

## Chapter 2

# (Un)Protecting Victims' Rights in the Colombian Criminal Justice Reform of the Early 2000s

**Abstract** This chapter examines the history of the Colombian criminal justice reform of the early 2000s, focusing on the domestic context, key actors and their legal and symbolic capital. This chapter explores how different actors used the idea of victims' rights in the debates for the 2002 constitutional reform and the 2004 Criminal Procedure Code (2004 CPC). This chapter shows that this reform was based on two pillars: i) the adversarial model, and ii) a broad protection of both defendants' rights and victims' rights in the criminal process. The 2002 constitutional reform promised broad protection of victims as active protagonists in criminal proceedings. However, there is a gap between the promises of the 2002 constitutional reform and the role of victims actually established in the 2004 CPC. In this Code, the adversarial model prevailed over the inclusion of victims as protagonists in the criminal process. The 2004 CPC recognizes a charter of victims' rights, but sets few specific mechanisms to enforce those rights. The 2004 CPC also incorporates principles of restorative justice, but establishes few rules regarding restorative justice programs. This chapter argues that the role and rights of victims in the 2004 CPC was the result of the competition and interplay between different conceptions of victims and victims' rights. As a result of ensuing disagreements, the 2004 CPC left indeterminate many key elements about victims, defined victims' rights in vague and ambiguous terms, and involved tensions and contradictions regarding the role and rights of victims.

In the early 2000s, Colombian Attorney General Luis Camilo Osorio Isaza promoted a criminal justice reform to adopt an accusatorial or adversarial system. The promoters of the reform claimed that this reform was necessary to improve efficiency in the criminal justice system, meet international human rights standards, and observe the doctrine of the Constitutional Court on defendants' rights and victims' rights. In particular, the 2002 constitutional reform promises a broad protection of victims' rights. This amendment includes three core elements: assistance and protection, comprehensive reparation, and participation of victims in the criminal process.

Although the Criminal Procedure Code of 2004 (2004 CPC) includes victims as participants and a broad charter of victims' rights, there is a discrepancy between the declared goals of the constitutional reform and the role of victims actually prescribed in the code. The 2004 CPC recognizes restorative justice principles and a broad charter of victims' rights. However, the Code established few specific mechanisms to claim or enforce those rights. The Code also introduced a very limited direct participation of victims in the criminal process despite the Constitutional Court doctrine on victim participation as a constitutional right (Judgment C-228/02).

The pillars of the reform of the early 2000s were the adoption of an accusatorial system and the protection of both victims' rights and defendants' rights. It is important to note that there is tension between the dichotomous structure of an accusatorial/adversarial system (defense v. prosecution) and significant participation of a third party such as victims.

There are normative and practical objections to introducing victims' participatory rights in an adversarial model. One set of these criticisms focus on the right of defendants to due process. Some critics claim that victim participation could harm defendants' rights because victims often reinforce the prosecution case. Because victims could become a second prosecutor and insert vindictiveness or revenge into criminal proceedings, their participation could reduce the fairness of the trial (Beloof 1999, pp. 310, 311, 316, 320; Pastor 2009b; Reyes Alvarado 2007, pp. 77, 79, 80, 83).

Other critics argue that the extensive participation of victims would undermine public interests, crime control, and efficiency of the criminal justice system. According to these critics, harm to society trumps harm to the individual victim, and the general public interest subsumes the interests of the victim. Thus, the public prosecutor speaks on behalf of society and victims (Pastor 2009b). These critics claim that public prosecutors should control charging decisions, since they are specialists in screening cases according to public policy and institutional resources. In preliminary stages of the criminal process, victims' participation may disrupt the quick disposition of cases. Public prosecutors should control the prosecution case at trial, so the public prosecutor would control the legal counsel of the victim. Some critics also note that victim participation at trial is unnecessary and inefficient, since the confrontation between prosecution and defense is an adequate mechanism to find the truth. Another problem of victim participation is that sometimes victims may oppose the prosecution case, which may affect law enforcement and crime control (e.g. domestic violence cases) (Beloof 1999, pp. 314, 319).

By contrast, some scholars and practitioners advocate the introduction of victims' participatory rights in the criminal process. The fundamental bases for victims' participation are fairness to the victim, respect for the victim, and dignity of the victim (Beloof 1999). Crime is a conflict that involves three agents: defendants, victims, and society (Beristain 2000, pp. 49, 84; 2004, p. 50; 2005, p. 467). Given that the victim is a protagonist of the conflict and suffered the harm, the criminal process and the conflict resolution must include the interests of the victim (e.g. knowing the truth and appropriate disposition of the case). These interests might

converge or diverge with public interest and the interests of prosecution. Victim participation seeks to ensure the promotion of their interests in criminal proceedings and to avoid secondary victimization (Beloof 1999; Maier 1992; Pizzi 1999).

The participation of victims may affect some defendants' rights. However, the criminal process must take into account all the interests involved and include all the voices. The legitimacy of the system depends on the accommodation of the rights and interests of all stakeholders: defendants, victims and society. Therefore, the criminal justice system cannot choose one and reject the rest.<sup>1</sup>

Promoters of broad victim participation in the criminal process argue that giving victims a voice provides benefits not only to victims, but also to society and the criminal justice system. The participation of victims may: (i) contribute to truth finding in the criminal process (Beloof 1999, p. 318; Beloof et al. 2010, p. 19); (ii) control the activity of prosecutors and plea bargaining (Beloof 1999, p. 314; Beloof et al. 2010, p. 18; Maier 1992, p. 221; Pizzi 1999, p. 353); and (iii) provide complete information to decision-makers (prosecutors or courts) that might lead to more appropriate decisions (Beloof 1999, p. 296; Beloof et al. 2010, p. 27; U.S. Senate Committee on the Judiciary 2003; Welling 1987, p. 308).

Notably, the Inter-American Court of Human Rights argues that the victim's right to effective judicial protection implies the rights to collaborate in the investigation, to be heard, and to participate in criminal proceedings.

Article 8 of the Convention reveals that the victims of human rights violations, or their next of kin, should have wide ranging possibilities of being heard and taking part in the respective proceedings, both in order to clarify the facts and punish those responsible, and also to seek due reparation.<sup>2</sup>

The definition of victim and the extent of victims' rights are contested. Thus, the criminal justice reform in the early 2000s was, in Bourdieu's terms, a site of competition for the definition of the meaning of "victim" and "victims' rights." This process of reform comprised interactions among several layers of actors and sources of power within different levels—transnational, national, and local.

National and transnational actors mobilized various forms of capital (e.g. social, legal, political, symbolic) in the criminal justice reform of the early 2000s.<sup>3</sup> These actors had incentives to participate in the reform in order to valorize their capital and position since legal reforms change the relative value of different forms of capital (Bourdieu 1986, p. 821; Dezalay and Garth 2011, pp. 3, 4). In the constitutional and legislative reforms, the actors mobilized their legal and symbolic

<sup>1</sup>"A just legal system must stand by its victims. We may neither deter future offenders, nor rehabilitate present inmates nor achieve justice in the eyes of God. But by seeking to punish the guilty, we do not abandon the innocent who suffer. We seek justice not only for offenders but for all of us" (Fletcher 1995, p. 258).

<sup>2</sup>Inter-American Court of Human Rights, *Fernández Ortega et al. v. Mexico*, Judgment of August 30, 2010, par. 192.

<sup>3</sup>"Lawyers profit from their possession of relatively valuable capital, which may be a set of relationships, or social capital, but it may also be symbolic capital (legal pedigree, highly sought expertise, or an ideology in the upswing)" (Dezalay and Garth 2011, p. 4).

resources to promote diverse agendas: *the adversarial system agenda, the restorative justice agenda, and the victims' rights agenda*. These agendas embrace multiple meanings of victim, victims' rights and the extent of the participation of victims in criminal proceedings. It is important to note that these different agendas not only competed but also influenced one another in this process of reform.

This chapter will uncover the multiple meanings of victim and victims' rights proposed by different actors in the criminal justice reform of the early 2000s. It will explore how these actors used the idea of victims' rights in the discussions for the 2002 constitutional reform and the 2004 Criminal Procedure Code (2004 CPC). In addition, this chapter will capture the power struggles underlying this process of reform, as well as the tensions and links between actors. Furthermore, this part of the text will describe the tensions and contradictions within the regulation of the role and rights of victims in the 2004 CPC.

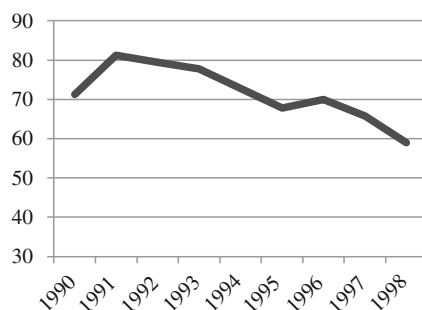
Section 2.1 of this chapter explores the domestic context of the criminal justice reform of the early 2000s, focusing on the key actors and their legal and symbolic capital. Sections 2.2 and 2.3 examine the discussions over victims of crime within the debates for the constitutional reform of 2002 and the 2004 CPC. Finally, Section 2.4 explains the gap between the promise of broad protection of victims as active protagonists in the constitutional reform and the role of victims actually established in the 2004 CPC.

## 2.1 Context of the Criminal Justice Reform of the Early 2000s

The 1991 Constitution failed to facilitate a peaceful coexistence. Throughout the 1990s, extraordinary violence and human rights abuses continued in Colombia. Although the homicide rate declined from 81 homicides per 100,000 in 1991 to 59 homicides per 100,000 in 1998, the rate remained extremely high in the regional context (Figs. 2.1 and 2.2).

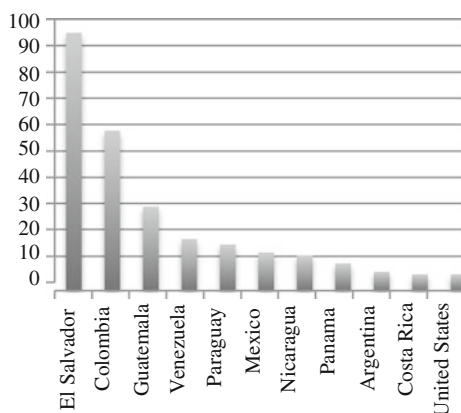
President Pastrana proposed a peace program to negotiate with the FARC guerrilla group in his campaign for the 1998 presidential elections. It included the demilitarization of a meeting zone that comprised five municipalities (42,000 km<sup>2</sup>) (Pécaut 2001, p. 298). U.S. President Clinton supported this peace policy and increased military aid to a total of 289 million dollars in 1999. In addition, Colombia received loans and financial aid from international organizations, including a loan from the International Monetary Fund totaling 3.5 billion dollars (Tickner 2000).

This peace negotiation process quickly lost support and credibility due to its lack of results. Therefore, in September of 1999 President Pastrana proposed to the United States a counter-narcotic 6-year strategy called "Plan Colombia." From then on, the United States has provided huge military and non-military assistance to Colombia. In addition, U.S. pressure to produce effective results in criminally prosecuting drug traffickers and terrorists increased (Tickner 2000).



**Fig. 2.1** Homicide rates per 100,000 population (1990–1998). *Source* Data are based on annual homicide (homicidio común) cases reported by Policía Nacional in Revista Criminalidad. Homicide rates are calculated using data on Colombian population from World Bank (<http://data.worldbank.org/indicator/SP.POP.TOTL/countries/CO?display=graph>)

**Fig. 2.2** Intentional homicide rate per 100,000 population of 10 countries in the Americas (1998). *Source* Data from World Bank (<http://data.worldbank.org/indicator/VC.IHR.PSRC.P5?page=3>)



The Plan Colombia objectives were: (i) to reduce the cultivation, processing, and distribution of illicit narcotics, (ii) to improve the security by reclaiming control of areas held by illegal armed groups financed with drug trade profits, and (iii) to strengthen democracy and human rights (Departamento Nacional de Planeación (DNP), Dirección de Justicia y Seguridad (DJS) 2006, p. 4). In this program, one of the main strategies was the criminal justice reform in order to improve efficiency and to decrease impunity (Departamento Nacional de Planeación (DNP)—Dirección de Justicia y Seguridad (DJS) 2006, p. 5).

In the 2002 presidential elections, President Uribe proposed the “Democratic Security” (*Seguridad Democrática*) program.<sup>4</sup> This policy was based on military

<sup>4</sup>The Democratic Security and Defense Policy is a political instrument designed to protect and guarantee the rights of Colombians and to neutralize the threat of terrorism against the Colombian people.

weakening of the guerrilla groups declared terrorists (Departamento Nacional de Planeación 2002, p. 16). Uribe's foreign policy emphasized Colombia's alliance with the U.S. government (Misión de Política Exterior 2010). This program contributed to strengthening bilateral relationships with the U.S. within the war on terror. U.S. military assistance, long focused on the war on drugs, was expanded to "counterterror." Given that Colombian guerrillas were considered terrorist groups, counterinsurgency campaigns began to use U.S. military support openly (Bushnell 2007; Tate 2007, pp. 304, 305).

In 2002, President Uribe started peace negotiations for the demobilization of paramilitary groups (*Autodefensas Unidas de Colombia-AUC*). The government submitted legislative proposals advocating benefits for demobilizations of AUC's members who were involved in human rights violations. The government promoted a restorative justice model of transition that included sanctions alternative to prison. Some scholars have noted that this discussion was very controversial as it dealt with the question of how to balance conflict resolution/peace with the rights of victims.

This proposed approach has provoked intense domestic and international debate on the grounds that it requires compromising the increasingly absolute human rights standards of truth, justice, and reparations with the desire to bring a warring faction to the negotiating table. How much is the Colombian state willing and able to cede to the paramilitaries while still remaining faithful to international jurisprudence and norms, as well as responding to the demands of a growing victim-survivors' movement that is well-versed in the transitional justice thinking that has emerged over the last twenty-five years? (Laplante and Theison 2006).

In the context of this debate, victims' rights were a central element within the struggle over the balance between peace and justice. Political leaders, scholars, victims' movements, NGOs, and international organizations mobilized the discourse on victims' rights to advocate criminal accountability for human rights violations perpetrated by paramilitary groups. Victims and their supporters, mainly the Colombian Commission of Jurists (CCJ), argued that human rights standards on victims' rights are absolute normative limitations on the terms of the legal and

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(Footnote 4 continued)

The primary objectives of this policy are the following:

1. Consolidation of State control throughout Colombia to deny sanctuary to terrorists and perpetrators of violence.
2. Protection of the population through the increase of State presence and a corresponding reduction in violence.
3. Destruction of the illegal drug trade in Colombia to eliminate the revenues which finance terrorism and generate corruption and crime.
4. Maintenance of a deterrent military capability as a long-term guarantee of democratic sustainability.
5. Transparent and efficient management of resources as a means to reform and improve the performance of government

(Presidency of the Republic of Colombia and Ministry of Defense, August 2002–December 2003, p. 2).

political struggle. They emphasized that transitional justice should respect international standards related to victims' rights to truth, justice and reparation, since impunity through pardons and amnesties is a violation of the state's international obligations. Moreover, they pointed out that the ICC has jurisdiction over crimes against humanity perpetrated in Colombia. This tribunal may admit those grave cases in which "the state is unwilling or unable genuinely to carry out the investigation or prosecution."<sup>5</sup> Consequently, they claimed that it was necessary to make compatible local peace initiatives with the duty to prosecute and punish human rights violations.

As a result of the debates, the Congress enacted the *Justice and Peace Law* (Law 975 of 2005), which determines benefits for the demobilization of members of illegal groups who were accused of serious human rights violations. The pressure of international and local actors led to the incorporation of a punitive perspective based on criminal prosecution and punishment as the primary mechanism of transitional justice. However, this law establishes a limited criminal sanction through a light punishment from five to eight years for demobilized members who confess their atrocities.

Victims' movements, human rights organizations, and international agencies strongly criticized the Justice and Peace Law because it uses victims' rights only as a rhetorical tool. These rights were included as principles without specific mechanisms aimed at enforcement in judicial practice. Furthermore, they have highlighted that this law violates international standards of human rights, as it does not ensure an effective protection of the victims' rights.<sup>6</sup>

### ***2.1.1 Key Actors in the Process of Reform of the Early 2000s and their Symbolic and Legal Capital***

In the following section, I will review the domestic context of the criminal justice reform of the early 2000s. I will focus on the key actors and their legal and symbolic capital in order to contextualize the reform.

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<sup>5</sup>Rome Statute of ICC. Article 17.

It is important to note that in March 2 of 2005 the ICC Prosecutor informed the Colombian Government that he had received information on alleged ICC crimes committed in Colombia.

<sup>6</sup>Inter-American Commission on Human Rights, Follow-up on the demobilization process of the AUC in Colombia, 2007, par. 7.

United Nations High Commissioner for Human Rights, Report on the human rights situation in Colombia, 2004.

United Nations High Commissioner for Human Rights, Report on the human rights situation in Colombia, February 28, 2005.

Comisión Colombiana de Juristas, Anotaciones sobre la Ley de Justicia y Paz. Una Mirada desde las Víctimas, March of 2007 [http://www.coljuristas.org/documentos/libros\\_e\\_informes/ anotaciones\\_sobre\\_la\\_ley\\_de\\_justicia\\_y\\_paz.pdf](http://www.coljuristas.org/documentos/libros_e_informes/ anotaciones_sobre_la_ley_de_justicia_y_paz.pdf).

In 2001, the Supreme Court elected Luis Camilo Osorio Isaza as Attorney General from the list submitted by President Andres Pastrana. Osorio is a lawyer from Javeriana University and received a degree in economics from University of Bonn. He was Vice Minister of Education, the National Civil Registrar (*Registrador Nacional del Estado Civil*), and Justice of the Council of State (*Consejo de Estado*). He is an expert in administrative law rather than criminal law. Pastrana and Osorio have been close friends and members of the Conservative Party.<sup>7</sup>

In the early 2000s, Osorio advocated a constitutional and legal reform to adopt an accusatorial or adversarial criminal justice system. The objectives were: (i) improving efficiency in criminal prosecution and eradicating impunity, and (ii) compliance with international human rights standards of both defendants and victims. Significantly, Osorio accepted to limit broad judicial powers of the Attorney General and prosecutors. It is important to note that several Latin American countries had adopted criminal justice reforms to replace inquisitorial systems with accusatorial or adversarial systems. Those reforms sought to solve similar problems such as inefficiency and lack of due process<sup>8</sup> (Langer 2007; Struensee and Maier 2000, p. 27).

The criminal justice reform of the early 2000s had various opponents and critics. First, various local actors argued that the accusatorial system was incompatible with the Colombian traditional legal culture based on the inquisitorial or mixed model. Second, some actors claimed that this reform was the result of the U.S. government promotion of a legal transplant of its adversarial system.<sup>9</sup> Third, some local state representatives suggested that this reform was an improvisation, and an adequate transformation of the criminal justice system needed a longer and deeper debate.<sup>10</sup> Fourth, some local politicians and state representatives suggested that the Colombian criminal justice system lacked the economic, institutional and human capital needed to implement this reform.<sup>11</sup> Fifth, Alfonso Gómez Méndez (former Attorney General) questioned the need to enact a new reform, arguing that his Code (Law 600 of 2000) enacted two years earlier was showing good results.

<sup>7</sup><http://lasillavacia.com/perfilquien/19367/luis-camilo-osorio>.

<sup>8</sup>New criminal procedure codes have been adopted in most Latin American countries. See e.g. Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay and Venezuela.

<sup>9</sup>For example, the lectures of Bernardo Gaitán Mahecha and Gustavo Zafra in the workshop on judicial reform at Javeriana University, March of 2011.

<sup>10</sup>Germán Gonzalo Valdés Sánchez (President—Supreme Court of Justice), Fernando Arboleda Ripoll (Justice—Criminal Chamber of the Supreme Court of Justice), Edgardo Maya Villazón (*Procurador General de la Nación*), Rafael Pardo (Senator). See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

Álvaro Orlando Pérez (President—Criminal Chamber of the Supreme Court of Justice). See, Preparatory Commission Meeting Minute # 1, February 1 of 2002, pp. 12–13.

<sup>11</sup>Edgardo Maya Villazón (*Procurador General de la Nación*), Fernando Arboleda Ripoll (Justice—Criminal Chamber of the Supreme Court of Justice), Piedad Córdoba (Senator), Rafael Pardo (Senator). See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.



Despite these criticisms, the government of President Pastrana supported the reform, siding with the promise of modernization of criminal justice, efficiency and protection of rights. It also should be noted that President Pastrana and Osorio had a close relationship. When Pastrana left the office in 2002, his successor Álvaro Uribe Vélez also supported Osorio's criminal justice reform.<sup>12</sup> Both governments supported the reforms; Pastrana's Government highlighted the protection of defendants' rights,<sup>13</sup> while Uribe's Government focused on strengthening the investigative capacity of the Attorney General's Office, the improvement of efficiency, and the reduction of impunity.<sup>14</sup> Notably, the "Democratic Security" program of President Uribe emphasized strengthening criminal investigation, and adopting an oral criminal justice model (Departamento Nacional de Planeación 2002, p. 51).

Moreover, several international actors such as the European Union and German Society for Technical Cooperation (GTZ) have supported the criminal justice reform in Colombia as a project under the rule of law promotion. However, the principal supporter has been the U.S. government through international cooperation programs implemented by USAID,<sup>15</sup> the State Department,<sup>16</sup> and the Department of Justice.<sup>17</sup> The adoption of an accusatorial system in Colombia is a strategy within

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<sup>12</sup>Fernando Londoño Hoyos (Conservative Party), Minister of Internal Affairs and Minister of Justice, supported the constitutional reform at Congress. See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

<sup>13</sup>Preparatory Commission Meeting Minute # 9, March 19 of 2002, p. 7.

<sup>14</sup>Fernando Londoño Hoyos (Minister of Internal Affairs and Minister of Justice). See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

<sup>15</sup>"In 1986, USAID awarded a series of small grants to be managed by a private foundation, the *Fundación de Educación Superior* (FES). The grants financed research, a diagnosis of judicial needs, pilot programs to modernize court systems, training, and the creation of an inter-institutional Advisory Committee. The work from those initial projects influenced and provided input to the restructuring of the Colombian justice system that culminated in the constitutional reform of 1991. In 1992, USAID initiated a \$36 million project, also channeled through FES, to support the implementation of the constitutional reforms and further restructuring of the justice sector. (...) USAID assistance and programming were increased significantly at the end of 2000 as a consequence of the passage of "Plan Colombia." The justice program has continued in two phases without interruption since then." ([http://pdf.usaid.gov/pdf\\_docs/PDACR349.pdf](http://pdf.usaid.gov/pdf_docs/PDACR349.pdf)).

<sup>16</sup>"Founded in 1991, Colombia is ICITAP's longest-standing program. Beginning in 2002, ICITAP greatly expanded its assistance through the Justice Department's Plan Colombia Justice Sector Reform Program (JSRP)—a strong collaboration among numerous Department entities. In particular, ICITAP and the Office of Prosecutorial Development, Assistance and Training (OPDAT) have helped Colombia transition to an adversarial system of justice and significantly reduce crime and violence. ICITAP has also assisted with the identification of victims and recovery of evidence from mass graves to expedite the prosecution of members of paramilitary groups who were responsible for mass murders, and worked to significantly increase crime scene processing and forensic laboratory capacity." (<http://www.justice.gov/criminal/icitap/programs/latin-caribbean.html>).

<sup>17</sup>One of the main actors in Colombia is the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) of the Department of Justice. "OPDAT's largest and longest running program in LAC is in Colombia. From 2000 through the present, OPDAT implemented in

the war on drugs and the war on terror. Particularly, U.S. government agencies supported the criminal justice reform of the early 2000s. The Colombian Attorney General's Office and Corporation for Excellence in Justice (*Corporación Excelencia en la Justicia*) worked with some representatives of the U.S. agencies in drafting materials for the reform. In addition, some delegates of the U.S. agencies participated in the official commissions that drafted the constitutional and the legal reforms.<sup>18</sup> Notably, the U.S. government has provided the major funding to implement this reform through *Plan Colombia* (Rodríguez Garavito 2006, p. 454; U.S. Department of State 2003, pp. IV-20). According to Luis Camilo Osorio, the alliance with the U.S. government agencies was a crucial factor for the adoption of the reform.<sup>19</sup>

Some key local actors were Corporation for Excellence in Justice (*Corporación Excelencia en la Justicia*)<sup>20</sup> and a group of criminal lawyers. They mobilized their social capital (a set of relationships) and symbolic capital (highly sought expertise) to promote and legitimize the criminal justice reform. Jaime Granados and Julio Sampedro were core members of this group of criminal lawyers, as their legal and symbolic capital was valuable in the context of the reform.<sup>21</sup>

Jaime Granados is a lawyer from Javeriana University and was a professor of criminal law and criminal procedure at Javeriana, Rosario, and Los Andes universities. Granados was also a professor at the University of Puerto Rico and legal advisor in Puerto Rico (Granados et al. 2003). Thus, Anglo-American ideas influenced Granados (Langer 2007, p. 59). The work of Granados on the accusatorial system references Ernesto Chiesa Aponte, a Puerto Rican expert on criminal procedure law (Granados Peña 1999a). When he returned to Colombia, he founded the law firm: Granados Peña y Asociados Ltda. and became an advisor of the Corporation for Excellence in Justice. Since then, Granados promoted the adoption of an accusatorial system to protect human rights. In fact, he challenged the constitutionality of the

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(Footnote 17 continued)

Colombia the Justice Sector Reform Program (JSRP) through the U.S. Embassy in Bogotá. It has assisted Colombian lawmakers, judges, prosecutors and police authorities to implement a Colombian Criminal Procedure Code that mandated that country's transition from a written, inquisitorial criminal justice system, marked by delays and inefficiency, to an oral, accusatorial one." (<http://www.justice.gov/criminal/opdat/worldact-programs/latin-caribbean.html>).

<sup>18</sup>Interview with Luis Camilo Osorio, July 11 and 13, 2014.

Interview with Julio Sampedro Arrubla, June of 2013.

Interview with Mildred Hartmann, February 8 of 2013.

<sup>19</sup>Interview with Luis Camilo Osorio, July 11 and 13, 2014.

<sup>20</sup>*Corporación Excelencia en la Justicia* was founded on August 28 of 1996. Its members are independent professionals, universities and mainly private corporations. This corporation is a think tank that promotes judicial reform in Colombia.

<sup>21</sup>"Crisis and changes over time affect the value of the different forms of capital, creating opportunities to reconfigure the mix. Lawyers profit from their possession of relatively valuable capital, which may be a set of relationships, or social capital, but it may also be symbolic capital (legal pedigree, highly sought expertise, or an ideology in the upswing)" (Dezalay and Garth 2011, p. 4).

Criminal Procedure Code of 1991 (Decree 2700); he claimed that the inquisitorial features of the Code such as prosecutors' judicial powers violated defendants' fundamental rights. The Constitutional Court argued that Granados's argument implied a reform of the criminal justice system to adopt an accusatorial system, but the demand failed to demonstrate a violation of the Constitution.<sup>22</sup>

In 2001, Osorio met Granados at a conference at Los Andes University, and they became friends and allies for the criminal justice reform (see Footnote 19). During the process of reform of the early 2000s, Granados was an advisor of Corporation for Excellence in Justice. He was considered a key expert on the accusatorial system because of his professional experience in Puerto Rico. Granados was both a member of the *Preparatory Commission* to draft the constitutional reform and a member of the *Constitutional Commission* to draft the legal reform. After this reform, Granados's law firm became one of the most important in the country. Thus, Granados participates as a lawyer in high profile cases such as the murder of Luis Carlos Colmenares, Interbolsa. He also represents politicians and former state representatives such as President Uribe Vélez, Bernardo Moreno (Secretary General of President Uribe), Luis Camilo Osorio, and Vice-Admiral Arango Bacchi.<sup>23</sup> Some of his clients are politicians who are accused of collusion with paramilitary groups (e.g. Miguel Nule Amin, former Governor of Sucre who was indicted for his participation in the massacre of Macayepo and the correlated forced displacement; Jorge Manzur, former Governor of Córdoba; Luis Eduardo Vives, former Congressman).

During the process of the reform of the early 2000s, Juan David Riveros Barragán and Mildred Hartmann Arboleda worked in Granados's office and participated in the drafting of working materials for the reform. Riveros and Hartmann are lawyers from Rosario University, where Granados was their professor of criminal procedural law. Riveros and Hartmann supported the adoption of an adversarial system. After the reform, Riveros created a law firm with Julio Sampedro (Sampedro Riveros Abogados), a significant office on criminal law in the country. Also, Riveros is a professor of criminal procedure at Rosario and Javeriana universities. Hartmann pursued a Masters of Criminal Law and Criminal Process at Diego Portales University. She is a researcher in projects on criminal justice reform in Latin America for Justice Studies Center of the Americas (CEJA, for its initials in Spanish). In 2008, she created a mid-size law firm, Hartmann Ortiz Abogados Penalistas, with a partner. Her most visible client is Luis Carlos Restrepo, High Commissioner for Peace in Colombia.

Julio Sampedro is a lawyer from Javeriana University. For several years, he was a member of a small criminal law firm and the director of the Department on Procedural Law at Javeriana. He received his doctoral degree from Javeriana, Rosario and Externado Universities. He developed his doctoral dissertation under

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<sup>22</sup>Constitutional Court, Judgment C-609 of 1996, Justices: Alejandro Martínez Caballero and Fabio Morón Díaz.

<sup>23</sup><http://www.kienyke.com/historias/uribe-entre-lombana-y-granados/>  
<http://www.elespectador.com/impreso/cuadernilloa/judicial/articuloimpreso-bufetes-del-poder.>

the supervision of his professor Antonio Beristain.<sup>24</sup> Sampedro follows the approach to victimology and recreative justice of his professor. Sampedro created the “Jorge Enrique Gutiérrez Anzola” Center on Criminology and Victimology. At Javeriana University, a reception was held to celebrate Osorio’s appointment as Attorney General, in which Osorio invited Sampedro to visit Puerto Rico to analyze its criminal justice system. At that time, Osorio suggested that Sampedro and Granados work together on the reform.<sup>25</sup> Sampedro was an advisor to Attorney General Osorio for the constitutional reform. Later, in the legal reform, Sampedro became an advisor of Corporation for Excellence in Justice. After the reform, Sampedro and Riveros created a successful law firm (Sampedro Riveros Abogados). They represent clients on high profile issues and cases, for example Chiquita Brands and victims of Interbolsa. In addition, the Colombian government appointed Sampedro as its attorney before the Inter-American Human Rights System in the Palace of Justice case.<sup>26</sup>

To summarize, despite the criticisms of the criminal justice reform in the early 2000s, Osorio mobilized his social and political capital and forged relevant alliances with key actors to achieve the enactment of this reform. At the domestic level, some of his allies were President Pastrana and President Uribe, some Congressmen, and the Excellence in Justice Corporation. At the international level, the European Union, the German Society for Technical Cooperation (GTZ), and the U.S. government supported the reform. Notably, the primary sponsor was the U.S. government.

In addition, Osorio invited some criminal lawyers to design the reform. Jaime Granados and Julio Sampedro were members of this group of lawyers because their legal and symbolic capital was valuable for the reform. Riveros and Hartmann also participated because they worked in the law firm of Granados. After the criminal justice reform of the early 2000s, the relative value of the capital and position of these lawyers increased. As a result, the law firm of Granados and the law firm of Sampedro and Riveros have become very prominent in the country. Hartmann is also a renowned lawyer and expert on accusatorial system. On top of that, Granados is called the father of the accusatorial system in Colombia (Bourdieu 1986, p. 821; Dezalay and Garth 2011, pp. 3, 4).

### 2.1.2 *The Agendas of Jaime Granados and Julio Sampedro*

Granados, Sampedro, Riveros, and Hartmann wrote together relevant working materials for the constitutional and legal reforms. A consensus existed between Granados and Sampedro on the need to reform the Colombian criminal justice

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<sup>24</sup>“*La humanización del proceso penal: Hacia una reformulación del modelo tradicional desde la victimología.*”

<sup>25</sup>Interview with Julio Sampedro Arrubla, June of 2013.

<sup>26</sup>Case No. 10.738, Carlos Augusto Rodríguez Vera et al. (Palace of Justice), Colombia.

system. However, they advocated competing agendas, which involved different conceptions of the criminal justice process, victims, and the content of victims' rights. On one hand, Granados promoted an adversarial criminal justice system, which he conceived as a contest or dispute between two parties—prosecution and defense—before a passive decision maker. On the other hand, Sampedro suggested a broad protection of victims' rights, a significant role for victims, and restorative justice principles. As a result, the reform was a compromise that involves some tensions and contradictions regarding the role and rights of victims in the criminal process.

### 2.1.2.1 Jaime Granados: Accusatorial/Adversarial System

In the reform of the early 2000s, Granados argued that adopting an accusatorial or adversarial criminal justice system was indispensable in Colombia, as this model is efficient and protects rights. He argued that international standards on defendants' human rights require an accusatorial system. He pointed out that broad judicial powers of prosecutors in the 1991 Constitution violated the right to an impartial adjudicator and the right to liberty. Moreover, Granados held that it was necessary to strengthen the investigative function of the Attorney General's Office to combat impunity and prevent prosecutorial errors (Granados Peña et al. 2003).<sup>27</sup>

Granados promotes an accusatorial system<sup>28</sup> based on the Anglo-American dispute model, which conceives the judge as a passive decision maker and the trial as a contest between two equal parties (Granados Peña 2005, p. 24).

Under the dispute model, common law jurisdictions conceive the decision maker as a passive umpire who decides upon the controversies that the parties present to him; the prosecutor as an active party who has to investigate and defend his own case, has something at stake in winning it (usually, obtaining a conviction), and has formal powers relatively equal to those of the defense; and the defendant and his attorney as procedural equals of the prosecutor. Finally, within the binary logic of this contest pitting prosecution against defense, there is no room for the victim as a party (Langer 2005, p. 839).

This description of the criminal process comprises three different roles: judicial decision making by the judge, criminal investigation and accusation by the prosecutor, and defense against the accusation by the defendant and his attorney. The parties (prosecution and defense) have relatively equal powers, and, generally, the Attorney General belongs to the executive branch. Thus, prosecutors lack judicial powers to limit the defendant's rights (Granados Peña 1999a, pp. 173–174).

The investigatory stage is not part of the criminal process, as the adversary proceedings start after the arrest, indictment or formulation of charges. Each party

<sup>27</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, pp. 6, 7; Minute # 5, February 25 of 2002, p. 7; Minute # 8, March 4 of 2002, pp. 2, 5.

<sup>28</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, pp. 6, 7.  
Preparatory Commission Meeting Minute # 8, March 14 of 2002, p. 2.

runs its own pre-trial investigation to build its own case (prosecution case and defense case) (Granados Peña 1999a, p. 176; 1999b, p. 15).<sup>29</sup>

In the adversary system the goal of the advocate is not to determine the truth but to win, to maximize the interests of his or her side within the confines of the norms governing the proceedings. This is not to imply that the theory of the adversary process has no concern with truth. Rather, the underlying assumption of the adversary process is that truth is most likely to emerge as a by-product of vigorous conflict between intensely partisan advocates, each of whose goal is to win. Thus, the duty of the advocate in the adversary system is to present his or her side's position in the very best possible light and to challenge the other side's position as vigorously as possible (Feeley 1987).

In an accusatorial (dispute) model, there is broad prosecutorial discretion in the charging decision. Thus, prosecutors could decide who to charge with a crime, what charges to file, when to drop the charges, and how to allocate prosecutorial resources. Another characteristic institution of an accusatorial model are stipulations and plea-bargaining; the parties may negotiate and reach agreements about the dispute (Granados Peña 1999a, p. 186; Langer 2004).

In this model, the trial is oral and public (Granados Peña 1999a, p. 175; 1999b, p. 16). The prosecutor and the defense counsel present their cases and evidence, examine and cross-examine witnesses, and object improper questions. Consequently, the accusatorial model favors the principles of orality, intermediation, concentration, and publicity (Granados Peña 1999a, pp. 175–183).

Granados embraces a due process oriented accusatorial system, which seeks the protection of defendants' rights. He argues that in a rule of law model, state legitimacy depends on the respect for human rights, so the criminal process should be effective without seriously undermining fundamental rights and guarantees (Granados Peña 1999b, p. 15).<sup>30</sup>

An agenda based on a traditional approach to the adversarial system suggests a very limited concept of victim. The victim is the passive subject of the crime who has been harmed individually and directly by the offender. Given that the crime is a

<sup>29</sup>The U.S. Supreme Court pointed out: "Our system of justice is, and always has been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body)" *McNeil v. Wisconsin*, 501 U.S. 171, 181 n. 2 (1991).

<sup>30</sup>The core of a due process accusatorial model is the protection of the defendant's rights in order to limit the state's punitive power. Montesquieu argues "the citizen's liberty depends principally on the goodness of the criminal laws" (1997). Based on Enlightenment discourse, Beccaria argues for the reform of the criminal justice system. He promotes the defendant's rights in arrest, criminal investigation and punishment (Beccaria 1994).

The modern constitutional tradition proposed institutional arrangements for limiting police power, such as mechanisms for the accountability of the state representatives. In addition, the constitutional law promotes a more or less justiciable charter of rights (Loader and Walker 2007, p. 62). In the Ferrajoli's *Garantista* (due process) model, fundamental rights are the foundation and the justification of the state and the law (Ferrajoli 1995, p. 29). According to Roxin, the criminal procedure is the seismograph of a Constitution. In a totalitarian state, in accordance with the state-citizen antithesis, the state will privilege the public interest. By contrast, in a rule of law model, the state has two simultaneous goals: ensuring order and security through criminal prosecution and protecting the individual's rights and freedoms (Roxin 2000, pp. 10, 258).

harm to society and a violation of abstract legal interests, the passive subject of a crime is an abstract identity (Córdoba Angulo 2003).

Commonly, in an adversarial criminal justice system victims do not directly participate in criminal proceedings.<sup>31</sup> The dichotomous/confrontational structure of the adversarial system rejects any significant participation by third parties, including victims (Doak 2005, p. 297).<sup>32</sup> In addition, from a due process perspective, the presence of two or more accusers would interfere with the principle of equality of arms (Doak 2005, p. 298; Thaman 1999, p. 244). Furthermore, the primary goal of criminal law is protecting public interests rather than the private interests of individuals (Ashworth 1986, p. 87). Consequently, the adversarial system limits the role of victims in the criminal process to cooperation with prosecutors.

### 2.1.2.2 Julio Sampedro: A Preferential Option for Victims in the Criminal Process

In the criminal justice reform of the early 2000s, Sampedro suggested an accusatorial system with a preferential option for victims in the criminal process. He proposed broad protection of victims' rights and the adoption of restorative justice mechanisms (Osorio Isaza and Morales Marín 2005, p. 14; Riveros Barragán 2010, p. 24). Sampedro claimed that the concept of victim and the role of the civil party was very limited in the 1991 Criminal Procedure Code (Sampedro Arrubla 1998, p. 50).

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<sup>31</sup>Some traditional adversarial systems have introduced mechanisms for limited participation of the victim in relation to specific issues (Doak 2005). For example, in the U.S. since 1982, several federal statutes, state statutes, and amendments to the constitutions of the states have established basic rights for victims, such as the right to be heard at sentencing and parole hearings (Beloof et al. 2010; Gillis and Beloof 2001). Significantly, the U.S. Crime Victims' Rights Act of 2004 (CVRA) grants some rights to victims in federal criminal cases, including the right to be heard at some stages of the criminal process (18 U.S.C. § 3771).

(a) RIGHTS OF CRIME VICTIMS. A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

<sup>32</sup>It is important to note that inquisitorial and mixed systems grant the participation of the victim within the criminal process through diverse mechanisms e.g. subsidiary prosecutors, civil party, etc. (Perrodet 2002, pp. 453–454).

Sampedro criticizes traditional approaches to criminal procedure and punishment that focus on the offender and marginalize the victim (Sampedro Arrubla 2010, pp. 27, 32–34). Notably, Sampedro's framework embraces the restorative justice model and the recreative justice model proposed by his professor Antonio Beristain.

The restorative justice approach criticizes modern criminal law. One of the main foundations of these criticisms is Christie's argument that criminal justice institutions "take away conflicts" from those affected (Beristain 2000, p. 476; Braithwaite 1996, 2007, p. 148; Christie 1977; Roach 1999, p. 673). In modern criminal law, the state has control over punishment systems and crimes are violations of an abstract legal interest or state authority. Thus, the conflict between the parties becomes a conflict between the offender and the state (Beristain 2005, p. 467; Braithwaite 1996). Traditional approaches to criminal procedure and punishment focus on the offender and marginalize the victim (Sampedro Arrubla 2010, pp. 27, 32–34).

A restorative justice approach promotes restoring the right of victims to their own conflict. This approach is based on victims' rights to autonomy and self-determination, which comprise the right to participate in the decision of their conflict (Dubber 2006, p. 519; Roach 1999, p. 709). This perspective seeks to empower victims, by giving them a direct voice in the criminal process and other proceedings on the crime (Braithwaite 2007, pp. 148, 157; Dubber 2006, p. 519). This model is victim-centered, in that it privileges needs, interests, and decisions of victims (Roach 1999, pp. 699, 707, 709).

The restorative justice ideal comprises values such as healing, apology, and forgiveness (Braithwaite 2007, p. 148). Therefore, this approach is non-punitive: it emphasizes crime prevention and restoration rather than criminal sanction, prosecution, and punishment (Roach 1999, pp. 699, 707, 709). The restorative justice model seeks restoring victims, restoring offenders, and restoring communities (Braithwaite 1999, p. 6). Thus, this model involves victims, offenders, and communities, and gives victims power and autonomy to participate in the conflict resolution (Roach 1999, pp. 707, 709, 710). Some scholars note that the restorative justice model is relevant to address not only small crimes, but also the most heinous crimes like war crimes (Braithwaite 1999, p. 7).

While acknowledging its benefits, some supporters of the restorative justice model consider that it should be improved. Beristain argues that the restorative justice model overly emphasizes the analysis of the past, as it focuses on harms caused by offenses to victims and their restoration. Thus, he suggests what he calls a "recreative justice" model that includes many elements of restorative justice, but that seeks more than re-establishing and restoring the past (Beristain 1998b, pp. 111, 117). According to Beristain, recreative justice seeks to not only understand the reasons behind the victimization (crime) and restore victims and society, but also to reconstruct the relationship and recreate a future social order. The recreation process comprises a dialogue that includes the offender, victims, and society. In this process, direct and indirect victims are protagonists. In consequence, the criminal sanction seeks restoration, reconciliation between the offender and the victim, and the recreation of the offender and victims as persons. Above all, in a criminal recreative justice model the *indubio pro victim* principle substitutes the



*indubio pro reo* (Beristain 1994, pp. 346, 353; 1998a, pp. 214, 215; 1998b, pp. 112, 117, 118, 122, 125).

Beristain proposes different conceptions of crime and punishment that place victims as protagonists, and that reject a retributive approach to criminal justice (Beristain 2000, p. 41). He renames “crime” as “victimization,” which is a violation of subjective and objective rights of concrete and vulnerable people rather than the violation of an abstract legal interest or state authority. In addition, victimization (crime) is a conflict that involves three agents or parties: the offender, the victim, and society. Thus, the criminal process implies dialogue between the offender, victims, and society. According to this framework, the objective of criminal justice is not only punishing the offender but also helping and restoring victims. Therefore, punishment mainly seeks reparation rather than *vindicta*, so that the prison may involve a restorative dimension. All in all, criminal law should include non-vindictive institutions such as mediation, conciliation, community services, etc. (Beristain 2000, pp. 49, 84; 2004, p. 50; 2005, p. 467).

Following the restorative justice and recreative justice models, Sampedro proposes the “humanization” of the criminal justice system, which entails:

- i. Making victims visible as protagonists in criminal justice through the recognition of their rights and the creation of formal or informal mechanisms to protect those rights (Sampedro Arrubla 2010, p. 36).
- ii. Understanding the crime as a conflict that can be resolved through a constructive sanction. This constructive sanction seeks to build relationships between the offender and the victim as well as achieve reconciliation and peaceful coexistence (Sampedro Arrubla 1998, p. 51; 2010, p. 39).
- iii. Implementing a criminal justice system that is communicative, resolute, and re-creative. The goal of this model is to foster creative communication among the parties or agents involved in the conflict (victims, offender, and society) to overcome the conflict. As a result, it is necessary to establish mechanisms that facilitate the creative encounter and recognize the victim and the offender as protagonists of the conflict (e.g. ADR mechanisms, principle of opportunity, etc.)<sup>33</sup> (Sampedro Arrubla 1998, p. 51; 2010, pp. 45–52).

## 2.2 The 2002 Constitutional Reform

Having reviewed the key actors in the reform, this section will now examine the details of the 2002 constitutional reform. First, I will explore how Granados and Sampedro promoted their agendas in the Preparatory Commission (the commission

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<sup>33</sup>Granados agrees with the introduction of alternative dispute resolution (ADR) mechanisms like conciliation, since they favor efficiency, efficacy and restoration of victims. These mechanisms not only seek an economic agreement, but also the resolution of conflict and social peace (Granados Peña 1999b, p. 26).

to draft a project of the constitutional reform). Then, I will examine the debates in Congress and the content of the amendment approved. A central point of this section is the promise of broad protection of victims as active protagonists of the 2002 constitutional reform. This amendment recognizes victims as subjects with rights in the criminal process. This reform also incorporates three elements for victims: assistance and protection, comprehensive reparation, and participation (Article 250 Constitution).

Attorney General Osorio promoted the creation of an interinstitutional commission to draft a project of the constitutional reform (*Preparatory Commission*), whose meetings began on February 1, 2002.<sup>34</sup>

In the Preparatory Commission, Jaime Granados promoted an accusatorial system. Following this model, he advocated for<sup>35</sup>: (i) implementing a public and oral trial<sup>36</sup>; (ii) including the jury as adjudicator<sup>37</sup>; (iii) introducing a regulated principle of opportunity (limited discretionary non-prosecution)<sup>38</sup>; (iv) recognizing more rights and guarantees to defendants; (v) reducing prosecutors' judicial powers; (vi) creating an oversight judge (*juez de control de garantías*) to pre or post-approve restrictions on defendant's rights<sup>39</sup>; (vii) strengthening the Public Defenders System; (viii) suppressing the intervention of Public Ministry (*Procuraduría General de la Nación*), that is different from the Attorney General's

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<sup>34</sup>Experts attending the Preparatory Commission:

- *Fiscalía General de la Nación*: Attorney General Luis Camilo Osorio Isaza and his advisors Julio Andrés Sampedro and Gustavo Gómez Velásquez, Vice Attorney General Gustavo Morales Marín and his advisor Nora Angélica Lozano Suárez, Prosecutors Delegate to Supreme Court Guillermo Mendoza Diago, Ramiro Alonso Marín Vásquez and Andrés Ramírez Moncayo.
- *Sala Penal de la Corte Suprema de Justicia*: Álvaro Orlando Pérez Pinzón (President) and Justice Fernando Arboleda Ripoll.
- *Consejo Superior de la Judicatura*: Fernando Coral Villota (President) and Justice Lucía Arbeláez de Tobón.
- *Ministerio del Interior y de la Justicia - Secretario Privado del Ministro*: Felipe Pinzón Londoño.
- *Procuraduría General de la Nación - Procurador General*: Edgardo Maya Villazón and *Procuradora delegada para la Policía Nacional* Dora Cifuentes Ramírez.
- *Defensoría del Pueblo - Defensoría Pública*: Karin Kuhfeldt Salazar and Juan Jaramillo Pérez.
- *Asociación Colombiana de Universidades*: Gustavo Salazar Trujillo.
- *Corporación Excelencia en la Justicia*: Jaime Granados Peña, Juan David Riveros Barragán.

<sup>35</sup>“*Ideas Temáticas, y Bases Ideológicas para un Esquema de Procesamiento Criminal de Tendencia Acusatoria*” (Working documents for Preparatory Commission).

<sup>36</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, p. 15.

<sup>37</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, p. 18.

<sup>38</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, pp. 6, 7; Minute # 7, March 6 of 2002, pp. 4–8; Minute # 8, March 14 of 2002, p. 7.

<sup>39</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, pp. 6, 7; Minute # 3, February 12 of 2002, pp. 4–6; Meeting Minute # 9, March 19 of 2002, p. 6.

Office,<sup>40</sup> in criminal procedures<sup>41</sup>; (ix) rethinking the parties' role during the pre-trial phase, so each party (prosecutor and defense attorney) should run its own investigation and gather its own evidence, but if the prosecutor finds exculpatory evidence he should discover it to the defense<sup>42</sup>; (x) establishing that the pre-trial investigation should remain secret.<sup>43</sup> Overall, the Preparatory Commission included the suggestions of Granados in the project for the constitutional reform.

Three aspects of the initial proposal were particularly controversial in the Preparatory Commission. First, although the reform would limit prosecutors' judicial powers, they maintain judicial powers to order searches, seizures, wire-tapping, and exceptional arrests. The representatives of the Ombudsman's Office (Karin Kuhfeldt and Juan Jaramillo) and the delegate of the Minister of Justice (Felipe Pinzón) criticized the remaining prosecutors' judicial powers. By contrast, Granados, Attorney General Osorio, and delegates of the Attorney General's Office (Gómez Velásquez, Morales Marín and Mendoza Diago) claimed that these judicial powers were essential to ensure an opportune criminal investigation. They also emphasized that searches, seizures, and exceptional arrests would have a post-judicial review. Furthermore, Granados argued that the Attorney General, and the new President (Álvaro Uribe Vélez) would not accept a project that affects the investigative function of prosecutors. In addition, Granados highlighted that the Attorney General was abandoning many judicial powers, but the Attorney General would not give up certain judicial powers (to order searches, seizures, wiretapping, and exceptional arrests). Representatives of the Ombudsman's Office and the Minister of Justice accepted such remaining judicial powers for prosecutors, in order to reach a project that, at least, limited judicial powers of prosecutors.<sup>44</sup>

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<sup>40</sup>Notably, the Constitution of 1991 established two different public institutions: the Attorney General's Office and the Public Ministry (art. 116, 118).

The Attorney General's Office was created in the Constitution of 1991 as a judicial institution. Its primary roles are investigating and prosecuting criminal offenses (art. 250 Constitution).

The Public Ministry was created in the Constitution of 1830 as an institution under the direction of National Government. By contrast, in the Constitution of 1991, the Public Ministry is an autonomous institution of control or supervision (art. 117). The Public Ministry includes the Office of Procurator General of the Nation (*Procurador General de la Nación*), the Office of the Human Rights Ombudsman (*Defensor del Pueblo*) and municipal ombudsmen (*personeros*) (art. 118 Constitution). The head of the Public Ministry is the Procurator General of the Nation.

Procurator General of the Nation and its agents have the following functions: (i) to promote the respect for human rights, (ii) to defend public interests, (iii) to investigate disciplinary misconduct committed by public officials, (iv) to intervene in legal proceedings before judicial or administrative authorities to defend the legal order, public property or fundamental rights (art. 277 Constitution).

<sup>41</sup>Preparatory Commission Meeting Minute # 1, February 1 of 2002, p. 17.

<sup>42</sup>Preparatory Commission Meeting Minute # 5, February 25 of 2002, p. 6.

<sup>43</sup>Preparatory Commission Meeting Minute # 3, February 12 of 2002, p. 10; Minute # 4, February 18 of 2002, p. 6; Minute # 9, March 19 of 2002, p. 11.

<sup>44</sup>Preparatory Commission, Meeting Minute # 1, February 1 of 2002, pp. 6–9; Meeting Minute # 3, February 12 of 2002, pp. 4–7; Meeting Minute # 9, March 19 of 2002, pp. 6–7.

Second, the reform would establish that the pre-trial investigation should remain secret and suppress the prosecutor's duty to gather both inculpatory and exculpatory evidence.<sup>45</sup> Representatives of the Ombudsman's Office (Karin Kuhfeldt and Juan Jaramillo) disagreed with these proposals. In contrast, Granados suggested that in an accusatorial system the preliminary investigation involves mere inquiries by law enforcement authorities rather than practice of proofs, and the investigatory stage is a pre-process phase. Thus, participation of the defense begins with an arrest or notification of charges. Moreover, Granados argued that in an accusatorial system the role of parties (defense and prosecution) is different, each party has to gather its own evidence. Consequently, the defense has to gather exculpatory evidence, and if the prosecutor finds favorable evidence to the accused's case, he has the duty to disclose it.<sup>46</sup> Given that the representatives of the Ombudsman's Office definitively rejected these aspects, Granados suggested that the Commission should submit the project and each institution could present its approach to this issue in Congress.<sup>47</sup>

Third, the proposal suggested excluding the Public Ministry (*Procuraduría General de la Nación*) from the criminal process because the participation of a "third party" would be incompatible with an adversarial system. The delegates of the Public Ministry (Dora Cifuentes) and the Minister of Justice (Felipe Pinzón) rejected the elimination of the Public Ministry's role in criminal proceedings. Cifuentes argued that the Public Ministry defends the public interest and individual rights. In addition, Pinzón said that the Public Ministry controls prosecutors' activities.<sup>48</sup> In the end, the Preparatory Commission omitted any reference to the Public Ministry (*Procuraduría General de la Nación*) in the criminal process.

Moreover, Julio Sampedro encouraged broad protection of victims' rights and the adoption of restorative justice mechanisms in the constitutional reform of 2002 (Osorio Isaza and Morales Marín 2005, p. 14; Riveros Barragán 2010, p. 24).

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<sup>45</sup>Certain features of adversarial systems and common law jurisdictions help explain secrecy of criminal investigations and the new role of prosecutors. First, adversarial systems conceive the criminal process as a dispute between two parties—prosecution and defense, so each party has to develop its own investigation (Langer 2004). Second, the crucial adjudicatory moment is the trial in an adversarial system, so the pre-trial phase is relatively informal and flexible (Langer and Roach 2013, p. 276).

In contrast, civil law jurisdictions conceive the criminal procedure as a unitary investigation developed by impartial officials (Langer 2004). In this conception, the pretrial phase and the written dossier play a central role (Langer and Roach 2013, p. 276). In the previous Criminal Procedure Code of Colombia (Law 600 of 2000), prosecutors—as "impartial" officials—run the investigation to gather exculpatory and inculpatory evidence. Prosecutors and police had to document all their activity in a written dossier. In addition, elements of proof collected during the preliminary investigation and pretrial phases were treated as proof at trial.

<sup>46</sup>Preparatory Commission, Meeting Minute # 3, February 12 of 2002, p. 10; Meeting Minute # 9, March 19 of 2002, p. 11.

<sup>47</sup>Preparatory Commission, Meeting Minute # 9, March 19 of 2002, p. 12.

<sup>48</sup>Preparatory Commission Meeting Minute # 4, February 18 of 2002; Preparatory Commission Meeting Minute # 5, February 25 of 2002; Preparatory Commission Meeting Minute # 7, March 6 of 2002.

Sampedro permanently invoked international human rights and the Constitutional Court's doctrine on victims' rights in the discussions to support his approach.<sup>49</sup>

The Preparatory Commission embraced the following victims' rights included in the "ideological basis for an accusatorial criminal justice system<sup>50</sup>:"

- i. The right to be treated with respect to their dignity.
- ii. The right to protection of their privacy and safety and the protection of the safety of their families and witnesses.
- iii. The right to access to justice.
- iv. The right to speedy and effective reparation.
- v. The right to be heard and to present evidence in criminal proceedings.
- vi. The right to information about the protection of their rights and the circumstances of the crime.
- vii. Victims' interests should be considered in discretionary decisions of prosecution.
- viii. The right to legal assistance during pre-trial and trial phases.
- ix. The right to receive compensation from the offender.
- x. The right to comprehensive assistance.
- xi. The right to have a translator.

In the Preparatory Commission, there was a strong discussion about the state institution responsible for ensuring the protection of victims' rights and providing legal assistance for victims. The three possibilities were the Ombudsman's Office, the Public Ministry (*Procuraduría General de la Nación*), and the Attorney General's Office. Representatives of the Ombudsman's Office and representatives of the Public Ministry rejected this duty. Ultimately, the Attorney General accepted the role.<sup>51</sup> In this context, the Commission decided that the Attorney General's Office would be responsible for the protection of victims' rights for two reasons. First, victims would intervene in criminal proceedings accompanied by prosecutors.

<sup>49</sup>Preparatory Commission Meeting Minute # 2, February 6 of 2002, p. 5; Minute # 7, March 6 of 2002, pp. 8–9.

<sup>50</sup>Preparatory Commission Meeting Minute # 4, February 18 of 2002, pp. 13, 14.

The Preparatory Commission approved these rights without much debate. There was only one modification to the initial draft; the draft said that victims would have those rights on equal conditions, and Gustavo Gómez Velásquez suggested the suppression of the equal conditions clause.

<sup>51</sup>Preparatory Commission Meeting Minute # 4, February 18 of 2002, pp. 10–13.

First, Granados and Guillermo Mendoza Diago (Delegate Prosecutor to the Supreme Court) suggested the Ombudsman's Office, due to its duties related to human rights protection. The Ombudsman's Office representatives (Karin Kuhfeldt and Juan Jaramillo) rejected this idea, arguing that this institution would not be able to comply with this new duty because of lack of resources and the potential conflict of interest in defending defendants and victims. Second, Gustavo Gómez Velásquez suggested the Public Ministry (*Procuraduría General de la Nación*), but the delegate of this institution (Dora Cifuentes) disagreed and claimed that the Public Ministry would retain its duties to intervene in criminal proceedings. Third, Sampedro suggested that the Attorney General's Office should create an office for assistance and protection of victims, which will have to ensure the efficacy of victims' rights.

Second, the Attorney General's Office already had the duty to ensure the protection of victims and witnesses since the 1991 Constitution (art. 250).<sup>52</sup>

The project for the constitutional reform established functions for prosecutors to enforce rights and interests of victims (art. 250 Constitution).<sup>53</sup> In particular, this project established responsibilities for prosecutors to ensure victims' assistance, protection, restoration, and comprehensive reparation.<sup>54</sup> Moreover, this reform recognized the victim as participant in the criminal process, but established that the legislation will define the terms of this participation<sup>55</sup> and will develop mechanisms

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<sup>52</sup>It is important to mention that in the meetings of the Constitutional Commission to draft the Code Gómez Velásquez, Adolfo Salamanca and Yesid Ramírez criticized the allocation of the function of protecting the victims' rights to the Attorney General's Office. They held that Ombudsman's Office should have this responsibility, so that the Attorney General's Office would focus on criminal investigation (Constitutional Commission Meeting Minute # 7, February 28 of 2003, pp. 4–10, Constitutional Commission Meeting Minute # 26, July 4 of 2003, pp. 5, 6).

<sup>53</sup>The Article 250 of the Constitution, after the 2002 constitutional reform, established:

The Attorney General's Office should:

1. Request to the oversight judge (*juez de control de garantías*) measures to ensure the presence of the accused in criminal proceedings, the preservation of evidence and the protection of community, especially victims. (...)
6. Request to the trial judge judicial measures for victims' assistance, as well as ordering the restoration of rights and comprehensive reparation to victims.
7. Ensure the protection of victims, jurors, witnesses and other participants in criminal proceedings, the legislation will determine the terms on which victims may participate in the criminal process and mechanisms of restorative justice.

<sup>54</sup>Preparatory Commission Meeting Minute # 2, February 6 of 2002, p. 5; Minute # 7, March 6 of 2002, pp. 9–10.

Sampedro argued that international human rights and the Constitutional Court recognize the right to comprehensive reparation, which is broader than an economic compensation or restitution.

<sup>55</sup>The victim's role in the criminal process was an undecided issue in the project of constitutional reform. In the Preparatory Commission, Granados presented a structure of the new criminal procedure including the role of parties (defense and prosecution). Fernando Coral Villota and Juan Jaramillo pointed out that this structure failed to determine mechanisms of victims' participation. In addition, they highlighted the elimination of the civil party, so they claimed that victims' role in criminal proceedings was imprecise. Moreover, Sampedro argued that this structure did not develop the charter of victims' rights and this omission involved a problem of access to justice. Thus, Sampedro proposed to include the description of the role of victims in the project (Preparatory Commission Meeting Minute # 7, March 6 of 2002, p. 9).

Sampedro and Granados mentioned that victims would have the right to information during the pretrial investigation phase, victims would be entitled to intervene at the pre-trial and trial phases, and victims would mainly participate accompanied by prosecutors (Preparatory Commission Meeting Minute # 7, March 6 of 2002, p. 9). On the contrary, Gómez Velásquez argued that victims should be protected, but their rights and interests should be pursued in the civil jurisdiction (Preparatory Commission Meeting Minute # 1, February 1 of 2002, p. 16).

Notably, Sampedro and Granados had different underlying ideas. Sampedro intended a preferential option for victims in the criminal process and broad victims' participation to replace the civil party (Preparatory Commission Meeting Minute # 3, February 12 of 2002, p. 12; Minute # 5, February 25 of 2002, p. 10), while Granados proposed that victims should be heard and restored as

of restorative justice.<sup>56</sup> As a result, Article 250 of the Constitution recognizes victims as subjects with rights in the criminal process.

In March 19, 2002, the Preparatory Commission finished a project for the constitutional reform, which included the ideological basis for an accusatorial criminal justice system.<sup>57</sup> Attorney General Luis Camilo Osorio delivered this project to President Pastrana's government; then the Minister of Justice and the Minister of Internal Affairs presented this project to Congress on April 26, 2002.

The Attorney General defended the project and advocated the adoption of an accusatorial or adversarial system. He represented this reform as a modernization project and the solution to the inefficiency of the criminal justice system. He encouraged the approval of limited prosecutorial discretion (e.g. a regulated principle of opportunity) as a tool to improve efficiency. In addition, he accepted the reduction of prosecutors' judicial powers in order that they focus on the investigation. However, he defended prosecutors' judicial powers to order searches, seizures, and exceptional arrests, by arguing that these powers were necessary to conduct an effective and opportune investigation. The Ombudsman criticized these judicial powers based on defendants' rights. As a response to these criticisms, the Attorney General highlighted that the criminal justice system should protect rights and interests not only of defendants but also of victims and society. Moreover, Osorio

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(Footnote 55 continued)

participants rather than full parties in an accusatorial criminal process (Preparatory Commission Meeting Minute # 7, March 6 of 2002, p. 9).

Following a suggestion of Attorney General Osorio, the Preparatory Commission deferred defining the role and participation of victims in criminal proceedings to the Criminal Procedure Code (Preparatory Commission Meeting Minute # 7, March 6 of 2002, pp. 9–10). According to Juan David Riveros, the deferral of this matter to the Code was a necessary strategy to reach a consensus on the project for the constitutional reform, because the role of victims was an extremely controversial issue and the Preparatory Commission had time pressure (Interview, June 11 and 18, 2014).

<sup>56</sup>Preparatory Commission Meeting Minute # 4, February 18 of 2002, pp. 13, 14.

Sampedro stated that Vienna Declaration and the Commission on Crime Prevention and Criminal Justice of United Nations suggested states to implement restorative justice mechanisms. He described these mechanisms as alternative dispute resolution (ADR) mechanisms such as conciliation and mediation.

<sup>57</sup>The "ideological basis for an accusatorial criminal justice system" included:

- Defendants' rights: liberty, privacy, presumption of innocence, defense.
- Rights of participants in criminal proceedings: human dignity and equality.
- Exclusionary rule.
- Principles of orality, intermediation, concentration and publicity. The trial should be oral and public, within a reasonable time.
- Victims' rights.
- Access to justice for victims: the state should provide legal assistance.
- Restoration of rights: judicial authorities should order measures to restore rights violated by the crime.



suggested that the new system would respect both victims and defendants rights, and would ensure comprehensive reparation for victims within a reasonable time.<sup>58</sup> All in all, Osorio used victim language to justify and legitimate the reform and some crime control measures.

The Supreme Court, the Public Ministry, and some Congress members, including Piedad Córdoba (Liberal Party) and Rafael Pardo (Radical Change Party), strongly opposed this project of constitutional reform.<sup>59</sup> Some opponents pointed out that this reform was an improvisation, and a longer and deeper debate was necessary to reach an adequate reform.<sup>60</sup> In addition, some opponents argued that the Colombian criminal justice system lacked the economic, institutional, and human resources needed to implement this reform. According to Rafael Pardo, the promoters of the reform failed to calculate a detailed and accurate budget for the implementation.<sup>61</sup> Nevertheless, the majority of Congress members agreed with the criminal justice reform. In particular, many Congress members supported the protection of defendants' rights and limitations to judicial powers of the Attorney General's Office. Some Congress members believed that the former Attorney General Gómez Méndez, affiliated with the Liberal Party, had initiated politically motivated criminal investigations against members of the Conservative Party, and committed abuses through his broad judicial powers.<sup>62</sup>

In general terms, Congress approved the project for constitutional reform designed by the Preparatory Commission through Legislative Act 03 of 2002. Congress included the following modifications: limiting the extent of the principle of opportunity,<sup>63</sup> maintaining the participation of the Public Ministry

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<sup>58</sup>*Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

*Gaceta del Congreso* 29, February 4 of 2003, *Acta de Plenaria del Senado de la República* 36, December 11 of 2002.

<sup>59</sup>*Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

<sup>60</sup>Germán Gonzalo Valdés Sánchez (President—Supreme Court of Justice), Fernando Arboleda Ripoll (Justice—Criminal Chamber of the Supreme Court of Justice), Edgardo Maya Villazón (*Procurador General de la Nación*), Rafael Pardo (Senator). See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

Álvaro Orlando Pérez (President—Criminal Chamber of the Supreme Court of Justice). See, Preparatory Commission Meeting Minute # 1, February 1 of 2002, pp. 12–13.

<sup>61</sup>Edgardo Maya Villazón (*Procurador General de la Nación*), Fernando Arboleda Ripoll (Justice—Criminal Chamber of the Supreme Court of Justice), Piedad Córdoba (Senator), Rafael Pardo (Senator). See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002.

<sup>62</sup>Interview with Mildred Hartmann, February 8 of 2013.

<sup>63</sup>In Congress, the introduction of the principle of opportunity was very controversial. Some Congressmen argued that prosecutorial discretion might generate abuses. They claimed that the traditional principle of legality ensures uniform and non-arbitrary law enforcement. On the contrary, the Attorney General maintained that the principle of opportunity would improve the efficiency of the system, the implementation of the criminal policy, and comprehensive reparation for victims. He also indicated that a regulated principle of opportunity involves a limited prosecutorial



(*Procuraduría General de la Nación*) in the criminal process,<sup>64</sup> and establishing the protection of victims as justification for pretrial detention.

Legislative Act 03 of 2002 mainly reformed two constitutional articles: Article 116 introduced juries as adjudicators, and Article 250 transformed the role and duties of the Attorney General's Office (see Table 2.1).

The constitutional reform had two pillars: the accusatorial model and the protection of rights of both defendants and victims. The reform pursued two objectives: (i) efficiency in criminal prosecution, eradicating impunity, and improving management of court caseloads, and (ii) compliance with international human rights standards on both defendants' rights and victims' rights (*Reforma Constitucional de la Justicia Penal – Actas de la Comisión Preparatoria y Documentos de Trámite Legislativo (Vol. I)*, 2002; *Reforma Constitucional de la Justicia Penal – Texto del Acto Legislativo 03 de 2002 y Documentos de Trámite (Vol. II)*, 2003).

Notably, the constitutional reform recognizes particular victims' rights as constitutional rights and victims as subjects with rights in the criminal process (art. 250 Constitution). Thus, the constitutional reform contributes to making victims visible as relevant actors in the criminal process. According to the Corporation for Excellence in Justice, the objectives of this reform regarding victims' rights were as follows:

- i. Ensuring adequate assistance to victims, providing victims with access to clear information about the system and their rights, and recognizing that victims have a special role in the system.
- ii. Implementing restorative justice programs and strengthening mechanisms to ensure comprehensive reparation (Corporación Excelencia en la Justicia 2010, pp. 16, 17).

In particular, the constitutional reform incorporates three elements for victims: assistance and protection, comprehensive reparation, and participation (Article 250 Constitution). Although the actors involved in this process of reform held

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(Footnote 63 continued)

discretion in accordance with the legislation. Moreover, the application of the principle of opportunity would involve judicial review and participation of Public Ministry and victims; these checks would protect citizens from arbitrary actions of prosecutors. *Gaceta del Congreso* 29, February 4 of 2003, *Acta de Plenaria del Senado de la República* 36, December 11 of 2002.

<sup>64</sup>In Congress, Edgardo Maya Villazón (*Procurador General de la Nación*) advocated for maintaining the intervention of Public Ministry in the criminal process. He argued that Public Ministry has a relevant role in the criminal justice system, as it controls the administration of justice and protects public interests and fundamental rights. See, *Gaceta del Congreso* 28, February 4 of 2003, *Acta de Plenaria del Senado de la República* 35, December 9 of 2002. Some people suggest that his real goal was to keep in the institution the large number of delegates responsible for intervention in criminal proceedings. Procurator General of the Nation has the power to appoint these delegates, so Procurator can exchange these positions for the support of Congressmen (Interview with Juan David Riveros, June 11 and 18, 2014).

**Table 2.1** Functions of the Attorney General's Office: Comparison between Article 250 in the 1991 Constitution and the 2002 constitutional reform

Functions of the Attorney General's Office	
Article 250 in the original constitution of 1991	Article 250 in the constitutional reform (Legislative Act 03 of 2002)
<p>The major functions of the Attorney General's Office were to:</p> <ul style="list-style-type: none"> <li>• Investigate and prosecute crimes, except crimes committed by military personnel during the service</li> <li>• Order arrests and pretrial detentions</li> <li>• Order measures for the restoration of rights and the compensation of damages caused by the crime</li> <li>• Direct and coordinate functions of judicial police</li> <li>• Ensure the protection of victims, witnesses, and participants in criminal proceedings</li> <li>• Investigate inculpatory and exculpatory facts, and to protect fundamental rights of defendants</li> </ul>	<p>The major functions of the Attorney General's Office are to:</p> <ul style="list-style-type: none"> <li>• Investigate and prosecute crimes, except crimes committed by military personnel during the service. Prosecutors have limited discretion in accordance with the legislation (regulated principle of opportunity). Its application involves judicial review</li> <li>• Request to the oversight judge (<i>juez de control de garantías</i>) measures to ensure the presence of the accused in criminal proceedings, preservation of evidence, and protection of community, especially victims. Legislation can attribute to the Attorney General's Office the power to order exceptional arrests subject to judicial review within 36 h</li> <li>• Order searches, seizures, and wiretapping subject to judicial review within 36 h</li> <li>• Collect elements of proof and maintain an unbroken chain of custody</li> <li>• Present written formal accusation to trial judges to initiate the public and oral trial</li> <li>• Request to trial judges for judicial measures for victims' assistance, as well as order the restoration of rights and comprehensive reparation to victims</li> <li>• Ensure the protection of victims, jurors, witnesses and other participants in criminal proceedings; the legislation will determine the terms on which victims may participate in the criminal process and mechanisms of restorative justice</li> <li>• Direct and coordinate functions of judicial police</li> <li>• Disclose all relevant information and elements of proof, including favorable evidence to the defense, with the accusation</li> </ul>

competing approaches on victims' rights, they agreed with those three basic elements because of their ambiguity and the multiplicity of interpretations that are possible. These victims' rights written in vague language seem compatible with the dichotomous structure of the accusatorial system (prosecutor vs. defense), and the interests of prosecutors and defendants.

The constitutional reform deferred to the legislation on the definition of the content of victims' rights. Importantly, the Code faced the challenge of how to accommodate the accusatorial structure and victims' participatory rights. The design of the Criminal Procedure Code involved the interplay of diverse conceptions of victims and victims' rights. Therefore, the legal reform comprised a conflict over the particular meanings of those contested elements.

### 2.3 Criminal Procedure Code of 2004

Legislative Act 03 of 2002 created a committee to draft the Criminal Procedure Code (*Comisión Constitucional Redactora*) during a six-month period, from January 15 to July 18, 2003. The Constitutional Commission was a technical committee that included representatives of diverse state institutions and criminal justice experts.<sup>65</sup> The Corporation for Excellence in Justice was the technical secretary. Some representatives of the U.S. Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) directly participated in the meetings of the Constitutional Commission (Granados Peña et al. 2003, p. viii).

Jaime Granados, Julio Sampedro, Juan David Riveros, and Mildred Hartmann submitted a pre-draft of the Criminal Procedure Code (hereinafter pre-draft CPC) to the Constitutional Commission as working material. This pre-draft was the result of a cooperation agreement signed by the U.S. Embassy, the Colombian Attorney General's Office, and Corporation for Excellence in Justice. Granados, Sampedro, Riveros, and Hartmann met with Paul Vaky and Kim Lindquist—OPDAT representatives—to discuss earlier versions of the pre-draft CPC (Granados Peña et al. 2003, p. viii).

The pre-draft CPC was a first step in an effort to articulate two agendas: Granados's agenda for an accusatorial system and Sampedro's agenda on a preferential option for victims in the criminal process. Their different conceptions of victims and the content of victims' rights not only competed but also influenced one

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<sup>65</sup>Members of the Constitutional Commission (*Comisión Constitucional Redactora*): Luis Camilo Osorio Isaza, *Fiscal General de la Nación*; Fernando Londoño Hoyos, *Ministro del Interior y de Justicia*; Temístocles Ortega, *Presidente del Consejo Superior de la Judicatura*; Yesid Ramírez Bastidas, *Presidente Sala Penal de la Corte Suprema de Justicia*; Edgardo Maya Villazón, *Procurador General de la Nación*; Eduardo Cifuentes Galindo, *Defensor del Pueblo*; Germán Vargas Lleras, *Presidente del Senado de la República*; Rodrigo Rivera Salazar, *Senador*; Luis Humberto Gómez Gallo, *Senador*; Jesús Ignacio García, *Representante a la Cámara*; Roberto Camacho, *Representante a la Cámara*; Eduardo Enríquez, *Representante a la Cámara*; Gustavo Gómez Velásquez, *ex Magistrado de la Corte Suprema de Justicia*; Adolfo Salamanca, *ex Vice fiscal General de la Nación y profesor universitario*; Jaime Enrique Granados Peña, *profesor universitario*.

another. Granados and Sampedro reached a compromise on which the pre-draft primarily developed the dichotomous structure of an accusatorial or adversarial system, and also included general standards on victims' rights that could be consistent with this structure.

The pre-draft CPC recognized a broad concept of victim consistent with international human rights doctrine,<sup>66</sup> introduced restorative justice principles and mechanisms, included the *in dubio pro victim* principle of interpretation,<sup>67</sup> and established a broad charter of victims' rights. However, this project incorporated few mechanisms to enforce those rights. Moreover, the project established a very limited participation of the victim in criminal proceedings. The central role of the victim was to cooperate with the prosecutor, and the prosecutor would represent the interests of the victim in the criminal process<sup>68</sup> (Granados Peña et al. 2003).

Notably, the dichotomous structure of the adversarial system approach prevailed over victims' participatory rights. Granados and his team—Hartmann and Riveros—mobilized an adversarial model more similar to the American one. OPDAT representatives supported their approach, and the U.S. Embassy provided funding for this pre-draft. In reflecting on this reform, Sampedro has recently conceded that the reform and its goals were extremely complex, and there was little clarity about how to incorporate victims in the accusatorial system.<sup>69</sup>

The debates of the Constitutional Commission involved the interplay among different conceptions of victims and the extent of victims' rights. On one hand, Granados and Sampedro defended the pre-draft CPC that included several standards for protection of victims. Gómez Pavajeau (Deputy of the Public Ministry) also supported this project. On the other hand, some members of the Commission proposed limitations or the elimination of some of those pro-victim standards. Some of them invoked a due process oriented accusatorial system and the principle of equality of arms (Gómez Velásquez—advisor of the Attorney General's Office and

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<sup>66</sup>The pre-project Code of Granados, Sampedro, Riveros and Hartmann embraced the broad concept of victim provided by the United Nations General Assembly (Resolution 40/34 of 1985), which includes direct and indirect victims.

<sup>67</sup>According to Beristain, the *in dubio pro victim* principle should substitute the *in dubio pro reo* to guarantee victims' rights in a restorative justice model (Beristain 1994, pp. 346, 353; 1998a, pp. 214, 215; 1998b, pp. 112, 117, 118, 122, 125). Article 92 of the pre-draft CPC incorporated a principle of interpretation *pro victim*, which means that the interpretation of rules must be favorable to victims.

<sup>68</sup>Interview with Julio Sampedro Arrubla, June of 2013.

Sampedro embraced the limited role of victims in the design of the reform. After the implementation of the reform, he points out that the intervention of victims accompanied by prosecutors is impossible because victims and prosecutors have different interests, sometimes contradictory.

<sup>69</sup>Interview with Julio Sampedro Arrubla, June of 2013.

It is important to note that Sampedro was educated in the Romano-Germanic tradition and was not an expert in Anglo-American adversarial system. So, he was not clear on how to incorporate his framework on victims' rights in an accusatorial or adversarial system.

former Justice of the Supreme Court, Yesid Ramírez—president of the Criminal Chamber of the Supreme Court, Alfonso Guarín Ariza—Justice of Superior Council of the Judiciary, and Carlos Mejía—delegate of the Ombudsman Office and former Justice of the Supreme Court). Other members claimed that victims pursue private interests, mainly economic compensation (Gómez Velásquez and Attorney General Osorio). In addition, the National Government sought to limit state liability to provide reparation for victims. After the debates, the Constitutional Commission approved the regulation on victims of the pre-draft CPC, except the *in dubio pro victim* principle. Moreover, the Constitutional Commission attributed to the Public Ministry the duty of ensuring the respect of victims' rights.<sup>70</sup>

On July 20, 2003, Attorney General Osorio submitted to Congress the draft prepared by the Commission (hereinafter draft CPC). In the House of Representatives, reports for debates about the bill of CPC were written by members of Conservative Party (Humberto Rodríguez, Carlos Eduardo Enríquez Maya and Javier Ramiro Devia), a member of National Salvation Movement (Roberto Camacho), a member of Liberal Party (Jesús Ignacio García), and a member of Radical Change Party (Reginaldo Montes Álvarez). In the Senate, the reports for the first and second debates were written by Senators Luis Humberto Gómez Gallo (Conservative Party), Héctor Helí Rojas (Liberal Party), and Germán Vargas Lleras (Radical Change Party).

In general terms, Congress approved the draft CPC through Law 906 of 2004. The explanatory memorandum of the draft CPC argued that the criminal justice reform of early 2000s developed an accusatorial system, and moreover, recognized victims as active protagonists in the criminal justice system. This memorandum criticized the traditional civil party, arguing that this institution was limited to economic restitution and marginalized victims of crime. Instead, the memorandum pointed out that the new Code would provide victims some mechanisms to participate in criminal proceedings and alternative dispute resolution (ADR) mechanisms. The objective was to protect victims' rights to truth, justice, and reparation according to international human rights law and the fight against impunity.

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<sup>70</sup>In the Constitutional Commission, Sampedro defended the principle arguing that it is necessary to favor victims in the criminal process. Moreover, Granados explained that this principle is to protect victims' rights when these rights are in collision with defendant's rights. He said that if the Commission eliminated this principle, judges would interpret the Code sacrificing victims' rights.

Gustavo Gómez Velásquez and Yesid Ramírez rejected the *in dubio pro victim* principle. They argued that it would interfere defendant's rights and the constitutional principle of equality. In addition, Jesús Ignacio García (Congressman) and Alfonso Guarín Ariza (Justice of Superior Council of the Judiciary) pointed out that victims' rights are included in the principles of interpretation of the Code (art. 26 of Law 906), so this rule of interpretation favorable to victims would be repetitive and unnecessary. In conclusion, the Constitutional Commission eliminated the *in dubio pro victim* principle.

(Constitutional Commission Meeting Minute # 14, April 25 of 2003, pp. 20–23).

### **2.3.1 *Victims in the Criminal Procedure Code of 2004 (Law 906)***

#### **2.3.1.1 Defining the Victim: A Restricted Concept**

A central issue in the criminal justice reform was to define the victim. Some actors promoted a broad concept of victim, while others defended a restricted definition. The Constitutional Commission approved the broad concept of victim included in the pre-draft CPC. But, the Attorney General's Office limited the concept of victim in the final draft submitted to Congress, without consulting the Commission. In the end, Congress passed the rule designed by the Attorney General's Office, so the 2004 CPC (Law 906) embraced a restricted concept of victim that excluded indirect victims.

The choice between a broad concept of victim and a restricted concept matters, since the notion of victim defines the scope of victimhood and determines who may claim for recognition and compensation in criminal proceedings. The construction of subjects by law fixes identities such as victim as right-holder. The definition of the right-holder determines who is entitled to claim rights and which rights can be invoked (Kennedy 2002b, p. 3).

Article 90 of the pre-draft CPC incorporated the broad concept of victim provided by the UN Basic Principles<sup>71</sup> (see Table 2.2). This concept includes three types of people: (i) persons who, individually or collectively, have suffered harm through acts or omissions that constitute a violation of criminal laws; (ii) immediate family or dependents of the direct victim; (iii) persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between the perpetrator and the victim.<sup>72</sup> This broad concept covers individual and collective victims, as well as both direct and indirect victims.<sup>73</sup>

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<sup>71</sup>Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, General Assembly, Resolution 40/34, 1985.

<sup>72</sup>Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, General Assembly, Resolution 40/34, 1985, section A.

Pre-project Code submitted by Granados, Sampedro, Riveros and Hartmann, art. 90.

<sup>73</sup>Inter-American Court of Human Rights. Case *Bámaca Velásquez v. Guatemala*, Judgment of November 25 of 2000. Case *Myrna Mack Chang v. Guatemala*, Judgment of November 25 of 2003, par. 232. Case *Escué Zapata v. Colombia*, Judgment of July 4 of 2007.

The Judge Sergio García-Ramírez has defined the direct victim and the indirect victim:

[T]he person who suffers impairment of his fundamental rights as the immediate effect of the violation, is a direct victim; between the victim and the impairment of his rights there is a relation of cause and effect (in the juridical sense of the connection), without intermediary or interruption. Conversely, an indirect victim would be the person who experiences the impairment of his right as an immediate and necessary consequence, according to the circumstances, of the injury suffered by the direct victim. Under this hypothesis, the effect on the

**Table 2.2** Changes in the concept of victim in the process of legal reform of the early 2000s

Pre-draft CPC (Art. 90)	Project of CPC approved by Constitutional Commission (Art. 86)	Project of CPC presented by Attorney General to Congress CPC (Art. 132 Law 906)
<p>i. Persons who, individually or collectively, have suffered harm through acts or omissions that constitute a violation of criminal laws</p> <p>ii. Immediate family or dependents of the direct victim</p> <p>iii. Persons who have suffered harm in intervening to assist victims in distress or to prevent victimization A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim</p>	<p>i. Natural or legal persons and other subjects of rights who, individually or collectively, have suffered harm through acts or omissions that constitute a violation of criminal laws</p> <p>ii. Immediate family or dependents of the direct victim</p> <p>iii. Persons who have suffered harm in intervening to assist victims in distress or to prevent victimization A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim</p>	<p>Natural or legal persons and other subjects of rights who, individually or collectively, have suffered <b>direct</b> harm through acts or omissions that constitute a violation of criminal laws A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim</p>

In the Constitutional Commission, Congressman Eduardo Enríquez argued that the concept of victim should include only direct victims, those who have experienced direct effects of crime. This proposal sought to limit the potential state liability, since his advisor, José Francisco Delgado, pointed out that the tendency is that the state provides redress to victims when the offender is unable to afford it. Sampedro clarified that the pre-draft CPC embraced a broad concept of victims, according to international human rights instruments and the doctrine of the Constitutional Court. However, only the direct victims would be entitled to financial compensation.<sup>74</sup> Without further discussion, the Constitutional Commission approved the broad definition of victim, and noted that this definition includes natural persons, legal persons, and other subjects of rights (see Table 2.2).<sup>75</sup>

The Attorney General's Office restricted the broad concept of victim approved by the Constitutional Commission, without consulting the Commission. It is worth to mention here that, in the constitutional reform of 2002, the Attorney General's

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(Footnote 73 continued)

latter would be the source of the violation experienced by the indirect victim. The technical distinction between the two categories does not imply that one of them has a higher rank for the purposes of the protection of the law. They are equally protected by the Convention and may be dealt with in the judgment, both to consider them, substantively, as passive subjects of a violation with claims to reparations, and to attribute them procedural competency, generically and without distinction. Separate Concurring Opinion of Judge Sergio García-Ramírez, Case Bámaca Velásquez v. Guatemala, Judgment of November 25 of 2000, par. 5.

<sup>74</sup>Constitutional Commission Meeting Minute # 7, February 28 of 2003, p. 10.

<sup>75</sup>Constitutional Commission Meeting Minute # 16, May 9 of 2003, p. 15.

Office supported a broad protection of victims and accepted the duty to ensure the respect of their rights.<sup>76</sup> Over time, this office claimed a lack of resources to assist victims of crime.<sup>77</sup> In the Constitutional Commission, representatives of the Attorney General's Office showed a desire to limit the duties of this state institution regarding assistance and protection of victims.<sup>78</sup>

In the version of the draft CPC submitted to Congress by Attorney General Osorio, the new provision limited the concept of victim to direct victims (see Table 2.2). Thus, the victim would be the passive subject of the crime who has been harmed directly by the offender<sup>79</sup> (Corporación Excelencia en la Justicia 2010, p. 97; Sampedro Arrubla 2010, pp. 76–84). In the end, Congress enacted this rule that failed to be as inclusive as the U.N. Basic Principles for Victims' definition (art. 132 of Law 906).<sup>80</sup>

Defining the victim, then, is a process of both inclusion and exclusion of some individuals, groups, and situations. The scope of the notion of victim in the 2004 CPC excludes indirect victims like family members or dependents of direct victims. For example, it would exclude children who witness domestic violence against one partner, as they are considered indirect victims.<sup>81</sup>

### 2.3.1.2 Victims' Rights as Imprecise Standards

The 2004 CPC recognizes a broad charter of victims' rights (art. 11) that includes the following: dignity, protection of their privacy and safety, speedy and comprehensive reparation by the offender or third parties responsible, access to

<sup>76</sup>In the constitutional reform process Sampedro was an advisor of the Attorney General's Office. After that, he became an advisor of Corporation for Excellence in Justice. In the Constitutional Commission, the Attorney General's Office was represented by Rómulo González, Gustavo Gómez Velásquez, Alfonso Ortiz Rodríguez, Andrés Ramírez Moncayo.

<sup>77</sup>Interview with Julio Sampedro, June of 2013.

<sup>78</sup>Constitutional Commission Meeting Minute # 14, April 25 of 2003, p. 25.

For example, Luis Alberto Santana claimed that it was necessary to clarify the duties of the Attorney General's Office and the duties of other state institutions regarding assistance and protection of victims. In addition, Andrés Ramírez argued that the chart of victims' rights in the draft said that the terms to enforce the right to assistance will be define by legislation, so the enactment of a specific statute about victims' rights would be necessary in the future. Sampedro argued that if victims' rights will be a "flag salute," it would be better to exclude them from the CPC.

<sup>79</sup>Note the Constitutional Court distinguished the victim and the injured under the former Criminal Procedure Code. Victims were the passive subjects of crime, while injured were who have suffered harm as a direct result of the crime. Both victims and injured could become civil parties in the criminal process (Judgment C-228 of 2002).

<sup>80</sup>Few Criminal Procedure Codes in Latin America adopted a broad concept of victim. See, for example, article 117(4) Criminal Procedure Code (CPC) of Guatemala; article 70 CPC of Costa Rica; article 108 CPC of Chile; articles 76 CPC of Bolivia.

<sup>81</sup>European Economic and Social Committee, *Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence*, Doc. 2006/C 325/15, Official Journal C 325/60, 30 Dec. 2006.



information, the establishment of the truth regarding the crime, integral assistance, legal counsel, and translators. In addition, article 137 incorporates a victim's right to participate at every stage of the criminal process, in order to guarantee the rights to truth, justice, and reparation.

The effectiveness of rights may be analyzed based on three variables: obligation, precision, and delegation.

"Obligation" refers to the binding nature of an institution's or a regime's rules; "precision" refers to the specificity of those rules; and "delegation" refers to the authority granted to neutral third parties to interpret and implement those rules, to resolve disputes relating to them, and (sometimes) to create new rules (Helfer 2002, p. 1839).

One of the major obstacles that victims face to claim and exercise the rights granted in the 2004 CPC is the lack of precision and obligation. The exercise of victims' rights implies a discretionary decision of state representatives.

First of all, the 2004 CPC establishes few precise and detailed duties for law enforcement authorities, prosecutors, and judicial representatives to protect victims' rights. The Code recognizes most rights for victims as general standards, without specific requirements for authorities and state institutions. For example, Article 11 incorporates the right to integral assistance, but the content of this right would be developed by future legislation. It should be noted that this legislation has not been enacted.

Second, although the 2004 CPC establishes functions for prosecutors to ensure the protection of victims and to represent their rights and interests, the Code did not establish an obligation of prosecutors to confer with victims and their lawyers. This right to confer with the prosecution during the criminal process is a way to ensure that victim's needs and interests are heard. As a result, the exercise of victims' rights depends on a discretionary decision by prosecutors as they can decide whether to hear victims and their legal representatives. If there is no legal obligation to hear victims, how could prosecutors represent their interests? (Comisión Colombiana de Juristas and Colectivo de Abogados "José Alvear Restrepo" 2011; Corporación Excelencia en la Justicia 2010).

Third, some victims' rights provisions that establish some duties include conditions in vague language, which transforms these provisions into optional or advisory. The Code establishes the duty of the Attorney General's Office to provide legal counsel for the victim if the interests of justice require it (art. 11, 137). The "interests of justice" standard is vague and imprecise, so the Attorney General's Office has excessive discretion to comply with the duty to provide legal counsel for the victim. As a result, this office may infringe or deny the victims' right to legal assistance.

Lack of legal counsel affects the exercise of victims' rights, since the Code requires that victims participate through a legal counsel from the preparatory hearing (art. 137). In addition, victims cannot engage effectively in the criminal process, as they often do not know the technicalities of their rights and mechanisms to enforce them. Effective participation in the criminal process is restricted to

lawyers who have a monopoly on the professional tools necessary to engage in the system (e.g. language, knowledge, etc.).

[I]f the victim's right conflicts with the position of the public prosecutor, the unwillingness of the prosecutor to defend the right leaves the victim as a *pro se* person in a complex and intimidating procedural system. Even if the victim were comfortable enough to pursue the right *pro se*, it is unlikely that he or she would be as effective as an attorney (Gillis and Beloof 2001, p. 693).

All in all, the Code fails to establish precise and detailed obligations for authorities regarding victims' rights. Therefore, the protection of victims, in practice, depended mainly on the evaluation or moral judgment of judges and prosecutors who interpret the law on a case-by-case basis.<sup>82</sup> Victims' rights are illusory when state representatives have unfettered discretion, as state representatives may interpret it either narrowly or expansively (Beloof 2005, p. 298). Bourdieu explains

Given the extraordinary elasticity of texts, which can go as far as complete indeterminacy or ambiguity, the hermeneutic operation of the declaration (judgments) benefits from considerable freedom (...) To varying degrees, jurists and judges have at their disposal the power to exploit the polysemy or the ambiguity of legal formulas by appealing to such rhetorical devices as *restrictio* (narrowing), a procedure necessary to avoid applying a law which, literally understood, ought to be applied; *extension* (broadening), a procedure which allows application of a law which, taken literally, ought not to be applied; and a whole series of techniques like analogy and the distinction of letter and spirit, which tend to maximize the laws elasticity, and even its contradictions, ambiguities, and *lacunae* (Bourdieu 1986, p. 827).

### 2.3.1.3 The Role of Victims in the Criminal Process: Limited Participatory Rights

The pre-draft CPC promoted the adoption of an accusatorial or adversarial criminal system. At the same time, it mentioned the need for comprehensive protection of victims' rights, including the participation of victims in criminal proceedings (Granados Peña et al. 2003). Thus, the process of reforming the Criminal Procedure Code reproduces the tension between the dichotomous structure of the adversarial system (prosecutor vs. defense) and the significant participation of victims. Moreover, during the debate of this legal reform, some scholars and practitioners claimed that the accusatorial system is inconsistent with participation of victims in criminal proceedings (Córdoba Angulo 2003, pp. 87, 88; Departamento de Derecho Penal de la Universidad Externado de Colombia 2003, p. 24; Sampedro Arrubla 2003a, b).

Granados and Sampedro tried to accommodate the tension between the adversarial system and victims' participatory rights in the pre-draft CPC. They proposed a very limited participation of victims because of the accusatorial/adversarial model. In the pre-draft, victims are participants but not full parties; this means that

<sup>82</sup>For an overview about the contrast between rules, standards and principles, see, for example (Dworkin 1967; Scalia 1989; Sunstein 1994).

victims may only participate at certain stages of the criminal process (Granados Peña et al. 2003).

Victim participation was limited during the preliminary inquiry and the investigation phases in the pre-draft CPC. Granados and Sampedro emphasized that victims would intervene through prosecutors, arguing that the prosecutor is on the same side as the victim. Also, the victim would help the prosecutor by providing information and evidence. Victims could participate directly at two points: (i) the victim could intervene in the preliminary hearing for judicial review of the application of the principle of opportunity (art. 211 pre-draft); and (ii) the direct victim could request restrictions on the offender's property to ensure financial compensation (art. 93 pre-draft).<sup>83</sup>

In the pre-trial stages and the trial, victims' participation is also limited. From the preparatory hearing, the victim would participate directly through his attorney, but this participation is restricted to: (i) intervening in hearing on preclusion of investigation (art. 289, 291 pre-draft); (ii) presenting a final conclusive argument at trial (art. 403 pre-draft); and (iii) requesting the incidental proceeding for comprehensive reparation.<sup>84</sup>

All in all, Sampedro and Granados suggested that the central role of victims would be to cooperate with prosecutors, and prosecutors would have the duty to protect and represent victims' rights and interests. However, the pre-draft failed to incorporate a specific right to confer with the prosecution.<sup>85</sup> It only established that victims have a right to information (art. 102 pre-draft), that prosecutors should hear victims before the application of principle of opportunity (art. 212 pre-draft), and that victims may request measures of protection to prosecutors (art. 91, 92 pre-draft). In other words, the pre-draft did not include a precise obligation of prosecutors to hear the victim at other crucial stages of the criminal process.

<sup>83</sup>Constitutional Commission Meeting Minute # 14, April 25 of 2003, pp. 20–25.

Constitutional Commission Meeting Minute # 16, May 9 of 2003, p. 15.

<sup>84</sup>Constitutional Commission Meeting Minute # 9, March 14 of 2003, p. 5.

Constitutional Commission Meeting Minute # 26, July 4 of 2003, pp. 5, 6.

<sup>85</sup>Some states in the U.S. established a victims' right to confer with prosecutors. See, e.g. victim's bill of rights, article II, 2. 1, Constitution of Arizona:

6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

Arizona Revised Statutes, Crime Victims' Rights, Section 13-4419.

Victim conference with prosecuting attorney

1. On request of the victim, the prosecuting attorney shall confer with the victim about the disposition of a criminal offense, including the victim's views about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations and pre-trial diversion programs.
2. On request of the victim, the prosecuting attorney shall confer with the victim before the commencement of the trial.

In addition to not being required to hear victims, prosecutors represent society and the public interest rather than individual interests of victims. The interests and goals of prosecutors and interests of victims sometimes converge and sometimes diverge (Gillis and Beloof 2001, p. 695; Pizzi 1999, p. 352; Welling 1987, p. 346). In some cases, the victim may pursue reparation while the prosecution may seek punishment. In other cases, the victim wants truth and justice, while the prosecutor would prefer a quick disposition of the case. There is a tension in the idea of prosecutors simultaneously pursuing the public interest and protecting the victim's interests. Therefore, prosecutors poorly represent the victims' interests (Doak 2005, p. 307). Some human rights defenders claim that prosecutors representing the interests of victims is problematic in cases of systematic human rights violations committed by state agents, as the Attorney General's Office represents the state (Comisión Colombiana de Juristas and Colectivo de Abogados "José Alvear Restrepo" 2011, p. 69).

Overall, the Constitutional Commission and the Congress approved without much debate the limited participation of the victim in criminal proceedings proposed by the pre-draft.<sup>86</sup> The main difference is that the pre-draft prohibited appealing an acquittal based on double jeopardy, while the Constitutional Commission incorporated that victims, prosecution, and the Public Ministry may appeal an acquittal.

In the discussions on the draft Code at Congress, there was a debate on the participation of victims within plea-bargaining. Senator Carlos Gaviria Díaz (Social and Political Front, which was a coalition of leftist political parties) highlighted tensions between the rights of victims and efficiency. He argued that the draft Code comprises contradictions between the principles and rights recognized in the first section and the specific rules on the procedure. As an example, he noted that Article 11 establishes the right to comprehensive reparation of victims. On the other hand, article 367 regulates plea-bargaining as a mechanism to improve efficiency of the system, in which the defendant and the prosecutor may negotiate the reparation to the victim without the victim's participation. This article indicates that if the victim disagreed with the assigned reparation, he or she could use other judicial mechanisms such as bringing a civil lawsuit. Gaviria concluded that the right of victims to comprehensive reparation is sacrificed to improve the efficiency of the criminal justice system.<sup>87</sup> Senator Rodrigo Rivera (Liberal Party) reinforced Gaviria's comment and said that article 367 of the draft Code should include consultation with the victim before plea-bargaining.<sup>88</sup> Nevertheless, Congress failed to grant victims' participation regarding plea bargains (art. 351 of Law 906).<sup>89</sup>

<sup>86</sup>Constitutional Commission Meeting Minute # 14, April 25 of 2003, pp. 20–25.

Constitutional Commission Meeting Minute # 16, May 9 of 2003, p. 15.

<sup>87</sup>*Gaceta del Congreso* # 359, July 19 of 2004, pp. 5, 6.

<sup>88</sup>*Gaceta del Congreso* # 359, July 19 of 2004, p. 7.

<sup>89</sup>Law 906 did not include the participation of victims in post-arrest release decision, a negotiated plea, and sentencing, which is granted in some jurisdictions in the U.S. See, e.g. U.S. Crime Victims' Rights Act of 2004 (CVRA); Constitution of Arizona, Victim's bill of rights, article II, 2. 1.

**Table 2.3** Victim participation in criminal proceedings (2004 CPC)

Investigation	<ul style="list-style-type: none"> <li>• Prosecutors should hear victims regarding the application of the principle of opportunity (art. 328)</li> <li>• The victim may participate at the hearing, before a judge, to review the legality of the application of the principle of opportunity (art. 328, 333)</li> <li>• Victims may request oversight judges (<i>jueces de control de garantías</i>), through prosecutors, measures for their assistance and protection (art. 134)</li> </ul>
Pre-trial stage	<ul style="list-style-type: none"> <li>• Victims are entitled to attend the pre-trial hearings, but there is no obligation to give victims notice of these proceedings. They could not intervene in pre-trial hearings (art. 336, 339, 340, 355), except in the hearing on preclusion of the investigation (art. 333)</li> <li>• From the preparatory hearing, the victim needs an attorney to participate in the criminal process. The Attorney General's Office has the duty to provide counsel for the victim if the interests of justice require it (art. 11, 137)</li> <li>• Victims or their attorneys may request trial judges measures for their assistance and protection (art. 134)</li> </ul>
Trial	<ul style="list-style-type: none"> <li>• The victim's attorney may present a final conclusive argument analyzing the proofs (art. 443)</li> </ul>
Appeal and review	<ul style="list-style-type: none"> <li>• The victim may appeal the decision of first instance (art. 176)</li> <li>• The victim may request the cassation of the judgment on appeal (art. 182)</li> <li>• The victim may seek the review of a final and enforceable sentence (art. 193)</li> </ul>
Mechanisms to ensure victims' reparation	<ul style="list-style-type: none"> <li>• The direct victim may request measures on offender's property to ensure financial compensation (art. 92)</li> <li>• The victim may participate in restorative justice mechanisms (art. 518)</li> <li>• The victim may request the incidental proceeding for comprehensive reparation after the conviction (art. 102)</li> </ul>

To sum up, the 2004 CPC regulates the participation of victims in criminal proceedings as follows (Table 2.3).

All in all, the pre-draft CPC, the Constitutional Commission, and the 2004 CPC introduce a very limited direct participation of victims in criminal proceedings. This restricted role of victims in the criminal process arguably fails to observe the Constitutional Court doctrine on the participation of victims in the criminal process as a constitutional right. In the judgment C-228/02, the Court argued that victims' rights to truth, justice, reparation, and access to justice justified extensive participation of victims in the criminal process. Therefore, the Court established that victim participation was not linked to reparation, that victims had the status of a full party, and that they can intervene in all stages of the criminal process (Table 2.4).

Significantly, the role of victims in the criminal process according to the 2004 CPC is more limited than in other Latin American Codes. Some CPC in the region

**Table 2.4** Status and role of victims Comparison between 2000 CPC and 2004 CPC

	CPP-Law 600 of 2000 Interpreted by C-228/02	CPP-Law 906 of 2004
Status of victims	Full party	Participant
Victim participation	Extensive participation in all stages of criminal proceedings	Limited direct participation

established mechanisms to ensure extensive participation of the victim. For example, the right to exercise private prosecution for certain crimes,<sup>90</sup> the right to request conversion of public prosecution to private prosecution under particular circumstances,<sup>91</sup> and the right to participate as a private accessory prosecutor within a public prosecution (*querellante adhesivo*).<sup>92</sup>

Although the participation of a third party arguably may disrupt the adversarial structure, the Constitutional Commission and the 2004 CPC gives to the Public Ministry functions similar to those of parties. As a result, the Public Ministry has extensive participation in criminal proceedings (Table 2.5).<sup>93</sup>

### 2.3.1.4 (Un)Protecting the Right to Comprehensive Reparation

The criminal justice reform of the early 2000s recognizes the victim's right to comprehensive reparation (art. 250 Constitution, art. 11 Law 906), following the doctrine of the Inter-American Human Rights System<sup>94</sup> and the Colombian Constitutional Court.<sup>95</sup>

<sup>90</sup>See, for example, article 19 CPC of Costa Rica; articles 53, 55, 56, 400 and 405 CPC of Chile; articles 18, 20, 27 and 270 CPC of Bolivia.

<sup>91</sup>See, for example, articles 20, 62 and 75 CPC of Costa Rica; articles 26 CPC of Bolivia; articles 26, 96 and 116 CPC of Guatemala.

<sup>92</sup>See, for example, num. 78–85 Model Criminal Procedure Code for Iberian America; articles 76, 292, 293, 307, 315, 316, 341, 347, 349, 356 and 358 CPC of Costa Rica; article 82 CPC of Argentina; articles 235, 261, 325 and 338 CPC of Chile; articles 317, 318, 320, 322, 327, 329, 342, 348, 353, 356, 386, 387 and 395 CPC of Paraguay; articles 116, 306, 307, 340, 341, 348, 349, 356 and 373 CPC of Bolivia.

<sup>93</sup>Constitutional Commission Meeting Minute # 32, July 17 of 2003, pp. 3, 4.

Gómez Pavajeau (Deputy of the Public Ministry) advocated the allocation to the Public Ministry of similar functions of a full party, and the Commission approved this proposal.

<sup>94</sup>See, Inter-American Court of Human Rights, Case Barrios Altos (Chumbipuma Aguirre and others v. Peru), Judgment of March 14 of 2001.

<sup>95</sup>Constitutional Court, Judgment C-228 of 2002, Justices Manuel José Cepeda and Eduardo Montealegre.

**Table 2.5** Participation in the criminal process comparison between victims and Public Ministry

Participation in criminal proceedings (Law 906)	Public Ministry	Victims
Participating in hearings about pre-trial detention, bail, and alternative restrictive conditions (art. 306)	✓	X
Participating in hearing on judicial review of arrest (art. 327)	✓	X
Participating in hearing on judicial review of the principle of opportunity (art. 327)	✓	✓
Participating in the hearing on preclusion of the investigation (art. 333)	✓	✓
Participating in the hearing to bring charges (indictment) (art. 339)	✓	X
Requesting proofs and calling witnesses (art. 357)	✓	X
Seeking the application of exclusionary rules (art. 359)	✓	X
Questioning witnesses at trial after cross-examination (art. 397)	✓	X
Objecting a question asked to a witness (art. 395)	✓	X
Presenting a final conclusive argument analyzing the proofs (art. 443)	✓	✓
Appealing the decision of first instance (art. 178)	✓	✓
Seeking the review of a final and enforceable sentence (art. 193)	✓	✓
Requesting the cassation of the judgment on appeal (art. 182)	✓	✓

According to the Inter-American Human Rights System, comprehensive reparation seeks to restore victims' rights, to re-establish the previous situation,<sup>96</sup> and to compensate the damage caused by the crime or violation.<sup>97</sup> Full reparation for victims may include the following measures: restitution, compensation, rehabilitation, guarantees of non-repetition, and measures of satisfaction.<sup>98</sup> Therefore, the

<sup>96</sup>The Inter-American Court argues that, in some cases, the re-establishment of the previous situation is not an adequate objective. In cases of violence against women in the context of structural discrimination, "the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification." Inter-American Court of Human Rights, Case of González et al. ("Cotton Field") v. Mexico, Judgment of November 16, 2009, par. 450.

<sup>97</sup>See, e.g., Inter-American Court of Human Rights, Case of González et al. ("Cotton Field") v. Mexico, Judgment of November 16, 2009. Case Barrios Altos (Chumbipuma Aguirre and others v. Peru), Judgment of March 14 of 2001. Case Almonacid Arellano v. Chile, Judgment of September 26 of 2006.

<sup>98</sup>Inter-American Commission on Human Rights, Access to Justice for Women Victims of Sexual Violence in Mesoamerica, 2011, OEA/Ser.L/V/II. Doc. 63, par. 108.

- a. Restitution: re-establishing the victim's prior situation and her rights. Restitution is not always possible, especially when the harm affects the victim's physical, emotional and sexual integrity;
- b. Compensation: is the pecuniary acknowledgment of the damages and injuries caused.
- c. Rehabilitation: medical and psychosocial treatment that helps the victim carry on with her life in society.

scope of the integral or comprehensive reparation is beyond a financial restitution or compensation.

The traditional mechanism to redress the victim's harm has been financial restitution or compensation. In seeking restitution or compensation, victims may claim the return of property, payment for the harm, and reimbursement of expenses in the criminal jurisdiction or the civil jurisdiction. The majority of inquisitorial and mixed systems establish the civil party institution. This legal institution grants victims the right to attend criminal proceedings by filing a civil lawsuit, mainly in order to apply for compensation and to get restitution from the offender (Perrodet 2002, pp. 453–454). By contrast, most common law systems determine that rights and interests of victims should be pursued in the civil jurisdiction, arguing that the primary interest of victims of crime is to receive compensation for civil damages (Ashworth 1986, p. 87).

While the tradition in Colombia was the civil party, the pre-draft CPC abolished the civil party and incorporated some mechanisms to guarantee victims' right to comprehensive reparation in the criminal process. The 2004 CPC incorporates such mechanisms: (i) restorative justice mechanisms (art. 518); (ii) limitations on the offender's property to ensure restitution or financial compensation (art. 92); and (iii) the incidental proceeding for comprehensive reparation (art. 102). The 2004 CPC also mentions a state compensation fund that will be developed by future legislation (art. 99).

### • Restorative Justice

The 2002 constitutional reform (Legislative Act 03 of 2002) establishes that the legislation will develop mechanisms of restorative justice. The Constitutional Commission did not discuss the rules and principles of restorative justice since this issue was not a priority, and this topic was new to most members of the commission. The pre-draft CPC and the 2004 CPC only include a few rules and principles and leave indeterminate many key elements regarding restorative justice. The 2004 CPC deferred regulating restorative justice programs to the Attorney General, who was asked to write a handbook on the matter. However, the Attorney General has not published this manual, so there is no a complete and precise formulation of the objectives and mechanisms of restorative justice in the country. In this section, I will briefly provide the background to the approval of the rules and

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(Footnote 98 continued)

- d. Guarantees of non-repetition: the guarantee that the victims will never again suffer the harm caused.
- e. Measures of satisfaction: public acknowledgment of the truth and public apologies.

For more information about restitution and other means for reparation, see, UN Office for Drug Control and Crime Prevention, Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1999, pp. 43, 47, 48.



principles of restorative justice in the 2004 CPC. Then, I will discuss these rules and principles in detail.

The pre-draft CPC included restorative justice programs (art. 456–482). The Constitutional Commission asked Sampedro<sup>99</sup> and Daniel Van Ness<sup>100</sup> (Prison Fellowship International) to explain the notion of restorative justice, in order to have more information for debates on these mechanisms. However, the Constitutional Commission did not discuss restorative justice programs since the Commission met only for six months and this issue was not a top priority.<sup>101</sup> The Constitutional Commission designated a sub-committee that merely defined a few rules and principles regarding restorative justice for the final project of CPC. Congress enacted those rules and principles in the 2004 CPC.

The pre-draft CPC (art. 456) and the 2004 CPC (art. 518) describe a restorative justice program as any process in which the victim and the offender actively participate in the resolution of a conflict arising from a crime, with or without the help of a facilitator. The goal of a restorative justice program is to arrive at a restorative outcome, which the draft defines as an agreement aimed to attend to the individual and collective needs and responsibilities of parties, as well as to accomplish reintegration of the victim and the offender into the community. These outcomes include responses such as reparation, restitution, and community service. In general terms, this definition embraces the concept of restorative justice programs of the UN Basic Principles on the Use of Restorative Justice.<sup>102</sup>

There is a difference, however, between the pre-draft CPC, the 2004 CPC, and the UN Basic Principles on the Use of Restorative Justice. The pre-draft CPC and the 2004 CPC limit the notion of stakeholders to victims and offenders. For the UN, on the other hand, in a restorative process, all the stakeholders—including other individuals or community members affected by a crime—deliberate about the reasons why the offender committed the crime, who is responsible, the

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<sup>99</sup>Constitutional Commission Meeting Minute # 14, April 25 of 2003, pp. 11, 12.

Sampedro argued that restorative justice is not only to improve the efficiency of the criminal justice system, but also to restore peace, social relations and peaceful coexistence. Moreover, he argued that restorative justice is not directed only to deal with minor crimes. Restorative justice programs can be applied even for heinous crimes because victims and offenders may design a conflict resolution while holding the offender criminally accountable, which means that restorative justice is not a substitute for imprisonment.

<sup>100</sup>Constitutional Commission Meeting Minute # 20, June 6 of 2003.

Daniel Van Ness highlighted that this model is victim-centered, so that privileges needs, interests and decisions of victims. It focuses on restoring and taking responsibility. Thus, the main questions are: who has been injured? What are their needs? Who has the obligation to repair? The major programs of restorative justice involve: mediation between victim and offender, conferences, and sentencing circles.

<sup>101</sup>In some meetings of the Constitutional Commission, Granados pointed out that the Commission had not discussed relevant topics such as restorative justice (Constitutional Commission Meeting Minute # 22, June 20 of 2003; Meeting Minute # 26, July 4 of 2003).

<sup>102</sup>United Nations Economic and Social Council, Basic principles on the use of restorative justice programs in criminal matters, Res. 2002/12, 2002.

consequences of the crime, the needs of the stakeholders, some possibilities of reparation, and ways to prevent the crime from happening again.<sup>103</sup>

The pre-draft CPC (art. 459) and the 2004 CPC (art. 521) incorporate three restorative justice mechanisms: pre-procedural conciliation, mediation, and conciliation in the incidental proceeding for comprehensive reparation. In the remainder of this section, I will discuss conciliation and mediation and reserve the third mechanism for the following section.

The Criminal Procedure Code has included conciliation for minor crimes since 1989.<sup>104</sup> The pre-draft CPC (art. 464) and the 2004 CPC (art. 522) establish the obligation to engage in a pre-procedural conciliation in *delitos querellables* which constitute minor crimes for which public criminal action can only start if the victim or authorized persons file a criminal complaint, with the understanding that victims are allowed to withdraw the complaint. If victims and offenders reach an agreement in the conciliation hearing, the prosecutor will close the case; otherwise, the prosecutor would initiate a criminal action.

The pre-draft CPC indicated that the conciliator would be a member of the community or a representative of the Attorney General's Office with training as conciliator. The 2004 CPC excludes the member of the community and establishes that the facilitator would be a member of a conciliation center, a recognized conciliator, or a prosecutor.

Establishing prosecutors as conciliators can be problematic because the role of conciliator often does not sit well with the role of prosecutors. According to the UN Basic Principles on the Use of Restorative Justice, the facilitator should be a fair and impartial third party. However, prosecutors failed to comply with this requirement because they are interested parties in the criminal process. Moreover, one goal of prosecutors might be the quick disposition of cases, so they may promote agreements that may affect victims' interests.<sup>105</sup>

The second mechanism that the 2004 CPC incorporates is mediation. This new mechanism was designed to deal with criminal offenses of a graver nature such as crimes prosecutable ex-officio. Notably, the 2004 CPC provides few rules on mediation and establishes that the Attorney General would develop a handbook to regulate mediation and restorative justice programs.<sup>106</sup>

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<sup>103</sup>Some experts advocate community involvement in restorative justice to guarantee community rights. Moreover, "[i]ncluding community representatives clearly brings strengths. They are aware of and may be able to mobilize resources in that community which can contribute to problem-solving solutions. They may add perceived legitimacy to agreements through raising them from the individual level" (Shapland 2003, p. 207).

<sup>104</sup>The Decree 1861 of 1989 incorporated the conciliation for minor crimes in which victims were allowed to withdraw their complaints.

<sup>105</sup>"In restorative justice schemes, typically there is no prosecutor present, so there is no-one representing the state's interests in enforcing criminal law" (Shapland 2003, p. 204).

<sup>106</sup>According to Corporation for Excellence in Justice, the use of mediation is infrequent. Therefore, they suggest that the Attorney General adopt strategies to strengthen this mechanism and design the manual on mediation ordered by the 2004 CPC (Corporación Excelencia en la Justicia 2010, p. 112).

According to Article 523, in mediation programs a neutral third person (private or designated by the Attorney General's Office) allows victims and offenders to express their opinions and help the parties in reaching an agreement to solve the conflict. This agreement may involve different forms of reparation such as restitution, apologies, community services, and/or realization or abstention of a specific conduct.

The victim or the offender can request a mediation program from the beginning of the investigation stage until the oral trial hearing (art. 524, 525). The 2004 CPC distinguishes mediation programs in accordance with the nature of the crime prosecutable *ex-officio*:

- i. If the crime is a more serious offense (minimum term of imprisonment exceeds five years), the agreement between the offender and the victim will be considered to offer benefits for the offender at sentencing or post-sentencing stages.
- ii. If the crime is a less serious offense (minimum term of imprisonment is less than five years and the legal good or interest protected does not exceed the personal sphere of the injured person), the 2004 CPC fails to regulate clearly the effects of mediation. In such cases, the prosecutor may apply the principle of opportunity to suspend prosecution conditionally within restorative justice programs (art. 324.8).

### • Incidental Proceeding for Comprehensive Reparation

After conviction, the victim, the prosecutor, or the Public Ministry agent may bring a claim for redress of victims within the incidental proceeding for comprehensive reparation (art. 102 CPC). The purpose of this proceeding is to ensure full reparation, so the claim may include not only financial compensation but also other remedies (e.g. medical and psychological treatments, guarantees of non-repetition, and measures of satisfaction). However, if the measure of redress requested comprises just financial compensation, only the victim can file a claim.<sup>107</sup>

In the Constitutional Commission that prepared the draft CPC, one relevant issue was to define who might request the incidental proceeding for comprehensive reparation. In these discussions, two agendas competed with regards to victims' right to reparation: a traditional approach based on private law, and an approach based on the concept of comprehensive reparation.

On one hand, Attorney General Osorio and his advisor Gustavo Gómez Velásquez proposed that only the victim could file a claim for redress. They argued that the criminal justice model adopted is a process of parties, and in this incident

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<sup>107</sup>The incidental proceeding for comprehensive reparation replaced the civil party, but this incident seeks full reparation and not only compensation for civil damages.

Most Codes of Criminal Procedure in Latin America have granted the victim the possibility to assert his civil interests before the criminal courts through a Civil Action (CPC Bolivia 1999, art. 36–41; CPC Chile 2000, art. 59; CPC Ecuador 2000, art. 69; CPP Guatemala 1992, art. 124; CPC Honduras 1999, art. 50–51; CPC Nicaragua 2001, art. 81; CPC Paraguay 1998, art. 27–30; etc.). According to some of these CPC, the civil claim before the criminal courts can take place only after conviction (CPC Paraguay, art. 429, CPC Nicaragua, art. 81, etc.).

the parties should be the offender and the victim.<sup>108</sup> The arguments by Attorney General Osorio and his advisor Gómez Velásquez assumed that the main interest of victims is to receive compensation for civil damages, and thus that the incidental proceeding for comprehensive reparation should follow the principle of autonomy of private law. According to this logic, victims' rights and interests are individual and private, so prosecutors have no interest regarding victims' reparation. Consequently, they argue that victims should have absolute control over the claim.

On the other hand, Granados and Carlos Arturo Gómez Pavajeau (Deputy of the Public Ministry) recommended that the victim, the prosecutor, and the Public Ministry agent could bring a claim. They emphasized that the Attorney General's Office has the duty to protect victims' rights (art. 250 of Constitution), and the Public Ministry has the obligation to protect human rights and collective interests. Gómez Pavajeau (Deputy of the Public Ministry) noted that the Code should include an exception if the victim is opposed to this procedure (see Footnote 108). This proposal was aimed at protecting the right of victims to comprehensive reparation, which involves not only economic and individual interests. In short, the Attorney General's Office and the Public Ministry have duties to ensure victims' rights, including the right to comprehensive reparation, so they should be able to request the incidental proceeding for comprehensive reparation.

Hugo Quintero Bernate (Delegate of the President of the Supreme Court of Justice) agreed that the victim, the prosecutor, and the Public Ministry agent could file a claim. However, he took an intermediary position by asserting that only the victim should be able to request this proceeding when demanding just financial compensation. The Constitutional Commission adopted this intermediate approach (see Footnote 108).

Another discussion was about the burden of proof within the incidental proceeding for comprehensive reparation. Granados advocated procedural privileges for victims in this proceeding. He proposed shifting the burden of proof in relation to damages from the plaintiff to the defendant.<sup>109</sup> Gómez Pavajeau (Deputy of the Public Ministry) supported this idea, citing as an example the doctrine of the Supreme Court of Justice on civil liability for hazardous activities.<sup>110</sup>

By contrast, Gómez Velásquez (advisor of the Attorney General's Office and former Justice of the Supreme Court), Guarín Ariza (Justice of Superior Council of the Judiciary) and Carlos Mejía (delegate of the Ombudsman Office and former Justice of the Supreme Court) said that this proposal was absurd. They claimed that this proceeding should respect the defendant's right to due process. They also argued that this incident is similar to a procedure for claiming extra-contractual civil liability, in which the plaintiff must prove damages.<sup>111</sup> In the end, the Constitutional

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<sup>108</sup>Constitutional Commission Meeting Minute # 16, May 9 of 2003, pp. 19–20.

<sup>109</sup>Constitutional Commission Meeting Minute # 16, May 9 of 2003, pp. 24, 27.

<sup>110</sup>Constitutional Commission Meeting Minute # 16, May 9 of 2003, p. 25.

<sup>111</sup>Constitutional Commission Meeting Minute # 16, May 9 of 2003, pp. 25, 27.

Commission rejected the shifting of the burden of proof in the incidental proceeding for comprehensive reparation (art. 103 of CPC).

The 2004 CPC recognizes victims as full parties in the incidental proceeding for comprehensive reparation, thus granting victims independent rights to participate and present evidence to prove the damages caused by the crime. In consequence, the main stage for victims to intervene and exercise their rights is a marginal proceeding after the conviction. By recognizing full rights for victims only at this stage, the Code suggests that the core interest of victims is reparation rather than justice and truth. Therefore, the Code reproduces traditional conceptions of victims' interests as limited to economic compensation for civil damages. Importantly, excluding victims from participating in previous stages of the criminal process in which the defendant's guilt is determined, affects victims' right to reparation. This is so because conviction is necessary to open the incidental proceeding for comprehensive reparation.

### • State Compensation Fund

Criminal offenders or third parties responsible for a criminal's behavior are bound by law to provide restitution to victims. For victims who could not get financial restitution from the offender, states should endeavor to provide financial compensation and create compensation funds,<sup>112</sup> in accordance with UN Basic Principles for Victims of Crime.<sup>113</sup>

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<sup>112</sup>For example, in Colombia, the Justice and Peace Law (Law 975) created a fund for reparation of victims recognized within this process of transitional justice.

The Rome Statute of the ICC created a Trust Fund for the benefit of victims of crime under the jurisdiction of the ICC, and their families (art. 79). This is a crucial element for victim redress.

Most states in the U.S. have also created state compensation funds.

As of 2004, all 50 states and the District of Columbia compensated victims for medical expenses, mental health costs (except Utah), lost wages, and funerals. A majority of states compensated victims for travel expenses and for attorney fees and rehabilitation costs, while only a minority of states covered moving costs and crime scene clean-up in victims' homes or other property. Maximum award limits ranged between \$4,000 and \$150,000, with \$26,000 as the mean limit on compensation to victims among the 50 states and the District of Columbia (Human Rights Watch 2008, p. 31).

It is important to note that the definition of victim within victims' rights statutes and compensation provisions gives victims legal status to demand compensation. The definition of victim varies considerably from state to state in the U.S. In some states, this definition includes victims of all crimes while in other states the legal status of victim is limited to certain crimes. For instance, as of 2004, Utah established that those rights only applied to victims of felonies, seven states stated that victims' rights applied only for certain violent felonies, and nine states had a list of offenses for which victims' rights applied (Hammond 2006, p. 17).

<sup>113</sup>Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, General Assembly, Resolution 40/34, 1985.

12. When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

Taking into account this framework, the pre-draft CPC suggested the creation of a state compensation fund for crime victims. Sampedro and Granados defended the state compensation fund based on the principle of solidarity. They argued that the state should not leave the victim without reparation when the defendant is not identified or convicted. Granados mentioned as examples the Solidarity and Guaranty Fund (*Fondo de seguridad social y garantía-FOSYGA*)<sup>114</sup> and the Mandatory Vehicle Insurance (*Seguro Obligatorio de Accidentes de Tránsito-SOAT*).<sup>115</sup>

Objections against the state compensation fund raised two important points. First, María Margarita Zuleta (Vice Minister of Interior and Justice) and Rómulo González (former Minister of Justice 1999 to 2002—Conservative Party) and Gustavo Gómez Velásquez (advisor of the Attorney General's Office and former Justice of the Supreme Court) argued that the offender should bear responsibility for financial compensation, making important to remove rules that suggest the state's responsibility. Secondly, opponents of the state compensation fund pointed out that it would be excessively expensive. Therefore, Zuleta, González, and Gómez Velásquez advised that the creation of the compensation fund would have to consider budget restrictions.

To reconcile these competing approaches, the Commission approved a vague rule that mentions the state compensation fund.<sup>116</sup> Its implementation, however, will require specific legislation (art. 99 CPC). The 2004 CPC does not establish precise and detailed requirements for state institutions regarding the compensation fund, so it is unenforceable.

## 2.4 The Gap Between the Promise of Broad Protection of Victims as Active Protagonists and the Role of Victims Actually Established

The reform of the early 2000s had two pillars: the accusatorial or adversarial model, and a broad protection of both defendants' rights and victims' rights in the criminal process. Notably, although the constitutional reform of 2002 includes participation

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(Footnote 113 continued)

- (b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.

For more information on state compensation programs, see, UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1999, p. 44.

<sup>114</sup>FOSYGA is an independently managed fiduciary fund under the Ministry of Health.

<sup>115</sup>Constitutional Commission Meeting Minute # 7, February 28 of 2003, pp. 4–10.

<sup>116</sup>Constitutional Commission Meeting Minute # 14, April 25 of 2003, p. 25.

of victims, in the end, the 2004 CPC tends to reproduce the dichotomous structure of the adversarial system (prosecutor vs. defense) that limits direct victim participation in the criminal process, as suggested by Granados.

The promoters of the reform claimed that inclusion of victims in this reform was necessary to observe international human rights standards and the doctrine of the Constitutional Court on victims' rights. Therefore, the constitutional reform of 2002 promises a broad protection of victims' rights to truth, justice, and reparation; the reform includes three core elements: assistance, participation, and comprehensive reparation. Moreover, the explanatory memorandum of the draft CPC (Law 906) recognizes victims as active protagonists in the criminal justice system.

Although the 2004 CPC incorporates victims as participants and a broad charter of victims' rights, there is a discrepancy between the declared goals of the constitutional reform and the role of victims actually prescribed in the pre-draft CPC and the 2004 CPC. These documents establish few effective mechanisms to enforce victims' rights, few precise obligations and requirements for law enforcement authorities and judicial representatives to ensure victims' rights, and a very limited participation of victims in the criminal process. A fundamental question is what can explain this gap between the constitutional reform and the legislative reform?<sup>117</sup> This is a complex phenomenon that has multiple causes; this section will discuss the main factors.

The regulation on victims in the 2004 CPC is the result of the interaction of various actors and agendas at different levels—local, national, and transnational. The actors of the reform mobilized their social, legal, political, and symbolic capital to promote diverse agendas. Such agendas embrace multiple meanings of victim and of victims' rights, which compete or overlap. Thus, this process of reform was a site of competition for the definition of the meaning of "victim" and "victims' rights."

In the competition between Sampedro's agenda for a preferential option for victims and Granado's agenda on an adversarial due process model, the dichotomous structure of the adversarial system prevailed over the inclusion of the victim as protagonist in the criminal process. Several factors could contribute to the prevalence of the adversarial structure. First, the protection of victims' rights within an adversarial system is highly controversial. Granados mobilized a traditional

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<sup>117</sup> Abel criticized gap studies in socio-legal research and proposed a shift in their methodology.

Effectiveness has been construed in a narrowly instrumental fashion as an examination of whether the declared goals of a law or legal institution (usually one that is new or reformed) have been attained. Yet we know they never are. We should ask instead: What are its inadvertent consequences or symbolic meanings? What are its costs? For whom does it work? What are the fundamental structural reasons 'why it does not work? What is the relationship between the routine (not the exceptional) in social and in legal life? (Abel, 1980, p. 828)

conception of an adversarial model that limits the direct participation of victims. In addition, the reformers had insufficient knowledge of how to include the victim as protagonist in an adversarial system, and there was little clarity about how to operationalize victims' rights in this criminal justice model.

Second, U.S. agencies promoted the adversarial system through their policies for Colombia. For example, the U.S. government increased funding and pressure to improve crime control through *Plan Colombia*. Moreover, representatives of U.S. agencies directly supported the adversarial model proposed by Granados.

Third, at the Constitutional Commission, some state representatives raised challenges to providing victims' rights and services from an institutional perspective. State institutions were reluctant to assume responsibility for ensuring victims' rights because they wanted to avoid institutional and financial costs. For instance, the Ombudsman's Office and the Public Ministry rejected the duty to look after victims' rights and provide legal services to victims, the Attorney General's Office attempted to limit its responsibilities and obligations in the 2004 CPC, and the National Government opposed the creation of a state compensation fund.

Fourth, the inclusion of the victim as protagonist in the criminal process implies a paradigm shift, away from the marginalization of the victim in modern criminal law to one based on the empowerment of victims. Unfortunately, the marginalization of victims was the dominant paradigm at the Constitutional Commission, as most members of the Commission mobilized traditional conceptions that exclude victims of the criminal process. As a result, they raised criticisms of the new paradigm, reproducing traditional normative and practical objections to victim participation in the criminal process.

The dominant paradigm at the Constitutional Commission against broad victim participation was grounded in larger debates about the role of victims in the criminal process. A central normative critique against victims' participatory rights has been that those rights are detrimental to defendants' rights since participation of victims would reinforce the prosecutor's case. Under this argument, the victim usually takes the prosecutor's side and becomes a second prosecutor and victim participation may allow victims to exact revenge against defendants in the criminal justice system (Beloof 1999; Pastor 2009b). Another objection to victim participation in criminal proceedings has been the separation between criminal law (punishment) and civil law (compensation). In modern criminal law, conflict between parties becomes a conflict between the offender and the state since the state has control over punishment systems and crimes are violations of an abstract legal interest or state authority (Maier 1992, p. 216). Therefore, the primary goal of criminal law is protecting public interests rather than the private interests of individuals. By contrast, the purpose of civil law is to regulate relationships between individuals and to compensate victims for any harm. Taking into account that the central interest of victims of crime is to receive compensation for civil damages, opponents of victim participation in the criminal process argue that the rights and



interests of victims should be pursued in the civil jurisdiction (Ashworth 1986, p. 87). Finally, some objections to the inclusion of victims have been based on an alleged harm of efficiency, crime control, and the interests of prosecution. Given that the public interest is more important than the individual victim's interest and prosecutors represent public interest, prosecutors should have complete control over the case. According to this logic, victims should have no access, independent of the public prosecutor, to criminal proceedings because it is unnecessary and would undermine efficiency (Beloof 1999).

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