by the incapacity of the state to respond efficiently to crimes. Third, and perhaps more important, are the costs involved in accessing this right in Chihuahua which merit a detailed explanation.

Victims can face great security costs associated when pushing for justice. Victims or their relatives are often subject to threats when they get involved in the case. It is not uncommon to hear stories about family members that "push for justice" and are eventually killed by the perpetrators. For example, less than a month after I concluded my fieldwork trip, Marisela Escobedo, the mother of a victim who had turned activist in her fight against impunity, was killed in December of 2010. Marisela's daughter had been brutally murdered by her boyfriend, who happened to be a member of the organized crime in Ciudad Juarez. After he was acquitted, Marisela vociferously protested, organizing social protests and demonstrations of condemnation around the city of Chihuahua. One night, in front of the main state government building, while security cameras where rolling, the mother was shot. No one has been charged or arrested for her murder.

But perhaps the biggest limitation to access the right to private prosecution in Chihuahua comes from the reduced size of a support structure. To be represented by a lawyer, like in any other country, involves a huge cost that most relatives of victims of

homicide crime, which are either from low-income or middle-income families, cannot afford. In great contrast to Guatemala and Chile, where a vast support structure has developed within society (like in Guatemala and Chile) and even within the state (like in Chile), in Chihuahua a support structure that helps victims access the right to private prosecution is still quite small and dependent on only one provider of free legal aid for victims: i.e, CEDEHM. Such a support structure is obviously quite small, given the rate of victimization prevalent in the state, and the fact that this NGO is mostly focused on women's rights given its origins: the women's movement.

The negative effect of having such a reduced support structure in place is that in generates unequal access to justice for male victims or their relatives. In Table 7.5 I show that most of the 157 cases that reached the courts of Chihuahua were cases involving a male victim. From the 31 cases where the victim was female, one third were unintentional homicides (most of these were car accidents) and another third were defined as "aggravated murder" (meaning that the victim was female).[75]

Table 7.5.
Types of homicide by the gender of the victim
in the City of Chihuahua, 2007-2009
(percentages in parentheses)

CRIME	Male	Female	Total
Second degree murder	63	1	64
First degree murder	21	2	23
Aggravated murder (i.e. victim is female)	0	12	12
Unintentional murder	18	11	29
Homicide attempt	11	2	13
Homicide attempt, first degree	8	3	11
Total	121(*80%*)	31 *(20%)*	152

Source: Database of Homicides in Chihuahua.

[75] Simple homicide (or second-degree murder) entails a punishment that ranges from 8-20 years, whereas first-degree homicide is punished with 20-50 years in prison. As noted above, aggravated homicide entails a punishment of 30-60 years behind bars.

Despite the fact that women constituted, on average, around 20% of all homicide victims for the 2007-2009 period, an interesting pattern emerges when we pay a closer attention to those cases where private prosecution is present (see Table 7.6 below). Four out of the nine cases with private prosecutor were for cases of female victims. That is, almost half of private prosecution cases were focused on female victims, which constitute only 20% of all victims. Furthermore, CEDEHM at the moment is the only NGO providing free legal aid for victims in Chihuahua, which means means that free legal aid is potentially available in Chihuahua for only 20% of the victims of violent crime.

Table 7.6.
Private Prosecution and Type of Homicide Cases in the City of Chihuahua, 2007-2009

Type of PP	Homicide (second degree)	Aggravated Murder	Unintentional Murder	Attempted Murder	Total
Private	4	1	1	0	6
NGO	0	2	0	1	3
Total	4	3	1	1	9

Source: Database of Homicides in Chihuahua.

But the inequalities generated by the agenda-driven litigation strategy followed by this NGO, reflect the same paradox found in Guatemala and Chile. Private prosecution, used as a tool to fight impunity by NGOs, may close doors for some victims but opens important windows of opportunity to others. And in Chihuahua, where less than 10% of all homicide cases actually reach the courts, and where an even a smaller percentage actually gets any type of judicial resolution, any window of opportunity provided is quite a remarkable accomplishment for justice.

Furthermore, that CEDEHM litigated only three cases during three years may sound an irrelevant number, but in a country were litigation for human rights has not been a common strategy followed by citizens in general, and social movements in particular, the work of CEDEHM is actually unprecedented in the country. In Mexico using the criminal courts as a means to push for human rights has been quite rare, in part, I argue, because previously there were little procedural remedies for victims, when compared to countries like Guatemala and Chile that have had a longer history with private prosecution. Hence, the emergence of an NGO involved in litigation as a strategy to push women's rights is quite novel in Mexico. CEDEHM as the only NGO litigating criminal cases in Chihuahua (and to my knowledge, in the country) clearly takes complicated cases, those of aggravated murder and attempted aggravated murder because its area of work is women's rights. And although agenda-driven, they also engage in strategic litigation (CELS 2008), which aims to change policy or make an impact on public debate through litigation of relevant cases linked to women's rights.

The activists behind CEDEHM decided to engage in this type of "cause lawyering" (Sarat & Scheingold 1998, 2006) for women's rights in part driven by personal loss and deep discontent with the justice system. One of the founders, Norma Ledezma, lost her daughter in 2002. After her daughter Paloma disappeared in a working-class neighborhood in the outskirts of the city of Chihuahua, the unresponsiveness that Norma encountered from the MP was traumatic. Initially, when she reported her daughter missing, the police told her that her daughter must had run away with a boyfriend, and the MP did not order to investigate the disappearance. When Paloma's body was found a

couple of days later, the official investigation that followed was severely deficient. To date, her case remains unsolved. As a response to the negligence of the police and the MP, Ledezma soon became one of the main female activists in the women's movement in the city of Chihuahua. The year that Paloma was murdered, Norma Ledezma met Lucha Castro, a labor rights' activist. Together, they joined the women's movement that had already gathered momentum in Ciudad Juárez.

The framing of their cause in "gender" terms had important consequences in how they pursued their fight, by creating organizations that focused only on women victims of crime. In 2002, supported by international aid, Ledezma founded an NGO called Justice for Our Daughters (*Justicia para Nuestras Hijas*) (hereafter, *Justicia*), through which Castro and Ledezma help relatives of victims with the investigation of their cases and, perhaps more importantly, in raising rights awareness. A few years later, in 2005, Castro founded her own NGO, the Center for the Human Rights of Women (*Centro de Derechos Humanos de las Mujeres*, CEDEHM) and almost immediately she got involved in the judicial reform process, as noted earlier (see also Chapter 3). However, the judicial reform of 2007 provided a unique political opportunity not only for the women's movement to incorporate their agenda in the debate and in the reform itself, but also it opened up the space for considering a new strategy to advance their fight against impunity: litigation. From this experience not only they learned about the new rights that victims gained in the reform, but they also received training in litigation skills for oral proceedings. And as already noted, as soon as the new criminal system began to operate, CEDEHM began applying these newly learned skills in the case of Lolita, which was

their first case in court. And the impact that they have had as private prosecutors on judicial responsiveness highlight the unique resources that private prosecution as a procedural right gives to the fight for criminal accountability.

7.3.2. The effects of private prosecution in ordinary murder cases

Although very few homicide cases reach the courts in the city of Chihuahua, once they reach the courts, about 60% of these reach a plea bargain or trial, and the rest are dismissed or remain ongoing In Table 7.7 I show the outcome of the cases in my sample, disaggregated by type of crime. The table shows that the more serious crimes (homicide in the first and second degree, as well as aggravated homicides, even when only attempted) tend to end in plea bargains or trials. Most unintentional homicides end in a dismissal, which carries the same weight as an absolutory sentence, but it is ruled by a judge without a trial either because the legal time to prosecute has passed, there is no crime to punish, or the accused was not found criminally responsible in the matter.

Table 7.7.
The fate of homicide cases in the City of Chihuahua, by type of crime 2007-2009

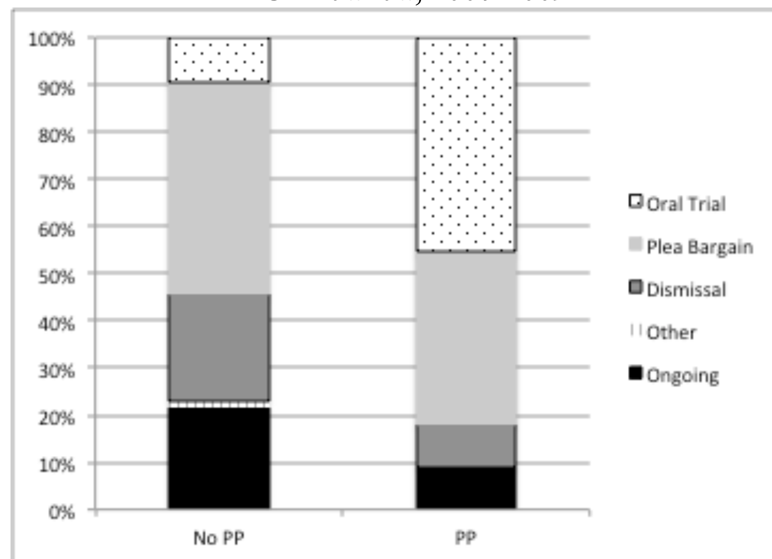
	Ongoing	Other	Dismissal	Plea bargain	Oral trial	Total
Homicide	24	0	5	30	5	64
First Degree Homicide	8	1	0	10	4	23
Aggravated homicide	1	0	1	5	5	12
Unintentional homicide	6	1	19	3	0	29
Attempted homicide	3	0	3	6	1	13
Attempted first degree	2	0	1	6	0	9
Attempted aggravated homicide	0	0	0	1	1	2
Total	44	2	29	61	16	152

Source: Database of Homicide Cases in Chihuahua. “Other” judicial endings include in this dataset were closing a case temporarily or permanently.

The reformed system in Chihuahua was designed with the purpose to increase the rights of the defendant and to make the system more efficient (even in terms of costs), which may in part explain why so very few cases reach the courts as the burden of proof that falls on the prosecution in the new accusatorial system is higher (M1-M 2010). This may also explain why so very few cases make it to oral trial, as the state wants to avoid the cost of a trial and very often the MP offers a plea bargain, where the state reaches an "agreement" with the accused for him to agree to the charges in exchange for a lesser sentence. There seems to be a tendency on behalf of the MP to offer plea bargains, which has already raised criticisms. Some have noted that the plea bargain may violate victims' rights, as the MP tends not to explain to the victims or their relatives that a lesser sentence should be expected, or that they will not see a "trial" (S1-M 2010) As one observer noted: "generally the public prosecutor decides what to do during the judicial process without consulting the victims, and many times, although those decisions may be legal, they are not what is most convenient for the victim or their relatives" (Volchanskaya 2009). Also, it is my impression that the use of plea bargains has been somewhat abused in detriment of the rights of the accused. Other countries, like Chile and Guatemala, put a limit on the type of crimes that can get a plea bargain, usually leaving out of the negotiating table those crimes with higher punishments. In Chihuahua, in contrast, there is no such limit and any defendant accused of any crime can be offered a plea. In 2010, for example, in a case of kidnapping by an organized crime member, a judge in the city of Chihuahua issued the first life sentence in the country during a plea bargain, which makes one wonder what type of bargain was made between the state and

accused in such a case. Therefore, although the plea bargain was introduced as judicial resolution that aims to provide efficiency, it may involve costs for both victims (wanting the "trial" or a tougher sentence), and the accused. And for whatever reason, there seems to be a tendency for homicide cases to end that way.

Graph 7.2.
Type of outcome disaggregated by type of prosecutor in Chihuahua, 2007-2009



Source: Database of Homicide Cases in Chihuahua. Cases of No PP=134, cases with PP=9

Since private prosecution was introduced as a procedural right in Chihuahua in 2007, and in the few instances that private prosecution has been used, this right has had important effects on judicial responsiveness or on how the judicial system responds to a claim. Similar to Chile and Guatemala, the impact of private prosecution has been mostly felt in improving the investigation of a case (S1-M 2010). Private prosecutors help the MP with the investigation by suggesting lines of investigation and offering key witnesses (M10-2010 M26-M 2010). Also, when they face an unresponsive MP, they complain to the judge, who can force the MP to continue with the investigation (M2-M 2010, M18-M

2010). This explains some of the trends found in my sample, described in Graph 7.2 above, where the distribution of the outcomes by type of prosecutor shows fewer cases ongoing or dismissed, and more cases going to trial where there was a private prosecutor (i.e., nine cases). In contrast, from the 134 cases where only the state prosecuted there was a high percentage of cases ending in a plea bargain, some in oral trial, and about 40% of their cases were either dismissed or remain ongoing.

Besides improving the investigation, perhaps the most important impact that private prosecution can have in Chihuahua is in avoiding a plea bargain. The tendency of the public prosecutor to end 1/3 of their caseload in a plea bargain, as noted before, may go against the interests of the victim. When a private prosecutor is present the interests of the victim can be voiced more forcefully and push a case to go to trial. To illustrate this point let me go back to the case of Lolita mentioned earlier, a case litigated by CEDEHM.

Lolita's case clearly shows the impact that a private prosecutor may have on how a case unfolds. After Lolita was severely injured by those two men in her business office, one man was arrested and accused of attempted homicide. The public prosecutor negotiated with the defense for a plea bargain. But Lolita wanted her aggressor to go to trial. On the day that the judge heard the decision of the public prosecutor to offer a plea bargain, Lucha Castro, acting as private prosecutor, voiced the victim's wishes:

> "We strongly reject a plea bargain which is only going to benefit the accused. We regret that the MP, the only one with the faculty according to the Criminal Procedure Code to request this procedure, has taken advantage of this right without taking into account the explicit rejection of the

victim and the private prosecution" (Volchanskaya 2009: 22).

At the same time that the private prosecution was being heard, outside the court CEDEHM had mobilized the local women's movement into a social protest, claiming for justice in Lolita's case, calling the media and using every possible means to be heard. At the end of that hearing, and against the public prosecutor's wishes, the judge ruled in favor of the victim and the case went to trial, where Lolita achieved a guilty verdict (Villalobos 2009).

But private prosecution seems to also play a role in improving the defense of a case during the trial. Table 7.8 shows the 76 cases that had a verdict through either a plea bargain or an trial disaggregated by type of prosecutor. In trial, only a total of 17 guilty verdicts and two acquittals were given in the 2007-2009 period. However, none of these acquittals were given when a private prosecutor was present. Of these 17 guilty verdicts, three were given in cases where lawyers of CEDEHM litigated, and two were given where the private prosecutor was a private lawyer. That means that almost a third of all convictions given in oral trials were for cases where private prosecutors were present.

Table 7.8.
Private Prosecution and Type of Verdict in Chihuahua, 2007-1009

	Non guilty	**Guilty**	**Total**
Private Prosecutor			
No	2	66	68
Yes	0	8	8
Total	2	74	77

Source: Database of Homicide Cases in Chihuahua.

Therefore, and also similar to what I found in Chile and Guatemala, the sample of Chihuahua suggests that there is a difference between the *types* of *private* prosecutors, that is, between NGO prosecutors and private lawyers litigating as private prosecutors. In table 7.9, below, we can see the last known outcome of the 9 cases where a private prosecutor has participated. The table reports a total of 10 cases because in one case (litigated by a private lawyer) there were two defendants that had different outcomes (one accepted a plea and the other one went to oral trial). The table shows that private lawyers litigating in homicide cases seem to be more willing to accept a plea bargain, and only cases with a private lawyers remain either ongoing or were dismissed. In contrast, the three cases that CEDEHM has litigated have ended in trial.

Table 7.9.
Cases with private prosecution, disaggregated by type of private prosecutor and type of outcome in the City of Chihuahua, 2007-2009

END	Private lawyer	NGO	Total
Ongoing	1	0	1
Dismissal	1	0	1
Plea Bargain	3	0	3
Oral Trial	2	3	5
Total	7	3	10

Source: Database of Homicide Cases in Chihuahua

Hence, similarly to Chile and Guatemala, NGOs seem to work "better" than privately hired lawyers. According to various interviewees, CEDEHM has been more active in pushing investigations when compared to private lawyers. According to some public prosecutors, of the six private lawyers that have litigated cases as private prosecutors, only one was said to have positively contributed to the investigation of the case the rest of the private lawyers took the more passive role of only informing their clients of the stage

of the investigation, rather than being actively engaged in the criminal investigation and legal framing of the case (M10-M 2010). Also, some judges and public prosecutors agree that poorly litigated private prosecutions are done mostly by older private lawyers (M14-M 2010, M18-M 2010, M20-M). Hence, the less pro-active role of private lawyers may be due in part to their inexperience in the new, oral, system. Some lawyers reported difficulties adjusting to the oral proceedings as they were trained to work in a system that only required written skills (L1-M 2010, L3-M 2010). In contrast, public prosecutors who were recruited when the new system got in place, tended to adjust fine to the new system, most of them being recent law school graduates with no previous experience. And CEDEHM lawyers, we must recall, received extensive training during the judicial reform process, which may explain their more pro-active role.

But private prosecutors from CEDEHM follow an agenda-driven litigation strategy. So, for instance, CEDEHM distinguishes from private lawyers in that throughout their litigation efforts they have always framed their arguments based on domestic and international laws regarding women´s rights.[76] For example, in the two other (aggravated) homicide cases that CEDEHM litigated, despite achieving a guilty verdict the private prosecutors were not satisfied with the verdict. Their complaint was that the punishment did not reflect the severity of the crime: i.e., the killing of a woman. As noted earlier, the killing of a woman is defined in the penal code of Chihuahua as

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[76] If this will be a good or a bad strategy only time will tell. But it is worth noting that, in contrast, Chilean lawyers in human rights cases have said: “If I want to make a point, I use international law, but if I want to win the case for my client, I stick to national law” (Francisco Cox, quoted in: Collins, C. 2010. *Post-transitional Justice: Human Rights Trials in Chile and El Salvador*. PA: Penn State Press., p. 132). I thank Lisa Hilbink for bringing this issue to my attention.

"aggravated murder, and yet CEDEHM lawyers appealed to the Supreme Court of Chihuahua convictions that had sent the defendants to 33 years in prison, arguing that in cases of "femicide" the punishment can be as high as 60 years. Their appeals were always framed using international and domestic law that prohibits violence against women, and in their legal arguments they always used the word "femicide" despite the fact that in the state´s criminal code it does not exist as such. They argue that their intention in framing their legal arguments based on both domestic and international law is to set important legal precedents that will have an impact in their fight against gender-violence (S3-M 2010, S4-M 2010).

Therefore, in contrast to private lawyers, CEDEHM also uses other strategies that go beyond litigation to push for their case, at the same time that they advocate their agenda of women´s rights. Like in Guatemala and Chile, CEDEHM lawyers have learned to use the media and their connections with domestic and international human rights networks to support their litigation efforts, as well as to shield themselves from the threats that they often receive from angry defendants. A journalist in Chihuahua claims that in every case that CEDEHM's lawyers have litigated as private prosecutors, their presence has always been felt (S1-M 2010). This is because CEDEHM is well aware that, for their fight against impunity to be successful, litigation has to be complemented by mediatization and social mobilization. As one of the lawyers of CEDEHM argued:

> "We have realized that legal resources by themselves do not work. They require social mobilization. They require demonstrations and protest. These things go together! [….] In that sense, here in Chihuahua you will find a very *sui generis* private prosecution, it is nothing ordinary! It is not only about laws! We organize, we mobilize people around

> the cases, and we also sustain a good communication with the authorities." (S2-M 2010)

As part of their advocacy commitment to women's rights, CEDEHM along with *Justicia* have had another important indirect effect to judicial responsiveness by improving rights' awareness and making "visible" the level of impunity. Since 2007, the relationship between *Justicia* and CEDEHM appears to follow a logic of division of labor. *Justicia* seems to have specialized in rights awareness through social mobilization and mediatization, whereas CEDEHM's role has focused on litigation, and on improving victims' rights consciousness through weekly workshops that focus on teaching victims their legal rights. But these workshops, aimed to raise rights' awareness, have also had the important consequence of making impunity "visible". During an interview, Castro summarized the impact that these NGOs have made in the following way:

> "The most important contribution of Justice for Our Daughters to the whole issue of femicides in Ciudad Juárez and Chihuahua, and even in the country, was that victims' relatives had been protesting and denouncing for years that the authorities were not doing their job, that they were not investigating, but they had no elements to prove that. […]. Hence, we began requesting a simple copy of the investigation files, and there was a law that forced [the MP] to give it to them. […] For example, in one case, a girl had been missing for two years and the authorities had claimed to the mother that there was a full investigation going on in her case. When we got the copy of her file, after two years of investigation, they submitted to us a file with only seven pages. It consisted of the missing report, a request for the police to investigate, and the testimony of the girl's sister. That was it. " (S2-M 2010)

Therefore, following a mixture of strategies that include litigation, social mobilization, and mediatization (similar to those pursued by NGOs in Chile and Guatemala), these

activists are raising rights' awareness, making visible that it is in the investigation where the MP fails the most, and are also opening a window for some victims to access justice. By mixing these strategies, therefore, these key players in the women's movement in Chihuahua are changing the relationship between social movements, citizens, and the law. As they discovered the law as a tool to fight impunity, these women are pushing social accountability and, arguably even strengthening the rule of law from below in Chihuahua.

As seen in previous chapters, the road of NGOs to a successful litigation is not always without obstacles or problems. But in contrast to the experiences of Chile and Guatemala, some of resistance or obstacles that private prosecutors have faced in Chihuahua, particularly those from CEDEHM, have been a consequence of the newness of the right to private prosecution in Mexico. In Mexico, prosecutors and judges were not used to having a third actor involved in the criminal proceedings. The victim, with a lawyer, participating in the proceedings is an entirely new experience in this country. Hence, it seems that many actors involved in the judicial system are still not very aware of the role and the rights of the private prosecutor. Lucha Castro commented in an interview that judges and public prosecutors "sometimes do not take us into account, but they will have to get used to it because we, the lawyers at CEDEHM, will seize the existence of this right to defend victims of gender violence." (Volchanskaya 2009: 21)

CEDEHM, for instance, has faced some obstacles to their litigation efforts from the bench, where many judges still operate under the premises that the MP has the absolute monopoly on the investigation and prosecution of a case, and are somewhat

reluctant, uncertain, and/or unaware of what to do with this new actor, the private prosecutor. For example, in the case of Lolita, the MP did not investigate the ex-boyfriend despite the fact that the victim had evidence that he had motive for hiring someone to kill her. Initially, CEDEHM was not successful in making the judge accept this evidence, including police reports for domestic violence issued before the attack that would have placed the ex-boyfriend as the intellectual author of the crime. CEDEHM's lawyers argued that the neglect of the MP to include this in their investigation was obviously harmful to the rights of the victim by obstructing the opportunity to press charges against her ex-boyfriend. The judge ruled against the private prosecution based on procedural arguments, claiming that such evidence was being brought to court outside the permitted timeframe by the CPC. The consequence of the judge's decision was that only the material author was charged and tried for the crime. But CEDEHM introduced a *casación* remedy (i.e. an appeal on points of law rather than of judgment) to the Appellate Court based on the argument that the victim's rights had been violated. The Appellate Court this time ruled in favor of the private prosecution's *casación* remedy and ordered a retrial. The defense then went to a federal tribunal that ruled that the rights of the victim had not been violated, and instead ordered a revision of the punishment and damages (CEDEHM 2010: 76). This case exemplifies the importance of the awareness of judges of the new right of private prosecution and of victims´ rights. At the federal level, there is no provision for private prosecution and such resolution suggests that some judges may be blinded by the idea of the MP as holding the monopoly of the investigation and prosecution.

The relationship with other actors in the criminal process, then, is not always smooth. Their aggressive tactics, using the media and calling for social mobilizations, have sometimes hurt their relationship with public prosecutors who may feel that their job is being constantly criticized (M26-M 2010). Despite some negative opinions regarding "how" these activists litigate their cases or criticisms about their agenda (women's rights), there was still a shared agreement that CEDEHM lawyers do in fact help in the investigation of the cases and in improving the overall prosecution of a case (M10-M 2010, M9-M 2010, M2-M 2010, M22-M 2010, M4-M 2010). And even though some public prosecutors may not like the media attention, it seems that increasing reputation costs to public prosecutors may matter on how the MP responds to a case. For instance, a public prosecutor commented that the quality of the MP´s investigation depends on various factors "beginning with the personality of the agent in charge, but also on the commitment the person dedicates to the job, and even the pressure that is exercised from outside, like in a high profile case that is being followed by the media or by NGOs" (M10-M 2010, M11-M 2010, M-12 2010).

CEDEHM lawyers also reported resistance towards their "gender-based" agenda as an obstacle for them to effectively prosecute cases. Some evidence of how adverse some actors are against their fight was reflected in interviews with public prosecutors and judges who described CEDEHM's lawyers basically as being a bunch of "scandalous feminists" that only love media attention (M2-M 2010, M4-M 2010, M14-M 2010, M15-M 2010, M16-M 2010). This was not a surprising finding given that Chihuahuan society tends to be conservative, with strong Catholic values, and a thinly veiled *machista*

culture.[77] But CEDEHM lawyers have argued that their work has been affected by how other actors in the judicial process (policemen, prosecutors, judges) "see" or "perceive" victims, women in particular, has affected how their cases evolve (CEDEHM 2010) or how the judicial system responds to a case. For example, Ledezma, the mother of Paloma, has criticized that mothers of victims in Chihuahua "confront on a daily basis an authority that blames the mother for the crime suffered by her daughter: if they are working mothers, they abandoned the child; if they are house wives, then they spoiled the child (S2-M 2010). This attitude taken by some state agents places blame on the family and frees the aggressor of any responsibility in the matter. This plight resonates with previous research that has found that a "macho," conservative, and misogynous culture that permeates the judicial system may severely hinder women victims' access to justice (Svendsen 2007, Diez 2004, CEDEHM 2010).

But, like in Guatemala and Chile, the relationship between public and private prosecutors, and other judicial actors, seems to depend in great part on the individuals involved. In Lolita's case, for example, Castro requested the *Fiscalía* to change the lawyers in charge of the public prosecution because of the failure of the MP to introduce the evidence that would have allowed to press charges against the intellectual author of Lolita's attempted murder. This change of individuals greatly improved the relationship between private and public prosecutors, and Castro reported that "the new public

[77] From the three countries in which I did fieldwork, Chihuahua was the only place where interviewees of various positions and ranks showed concern for my reputation and wondered how was I allowed by my family and husband to travel and conduct research alone. Their concerns were easily assuaged when I replied that I was staying with relatives. Also, there were many negative remarks about the improvement of women´s rights and women´s rights protections in the state. One such remark even came from a magistrate of the Supreme Court of the state.

prosecutors were very responsible, sensitive, and respectful regarding the role of the private prosecution; we made a great team, worked together, coordinated, and the result was a success." (Volchanskaya 2009: 22) CEDEHM seems to also be aware that the newness of the right may play a role in creating tensions either with judges or public prosecutors. After Lolita's case, CEDEHM seems to have started developing a culture of collaboration with the MP for the cases they litigate, working together with the public prosecutors in an effort to make the prosecution more successful (M10-M 2010, S4-M 2010). Also, they created a roundtable of discussion with the MP and the judiciary to help raise awareness on issues of access to justice for women (CEDEHM 2010). Therefore, despite some instances of judges or public prosecutors dismissing or rejecting the presence of private prosecutors, there seems to be an emerging willingness to work with this new subject in the criminal system in Chihuahua.

Like in the other two countries, despite the potential that private prosecution may bring to judicial responsiveness and access to justice, this right comes with limitations, which are exacerbated in the case of Chihuahua given the n=1 size of the support structure, when compared to countries that have developed a state-funded (Chile) and/or societal-based support structures (Guatemala). Funded only by an industry of international aid that wants to promote human rights, victims' rights, and women's rights, CEDEHM has learned that in order to keep the funding, they have to prove to be successful in their job. This need for funding and the need to make the best use of their limited resources, has pushed the NGO to develop strategies in their litigation work. Although they do provide legal advice for victims of intra-family violence and sexual

violence, they strategically choose the cases where they litigate as private prosecutors. In cases of femicide, Castro argues, they have accepted to litigate every case that has come to their door. At CEDEHM, however, their interest in success is not only driven by financial reasons, as they know that success will bring them leverage as well. Castro argues that because they are not a law firm they "have moral standing and credibility [and it] is different to go to a judge as a lawyer, than to go as an organization."[78]

CONCLUSIONS

The case of Mexico offers an interesting opportunity to trace the emergence and mobilization of a new right. In human rights cases, the lower judicial responsiveness observed in Mexico may be explained by the absence of private prosecution at the federal level. Without a control mechanism on the state's duty to investigate and prosecute crime, victims of human rights abuses committed by the military or judicial police are left without judicial protection. In contrast, the case of Chihuahua shows that in a context of high impunity and weak rule of law, where victims' relatives as well as every actor in the judicial system face real threats from organized crime, private prosecution can have an impact on judicial responsiveness. In Chihuahua, political opportunity emerged with judicial reform that opened the door for activists to consider litigation as a new strategy to push for their agenda on women´s rights. Judicial reform coincided with the creation of a support structure that was based both on domestic and international material and ideational resources, and the convergence of these factors opened a space for the local

[78] Interview in Chihuahua, Mexico. January 2010.

women’s movement to frame their cause in legal terms, to bring their cause to the courts, to resort to law as a tool to fight impunity, and to push for accountability on cases of gender-based violence.

Although the use of private prosecution is still small and more successfully used by an NGO than by private lawyers, the recent introduction of this right has produced a power struggle between the MP and the private prosecution where the role of the judge as mediator varies depending on the judge´s awareness of victims or even on their perception of the scope of what these rights really entail. In other words, the introduction of a new control mechanism in the form of private prosecution has not been an easy pill to swallow by some within the MP´s office and the judicial bench. But despite the tensions that the exercise of this new right has created, the experience of CEDEHM suggests that change is possible in judicial responsiveness and how actors in the judicial system respond to private prosecutors.

Some other interesting issues must be highlighted. First, rights awareness does shift over time and the relationship between law and society is dynamic. Previous experiences or perceptions regarding the legal system can be modified when bearers of rights and rights adjudicators become aware of these rights, and the efforts of the women’s movement in the city of Chihuahua show that they recognize that awareness can empower women. Second, the importance of procedural law cannot be underestimated. The right to private prosecution does offer the legal incentives for claimants to engage in litigation, and future comparative studies on the consequences of judicial reform should take this procedural right into consideration. And, finally, the fact

that legal aid for victims of crime depends on non-state actors leads to a privatization of the supply of legal aid. In the case of Chihuahua, this inevitably has produced some inequality in terms of access to justice given that the support structure available for victims is quite small and focused mostly on gender-related crimes, this has left many victims without any real opportunity to access justice, especially in homicide cases where males constitute the largest percentage of those victims. Whereas women victims can hope to improve access to justice with the existence of a support structure that focuses on gender-based violence, in contrast, the relatives of male victims of homicide are left without access to legal aid from NGOs and must resort to the family's economic resources. In other words, the development of a support structure framed with certain norms and discourses may open space for some causes, but close it for others. In a way, the support structure that allows access to the right of private prosecution becomes another gatekeeper to access justice.

CONCLUSIONS:

PRIVATE PROSECUTION, RULE OF LAW, AND ACCESS TO JUSTICE

Private prosecution is a fascinating right through which we can learn about the inter-relationship between access to justice and ideational, institutional, and structural factors. Private prosecution is by no means a guarantee for retribution, but it serves an important role as a control mechanism on the state's duty to prosecute and investigate crime. It is a right that matters, but with limited powers, as its subsidiary role to that of the state is always evident.

In the dissertation I have argued that the introduction and/or expansion of private prosecution in Latin America reflected a profound transformation that took place at the international and ideational level regarding the role of the victim as a rights' bearer. Judicial reforms introduced/expanded the right to private prosecution in a context where victims' rights where already firmly rooted in international law. Domestic demands for reform found in the international arena a quite defined "solution" for reform, where the right to private prosecution was an integral part of the package of criminal procedure reform. The new understanding of the victim as rights' bearer had an important role in explaining why countries that already had the right to private prosecution only made this right stronger (like Chile and Guatemala), whereas countries that had no history of the right found it necessary to include it to keep up with international standards regarding victims' rights. I also argued that the history of the right in a given country plays an

important role in the future use of the right, as well as on the development of a support structure that is necessary for victims to access the right to private prosecution.

I also argued that across countries and across types of crime the use of private prosecution depends on the costs associated to entering the justice system as well as on the ideas about law and justice hold both by victims and other key societal actors. An interesting finding of this research is that these costs are not only a function of resources (money, access to a lawyer, information, and rights' awareness), but also a function of the security the individual victim faces when fighting for justice. Therefore, the political context in which the struggles for justice take place is important for both, placing claims through the courts, as well as for the eventual legal success of the claims. How citizens perceive their context, then, is also important. Access to the right to private prosecution is also dependent on the beliefs that key societal actors have regarding rights and the purpose of courts. Where and when committed individuals believe that grievances should be channeled through the courts, NGOs emerge engaging in a sorts of cause lawyering providing free legal aid for victims or their relatives. Supported by international and ideational resources focused on victims' rights, these NGOs provide the necessary support structure for victims to overcome the costs of litigation and use the right of private prosecution. When there are NGOs that allow victims to reduce the costs (economic-wise as well as security-wise), we see a higher use of private prosecution, in both ordinary and human rights cases.

Access to the right to private prosecution, however, does not need to be a private affair, as paradoxically the case of Chile showed. Ideas about law and justice, and the role

of private prosecution as a right in the legal system may be institutionalized by the state. When the right to private prosecution is as consolidated as it is in Chile, the support structure allowing victims to access the right to private prosecution is expanded by the public provision of legal aid for victims through different state agencies.

Across countries and across types of crimes, private prosecution matters most at the investigation phase. By improving the investigation, private prosecution also helps cases reach the courts. In contexts where impunity is low (like Chile) private prosecution may not determine how a case ends once it reaches the courts, but having a private prosecutor does help the initial investigation and helps cases actually reach the courts. In contrast, in cases of high impunity where the state neglects to fulfill his obligation to investigate and prosecute crime either for commission or omission, lack of access to private prosecution may entail a bigger loss for victims in terms of judicial responsiveness. The lack of private prosecution for human rights cases in Mexico suggests that the absence of private prosecution may be a key factor explaining the low judicial response to human rights cases. The cases of Guatemala, Chile, and Mexico further show that when impunity is either the result of a state's choice or weak/inefficient institutions, private prosecution can improve access to justice by making evident the state's failure, pushing the investigation, and giving victims a chance to access the justice system by helping the cases reach the courts.

In ordinary and human rights cases I found that the impact of private prosecution in terms of judicial responsiveness depends a lot on how the state does its job in the first place. To understand when and how private prosecution matters we must first understand

the different contexts in which these private prosecutors are acting. In contexts of vulnerability or insecurity, private prosecution litigated by NGOs not only improves access to courts, by serving as the means for victims to access the courts, but it also improves judicial responsiveness as it may help "absorb" some of the risks and costs involved in prosecution. In other words, private prosecution does not always get convictions, but does avoid cases being forgotten by sending the cases to the archives or dismissing them due to inefficient investigations.

My findings further suggest that private prosecution may in fact diminish the inequalities inherent to the legal system by providing marginalized victims a means to access the justice system. Even in contexts of impunity, when you have a support structure in place, through the resources and protection provided by NGOs victims or their relatives may press claims and access the courts. Furthermore, as was shown in human rights cases, these NGOs may even press claims knowing that legal success may not ensue, but use the courts as a means to avoid state oblivion of past abuses. The key role that NGOs play in victims' access to justice highlights the importance of principled beliefs in pushing for justice through the courts and not through other means, and of the role of civil society in building the rule of law from below.

There are important lessons provided by this research. First is that rights matter, but that legal mobilization of rights also requires resources and an appropriate support structure. Also, the ways in which rights matter is in part determined by the ideas that citizens have about law and courts. Rights' consciousness is pivotal for citizens to recognize that they have a right that they can use. Beyond rights' awareness is the issue

of a principled belief regarding what law and courts are for, which explains why even in not very favorable contexts victims bet on the judicial system to channel their grievances. This highlights the importance of recognizing the possibility of building or strengthening of rule of law from below. When citizens use their rights, they do so because they believe that the courts are the appropriate means to solve grievances. The story of the use and impact of private prosecution is indeed a story about rights emergence, rights consolidation, and rights mobilization. It is a story not only about incentives but also about principled behavior

Second, context matters. The politics of criminal prosecution always reflect the political context and the “world” or “historic” time as well as the institutional capacities or resources that are available to the state, which serve as the scenario in which victims enter the judicial system. That is, when citizens become victims they may face an unresponsive state by omission or by commission, determined by the choice and/or context and/or by institutional design.

And third, timing matters too. Time is not only important to understand the actual prosecutorial behavior that the state is following, but it is also important to understand that a procedural right such as private prosecution takes time to consolidate as a right in the minds of citizens. Also time is important to understand that change in judicial responsiveness is possible, and that unresponsive states at some point may eventually become responsive at another.

In this research, the focus on how a particular institution works (i.e., private prosecution) and with what effects on judicial responsiveness (i.e., the judicial response

to a murder case) has provided a window through which we can learn about access to justice and rule of law in developing democracies. How a state conducts the investigation and prosecution of crime reflects two ideal elements of a judicial system in a constitutional democracy: capacity and moderation. On the one side, the efficiency with which a state performs these duties provides insights into how capable a state is of maintaining order and security. It can serve as a proxy of state capacity (Geddes 1994). On the other hand, when the state abides by due process rules, the investigation and prosecution of homicides can also signal that rule of law is respected, and can also serve as a proxy of state moderation (Schedler, Diamond and Plattner 1999). This research shows that state capacity is determined by political and contextual factors. Also, institutional design proves to be quite important. And when the state's capacity to uphold its duty to prosecute crime is weak, the role of private prosecution serves to at least help keep files open and avoid state oblivion on its responsibilities towards victims.

There are, however, a few important caveats regarding private prosecution that we need to keep in mind. Public prosecutors have been traditionally been understood as gatekeepers to the justice system. However, the empirical chapters have shown that private prosecution, although it may offer a window of opportunity for some marginalized victims, it may actually close doors for others. This is not only the case of private lawyers, who are more difficult to access given the costs it involves, but also the case of NGOs litigating cases for victims. NGOs not only have limited resources, which greatly limits the amount of cases they can support. This is more obvious in smaller and newer NGOs, like the case of Chihuahua, than in older, bigger, and better funded NGOs,

like many in Guatemala. But also, NGOs have a limited agenda. They follow strategic litigation, choosing cases that are usually most relevant for their agenda and that may have a higher policy impact. Therefore, in a way they turn into gatekeepers by keeping one "kind" of victim "in" and other "out". This is most evident for male victims of common crime. Many NGOs follow a "women's rights" agenda that clearly leave male victims out despite the fact that in every country most of the homicide victims are male.

Also, some critics have suggested that there may be a risk of making the state "lazy" with private prosecution. In Chile, while the public prosecutors may perform well in terms of investigating and prosecution a crime, the "service" provided to victims has been deemed as poor, and public prosecutors rely on the private prosecutor to provide information and attention to victims relying on them for this "service." From this research, however, it is not evident that the public prosecutor is made "lazy" in terms of investigation and prosecution, as when private prosecution is mostly felt is when the state is actually unresponsive. Nonetheless, this would need further research to appropriately evaluate the impact of private prosecution on making the state slack in its duty to investigate and prosecute.

Another pending issue to evaluate is the role of judges. It is quite evident, from qualitative data, that judges do play a key role in making private prosecution an important right. Judges accept or reject every petition the private prosecutor makes, therefore, the impact of private prosecution may also be determined by how judges respond to their petitions.

Finally, another crucial issue left for future research in judicial politics lies on the importance of institutional design for judicial responsiveness. This research clearly shows the importance that the Ministerio Publico (MP) or the District Attorney's office has. Until now research has focused a lot of efforts on studying the work of the courts and judges (Helmke and Rios-Figueroa 2011, Couso 2009, Hilbink 2007, Ginsburg 2003, 2008), but there is a scarcity of studies that focus on how the politics of the MP affect judicial outcomes (Rios-Figueroa 2006, Brinks 2008). Future research should therefore take into consideration the impact of institutional design for both ordinary and human rights cases.

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M2-C 2010. Interview (judge). Santiago October 1, 2010.
M3-C. 2010. Interview (judge). Santiago. September 13, 2010.
M4-C 2010. Interview (prosecutor). Santiago. September 14, 2010
M5-C. 2010. Interview (prosecutor). Santiago, September 15, 2010.
M6-C 2010. Interview (judge). Santiago, September 27, 2010.
M7-C. 2010. Interview. Interview (public defense). Santiago. September 28, 2010.
M8-C. 2010. Implementation (legal aid). Santiago, September 29, 2010.
M9-C & M10-C. 2010. Interview (executive). In Chile. Santiago. September 9, 2010.
S1-C. 2009. Interview (HR lawyer). Santiago, July 24, 2009.
S2-C 2010. Interview (civil society). Santiago, September 10, 2010.

S3-C 2010. Interview (civil society). Santiago, September 7, 2010.
S4-C 2010. Interview (politician). Santiago, October 5, 2010.

Interviews in Guatemala

A3-G 2009. Interview (academic). Guatemala, August 11, 2009.
A4-G 2009. Interview (academic/lawyer). Guatemala, August 11 and 21, 2009
A5-G. 2009. Interview (academic/researcher). Guatemala. August 12 and November 13, 2009.
D1-G 2009. Interview (designer/academic). Guatemala. August 12 and 20, 2009; and November 13, 2009.
D2-G 2009. Interview (designer). Guatemala. August 20, 2009.
D3-G. 2009. Interview (designer/lawyer CICIG). Guatemala, August 10, 2009.
I2-G. 2009, 2010. Interview (Comision Internacional Juristas). Guatemala. August 8, 2009; March 2, 2010.
I3-G 2009. Interview (lawyer CICIG). Guatemala, August 13, 2009.
L1-G. 2009. Interview (lawyer). Guatemala. November 10, 2009.
M1-G. 2009. Interview (civil society/Copredeh). Guatemala. August 8, 2009.
M2-G 2009. Interview (prosecutor). Guatemala, August 11, 2009.
M3-G 2009. Interview (executive). Guatemala, August 13, 2009.
M4-G 2009. Interview (judge). Guatemala, August 14, 2009.
M5-G 2009. Interview (executive). Guatemala. August 19, 2009.
M6-G and M7-G 2009. Interview (MP). Guatemala, August 19, 2009.
M8-G 2009. Interview (MP). Guatemala. November 18, 2009.
M9-G 2009 and 2010. Interview (judge). Guatemala. November 20, 2009, and April 2, 2010.
M10-G. 2009. Interview (Judge). Guatemala. November 23, 2009.
S1-G. 2009. Interview (CALDH). Guatemala. August 18, 2009.
S2-G 2009b. Interview (Fundacion Mack). Guatemala. August 19, 2009.
S2-G. 2009a. Interview (Fundacion Mack). Guatemala. August 19, 2009.
S3-G. 2009. Interview (Sobrevivientes). Guatemala. August 12, 2009.
S5-G. 2009. Interview (ODAH). In Guatemala. November 10, 2009.
S7-G. 2009. Interview (Sobrevivientes). Guatemala. November 11, 2009.
S8-G. 2012. Interview (CALDH/ODHA). Oxford, England. June 1, 2012.

Interviews in Mexico

A6-M 2009. Interview (academic). Mexico City. August 31, 2009.
D1-M. 2010. Interview (designer). Chihuahua, Mexico. January 22, 2010.
D2-M. 2010. Interview (designer). Chihuahua, Mexico. January 27, 2010.
L1-M 2010. Interview (lawyer). Chihuahua, Mexico. January 18, 2010.
L3-M 2010. Interview (lawyer). Chihuahua, Mexico. November 26, 2010.
M1-M. 2010. Interview (prosecutor). Chihuahua, Mexico. January 22, 2010.
M2-M 2010. Interview (judiciary). Chihuahua,Mexico January 18, 2010.
M4-M 2010. Interview (judge). Chihuahua, Mexico. January 21, 2010.
M5-M 2010. Interview (MP). Chihuahua, Mexico. January 12, 2010.

M6-M 2010. Interview (judge). Chihuahua, Mexico. January 22, 2010.
M7-M 2010. Interview (judge). Chihuahua, Mexico, January 22, 2010.
M8-M 2010. Interview (MP). Chihuahua, Mexico. January 29, 2010.
M9-M 2010. Interview (judge). Chihuahua, Mexico. November 23, 2010.
M10-M. 2010. Interview (prosecutor). Chihuahua, Mexico. November 25, 2010.
M11-M. 2010. Interview (prosecutor). Chihuahua, Mexico. November 25, 2010.
M12-M. 2010. Interview (MP). Chihuahua, Mexico. November 26, 2010.
M14-M. 2010. Interview (prosecutor). Chihuahua, Mexico. November 30, 2010.
M16-M 2010. Interview (prosecutor). Chihuahua, Mexico. November 30, 2010.
M17-M 2010. Interview (prosecutor). Chihuahua, Mexico. November 30, 2010.
M18-M 2010. Interview (MP). Chihuahua, Mexico. December 1, 2010.
M19-M 2010. Interview (MP). Chihuahua, Mexico. December 1, 2010.
M20-M. 2010. Interview (judge). Chihuahua, Mexico. December 3, 2010.
M21-M. 2010. Interview (judge). Chihuahua. Mexico, December 3, 2010.
M22-M. 2010. Interview (judge). Chihuahua, Mexico. December 4, 2010.
M23-M 2010. Interview (judge). Chihuahua, Mexico. December 7, 2010.
M24-M 2010. Interview (judge). Chihuahua, Mexico. December 10, 2010.
M25-M 2010. Interview (judge). Chihuahua, Mexico. December 10, 2010.
S1-M. 2010. Interview: Civil Society. Chihuahua. Chihuahua. January 20, 2010.
S2-M. 2010. Interview: Civil Society. Chihuahua, Mexico. January 23, 2010.
S3-M. 2010. Interview: Civil Society. Chihuahua, Mexico. January 23, 2010.
S4-M. 2010. Interview: Civil Society. Chihuahua, Mexico. January 24, 2010.
S5-M. 2010. Interview (lawyer). Chihuahua, Mexico. December 8, 2010.

ANNEX 1

Sample Methodology of Homicide Cases in Chile

In order to assess whom, when, and with what effects uses private prosecution in those instances of violent crime, I constructed a Database Homicide Cases. A review of all cases of homicide in the country was not possible given the lack of time and resources required to undertake such a task. Therefore, the database consists of a sample of cases in the Metropolitan Region, which includes the capital of the country, Santiago, and which concentrates, in average, almost 50% of all homicides reported to the police in the country (see Table A). The database covers the years 2006-2009, because the new judicial system based on the CPC of 2000 began functioning in Santiago in June of 2005.

-Table A-

The Population Size in Chile

	2006	**2007**	**2008**	**2009**	
All crimes (Chile)	409,093	442,789	455,070	489,197	
All crimes in Metropolitan Region (MR)	180,671	202,068	201,565	206,086	
HOMICIDE					
Homicide as % of total crime	0.08	0.07	0.06	0.06	
Total homicide	312	318	271	285	
Total homicide in MR	***152***	***176***	***130***	***145***	**Population size (N) = 603**
MR as % of all homicide	55.35	47.97	50.88	48.72	

Data reflects crime reported to the police (i.e, Carabineros and Policía de Investigaciones de Chile).
Source: División de Seguridad Pública, Ministerio del Interior

To calculate the sample size (Bethlehem 2009), I defined the population under study as all victims of homicide in the Metropolitan Region between 2006-2009. That is, my population of study consists of 603 victims of homicide (see Table A). Given that there is no published official data on how many private prosecutions exist in cases of homicide, I estimated the proportion of "observed" private prosecutors in the population from information given by judges, lawyers, and academics during my interviews, who all shared the perception that private prosecution occurred in 10% of all cases.

Given that a representative sample consisted of 39% of the population of homicide cases (see Table B), for practical reasons these numbers were rounded. Therefore, 40% of all homicide cases in the Metropolitan Region were sampled for each year as well (see Table C). In the Statistics Department of the Chilean Judiciary

(*Departamento de Informática de la Corporación Administrativa del Poder Judicial*), I had access to the courts' archives of all judicialized cases. The case files were selected following a random sampling method (see Table C). For each year, I calculated the appropriate percentage of cases that had to be sampled (10% in the case of homicides). This yearly sample number was divided by 12 months, which provided the number of case files that had to be sampled for each month of the year. For each month, then, I selected the first cases that entered the courts. Using this random sampling selection strategy for each year, I can assume with a 95% confidence level that the sample reflects the population, and with a sampling error of ±3%. In total, therefore, the Database of Homicide Cases in Chile samples 240 cases that reached the courts in the Metropolitan Region.

-Table B-
The Sample Size in Santiago

	HOMICIDE
Population (N)	603
Margin of error (M)	3
Estimated variance in the population (P)	10
Confidence interval (z)	1.96
Sample size (n)	234.90
n/N*100	38.9551 *(40%)*

-Table C-
Random sampling method in Santiago:
number of cases sampled, per year, per crime type

HOMICIDE					
Total homicide in MR	*152*	*176*	*130*	*145*	
10%	61	70	52	58	241
Cases selected per month **(in parentheses)**	5.07 (**5**)	5.87 (**6**)	4.33 (**4**)	4.83 (**5**)	
Total number of cases sampled for each year	**60**	**72**	**48**	**60**	**240**

ANNEX 2

Database of Homicide Cases in Chihuahua, Mexico

The Database of Homicide cases in Chihuahua covers the whole universe of homicide cases reported to have entered the courts of the judicial district of Morelos, which covers the City of Chihuahua for the 2007-2009 period.[79] Although it was important to gather data for previous years to assess responsiveness before and after the reform, access to case files was severely restricted by an environment of distrust to outside observers. Actually, only in Chihuahua I was not given direct access to the case files. The data was gathered and provided by the judiciary itself, after I submitted an information request form. Therefore, the wealth of information that I could obtain in Chihuahua was considerably lower when compared to the data I could obtain in Chile and Guatemala where I was able to read the complete history of a case, including any victims' request as well as any judicial resolution or the final verdict. Nonetheless, I do believe that the data gathered in Chihuahua makes an important contribution into understanding how and when a new right works in a newly reformed judicial system. This dataset covers all 157 homicide cases that entered the courts during the 2007-2009 period in the Morelos Judicial District, which covers the capital City of Chihuahua.

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[79] Information for the City of Chihuahua actually covers the whole judicial district of Morelos, which has jurisdiction over the capital city of Chihuahua.

ANNEX 3

Sample Methodology of Homicide Cases in Guatemala

Making this database proved to be the most difficult data gathering process during all my fieldwork trips. A review of all cases of homicide any country is not possible, but in Guatemala even a review of a sample is an incredibly difficult task that reflects so much of the judiciary's problems. Data gathering was problematic not only because, unlike Chihuahua in Mexico or Santiago in Chile, the judiciary has not yet fully transitioned to an electronic database that collects the compete history of each criminal case. But, as I explain below, because of a lack of organization which leaves the institution more vulnerable for corruption and negligence.

-Table A-
The Population Size in Guatemala

	2003	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	
All violent crime (crimes against life and bodily security) in Guatemala	9096	10615	11732	14214	14508	15956	17587	
All violent crime in Guatemala City	1338	3015	3904	4190	4651	4791	4838	
HOMICIDE								
Homicide as % of all violent crime in Guatemala City	97.16	99.17	98.16	89.76	77.96	79.44	80.20	
Total homicide in Guatemala City	**1300**	**2990**	**3832**	**3761**	**3626**	**3806**	**3880**	**Population Size (n)** **23,195**

Source: Ministerio Público de Guatemala. Data on homicide includes murder, manslaughter, femicide, parricide, and extrajudicial executions. Data for Guatemala City includes the whole Department of Guatemala.

I began my design of my database, by calculating the sample size (Bethlehem 2009). For this task I defined the population under study as all reported instances of homicide in the Departamento de Guatemala, which includes the capital city of Guatemala. That is, my population of study consists of 23,195 cases of homicide (see Table A). Given that there is no published official data on how many private prosecutions exist in cases of homicide, I estimated the proportion of "observed" private prosecutors from interview information provided by judges, lawyers, and academics during my

interviews, who all shared the perception that private prosecution occurred in 10% of all cases.

-Table B-
The Sample Size in Guatemala City

	Homicide crimes
Population (N)	23,195
Margin of error (M)	5
Estimated variance in the population (P)	10
Confidence interval (z)	1.96
Sample size (n)	137.48
n/N*100	0.59 *(1%)*

Access to bigger sample (with a lower margin of error) proved to be impossible given my resources and time constraints. Nonetheless, and despite the fact that I had the Supreme Court's authorization and the logistic support of many workers at the Judiciary to conduct my research, gathering information on this sample proved to be a challenge. In the Statistics Department of the Guatemalan Judiciary (*Centro Nacional de Análisis y Documentación Judicial, Organismo Judicial*), they did not have complete case files or histories of each criminal case, as they did in Mexico or Chile. Electronic versions of a complete case file are non-existent. Furthermore, a complete case file is usually not easy to find unless the case has concluded and is sent to the "closed case archive" (Archivo General). The main problem of gathering a complete history of a case, is that the file is divided as it goes through the system, and only when the case is concluded (in theory though not really in practice) it is then reassembled and goes to the Archivo General.

To make matters worse, even by looking at a file it is not clear where the cases move next. To get better information for each case, I needed to ask directly at each Juzgado de Instancia, i.e., the court in charge of the preliminary stage (there are 14 of these Juzgados in Guatemala City). From these courts, the cases can then go to 14 different Tribunales de Sentencia (oral tribunals). Or, the cases can go to two different Appeals Courts, or even to the Supreme Court. In total, for anyone to get a complete history of random sample of cases she would have to go to each one of these 31 courts to trace the histories of the case files.

Furthermore, misplacing files is a common thing in Guatemala City. Files are either misplaced by mistake, by neglect, or also in purpose, to delay a process. Obviously, the office that controls these case files, "Gestion Penal", is highly susceptible to corruption. They are highly aware of this problem, as it is evidenced in the office of the coordinator of this section, where they have placed a monitor that projects the image

of 4 different video cameras that are placed around the floor, in an attempt to decrease corruption.

Therefore, I decided to draw my sample only on all the homicide cases that entered in two randomly chosen Juzgados: the *Juzgado Undecimo de Primera Instancia Penal* and the *Juzgado Tercero de Primera Instancia Penal*. Although I required a sample size of only 137 cases, I focused my data gathering efforts on all 210 homicide cases that entered these two Juzgados for the period 2003-2009.[80] Using this random sampling selection strategy, if I had found all 210 case files, I could have assumed with a 95% confidence level that the sample reflects the population, and with a sampling error of ±5%.

However, at the end the data gathered in the Database covers the complete history of 120 murder cases. The 90 cases that were "lost" in the data gathering process were mostly case files that had been referred to other judicial districts, but there were also case files that were "missing" or that were mislabeled as "homicide" or "crimes against life" when in fact they were related to other crimes. Therefore, I only found data on 120 files, leaving me with an approximate sampling error of ±6%.

[80] According to data provided by the Centro de Informática y Telecomunicaciones, Organismo Judicial, Guatemala.

ANNEX 4

Sample Methodology of Human Rights Prosecutions in Latin America

The Transitional Justice Database (TJB) is an original database, unique in the amount and type of information that it provides. Based on the Human Rights State Department Reports, we coded every prosecution that was mentioned in the reports for each country in Latin America for the period 1980-2009. We supplemented the information for each prosecution with other sources (LexisNexis and domestic newspapers), to get more complete and reliable information on the criminal proceedings and the outcome of the cases. The TJD has information on the membership of the defendant, his rank, the charges made, and if the case ended or not, and how. It includes information on the entire judicial process, which includes indictments, extraditions, preventive detention, and the outcome of the trials themselves, even when these do not necessarily result in a conviction. We focus exclusively on criminal cases and do not include any civil cases in our database. We also gathered information on the participation of other plaintiffs on the trial (NGOs or victims' relatives). Given that the sources do not always distinguish between civil actor or private prosecution, the dataset is unable to distinguish between these two types of rights of victim participation in criminal proceedings. In this research victim participation is taken as a proxy of private prosecution.

We coded 1,312 prosecutorial activities in Latin America. We encountered that finding information on the type of prosecutor that has participated in these criminal prosecutorial efforts is a daunting task as this information is not always reported on the sources from which we are coding (State Department reports or newspapers). Nonetheless, we do have information on the presence or absence of plaintiffs (civil actor and/or private prosecutors) for about one third of all prosecutorial activities in Latin America (i.e., for 441 cases), which is a considerable sample to explore the role of private prosecution in human rights criminal accountability efforts.

Annex 5

Countries Granting Participation Rights to Victims by Legal System

CIVIL LAW	COMMON LAW
Algeria	Bangladesh
Argentina	Canada
Armenia	Dominica
Austria	England/Wales
Belgium	Guyana
Benin	Jamaica
Bolivia	Malta
Bosnia and Herzegovina	Nepal
Brazil	Pakistan
Bulgaria	Papua New Guinea
Cambodia	Samoa
Chile	Scotland
China	Seychelles
Colombia	Solomon Islands
Congo, Republic of	South Africa
Costa Rica	St. Vincent and the Grenadines
Cyprus	Sri Lanka
Czech Republic	Trinidad and Tobago
Denmark	Uganda
Dominican Republic	Zambia
East Timor	Zimbabwe
Ecuador	
El Salvador	
Finland	
France	
Germany	
Greece	
Guatemala	
Haiti	
Honduras	
Hungary	
Iceland	
Italy	
Japan	
Korea	
Liechtenstein	

Luxemboug	
Mexico (only some states)	
Montenegro	
Morocco	
Mozambique	
Namibia	
Netherlands	
Nicaragua	
Norway	
Panama	
Paraguay	
Peru	
Philippines	
Poland	
Portugal	
Romania	
Russia	
Senegal	
Slovakia	
Slovenia	
Spain	
Surinam	
Swaziland	
Sweden	
Switzerland	
Syria	
Tajikistan	
Taiwan	
Thailand	
Tunisia	
Turkey	
Uzbekistan	
Venezuela	
Yugoslavia	

Source: Veronica Michel and Kathryn Sikkink (draft), "Public and Private Prosecutions in Human Rights Trials"

Annex 6
Rights of the Victim in the Criminal Procedure Codes of Latin America

	PROTECTION RIGHTS		REPARATION RIGHTS	PARTICIPATION RIGHTS (regarding private prosecution)	
Country (EIF)	**Right to be heard**	**Right to protection**	**Civil action**	**Autonomous PP**	**Auxiliary PP**
Argentina (BA, 1997)	X	X	X	X	
Bolivia (2001)	X		X	X	
Brazil (federal CPC 1941)	X	X	X		X
Chile (2000)		X	X	X	
Colombia (2000)	X		X		
Costa Rica (1998)	X		X	X (only for some types of crime)	X
Ecuador (2001)	X	X	Only through civil claim after conviction		X
El Salvador (1997)	X	X	X		X
Guatemala (1994)	X		X		X
Honduras (2002)	X		X		X
Mexico (Chihuahua, 2007)	X	X	Duty of the public prosecutor		X
Nicaragua (2002)	X	X	X	X	
Panama (2011)		X	X	X	
Paraguay (1999)	X	X	X	X	
Peru (2004)	X	X	X		
Uruguay (1981)			X		
Venezuela (1999)	X	X	X	X	

Annex 7
Variables and models used in the analysis of human rights prosecutions

To assess if there was any relationship between the right to private prosecution and human rights prosecutions, I test the effects that different legal and institutional factors have on prosecutorial efforts against state agents who allegedly committed human rights violations in Latin America. Also, I look at how these same legal and institutional factors impact how successful these efforts are in terms of convictions.

Next, I describe the different variables included in the statistical analyses as well as the main hypotheses that were tested. To measure how many human rights prosecutorial activities have been initiated in a given year I draw on data from the Transitional Justice Database. This dataset covers 1,312 prosecutorial activities initiated against state agents between 1980-2009 in Latin America. Based on this dataset, I only look at the impact of private prosecution on the amount of prosecutorial activities initiated in a given country in a given year, and how many convictions were observed in a given country in a given year. That is, I analyze 559 country-years, covering information for 17 countries in the period 1980-2009, using the variables described in Table A, below.

Table A
Summary statistics of variables by country year

Variable	Obs	Mean	Std. Dev.	Min	Max	Variance
Prosecutions started	559	2.88	4.51	0	37	20.36
Convictions	559	1.29	2.38	0	19	5.66
Unfair trials	304	2.80	1.09	1	4	1.18
Judicial Independence	476	0.83	0.77	0	2	0.59
Law and Order	340	3.71	1.13	1.00	6	1.27
CPC Reform	511	0.34	0.47	0	1	0.22
Private Prosecution	559	0.41	0.49	0	1	0.24
Autonomous MP	562	0.60	0.49	0	1	0.24
MP in Judiciary	562	0.15	0.36	0	1	0.13
MP in Executive	562	0.25	0.43	0	1	0.19
Logged GDP per capita	527	8.67	0.49	7.47	9.57	0.24
Regime type	527	5.88	4.79	-9.00	10.00	22.94
Level of Repression	474	3.09	1.05	1.00	5.00	1.11

Dependent variables

Human Rights Prosecutions.. This is a count variable that measures how many prosecutions were initiated in a given country in a given year for the period 1980-2009.

Convictions. This is also a count variable that measures how many convictions were achieved in a country in a given year in Latin America for the period 1980-2009.

Independent variables

To test the impact that private prosecution may have or not on prosecutorial efforts towards individual criminal accountability for human rights abuses, I use two main variables provide information on the introduction of private prosecution in criminal procedure codes, and another variable that reflects the institutional design of the prosecutorial organ.

Private Prosecution. This is a dummy variable that measures the presence or absence of the right to private prosecution in a given country in a given year from 1980-2009.

> *Hypothesis 1a: having the right of private prosecution will improve the probability that prosecutions will be initiated against state officials.*
> *Hypothesis 1b: private prosecution will also improve the probability of convictions.*

Criminal Procedure Code. This is a dummy variable that reflects if the country reformed its criminal procedure code towards an accusatorial system, from 1980-2009. As noted earlier, through this reform designers intended to make the criminal justice system more efficient, transparent, and accessible.

> *Hypothesis 1a: criminal procedure code reform will improve the probability that prosecutions will be initiated against state officials.*
> *Hypothesis 1b: criminal procedure code reform will also improve the probability of convictions, as a more efficient system may be may strengthen the overall prosecutorial effort.*

Design of the Prosecutorial Organ. Data on the institutional design of the prosecutorial organ or the MP was drawn from Pozas-Loyo and Rios-Figueroa's database on judicial reform (2011). These are a series of dummy variables that reflect the institutional design of the prosecutorial organ of a country in a given year, detailing if the prosecutorial organ is an autonomous institution (mp_auto), or if it is dependent on the executive branch (mp_exe), or if it the prosecutorial functions lie within the judiciary branch (mp_jud). Data was coded according to the constitution of each country. In theory, we should see more prosecutions against state agents when the prosecutorial organ is autonomous.

> *Hypothesis 2a: the probability that prosecutions will be initiated against state officials will be higher when the*

prosecutorial organ is autonomous rather than dependent on the executive or the judicial branch.

Hypothesis 2b: the probability of convictions will be higher where the prosecutorial organ is autonomous rather tan dependent on the executive or the judicial branch.

Given the emphasis that the literature has placed on rule of law as a potential factor explaining human rights prosecutions, in the model I also include different variables that test institutional- and process-oriented measures of the rule of law. All rule of law variables are hypothesized to be positively correlated with more prosecutorial activities and convictions.

Unfair trials. How fair or unfair the trial process is perceived to be is taken here as a proxy for rule of law "as process". For this I use the Fair Trial Scale (Hathaway 2002) as a proxy for rule of law, which measures from low to high, how unfair trials are in a country, coded from State Department Human Rights reports for the period 1985-2003. According to international law, a "paradigmatic" free and fair trial has ten elements: an independent and impartial judiciary, the right to counsel, the right to present a defense, a presumption of innocence, the right to appeal, the right to an interpreter, protection from ex post facto laws, a public trial, the right to have charges presented, and timeliness (Hathaway 2002: 1972-1974).

Law and Order. I also use the Law and Order variable from International Country Risk Guide (ICRG) that measures, from low to high, the strength and impartiality of the legal system, and the popular observance of the law for the period 1984-2004.

Judicial Independence. This variable documents by country-year (1980-2007), from low to high, the level of independence in the judiciary, as reported by the Annual Human Rights Reports of the Department of State (Camp Keith et al. 2009).

Hypothesis 3a: the more rule of law, the more likely prosecutorial activities will be initiated.

Hypothesis 3b: the more rule of law, the more likely convictions will be achieved.

Control variables

Given that prosecutions and trials are quite an expensive means to push for accountability, it may be that countries that are wealthier are more likely to engage in domestic trials. To control for the effect of development I included in the model logged GDP per capita.[81] I also include in the model the type of regime, and I use the Polity2 variable that measures regime type from (-10) autocratic to (10) democratic. Finally, I

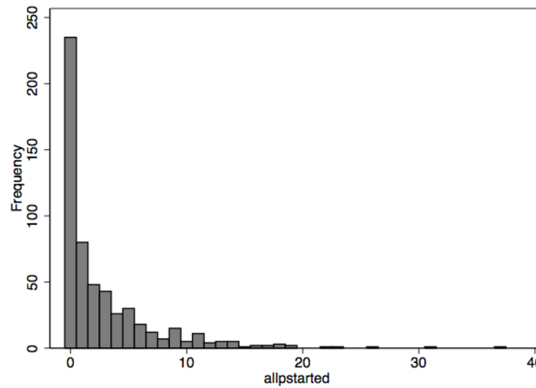
[81] Source: World Bank. I used GDP per capita based on purchasing power parity (PPP). PPP GDP is gross domestic product converted to international dollars using purchasing power parity rates. An international dollar has the same purchasing power over GDP as the U.S. dollar has in the United States. GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current international dollars.

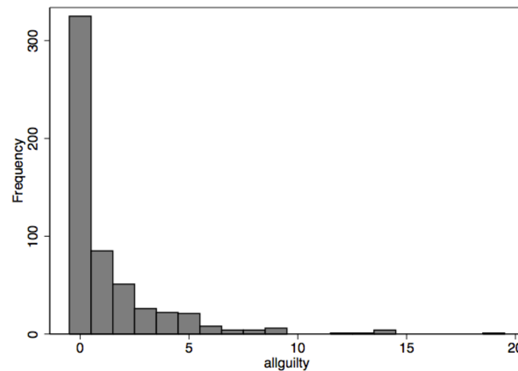
also control for the level of repression that the state faces using the Political Terror Scale variable that draws from Amnesty International reports the level of repression from (1) low to (5) high repression.

Zero-Inflated Negative Binomial Regression (ZINB)

A count model is appropriate when we have a variable that measures how many times an event happened. The outcome or dependent variables that I use here fit this characteristic, as they measure how many prosecutions/convictions happened in a given country in a given year. As assumed for a negative binomial model, my dependent variables (number of prosecutions and number of convictions per country-year) are count variables and the variance of these dependent variables is greater than their mean (see Table A above, and Graph A below).

Graphs A
Histograms of Count Variables:
Prosecutions started and Number of Convictions by Country-year.



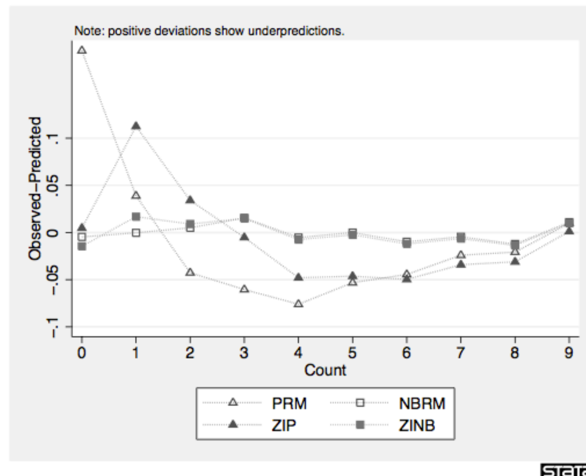


The histograms give indication that a count model is appropriate to use. They show a vast number of country-years having no prosecutorial activity initiated and no convictions, and some countries with some prosecutions/convictions. It is important to acknowledge, however, that there may be countries that do not have prosecutions for

other reasons other by choice (e.g., there were no human rights violations or they were still ruled by an undemocratic regime). This means that the dependent variables (count of prosecutions and count of convictions) may have a number of zeros (no prosecutions initiated and no convictions) that cannot be explained in the same manner as other countries that may be capable of having prosecutions but choose not to.

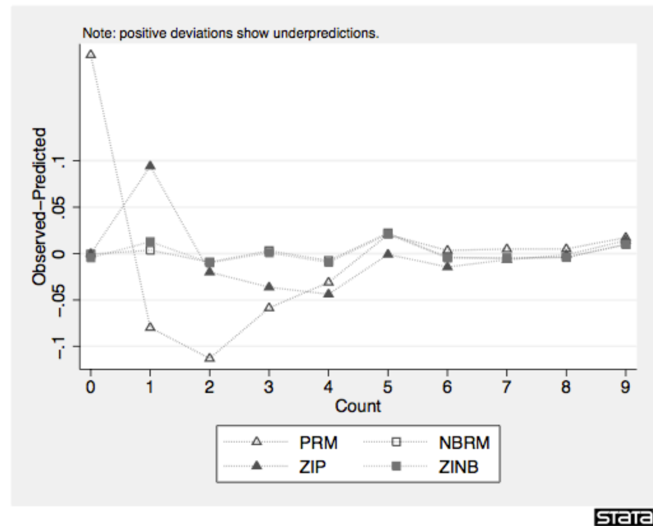
A zero-inflated negative binomial (ZINB) model allows for and accommodates this complication by allowing to test different factors that may explain why a country has prosecutorial activity/convitions compared to those that do not.[82] ZINB runs two models: one with a count equation that predicts the counts (that is, it predicts what variables determine counts among countries that have had one or more prosecutorial activities/convictions), and then another model with a binary equation that predicts the certain zeros (it predicts what variables determine the odds of country always being zero group, i.e., the zero counts of prosecutorial activity/convictions). To test if ZINB was the best count model to use, I conducted a series of countfit tests[83], which indicated that a ZINB model was better at predicting the outcomes (see Graphs B and C below).

Graph B
Fit of different count models predicting initiation of HR prosecutions



[82] See: Liao, Tim F. (1994) *Interpreting Probability Models: Logit, Probit, and Other Generalized Linear Models (*Sage University Paper series on Quantitative Applications in the Social Sciences, series no. 07-101) Thousand Oaks, CA: Sage; Long, J. Scott and Freese, Jeremy (2006) *Regression Models for Categorical Dependent Variables Using Stata* (2nd edition, College Station, TX: Stata Press)
[83] For an explanation of Stata's countfit command see: http://www.ats.ucla.edu/stat/stata/faq/countfit.htm

Graph C
Fit of different count models predicting convictions in HR prosecutions



Graphs B and C plot the residuals from the tested models. Small residuals are indicative of good-fitting models, so the models with lines closest to zero are the ones that should be considered for our data. According the countfit tests, ZINB models were the most appropriate, which are the models used here to test the impact of private prosecution on both initiation of human rights prosecutions, and convictions of human rights cases. Given that for a few independent variables there are less observations (as they cover a smaller period of time, refer to Table A above), I ran two different ZINB models for each one of my dependent variables: a *full model* that takes into account all rule of law variables (unfairness of trials, judicial independence, and law and order) but that draws on a smaller sample of cases, and a trimmed down model with variables that allowed to analyze a bigger number of observations. The results of these models are shown in Annexes 9 and 10.

Annex 8

Description and sources of variables in Human Rights Prosecutions

Variable	Source	Scale	Period	N
HR Prosecutions	Human Rights Prosecutions Database	Number of prosecutions initiated per year per country	1980-2009	559
Convictions	Human Rights Prosecutions Database	Number of convictions in human rights cases per country per year	1980-2009	559
Unfair trials	Fair Trial Scale (Hathaway)	1=Fair trials 2=Somewhat fair 3=Somewhat unfair 4=Unfair	1985-2000	304
Law and Order	International Country Risk Guide	1-6 scale, from low rule of law to high rule of law	1984-2004	340
Judicial Independence	Camp, Keith, and Tate	0= Non-independent judiciary 1= Somewhat independent judiciary 2=Independent judiciary	1980-2007	476
CPC	Inclusion of PP in the criminal procedure code of each country (own coding)	0=No 1=Yes	1980-2010	511

Autonomous Prosecutorial Organ	Pozas-Loyo & Rios-Figueroa	0=Other 1=Autonomous	1980-2005	562
Prosecutorial Organ in the Judiciary	Pozas-Loyo & Rios-Figueroa	0=Other 1=Within the judciary	1980-2005	562
Logged GDP per capita	World Bank		1980-2010	527
Regime type	Polity2	-10 to 10 scale from autocracy to democracy	1980-2010	527
Repression	Political Terror Scale (only Amnesty variable)	1-5 scale, from no repression to political terror	1980-2010	474

Annex 9
Predictors of Counts of Human Rights Prosecutions Initiated
(within country years)

Some rule of law variables (bigger n)				All rule of law variables (smaller n)		
Counts of prosecutions initiated (for those not always zero)	Coefficients	Robust Std. Errors	Factor change in expected count (for a std. dev. change in X)	Coefficients	Robust Std. Errors	Factor change in expected count (for a std. dev. change in X)
Unfair trials	----	---	---	0.084	0.084	1.09
Law and order	---	---	---	0.153	0.101	1.18
Judicial Independence	-0.193**	0.097	0.87	-0.125	0.125	0.91
CPC Reform	-0.363**	0.157	0.85	-0.366*	0.203	0.86
Private Prosecution	0.778***	0.142	1.47	0.756***	0.188	1.44
Autonomous MP	0.453**	0.197	1.25	0.509**	0.210	1.28
MP in Judiciary	-0.236	0.251	0.92	0.047	0.273	1.02
Polity (regime type)	0.022	0.020	1.11	-0.017	0.026	0.94
Repression	0.130	0.099	1.14	0.095	0.111	1.10
Lagged repression	0.106	0.103	1.12	0.043	0.115	1.04
Logged GDP	0.354**	0.152	1.19	0.113	0.181	1.06
constant	-3.141	1.301		-1.226	1.532	
Odds of always being in a zero count (logit)			Factor change in odds of always zero			Factor change in odds of always zero
Regime type	-0.375***	0.126	0.17	1.894**	0.852	9.26
Repression	0.983	1.500	2.77	0.205	0.410	1.23
Logged GDP	1.930	1.910	2.56	-0.923	1.375	0.64
_cons	-23.558	20.347		-11.179	12.907	
		Number of observations	*450*			*293*
		Nonzero observations	*299*			*217*
		Zero observations	*151*			*76*
		Wald chi2(8)	*78.48*			*54.09*
		Prob > chi2	*0.000*			*0.000*
		Log pseudolikelihood	*-989.053*			*-685.598*

Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Annex 10
Predictors of Counts of Human Rights Convictions
(within country years)

Some rule of law variables (bigger n)				All rule of law variables (smaller n)		
Counts of convictions (for those not always zero)	Coeff.	Robust Std. Errors	Factor change in expected count for those not always zero (for a Std. Dev. change in X)	Coeff.	Robust Std. Errors	Factor change in expected count for those not always zero (for a Std. Dev. change in X)
Unfair trials	---	---	---	0.121	0.091	1.14
Law and order	---	---	---	-0.053	0.106	0.94
Judicial Independence	-0.113	0.104	0.92	-0.140	0.132	0.90
CPC Reform	0.115	0.175	1.05	0.125	0.219	1.05
Private Prosecution	0.358***	0.143	1.19	0.525***	0.177	1.29
Autonomous MP	0.096	0.195	1.05	-0.067	0.221	0.97
MP in Judiciary	0.214	0.262	1.07	0.183	0.262	1.06
Regime type	0.053***	0.018	1.28	0.071***	0.028	1.31
Repression	0.011	0.093	1.01	0.002	0.106	1.00
Lagged repression	0.310***	0.102	1.38	0.293***	0.125	1.34
Logged GDP	0.257*	0.149	1.13	0.308*	0.190	1.16
constant	-3.110	1.293		-3.615	1.560	
Odds of always being in a zero count (logit)			Factor change in odds of always zero			Factor change in odds of always zero
At least one prosecution initiated	-19.345***	1.212	0.00	-17.194***	1.902	0.00
Polity (regime type)	-0.151*	0.082	0.49	0.066	0.109	1.28
Repression	-0.576	0.360	0.55	-0.698	0.512	0.50
Logged GDP	-0.707**	0.322	0.71	-1.096**	0.524	0.59
_cons	11.192	3.276		13.322	4.348	
Number of observations			450			293
Nonzero observations			219			159
Zero observations			239			134
Wald chi2(8)			42.79			36.76
Prob > chi2			0.000			0.000
Log pseudolikelihood			-614.313			-446.511

Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Annex 11
Description and sources of variables in Ordinary Crime Prosecutions

Variable	Source	Scale	Period	N
Type of ending	Stage of the case in the criminal proceedings according to the case file as of March 2010.	.=missing 0=Ongoing 1=Other 2=Dismissed 3=Plea Bargain 4=Trial	2003-2010	556
Guilty Verdict	Verdict as established in the written record of the verdict hearing, from the files of murder cases.	.=missing 0=Not Guilty 1=Guilty	2003-2010	324
First degree murder	Crime as described in the indictment according to the case file.	.=missing 0=Other 1=	2003-2010	552
Private prosecution	Inclusion of PP in the criminal procedure code of each country (own coding).	.=missing 0=No 1=Yes	2003-2010	534
Private defense	Record of the defendant(s) having a private defense according to case files.	.=missing 0=No 1=Yes	2003-2010	466

Annex 12
Ordered Logistic Regression:
Estimates of Determinants of Type of Ending of a Murder Case

	Controlling for Chile	Robust Std. error	Controlling for Guatemala and Chihuahua	Robust Std. error
Private Prosecution	1.395**	0.564	0.179	0.301
First degree murder	0.953***	0.327	1.085***	0.312
Second degree murder	0.221	0.228	0.312	0.216
Private defense	0.594***	0.217	0.628***	0.221
Chile (dummy)	1.228***	0.230	---	---
Chile with PP	-1.219*	0.637	---	---
Guatemala (dummy)	---	---	-1.445***	0.341
Guatemala with PP	---	---	0.494	1.566
Chihuahua (dummy)	---	---	-1.068***	0.215
Chihuahua with PP	---	---	1.442**	0.595
	Number of observations	465	Number of observations	465
	Prob > chi2	0.000	Prob > chi2	0.000
	Pseudo R2	0.0703	Pseudo R2	0.0714
	Log pseudolikelihood	-587.964	Log pseudolikelihood	-587.276

Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Annex 13
Logistic Regression:
Estimates of Determinants of Convictions of a Murder Case

	Controlling for Chile	Robust Std. error	Controlling for Guatemala and Chihuahua	Robust Std. error
Private Prosecution	-0.219	0.822	0.715	0.532
First degree murder	-0.577	0.721	0.566	0.815
Second degree murder	-0.392	0.689	0.525	0.711
Private defense	-0.249	0.366	-0.214	0.402
Chile (dummy)	0.292	0.424	---	---
Chile with PP	0.893	1.040	---	---
Guatemala (dummy)	---	---	-1.380***	0.464
Guatemala with PP	---	---	-1.950	1.398
Chihuahua (dummy)	---	---	1.233	0.777
Chihuahua with PP	---	---	(omitted)	
	Number of observations	322	Number of observations	313
	Prob > chi2	0.7472	Prob > chi2	0.0007
	Pseudo R2	0.0184	Pseudo R2	0.0714
	Log pseudolikelihood	-114.722	Log pseudolikelihood	0.1064

Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Annex 14
Statistical analyses of murder cases in Santiago, Chile

Logit estimates of determinants of having a private prosecutor in Chile

Having a Private Prosecutor	Coefficient	Standard errors
First degree murder	1.22***	0.32
Socioeconomic status of the victim	-0.17	0.27
Victim is female	0.78	0.63
Accused is female	0.05	0.75
_cons	-0.67	0.78
	Number of observations	225
	Prob > chi2	0.0006
	Pseudo R2	0.0689
	Log likelihood	-132.69522

Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Ordered logit estimates of determinants of how a murder case ends in Santiago

	Coefficient	Standard errors
Private prosecution	0.03	0.33
Private defense	0.56*	0.31
Socioeconomic status of victim	-0.34	0.28
First-degree murder	1.46***	0.40
Victim is female	-0.25	0.64
Accused is female	0.61	0.92
	Number of observations	221
	Prob > chi2	0.0001
	Pseudo R2	0.0630
	Log likelihood	-211.79632

Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Annex 15

Political Map of Mexico and of the State of Chihuahua