


# How does international law work in addressing domestic violations of access to justice? The backstopping function of the Inter-American Commission on Human Rights in friendly settlements

*Como o direito internacional opera frente a violações domésticas de acesso à justiça? A função de backstopping da Comissão Interamericana de Direitos Humanos em soluções amistosas*

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**Abstract:** Ineffective access to justice in a State's domestic institutions is a local problem that, in the globalized world, has international repercussions, and demands a reassessment of the functions of international law. Given this, the article empirically investigates which violations of access to justice are reported to the Inter-American Commission on Human Rights (IACHR) and solved through friendly solutions, which actors are involved and how these processes impact domestic institutions. The research methods includes document analysis and qualitative deductive content analysis. Among the 98 friendly settlement reports published by the IACHR between January 2011 and July 2021, the content analysis identified 25 that report violations of access to justice due to judicial delays (8 reports), disrespect of due legal process (8 reports), irregularities in the judicial process (6 reports), denial of justice (6 reports) and violation of access to justice stricto sensu (2 reports). The data collected allows to frame the IACHR in the role of backstopping domestic justice systems, supporting national institutions, individuals and organizations when access to justice within States is not effective.

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**Keywords:** Access to justice; friendly solutions; human rights violations; Inter-American Commission on Human Rights; international law.

**Resumo:** O inefetivo acesso à justiça nas instituições domésticas de um Estado é um problema local que, no mundo globalizado, repercute internacionalmente e demanda um reexame das funções do direito internacional. Diante disso, este artigo investiga empiricamente quais violações ao acesso à justiça são denunciadas à Comissão Interamericana de Direitos Humanos (CIDH) e resolvidas por soluções amistosas, quais os atores envolvidos e como estes processos influenciam os sistemas de justiça domésticos. Como método de pesquisa, realiza-se análise documental e análise de conteúdo qualitativa dedutiva. Dentre os 98 relatórios de soluções amistosas publicadas pela CIDH entre janeiro de 2011 e julho de 2021, a análise de conteúdo identificou 25 que relatam violações ao acesso à justiça em razão de morosidade judicial (8 relatórios), ofensa ao devido processo legal (8 relatórios), irregularidade no processo judicial (6 relatórios), denegação de justiça (6 relatórios) e violação ao acesso à justiça *stricto sensu* (2 relatórios). Os dados obtidos permitem argumentar que a CIDH exerce a função de backstopping (apoio) dos sistemas de justiça domésticos, apoiando as instituições nacionais, indivíduos e organizações quando o acesso à justiça dentro dos Estados não é efetivo.

**Palavras-chave:** Acesso à justiça; soluções amistosas; violações a direitos humanos; Comissão Interamericana de Direitos Humanos; direito internacional.

## 1. INTRODUCTION

Individuals and non-governmental organizations (NGOs) may lodge petitions with the Inter-American Commission on Human Rights (IACHR) with denunciations or complaints of human rights violations, including offenses against the *human right of access to justice*, perpetrated by a member State of the Organization of American States (OAS). In light of such petitions, the IACHR is responsible for examining their admissibility and merits, in addition to making itself available to the interested parties to facilitate a friendly settlement of the conflict at any point in the process. In this context, friendly settlements consist of a self-composing and non-contentious procedure, through which the State and individuals or NGOs can reach an agreement in which they agree on measures to repair the violation of human rights. The agreement, if appropriate, will be ratified by the IACHR with the publication of a friendly settlement report and will be supervised by the IACHR until its full implementation. This is an

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“alternative” to the IACHR’s heterocompositional and contentious procedure for resolving demands and international accountability.

Considering this scenario, the present study aims to empirically investigate which violations of access to justice are brought to the IACHR and resolved through friendly settlements, which actors are involved in these processes, and how these processes influence domestic judicial systems. It is important to clarify that the focus of this study is not access to international justice, but rather how domestic violations of access to justice are brought to the international sphere, specifically to the IACHR, and resolved friendly, generating intranational effects. To this end, the research involves an exploratory and descriptive review of the literature on (i) access to justice and (ii) the intranational dimensions of international law, that is, the ways in which international law is internalized in the legal system of States and impacts domestic institutions (Slaughter & Burke-White, 2006; Slaughter, 1997).

The empirical methodology adopts the document analysis (Reginato, 2017) as a data collection procedure, and the content analysis as a data processing technique. The documentary collection analyzed consists of all 98 IACHR friendly settlement reports, published between 2011 and July 2021. This temporal delimitation is due to the fact that, in 2011, the IACHR developed its first strategic and action plan on friendly settlements, and in July 2021, the present research concluded its data collection. The deductive qualitative content analysis technique (Mayring, 2014; Sampaio et al., 2024) is adopted to codify the types of violations of access to justice *lato sensu* in the context of domestic legal proceedings, which have been reported in the “summary” and “alleged facts” sections of the IACHR’s friendly settlement reports. This codification was carried out based on the theoretical framework, so that articles XVIII and XXVI of the American Declaration of the Rights and Duties of Man (ADHR, 1948) and the analytical constructs of Tinoco (2005) on the IAHRs support the identification of five types of domestic violations of access to justice *lato sensu*, which are: (A) violation of access to justice *stricto sensu*; (B) denial

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of justice; (C) irregularity in the judicial process; (D) due process of law violation; and (E) judicial delay.

The first section of the article analyzes the main elements that structure the debate on effective access to justice, based on literature review, analysis of decisions of the Inter-American Court of Human Rights (IA Court HR) and documents of the IACHR. The first section also discusses the domestic functions of international law (Slaughter & Burke-White, 2006) and argues that ineffective access to justice is a local problem that has international repercussions, demanding new responses from international law. In the second section, through document analysis and content analysis, the IACHR's friendly settlement reports that mention violations of access to justice are investigated, highlighting, among other data, the jurisdiction involved in the violations – Civil, Criminal, Federal, Labor or Military -, the definition or scope of each type of violation, the distribution of the reports over time and the actors involved – petitioners and the offending State. The third section of the article draws on empirical research data to discuss the intranational functions of the IACHR, concluding that its institutional design can support national institutions, individuals, and NGOs with regard to domestic access to justice.

## **2. ACCESS TO JUSTICE: DOES INTERNATIONAL LAW CARE ABOUT THIS "INTERNAL MATTER"?**

"Effective access to justice" is related to the basic purposes of any legal system, which must be accessible to all and produce results that are individually and socially just (Cappelletti & Garth, 1988). In this sense, access to justice in the domestic sphere of a State is described by Cappelletti and Garth (1988) as the most basic of human rights, as it makes it possible to claim all other rights – without which they would be reduced "to mere political declarations, with mystifying content and function" (Santos, 1986, p. 18, translated). Over the course of history, the right of access to justice, of liberal origin and individualistic character, has incorporated a second dimension linked to social rights and duties (Cappelletti & Garth, 1988). Based on the growing recognition of access

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to justice as a fundamental social right, the State bears the responsibility to develop the necessary means to make such access effective. This entails positive obligations of the State, particularly in view of the economic, social and information inequality between litigants (Pozzatti, 2015).

The Inter-American Human Rights System (IAHRS) has consolidated among the obligations of States both the legislative promotion of the right of access to justice and the protection through public policies of effective access to all those under their jurisdiction. In the jurisprudence of the IA Court HR (2023), the obligation of States to regulate access to justice in accordance with inter-American standards, especially Article 2 of the American Convention on Human Rights (1969), unfolds into the adequate regulation of judicial protection – see *Caesar v. Trinidad and Tobago* (2005) – and judicial guarantees such as independence and impartiality – see *Apitz Barbera and others v. Venezuela* (2008). In terms of protecting the law through policies, the IA Court HR (2023) established that access to justice as a positive obligation of States is enshrined in Articles 8.1 and 25.1, combined with Article 1.1 of the American Convention, so that

the States Parties [of the OAS] are obliged to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8.1), all within the general obligation, borne by the States themselves, to guarantee the free and full exercise of the rights recognized in the Convention to all persons under their jurisdiction (Article 1.1). (IA Court HR, 2022, p. 26)

In addition, access to justice, to be effective, must consider the way in which inequality defines which individuals are able to mobilize judicial institutions and procedures, how they do so, and what results they obtain – see, for example, the conclusion of *V.R.P. and V.P.C. v. Nicaragua* (2018) and *López Soto and others v. Venezuela* (2018), both from the IA Court HR. By framing access to justice as a guarantee of economic, social and cultural rights, the IACHR (2007) highlighted core issues to this agenda: economic obstacles to access to courts; due process of law, composed of essential elements in the judicial sphere, such as the principle of equality of arms and the right to

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reasoned decisions; and the obligations of States to provide resources and remedies that are accessible, prompt and effective for the protection of rights. Considering all these factors, in the current conception of the IAHRs, the right of access to justice in cases of human rights violations must ensure, "within a reasonable time, the right of the alleged victims or their families to have all necessary measures taken to learn the truth about what happened and, as appropriate, for those responsible to be punished" (IA Court HR, 2022, p. 25).

The failure to adopt the State's obligations to promote (build a legal apparatus) and tutelage (build public policies) effective access to justice is, *per se*, a violation of the human right of access to justice perpetrated by that State. In the case of OAS member states that have ratified the American Convention on Human Rights (1969), accepting the competence of the IACHR, and that have recognized the jurisdiction of the Inter-American Court, human rights violations are subject to international accountability before the IAHRs. Thus, if a state violates the right of access to justice within its domestic jurisdiction, individuals or organizations may bring this matter to the attention of the IACHR with the aim of holding the state internationally accountable for the violation.

During the proceedings before the IACHR, the State and the individual or group of individuals may agree to resolve the dispute amicably, engaging in dialogue and ultimately signing a friendly settlement agreement, which must contain measures to repair the violation of the right of access to justice. If deemed appropriate, this agreement will be ratified by the IACHR and supervised by it until full compliance. This procedure is particularly interesting because it reveals the intranational dimensions of international law and the ways in which it "penetrates the state membrane" and influences domestic institutions of the justice system, that is, the up-down dimension of international law.

As Slaughter and Burke-White (2006) argue, the most classic studies of International Law highlight only the *interstate* dimensions of international law, and not the *intrastate* ones. This is because, as Jouannet (2013) argues, classical international law was indifferent to the political choices made by States

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within the scope of their internal order, including the conditions of access to the domestic judicial system. It is only more recently that international law has come to regulate relations between governments and their own citizens and to deal with the "internal affairs" of states (Slaughter & Burke-White, 2006; Jouannet, 2013).

Friendly settlements addressing violations of access to justice are precisely part of this new trend in international law to intervene in situations that were previously relegated solely to the internal sovereignty of States. This intranational dimension of international law is particularly important today, since, as Slaughter and Burke-White (2006, p. 330) argue, there is "a new generation of worldwide problems" that "arise from within states rather than from state actors themselves". However, even in this new scenario, the logic of the demarcation between international politics and domestic politics persists in numerous studies in the field of international law, as if they were, in fact, separate (Slaughter & Burke-White, 2006).

To offer an effective response to challenges of local origin in a globalized world, the IACHR and, as a whole, "the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives" (Slaughter & Burke-White, 2006, p. 328). In this sense, Slaughter and Burke-White (2006, p. 329) argue that there are "three means through which international law is coming to influence domestic outcomes – strengthening domestic institutions, *backstopping* national governance, and compelling domestic action". To assess whether and to what extent these means of engagement materialize in the practice of the IACHR's friendly settlements, the empirical research reported below was developed.

### **3. VIOLATIONS OF ACCESS TO JUSTICE AND THE IACHR'S FRIENDLY SETTLEMENTS**

To investigate which human rights violations related to access to justice are brought to the IACHR and resolved by friendly settlements, which actors are involved, and how this influences domestic judicial systems, the methodology of this empirical research involves a document analysis, as a data collection

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procedure, and content analysis, as a data processing technique. The documentary collection analyzed consists of all 98 IACHR friendly settlement reports, published between 2011 and July 2021.

The technique of deductive content analysis is adopted to code the types of violations of access to justice *lato sensu* in the context of domestic judicial process, which have been reported in friendly settlements of the IACHR. Deductive content analysis is based on previously defined categories based on a theoretical framework (Mayring, 2014; Sampaio et al., 2024). Considering that Sampaio and Lycarião (2021) highlight the positive potential of deductive content analysis, especially in Political Science research (Sampaio et al., 2024, p. 262)<sup>3</sup>, and that the literature has already identified several types of violations of access to domestic justice based on the norms, reports, and contentious decisions of the IAHRs, a deductive approach is implemented in this research. The gap in the literature with which this research study seeks to engage lies in the types of violations of access to domestic justice reported in friendly solutions of the IAHRs (non-contentious procedures). Given the approach adopted, the research does not claim to exhaustively analyze all the possible violations reported throughout the history of friendly settlements at the IACHR, but only some<sup>4</sup> of them, also because this research pursues other specific objectives beyond the identification of violations (documentary analysis of the actors and the IACHR's mode of influence)<sup>5</sup>.

Based on the steps proposed by Mayring (2014) and Sampaio et al. (2024), content analysis begins with the construction of the research problem, anchored in a theoretical context. The problem that guides this research was

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<sup>3</sup> "Although there are inductive content analyses, we believe that content analysis "shines" when it adopts a deductive logic." (Sampaio et al., 2024, p. 262, translated).

<sup>4</sup> The selection of the violations analyzed was based on two criteria: a temporal one, that is the violations reported in friendly settlements from 2011 (date of the first IACHR Plan of Activities) to July 2021 (end of data collection); and a material one, the violations derived from articles XVIII and XXVI of the American Declaration of the Rights and Duties of Man (ADHR, 1948), according to the theoretical contributions of Tinoco (2005).

<sup>5</sup> The purpose of this research is not to conduct an exploratory analysis outside the theoretical matrix. In Verдум (2021), an exploratory analysis was carried out in friendly settlements of the IACHR, with different research problems, objectives, and data clipping: Verдум, A. C. C. (2021). *Between dialogue and recognition: Empirical analysis of friendly settlements in the Inter-American Human Rights System*. [Monograph of Bachelor of Laws, Federal University of Santa Maria]. Advisor: Ademar Pozzatti.

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presented above, and the theoretical context was described in the first section of this article. The research examined all 98 friendly settlement reports published by the IACHR that fell within the time period defined as 2011 to July 2021. The "summary" and "alleged facts" sections of the reports were submitted to content analysis, as it is in these sections that the IACHR reports which human rights were considered violated by the petitioners, as well as the State's defense in this regard, if any, which depends on the procedural stage.

Based on the theoretical framework, the categories of content analysis were defined (Mayring, 2014; Sampaio et al., 2024). According to Mayring (2014, p. 97), "not all categories have to be found in the research literature, but they have to be grounded with theoretical arguments". Considering Articles XVIII (entitled "Right to a fair trial") and XXVI (entitled "Right to due process of law") of the American Declaration of the Rights and Duties of Man (ADHR, 1948), as well as the analytical constructs proposed by Tinoco (2005) on the IAHRs<sup>6</sup>, five types of domestic violations of access to justice *lato sensu* covered by the theory and practice of the IACHR are identified: violation of access to justice *stricto sensu*; denial of justice; judicial delay; irregularity in the judicial process and violation of due process of law. The first three offend Article XVIII of the ADHR, entitled "Right to a fair trial", while the last two offend Article XXVI of the ADHR, entitled "Right to due process of law" (Tinoco, 2005). The definition of each of these types of violations is discussed below, along with an analysis of their use in the IACHR's friendly settlement reports.

In brief, access to justice *lato sensu* is considered a broad topic and composed of specific rights (Tinoco, 2005). Access to justice *stricto sensu* is a human right that, in addition to the possibility of filing a petition and obtaining a

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<sup>6</sup> Based on another theoretical framework, other types of violations and categories could be identified. For example, based on the ACHR, it would be possible to list two other types of violations of access to justice, namely "violation of judicial guarantees" and "violation of judicial protection", which correspond to Articles 8 (entitled "judicial guarantees") and 25 ("judicial protection") of the American Convention, the qualitative analysis of these violations would be unfeasible for the limits of this publication. This is because almost all of the IACHR's friendly settlement reports cite Article 8 and/or Article 25 of the American Convention as violated, including in order to better meet the requirement for the admissibility of the petition. Quantitatively, of the 98 friendly settlements examined, only 4 did not mention violations of Article 8 or Article 25. In addition, there are 213 mentions of "judicial guarantees" and 214 of "judicial protection" (in Spanish) in the friendly settlement reports analyzed.

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final judgment, ensures that there are no barriers to this. The violation of this right has been prohibited, although not expressly, since Article XVIII of the ADHR (Tinoco, 2005, p. 17). Denial of justice refers to situations in which resources for judicial protection are illusory or non-existent (Tinoco, 2005, p. 26, 33). Judicial delay consists of excessive and unjustified delays in the processing of judicial proceedings or process, violating the right to a brief procedure (as provided in Article XVIII of the ADHR) and to the resolution of the conflict within a reasonable time (Tinoco, 2005). Due process of law violation covers, directly or indirectly, offenses to a series of substantive, formal and qualitative rights of the ADHR that occur not only in the scope of criminal justice, but in all areas of the legal system, and, ultimately, offends equality and non-discrimination (Tinoco, 2005, p. 45-46). Irregularity in the judicial process, as provided for in Article XXVI of the ADHR, refers to illegalities in the field of criminal justice, with non-observance of procedural formalities and minimum procedural guarantees (Tinoco, 2005, p. 47-48)<sup>7</sup>.

For content analysis, a coding guideline (Mayring, 2014) was developed, similar to the codebook proposed by Sampaio et al. (2024), containing the label and definition of the category or code, an anchor example<sup>8</sup> and a coding rule. The categories and coding rules were tested, applying them to almost half of the friendly settlement reports (48), according to the guidelines of Mayring (2014) and Sampaio et al. (2024). At this stage, it was found that the violations are sometimes intertwined, so that, in order to maintain the replicability of the research and the three essential characteristics of the categories and codes of content analysis – namely, exclusivity, exhaustiveness, and homogeneity (Sampaio & Lycarião, 2021) –, the coding rules were improved, defining that: the five types of violations would be identified, at a first level, from the literal textual expressions used in the reports, and, at a second level, from equivalent expressions, contextual synonyms and typical situations. This strategy, in

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<sup>7</sup> Other studies have also identified definitions of these types of human rights violations in the domestic sphere in the theory and practice of the IASHR – see: MPF de la Ciudad Autónoma de Buenos Aires. (2013). *The legal process: analysis from the inter-American and universal system of human rights*.

<sup>8</sup> Anchor examples are shown in the third column Table 1 of this paper.

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addition to aligning with the suggestion of Corbin and Strauss (1990), who propose an approximation of the actual words of the text, also values the language employed by the authors of the document themselves and the meanings attributed by them. It also helps to understand the legal culture within the scope of the IACHR and how the actors in the IACHR employ these concepts, and allows the testing of the categories and definitions drawn from the theoretical framework, which is, ultimately, the objective of deduction, according to Mayring (2014).

The expressions found in the IACHR's friendly settlement reports to refer to the five types of violations of access to domestic justice were: (A) "access to justice", (B) "justice denial" and "denial", (C) "irregular," "irregularity," and "irregularities", (D) "due process", and (E) "delay" and "slowness", in Spanish<sup>9</sup>, since this is the language of the documents. In the coding rules, these were the expressions considered, complemented by contextual analysis, and, in order to limit the results to domestic judicial proceedings, exclusion criteria were established<sup>10</sup>. After testing, validating and reviewing the coding rules, the final coding of the data and the analysis was carried out manually. Table 01, below, lists and categorizes the friendly settlements with reports of violations of the right of access to justice *lato sensu*.

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<sup>9</sup> (A) "acceso a la justicia", (B) "denegación de justicia" e "denegación", (C) "irregular", "irregularidade" e "irregularidades", (D) "debido proceso" e (E) "retardo" e "demora".

<sup>10</sup> Exclusion criteria: (1) violations that refer to the investigation phase or occurred within the scope of Administrative Courts or in administrative proceedings or disciplinary or qualifying proceedings of public servants; (2) use of the expression in other contexts, such as "irregularity" in a medical procedure, "denial" of an appeal that is not necessarily improper and unjustified dismissal without "due process"; and (3) "irregular" procedure in intercountry adoption, without elucidating whether the irregularity occurred in the administrative or judicial route (there was only 1 exclusion based on this third criterion).

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**Table 01:** IACHR's friendly settlement reports with reference to violations of access to domestic justice lato sensu

REPORT N./YEAR	COUNTRY	KEY QUOTE <sup>11</sup>	CODE	BRANCHES OF THE JUDICIARY <sup>12</sup>
136/21 CASE 12.277	Brazil	"serious <i>irregularities</i> in the process, among which unjustified <i>delays</i> are found"	<b>Irregularity in the process; Judicial delay</b>	Criminal
114/21 CASE 12.737	Guatemala	" <i>denial of justice</i> suffered by the petitioner and the presumed victims in the criminal process and in the civil reparation"; "no justice had been obtained within a <i>reasonable period of time</i> , given the <i>delays</i> in the initiation of the first criminal process, the failure to enforce civil obligations in a <i>timely manner</i> , as well as the <i>delay</i> in processing the criminal complaint"	<b>Denial of justice; Judicial delay</b>	Criminal and Civil
41/21 CASE 13.642	Colombia	"violation of the right of <i>access to justice</i> and equality before the law"	<b>Violation of access to justice</b>	Civil
334/20 CASE 12.972	Honduras	"violation [...] of his rights to <i>due process</i> and judicial guarantees"	<b>Due process violation</b>	-
216/20 CASE 11.824	Mexico	"unwarranted <i>delay</i> in the administration of justice"	<b>Judicial delay</b>	Criminal
111/20 CASE 12.674	Brazil	"violation of human rights contemplated in the articles [...] XVIII ( <i>right to justice</i> ) of the American Declaration of Rights and Duties of Man, as well as of the articles [...] 8 (guarantee of <i>access to justice</i> ) and 9 (guarantee of compensation for victims of the crime of torture) of the Inter-American Convention against Torture"	<b>Violation of access to justice</b>	Military

<sup>11</sup> Translated.

<sup>12</sup> Notwithstanding the diversity in the organization of the judiciary of the states covered by the research, this column indicates whether the violation occurred in matters related to the scope of action of the Specialized Justice and/or the Common Justice, including its two jurisdictional competences, the Federal Justice (national) and the State Court (subnational). This refers to the branches of the judiciary. When the report does not contain such information, the table indicates this by means of the "-" symbol.

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<b>86/20</b> CASE 12.732	Guatemala	"The petitioner [...] filed a criminal complaint for the crimes of <i>denial of justice</i> and concealment before the Court of First Instance for Criminal Matters and Crimes against the Environment of the Municipality of Coatepeque, [and] against the Public Prosecutor's Office [...]. Said complaint was admitted, processed and eventually dismissed"	<b>Denial of justice</b>	Criminal
<b>85/20</b> CASE 12.374	Paraguay	"failure to investigate and punish the parties responsible due to irregularities in the investigation of the events by [...] judicial authorities"; "there had been an unjustified delay in the process"	<b>Irregularity in the process; Judicial delay</b>	Criminal
<b>1/20</b> CASE 13.776	Colombia	"under the Military Criminal Jurisdiction, the [...] Judge underestimated several alleged <i>irregularities</i> , which had been reported during this proceedings"	<b>Irregularity in the process</b>	Military Criminal
<b>106/19</b> CASE 12.986	Mexico	"several <i>irregularities</i> related to the process that would have been initiated against him"; " <i>delay</i> in the resolution of the controversy"	<b>Irregularity in the process; Judicial delay</b>	Criminal
<b>102/19</b> CASE 13.017A	Panama	"a situation of structural impunity existed in Panama in relation to the crimes committed during the military dictatorship [...] that [...] was consolidated through the use of procedural mechanisms, such as the [...] <i>denial of justice</i> , as was clearly visible in the processes brought by the families of the victims."	<b>Denial of justice</b>	-
<b>91/19</b> CASE 13.017C	Panama	Id.	<b>Denial of justice</b>	-
<b>43/19</b> CASE 13.408	Mexico	" <i>due criminal process</i> violations"	<b>Due process violation</b>	Criminal
<b>37/19</b> CASE 12.190	Chile	"a <i>denial of justice</i> by the highest-level judicial bodies of the Chilean State was configured on being victims of a judicial proceeding that violated basic rights and without judicial guarantees."	<b>Denial of justice</b>	-
<b>36/17</b> CASE 12.854	Argentina	"various <i>irregularities</i> in connection with the absence of impartiality and autonomy of the court authorities in the criminal cause"	<b>Irregularity in the process</b>	Criminal

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103/14 CASE 12.350	Bolivia	"the sentences handed down by the Superior Court of the District of Cochabamba and Bolivia's Supreme Court of Justice fell outside <i>due process</i> and entail the violation of various rights"	<b>Due process violation</b>	Criminal
102/14 CASE 12.710	Argentina	"the rights to appeal, presumption of innocence, and <i>due process</i> had been violated"	<b>Due process violation</b>	Criminal
101/14 PETITION N 21-05	Argentina	"the <i>judicial delay</i> by the State kept the perpetrators of the events from facing justice."	<b>Judicial delay</b>	Criminal and Federal
69/14 CASE 12.041	Peru	"the Senior Prosecutor of Puno appealed the judgement requesting the entire proceedings be overturned for <i>procedural irregularities</i> , which was denied"	<b>Irregularity in the process</b>	Criminal
65/14 CASE 12.769	Mexico	"absence of <i>due process of law</i> during the criminal proceedings filed against them."	<b>Due process violation</b>	Criminal
59/14 PETITION 12.376	Colombia	" <i>due process</i> and judicial guarantees violations"	<b>Due process violation</b>	Criminal
109/13 CASE 12.182	Argentina	"Excessive <i>delay</i> in the processing of the judicial and administrative claims that were filed in the domestic jurisdiction."	<b>Judicial delay</b>	-
124/12 CASE 11.805	Honduras	"unwarranted <i>delay</i> in the proceedings"; " <i>denial</i> and <i>delay</i> of justice"	<b>Judicial delay; Denial of justice</b>	Criminal and Juvenile
85/11 PETITION N 12.306	Argentina	"filed a special appeal ( <i>recurso extraordinario</i> ), alleging the violation of <i>due process</i> guarantees during the arrest and expulsion of Mr. de la Torre, as well as the lack of judicial review of administrative decisions"	<b>Due process violation</b>	Criminal
11/21 CASE 11.833	Argentina	" <i>due process</i> denial"	<b>Due process violation</b>	Labor

**Source:** Prepared by the authors, based on reports published on the IACHR website.

Of the total of 98 friendly settlement reports published by the IACHR between January 2011 and July 2021, 25 registered violations of the right of access to justice *lato sensu* committed by Latin American and Caribbean states. These violations are subdivided into: (A) violation of access to justice *stricto sensu*, present in 2 reports; (B) denial of justice, present in 6 reports; (C) irregularity in the judicial process, present in 6 reports; (D) due process of law violation, present in 8 reports; and (E) judicial delay, present in 8 reports.

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Violations of access to justice *stricto sensu* (A) are registered in 2 friendly settlement reports, one relating to the Brazilian Military Justice and another due to contradictory decisions in the Colombian Civil Justice. Denial of justice (B) is mentioned in 6 friendly settlement reports. In 2 of these, the denial stems from a structural problem of impunity regarding crimes committed during the military dictatorship in Panama. In 2 others, the denial of justice is attributed to Guatemala, regarding both Civil Justice and Criminal Justice. Moreover, a denial by the highest bodies of the Chilean justice system and another by a criminal judge in Honduras, who allegedly acted ineffectively and negligently, were reported.

Although the concept of denial of justice is widely used in legal praxis, Cançado Trindade (1979, p. 23, translated) argues that there are "difficulties in the precise determination of its meaning and scope", which "is relevant to the very determination of the international responsibility of States". In view of this, Cançado Trindade (1979, p. 39-40, translated) presents three points about the meaning and scope of the denial of justice: first, the term applies exclusively to the judicial activity of the State, since, if it were extended to the illicit acts of the Executive or Legislative, its technical value would be emptied; second, "in its proper sense, the denial of justice implies the refusal of a State to extend judicial protection to the rights of foreigners through its appeals and national courts"; and third, "[i]n relation to the exhaustion of domestic remedies, the denial of justice concerns to failures in the State's duty to provide such remedies". Thus, in the understanding of Cançado Trindade (IA Court HR, 2006), denial of justice can be presented in a multiform way, without ceasing to be characterized as such.

Irregularities in the judicial process (C) are exposed in 6 friendly settlement reports, involving 6 different countries, namely Brazil, Paraguay, Colombia, Mexico, Argentina and Peru. In 5 of these reports, the irregularities narrated were present in criminal proceedings, and in 1, in a case before the Military Criminal Court. In Report No. 106/19, it is documented that the irregularities concerned the "absence of diligence to prove" facts, "falsehood in

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judicial statements and reports" and "negligence in the processing of the case" in the Mexican justice system. In Report No. 36/17, the irregularities stemmed from the lack of impartiality and independence of the Argentine judicial authorities, according to the petitioners.

Due process of law violations (D) are mentioned in 8 reports, tainting, in the domestic context, one labor lawsuit and six criminal lawsuits. These violations, according to the petitioners, were perpetrated by Argentina (3 reports), Mexico (2 reports), and Honduras, Bolivia and Colombia (1 report each). As the Inter-American Court (2003) recognizes, due process of law is a dynamic concept guided from a guarantor model. It is noteworthy that, in 2 of the 8 friendly settlement reports mentioning due process violations, it is described the configuration of a discriminatory judicial process due to the condition of women, based on harmful stereotypes (Report No. 103/14 and Report No. 102/14). For example, in Report No. 102/14, the petitioners narrate "violations of privacy and non-discrimination against Mrs. Chaves, every time that, during the trial, she was asked about her sexual preferences and habits, stereotyped physical conditions, and her alleged 'coldness' in the face of the loss of her spouse," as well as "about the color and shape of her undergarments" (IACHR, 2014, p. 2-3, translated). Non-discrimination is not a principle commonly listed as a component of due process (IACHR, 2007), but Report No. 103/14 and Report No. 102/14 invoke the expansion of the scope of due process to this end. Based on this, it is necessary to strengthen the concern with gender equality in access to justice and this from an intersectional perspective, i.e., considering the interaction of different forms of oppression, such as those associated with race and class, in access to justice.

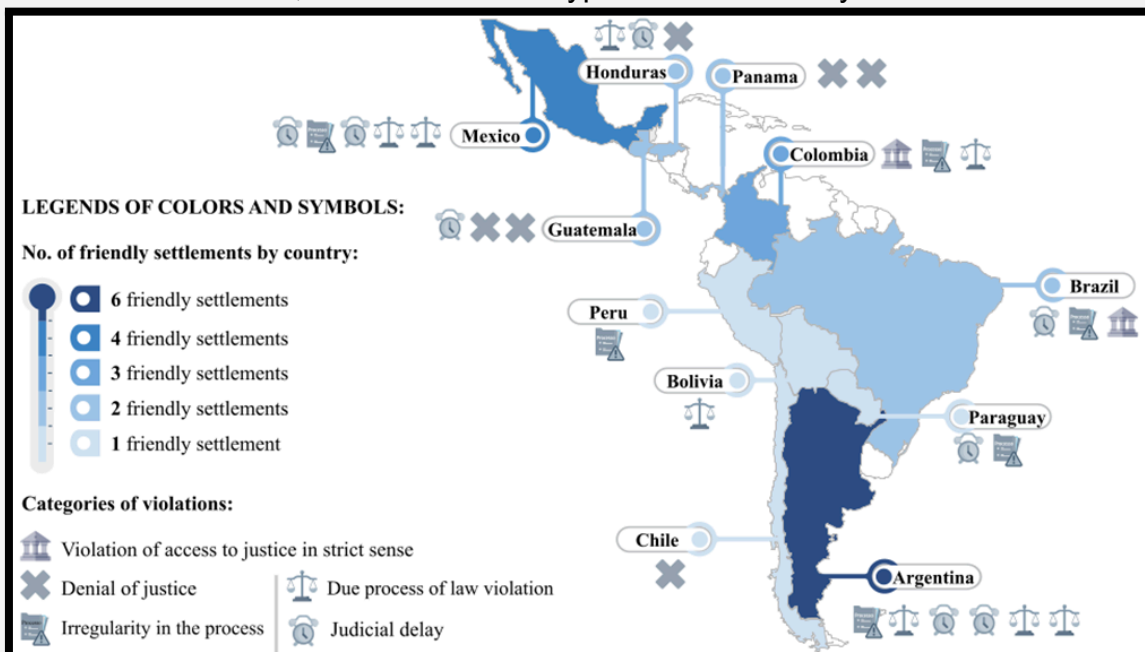
Judicial delays (E) are defined in the IACHR's friendly settlements as unjustified or excessive slowness and failure to comply with the reasonable time of the process. Judicial delays are registered in 8 reports of friendly settlements, and constitute a violation of the right of access to justice perpetrated by several Latin American States: Mexico and Argentina, each of which face two petitions with this allegation, and Brazil, Guatemala, Paraguay and Honduras, with one

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petition each. In 7 of the cases, judicial delay is linked to the Criminal Justice. Friendly Settlement Report No. 136/21 narrates delay within the Brazilian justice system in taking statements from the alleged perpetrators of a crime. In Report No. 85/20 and Report No. 101/14, it is reported that domestic judges and courts have delayed issuing decisions and convicting those responsible for the facts. In Report No. 124/12, due to judicial delay in Honduras, an adolescent was detained for one year and three months in an adult prison, waiting to be sent to the local Juvenile Court (“*Juizado de Menores*”).

Regarding the spatial distribution of the 25 reports with violations of access to justice that resulted in friendly settlements before the IACHR, 6 concern the Argentine justice system, 4 refer to Mexico, and 3 were configured in Colombia. 2 situations of violations of access to justice were reported in Brazil, Panama, Honduras and Guatemala. The other countries that reached one friendly settlement each, related to violations of access to justice, were Paraguay, Chile, Bolivia, and Peru. Figure 01, below, maps the 25 reports with violations of access to justice.

**Figure 01:** Map of violations of access to justice resolved amicably at the IACHR, with number and types of violations by State



**Note:** More than one kind of violation can be mentioned in each petition.

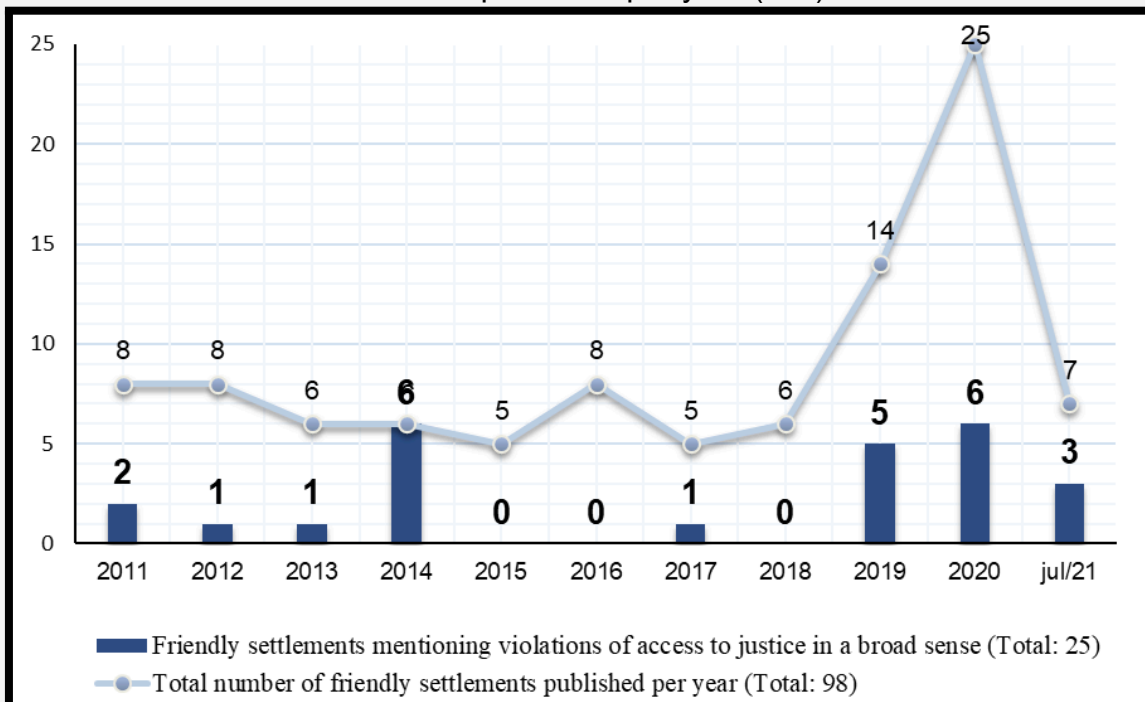
**Source:** Prepared by the authors, based on the IACHR website.

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Caution is needed in the interpretation of these data. For example, it is not correct to say on the basis of them that Argentina is the biggest violator of the right of access to justice in Latin America, since it is possible that Argentina is only the country that most reaches friendly settlements agreements in cases of violations of access to justice. Unfortunately, detailed information on all petitions received by the IACHR is not published, and the IACHR only publishes on its website reports of successful friendly settlements whose agreement has been analyzed by the members of the IACHR and ratified. As reported by other researchers (Jiménez et al., 2015), the lack of data related to petitions or cases of the IACHR becomes an obstacle to conducting empirical research and interpreting the results.

With regard to the distribution over time, the reports of violations of access to justice that culminated in friendly settlement agreements vary greatly over the years, as shown in Figure 02 below.

**Figure 02:** Number of friendly settlements mentioning violations of access to justice per year (columns) combined with the total number of friendly settlements published per year (row)



Source: Prepared by the authors, based on the IACHR website.

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It should be noted that the number of friendly settlements published containing accounts of violations of access to justice between January 2019 and July 2021 (14 solutions) already exceeds that of the 8 previous years (11 solutions) – which, in part, is due to the increase in the publication of friendly settlements in general in the 2019-2021 triennium (46 solutions). In addition, it is noteworthy that, in 2014, all 6 friendly settlements published by the IACHR reported violations of access to justice. In the first half of 2021, almost half of the published friendly settlements mentioned violations of access to justice. It is not possible, based on the data published by the IACHR on friendly settlements, to estimate whether there has been an increase or decrease in reports of violations of access to justice, since the friendly settlement procedure is long and the number of reports published is only the visible dimension of a broader set of data (it is the "tip of the iceberg"), since there is no public access to detailed data on cases that are in progress with friendly settlements, nor on those cases in which the agreement has already been signed but is still pending approval by the IACHR.

Finally, of the 25 petitions with reports of violations of access to justice that culminated in successful friendly settlements, 52% had an NGO in the active pole of the process (exclusively or together with individuals), while in 48% the active pole was composed exclusively of individuals – victims or family members and lawyers. In none of the cases it is mentioned that the petitioner was represented by a Public Defender's Office or equivalent. The data obtained through this research reveal that both individuals and NGOs have been able to successfully bring their petitions to an end through friendly settlements – although their capacities differ, the results are balanced. Thus, it is not only petitions filed by NGOs that gain strength in proceedings before the IACHR, as one might think.

Furthermore, although there are NGOs with greater experience in acting before the IACHR – i.e., NGOs that have already acted on a greater number of petitions, and with better informational and financial resources to do so –, with regard to friendly settlements containing reports of violations of access to

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domestic justice, there is no significant difference in capacity between the different NGOs to obtain the end they desire. Among the 25 friendly settlements, there is a certain prevalence of the *Centro por la Justicia y el Derecho Internacional* (CEJIL), which was present in the active pole (petitioner) of 5 petitions – only in 1 of these CEJIL filed individually, in the others there were other petitioners. In addition to this NGO, the *Comité Latinoamericano y del Caribe para la Defensa de los Derechos de la Mujer* (CLADEM) acted as co-petitioner of 2 successful petitions. The other NGOs acted as petitioners or co-petitioners in only 1 petition each.

From the documentary analysis, it is also possible to assess the reparatory measures agreed upon in these 25 friendly solutions that deal with violations of access to justice in the domestic sphere. In 12 of the 25 reports, a measure of justice was agreed upon, consisting of initiating, advancing or continuing judicial proceedings at the domestic level. For example, in Report No. 124/12, the State of Honduras committed to carrying out "the corresponding administrative and judicial actions that allow for the prosecution and punishment of those responsible for the facts denounced" (IACHR, 2012, translated), a measure that the IACHR declared fully implemented in 2012. In addition to measures of more limited scope, such as these, there are structural measures, which impact the entire domestic justice system, agreed upon in friendly settlements. For example, in Report No. 85/20, the "Paraguayan State undertakes, through the Supreme Court of Justice, to request reports on the procedural status of the cases of all the courts in the country every six months, in order to verify strict compliance with the deadlines and terms established in the procedural laws, and in the event of violations of these principles, to apply the corresponding sanctions" (IACHR, 2020B, translated). The IACHR considered this measure fully complied with in 2021. In Report No. 103/14, it was agreed that the Bolivian State would include in the evaluation processes of judges in office the variable "degree of knowledge in human rights, particularly in issues related to gender discrimination" (IACHR, 2014b). The IACHR declared this measure fully implemented.

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Empirical data show that both individuals and NGOs have been able to reach successful friendly settlements under the auspices of the IACHR to address violations of access to justice perpetrated by Latin American states. It also shows that these friendly settlements influence the implementation in domestic judicial systems of both individual and structural reparatory measures to improve access to justice. Therefore, the IACHR, through the friendly settlement procedure, exercises a *backstopping* function for individuals, NGOs, and state institutions.

#### **4. THE IACHR AS A BACKSTOP**

The data obtained in the empirical research make it possible to frame the IACHR in the role of *backstopping* domestic jurisdiction, supporting the actions of domestic groups and individuals when access to justice within the State is not effective. This demonstrates an intranational dimension of international law. IACHR's performance of this function is linked to at least two factors in its institutional design. First, it is a requirement for the admissibility of petitions for international accountability of a State before the IACHR that the remedies under the domestic jurisdiction of that State have been exhausted, in accordance with Article 31(1) of the Rules of Procedure of the IACHR<sup>13</sup>. For Slaughter and Burke-White (2006, p. 340), this "requirement that individuals first exhaust local remedies gives States – and particularly their domestic courts – an incentive to reach conclusions acceptable to the international institution", so that the IACHR does not have to intervene to analyze the case. Thus, the IACHR acts directly only when the domestic justice system (the first line of defense) fails to act.

All quotations listed in the third column of Table 1 are allegations made by the petitioners, summarized by the IACHR in its reports. In only one report – Report No. 102/14 – the IACHR mention the State's defensive thesis regarding the violation of access to justice alleged by the petitioners. In such report, Argentina alleged that the domestic criminal procedure "had been adequately adjusted to the guarantees of due process," so that "the petitioners' claim would

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<sup>13</sup> This requirement is only excepted in three situations, which are contained in article 31 (2) of the aforementioned Regulation.

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be solely for the IACHR to act as a fourth instance and review the assessments of fact and law that motivated the judicial decisions at the domestic level, simply because they disagreed with the judge's way of appraisal" (IACHR, 2014, translated). In this regard, it should be clarified that the function declared of the IASHR is not to act as a fourth instance of adjudication.

With regard to the Inter-American Court of Human Rights (2015), it has repeatedly reaffirmed that international jurisdiction has a subsidiary and complementary nature, which is why the Inter-American Court, for example, is not competent to decide disagreements on elements concerning the evaluation of the evidence made in a domestic proceeding, nor on the application of domestic law in relation to aspects that are not directly related to the compliance with international human rights obligations. The IACHR (2020, p. 5, translated) also distinguishes its functions from those of a fourth instance in a judicial proceeding, so that, when considering petitions alleging violations of access to justice, it "does not intend to suppress the competence of domestic judicial authorities". In the case of Report No. 102/14, the success of the friendly settlement prevented the petition from reaching the stage at which the IACHR would decide the merits; however, in cases that do reach this procedural merits stage, the IACHR's role is not that of a quasi-judicial fourth instance, but is instead limited to analyzing "whether the judicial proceedings complied with the guarantees of due process and judicial protection, and offered the necessary guarantees of access to justice to the alleged victims under the terms of the American Convention" (IACHR, 2020, p. 5, translated).

Therefore, the institutional design of the IACHR results in a function not of a fourth instance of decision, but rather of *backstopping*. The real effect of this on the international institutional conception is twofold, as Slaughter and Burke-White (2006) argue. The first, "and most obvious, is the provision of a second line of defense when national institutions fail" (Slaughter & Burke-White, 2006, p. 341). The second, "and potentially more powerful, is the ability of the international process to catalyze action at the national level" (Slaughter & Burke-White, 2006, p. 341). This is because the political benefits of adjudicating

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issues domestically rather than giving jurisdiction to an international institution, such as the IACHR or the Inter-American Court, over which domestic officials have little or no control, creates new incentives for States to act locally, enhancing access to domestic justice.

The second characteristic of the institutional design of the IACHR that results in a *backstopping* function is to grant standing/active legitimacy to individuals or organizations so that they can, directly at the international level, file complaints of human rights violations perpetrated by States. Because it is conceived and structured in this way, the IACHR helps to "backstop domestic political and legal groups trying to comply with international legal obligations" (Slaughter & Burke-White, p. 333). Hence, as Pozzatti and Arreal (2018, p. 121, translated) argue, "international norms can enhance the effectiveness and capacity of national institutions and, when properly structured, may protect specific groups and ensure that States comply with their international obligations".

The IACHR provides a forum for the voices of individuals or communities to be heard when there is no such space locally, or when the existing national space is ineffective. Moreover, the voices that resonate before the IACHR reverberate much louder, given the privileged international locus. Furthermore, if these individuals or organizations have not been able to achieve effective access to justice before domestic institutions, they may be able to access international justice as a *backstop*, through the IACHR's friendly settlements. Individual and collective action (through NGOs), in the face of violations of access to justice, has been effective in obtaining local results – since, as shown by the data summarized in Table 1 above, 25 friendly settlement agreements were reached in the period analyzed. This empowerment of non-state actors does not necessarily translate into a loss of power for States (Slaughter, 1997); on the contrary, the engagement of individuals and particularly of human rights NGOs before the IACHR operates as an additional pressure on the traditional levers of domestic politics, in order to improve and strengthen the domestic justice system.

## **5. CONCLUSIONS**

Friendly settlements addressing violations of access to justice reflect a trend in contemporary international law to intervene in situations that classical international law once left solely within the internal sovereignty of States. Thus, if a State violates the right of access to justice within its domestic jurisdiction, this fact can be brought by individuals or organizations before the IACHR with the aim of holding the State internationally accountable for the violation. In the course of the international process, the State and the individual or organization may consent to a friendly settlement, engaging in dialogue and ultimately signing an agreement containing measures to repair the violation of the right of access to justice. If appropriate, this agreement will be ratified by the IACHR and supervised until full compliance. This procedure reveals intranational dimensions of international law and the ways in which it is internalized and influences domestic institutions of the justice system. Through IACHR's friendly settlements, international law can enable effective responses to local problems.

The methodological approach of this research, which includes a literature review, documentary analysis and qualitative content analysis, allowed the identification of both the types of domestic violations of access to justice described in friendly settlements of the IACHR based on a theoretical framework, as well as the actors involved in these agreements – States, individuals and organizations – and the agreed reparation measures. According to the empirical analysis, of the 98 friendly settlement reports published by the IACHR between January 2011 and July 2021, 25.5% are linked to the ineffectiveness of access to justice in the domestic institutions of States, due to judicial delays (8.2% of the total), due process of law violations (8.2%), irregularities in the judicial process (6.1%), denial of justice (6.1%), and violations of access to justice *stricto sensu* (2%). Regarding the spatial distribution of these 25 reports of violations of access to justice, it is noteworthy that 6 concern the Argentine justice system, 4 refer to Mexico, and 3 were configured in Colombia. The number of published friendly settlements containing reports of violations of access to justice increased substantially in the

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2019-2021 period. Regarding the actors, of the 25 petitions, 52% had an NGO as petitioner (exclusively or together with individuals), while in 48% the petitioner was exclusively individuals – victims, family members and lawyers. There is a diversity of NGOs acting before the IACHR and few appear repeatedly in successful friendly settlements – notably CEJIL, CEJIL, which acted as claimant of 1 petition and co-claimant of 4 petitions, and CLADEM, which acted as co-claimant of 2 different petitions. The reparatory measures agreed upon in the friendly settlements include individual and structural measures that impact the domestic justice system, such as the State's commitment to push forward judicial proceedings against human rights violations, to create a national oversight mechanism for access to justice, and to incorporate a gender perspective into the evaluation of judges.

The data obtained make it possible to frame the IACHR in the role of *backstopping* the domestic jurisdiction. The institutional design of the IACHR, by requiring the exhaustion of domestic jurisdictional remedies as a requirement for the admissibility of petitions, encourages local action (first line of defense), so that IACHR only takes action when domestic institutions fail to act (second line of defense). Furthermore, the possibility of international accountability of the State for violations of the right of access to justice in an international institution over which the State has little or no control creates incentives for the State to resolve conflicts at the domestic level.

Another feature of the IACHR's institutional design that results in a *backstopping* function is granting standing/active legitimacy to individuals or organizations to file complaints of human rights violations perpetrated by States to the IACHR, guaranteeing them access to international justice when the State fails to guarantee them access to domestic justice. In this way, the IACHR provides a forum for the voices of individuals and NGOs to be heard when there is no such space locally. Finally, the voices that resonate before the IACHR reverberate much louder when there is the publication, in this international forum, of a friendly settlement agreement in which the State acknowledges its

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responsibility for the ineffective access to justice and undertakes to implement reparatory measures to improve its justice system.

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