Furthering the fight against impunity in Latin America: the contributions of the Inter-American Court of Human Rights to domestic accountability processes

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Part I:

The fight against impunity in the jurisprudence of the Inter-American Court of human rights

2 The IACtHR's doctrine on the duty to investigate, prosecute and punish human rights violations

1 Introduction: structural impunity and the development of the IACtHR's case law

It has been noted that the spectacular rise of the fight against impunity as a policy goal of the international community and a matter of international law was shaped by the 'special circumstances' in which the international community found itself in the early 1990s.[1] The same is certainly true for the Inter-American Court's turn to the fight against impunity. As will be discussed in Chapter 4 of this study, 'anti-impunity' is not a traditional concern of human rights courts. But the circumstances in which the region under the Inter-American Court's jurisdiction found itself in the late 1980s, put it at the top of that particular court's agenda.

As discussed in the introduction to this study, the regional context in which the IACtHR delivered its first judgment included the transition from civil war to peace and/or from military dictatorship to democracy. An important issue in all of those transitions was the question whether and how the atrocities committed by dictatorial regimes and/or during civil wars should be addressed. More particularly, the question arose whether these atrocities should be officially investigated and those responsible prosecuted or whether the 'crimes of the past' should better be forgotten. It seemed that the region had committed itself to the latter option, as many new regimes adopted amnesty legislation. Moreover, the first post-transitional years made it clear that, even though warring parties had officially laid down their weapons and dictatorships had officially ceded to democracy, those who had been involved in the commission of serious crimes remained powerful and continued to exert influence over their respective societies, including the criminal justice systems. The criminal justice apparatuses of the region, which in many states had operated under the control of the military for many decades, were fragile and still developing and vulnerable to interferences by other powerful elements in society.

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1 *See for example* B.N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008), pp. 1-39. Schiff argues – amongst other things – that, while the idea of accountability for human rights violations has a much longer history, the politicization of the Cold War made it impossible to act on such ideas. However, "[w]ith the end of the Cold War, that politicization receded in significance. Meanwhile, the development of globalized international communications and the increasing effectiveness of nongovernmental organizations in using these technologies to publicize violations the world over enhanced the salience of human rights issues." Idem, p. 29-30.

On top of this tense and unstable (post-)transitional situation, the first decades of the IACtHR's operation were characterized by the emergence of a 'new' threat in the region: that of organized crime. The region's still-fragile criminal justice systems were mostly unable to adequately respond to the rise of increasingly wealthy and powerful criminal organizations, leading to soaring rates of crime and of impunity. When state forces did respond to the crime wave, they often did so in ways that ran afoul of the law and the mandate it provided them. The systematic practices of disappearance, torture and extrajudicial killing which had previously been used against those who were (suspected of being) subversives or members of a terrorist group, were now employed in the fight against organized crime.[2] And as before, the crimes committed by state agents in the context of the fight against organized crime were rarely investigated, let alone prosecuted.

All of these factors contributed to the existence of a situation of widespread and structural impunity in the region, which the IACtHR has had to confront as it developed the jurisprudence which will be discussed in these chapters. It should be noted, moreover, that this widespread and structural impunity existed not only as the result of the fragility of criminal justice systems, the incompetence of individual state agents, and the complexity of cases or the simple lack of evidence. As the IACtHR's case law and its analysis of the mechanisms underlying impunity shows, impunity was often the result of active obstruction by elements within the state.[3] In certain

2 *See for example* IACtHR *Villagrán Morales ('Street Children') v. Guatemala (merits)*, 19 November 1999, which concerned the extrajudicial execution of a number of young men and boys from an underpriviledged areas, who were suspected of being gang members. The mechanisms used in executing these youths were the same as those used during the internal armed conflict to eliminate political opponents of the regime. Another example can be found in the case of *Tibi v. Ecuador*, which concerned the illegal detention and torture of the material victim in the context of a police operation against an organized crime group. In his separate opinion to this judgment, Judge García Ramírez noted: "Persistence of old forms of crime, the appearance of new expressions of crime, systematic attacks by organized crime, the extraordinary virulence of certain extremely grave crimes – such as terrorism and drug trafficking – have determined a sort of "exasperation or desperation" which is ill advised: it suggests setting aside progress and going back to systems or measures that already demonstrated their enormous ethical and practical flaws." IACtHR *Tibi v. Ecuador (preliminary objections, merits, reparations and costs)*, judgment of 7 September 2004, separate opinion by Judge García Ramírez, para. 30.

3 See for example IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 73 and p. 28 (testimony Jennifer Harbury).

cases, impunity was also enforced through violence, committed either by state agents[4] or by groups close to the state.[5]

It is helpful, going forward, to be mindful of the context of structural and entrenched impunity in which the IACtHR operated, because it helps to explain certain developments in its case law and certain choices made along the way. In particular, as noted by Anja Seibert-Fohr, the "grave systemic deficits" in the criminal justice systems of the region pushed the IACtHR to develop a jurisprudence that is particularly "ambitious and strict […] on prosecution and punishment" of human rights violations.[6] It also gives context to the IACtHR's understanding that "impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless"[7] and that it erodes the confidence of the population in public institutions.[8]

The following chapters will analyze the legal instrumentarium developed by the Inter-American Court to combat such structural and entrenched impunity. This chapter will discuss the main tool and overarching doctrine developed to this effect: that of the state's obligation to investigate, prosecute and punish those responsible for human rights violations. None of the ACHR's provisions explicitly require states to investigate and prosecute human rights violations. In spite of the lack of such a clear and explicit basis in the Convention, the obligation to investigate, prosecute and punish human rights violations has become a major theme in the Court's case law. The Court found this obligation to be implied in several provisions, including the general obligation of states to ensure to those under their jurisdic-

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4 *See for example* IACtHR *Myrna Mack Chang v. Guatemala (merits, reparations and costs)*, 25 November 2003, para. 134.95-100 and IACtHR *Bámaca-Velásquez v. Guatemala (merits),* 25 November 2000, para. 34.

5 The case of *La Rochela Massacre v. Colombia* offers a disturbing illustration of how impunity is enforced. It concerns the massacre of 15 judicial officers, perpetrated while they were investigating the crimes committed by paramilitary groups in the Colombian Magdalena Medio region. These crimes have been the object of a separate case before the Court, the case of the *19 Tradesmen v. Colombia*. The massacre of the judicial officers was committed by paramilitary organizations, with acquiescence of the State. The Court notes "the seriousness of the fact that this massacre was directed at judicial officials in the course of their work, and was aimed at affecting their investigation of grave violations in which members of paramilitary groups and senior military commanders had participated. At the same time, the massacre represented a clear and threatening message that this type of crime should not be investigated." IACtHR *La Rochela Massacre v. Colombia* (merits, reparations and costs), 11 May 2007, para.149.

6 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 108-109.

7 *See for example* IACtHR *Baldeón García v. Peru (merits, reparations and costs)*, 6 April 2006, para. 168 and IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para 211.

8 IACtHR *Barrios Altos v. Peru (merits)*, 14 March 2001, Concurring Opinion of Judge A.A. Cançado Trinadade, para. 4. *See also* X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin American national prosecution of mass atrocities' (2013) 46(3) *Israel Law Review* 405-430, p. 413.

tion the free and full exercise of their rights. The Court has proceeded to gradually develop the duty to prosecute, to the point where investigation and prosecution is now treated not only as a duty on states, but also as a right of the victim. The following pages will analyze how, and through which judgments, this development came about.

This chapter will focus on the doctrine of the state's obligation to investigate, prosecute and punish as it has developed from its origins in the *Velásquez Rodríguez* judgment. It will discuss the legal basis of this doctrine in the ACHR, the scope of its application and its relation to two other important doctrines developed by the Court, namely the concept of enforced disappearance[9] and the victim's right to truth. Finally, it will compare the IACtHR's doctrine to the jurisprudence developed on the same topic by other human rights bodies and to soft law instruments developed by the UN. In doing so it will consider the Court as part of the broader, international movement.

2 Legal basis and rationale of the duty to investigate, prosecute and punish human rights violations under the ACHR

2.1 From procedural obligation

The judgment which introduced the IACtHR's concept of an obligation to investigate, prosecute and punish human rights violations in the case of *Velásquez Rodríguez v. Honduras* was truly ground-breaking for a number of reasons. Firstly, it was the very first judgment (on the merits) ever delivered by the IACtHR, and it clearly signaled to the states under its jurisdiction the Court's approach to the law and the role it envisioned for itself within the region. Secondly, it tackled head-on some of the most sensitive and controversial themes of relevance to practically all states under its jurisdiction, such as systematic practices of enforced disappearance and the question how to officially respond to such legacies of violence and impunity. Thirdly, it introduced legal concepts in response to those difficult questions which were new and relevant not only to the states under its jurisdiction, but to all states going through political transitions and also to the international institutions which were just starting to give serious thought to these questions. The *Velásquez Rodríguez* judgment coincided with the rise of the fight against impunity as a global phenomenon, described by UN Special Rapporteur

9 The concept of enforced disappearance as a serious human rights violation and an international crime has of course not exclusively been developed through the case law of the IACtHR. Today, this concept is regulated by several international human rights conventions, both regional and universal in scope, and by the Rome Statute of the ICC. Other regional human rights courts, including the ECtHR, have also discussed and ruled on the issue and thereby contributed to its development as a legal concept. However, the IACtHR was an early contributor to this process and the first international court to tackle the concept of enforced disappearance.

Louis Joinet as its "fourth stage",[10] when the need to combat impunity was introduced as an important goal of the international community and the issue was beginning to be understood in terms of states' legal obligations, rather than a moral claim by the victims. In effect, *Velásquez Rodríguez* provided the opening salvo of this development.

The facts underlying the *Velásquez Rodríguez* case concerned the disappearance of Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, allegedly at the hands of National Office of Investigations and the G-2 (military intelligence) of the Armed Forces of Honduras. First, the Court established that enforced disappearance constituted a "multiple and continuing violation of many rights under the Convention",[11] especially those protected Articles 4 (right to life), 5 (prohibition of torture) and 7 (right to personal liberty). It then went on to consider whether these violations could be attributed to the state which, due to the particular circumstances of the case, posed a bit of a puzzle. It was in this context that the IACtHR introduced the concept of an obligation to investigate, prosecute and punish human rights violations under Article 1(1) ACHR.

The Commission had been able to prove, through a combination of testimony and documentary evidence, that there existed in Honduras at the relevant time a systematic pattern of disappearances, often combined with torture and extrajudicial execution, carried out by state officials and that the disappearance of Manfredo Velásquez seemed to fit this pattern very well. However, there was no direct evidence as to the identity of the perpetrators of this particular disappearance, making it difficult for the Court to establish the direct involvement of the state. The Court made clear its belief that the disappearance of Manfrédo Velásquez was carried out by state agents, but said that "even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention".[12]

Article 1(1) ACHR contains the signatory states' obligation to respect the rights contained in the Convention and, as such, is essential for establishing the conditions under which a particular violation can be imputed to the state.[13] It reads:

> "The States Parties to this Convention undertake to *respect the rights and freedoms recognized herein* and to *ensure to all persons subject to their jurisdiction the free and full exercise of those rights* and freedoms, without any discrimination for reasons

10 Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (2 October 1997), para. 5.

11 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 155.

12 Idem, para. 182.

13 Idem, para. 160.

> of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." [emphasis added]

The first part of this paragraph, concerning the obligation to respect human rights, describes the states' negative obligations, or, in the words of the Court, it provides limits to the exercise of public authority.[14] As a result, "any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State".[15] Beyond that, the second part of the paragraph, which addresses the obligation to *ensure* human rights, forms the basis for the states' positive obligations under the Convention and implies:

> "the duty of States Parties to organize the governmental apparatus, and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of those rights. As a consequence, the *States must prevent, investigate and punish any violation of the rights recognized by the Convention* […]." [16]

Thus, according to the Court, the obligation to investigate and punish human right violations after they occur is part of the obligation of the state to ensure human rights to all persons subject to their jurisdiction, as enshrined in Article 1(1) ACHR. The Court then returned to, and further clarified, this obligation to investigate and punish human rights violations, stating:

> "The State has a legal duty […] to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[17]

As noted by Anja Seibert-Fohr,[18] the rationale underlying the obligation to investigate, (prosecute) and punish as articulated in the *Velásquez Rodríguez* judgment is twofold: firstly, investigation and punishment is necessary in the interest of general prevention, in order to prevent further human

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14 Idem, para. 165.
15 Idem, para. 172.
16 Idem, para. 166.
17 Idem, para. 174. As will be further discussed below, this quote from the Velásquez Rodríguez judgment is considered "the first truly complrehensive statement of a state's human rights obligations" in the area of transitional justice and has had an important effect on the further development of the fight against impunity on the international level. M. Freeman, *Truth commissions and procedural fairness* (Cambridge University Press, 2009), p. 8. See *also* F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann, T. Unger and V. Cadelo (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17.
18 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 55-58.

rights violations.[19] Secondly, investigation and punishment of human rights violations also serves the 'retrospective protection' of the rights of the victim, even if doing so cannot truly restore those rights – as in the case of an enforced disappearance. The reasoning here seems to be *a contrario*: if the state does not investigate a human rights violation and punish those responsible, it communicates its subsequent acquiescence to that violation. In the words of the Court:

> "[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."[20]

For the case at hand, this meant that the lack of evidence as to the identity of the perpetrators of the disappearance of Manfredo Velásquez did not preclude the Court from holding the state responsible for it, as its agents had clearly failed to properly investigate the disappearance.[21] The Court thus found that Honduras had violated Articles 4, 5 and 7 in relation to its obligation to ensure rights under Article 1(1) ACHR.

Finally, the *Velásquez Rodríguez* judgment also provided the first outlines for the further development of the Court's doctrine on the state's duty to investigate, prosecute and punish. Specifically, the Court established that the obligation ensure human rights violations, of which the obligation to investigate, prosecute and punish is part, has implications both for the state's legal and institutional framework for investigation and punishment of human rights violations and for its enforcement of that framework. In the word of the Court:

> "The obligation to ensure the free and full exercise of human rights is not fulfilled by the *existence of a legal system designed to make it possible to comply* with this obligation --it also requires the government to *conduct itself so as to effectively ensure the free and full exercise of human rights*."[22]

Applying the same logic to the obligation to investigate, prosecute and punish itself, this would require two things: 1.) the existence of a (legal) system which makes it possible to investigate, prosecute and punish human rights violations; 2.) an effort, on the part of the state to investigate, prosecute and punish individual human rights violations effectively. Given the facts of the

19 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 175.
20 Idem, para. 177.
21 Idem, para. 180.
22 Idem, para. 167.

case,[23] the judgment is especially explicit on the second of these two dimensions. In this context, the Court remarked:

> "In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[24]

Thus, while the Court considers the obligation to investigate, prosecute and punish human rights violations to be an obligation of effort rather than result, it does require states to make a genuine effort and perform an effective investigation whenever they become aware that a human rights violation may have occurred – and prosecute and punish those responsible if appropriate.

The other dimension, that the state has an obligation to create a (legal) system which makes investigation and punishment of human rights violations possible, was not explicitly discussed in *Velásquez Rodríguez* – primarily because this had not been the problem keeping the state from investigating the underlying human rights violation in that particular case. It does however, seem to be implied in the Court's observation that the obligation to ensure human rights includes the duty to "ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages".[25] In its later case law, the Court has confirmed that the obligation to investigate, prosecute and punish indeed includes an

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23 *See* idem, para. 178, stating that: "In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velásquez, and of the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1 (1) of the Convention." Thus, in the case of the disappearance of Manfredo Velásquez, the legal and institutional framework was adequate (in theory), to investigate and prosecute those responsible. The problem was a lack of effective enforcement of that framework in the case at hand.

24 Idem, para. 177.

25 Idem, para. 175. It should be noted that the Court made this observation primarily in relation to the obligation to prevent human rights violations, which, like the obligation to investigate, prosecute and punish, flows from the broader obligation to ensure under Article 1(1) ACHR. While the IACtHR in *Velásquez Rodríguez* makes an explicit distinction between the obligation to prevent and the obligation to investigate, prosecute and punish, the two are closely related, as evidenced by the fact that the prevention of further violations is part of the rationale underlying the obligation to investigate, prosecute and punish.

obligation to create an appropriate legal and institutional framework and to "remove all *de facto* and legal mechanisms and obstacles that maintain impunity […]"[26]

In short, the *Velásquez Rodríguez* judgment established that states have a positive, procedural obligation under Article 1(1) ACHR to investigate, prosecute and punish human rights violations. This obligation entails a duty to create a state apparatus conducive to the investigation, prosecution and punishment and to carry out an effective investigation whenever the state becomes aware that a human rights violation may have occurred. Through this interpretation of Article 1(1) ACHR and the procedural obligation contained in it, the IACtHR gave a considerable impulse to the fight against impunity, in Latin America and worldwide, and to the growing sense that the investigation and punishment of human rights violations is a question not 'just' of morality, but of international law.

2.2 To a form of reparation

While the *Velásquez Rodríguez* judgment on the merits thus constituted a considerable leap in the development of the international legal framework of the fight against impunity and a significant expansion of the scope of the ACHR's material provisions, the Court was more conservative when determining reparations in the same case. The Commission and the victims' representatives had requested the Court to order the state to investigate the disappearance of Manfredo Velásquez as part of the reparatory measures, and to punish those responsible. However, the IACtHR explicitly declined to do so.[27] The Court noted that it had already found in its judgment on the merits that the state was under an obligation to investigate the disappearance and that this obligation would continue to exist for as long as there was uncertainty regarding the fate of the disappeared person. It did not deem it necessary to include this duty separately in the reparations. Instead, it chose a more conventional line of ordering only monetary compensation for the violations committed by the state.

In the years following *Velásquez Rodríguez*, it became clear that this conservative stance on reparations was a disappointment for the victims who appeared before the IACtHR. They considered money to be a wholly

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26 IACtHR *Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs)*, 25 November 2003, para. 277. S*ee also* IACtHR *Gómez Paquiyauri Brothers v. Peru (Merits, Reparations and Costs)*, 8 July 2004, para. 232; IACtHR *Tibi v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, 7 September 2004; IACtHR *Carpio Nicolle et al. v. Guatemala (Merits, Reparations and Costs)*, 22 November 2004, para. 134; IACtHR *La Cantuta v. Peru (Merits, Reparations and Costs)*, 29 November 2006, para. 226; IACtHR *Heliodoro-Portugal v. Panama (Preliminary Objections, Merits, Reparations and Costs)*, 12 August 2008, para. 246; and IACtHR *The Río Negro Massacres v. Guatemala (Preliminary Objections, Merits, Reparations ad Costs)*, 4 September 2012, para. 257 and IACtHR *The Case of the Massacre of El Mozote and Nearby Places v. El Salvador (Merits, Reparations and Costs)*, 25 October 2012, para. 249.

27 IACtHR *Velásquez Rodríguez (reparations)*, 21 July 1989, paras. 32-36.

inadequate reparation for the violations they suffered, especially in cases concerning the death of a loved one.[28] Faced with structural impunity on the national level, they came to the Court looking for something else: justice. Monetary compensation did not provide any incentive for the state to provide this. On the contrary, it offered states a way to 'buy off' their human rights obligations. Thus, in order to maintain its credibility in the eyes of the victims, the Court was moved to change its stance on reparations.

It first did so in 1996, in its reparations judgment in the case of *El Amparo v. Venezuela*, [29] which concerned the massacre of 14 fisherman in the village of El Amparo by members of Venezuela's armed forces in October 1988. The relevance of this judgment, which represents a remarkable step forward in the IACtHR's interactions with states concerning the investigation and prosecution of human rights violations, is not immediately apparent upon reading it. In relation to non-pecuniary damages, the Commission had requested the Court, amongst other things, to order the state to effectively investigate the massacre and punish those responsible. Nothing in the Court's discussion of this request indicates a fundamental break from its decisions in previous cases. In fact, the Court seemed to channel its remarks in the *Velásquez Rodr*íguez reparations judgment, when it remarked that:

> "[c]ontinuation of the process for investigating the acts and punishing those responsible is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality."[30]

Beyond this short paragraph, there is no further substantive discussion of the Commission's request. However, in contrast to previous practice, the operative paragraph of the judgment contained the unanimous decision of the Court "that the State of Venezuela shall be obliged to continue investigations into the events referred to in the instant case, and to punish those responsible".[31] The operative paragraph provided no explanation as to why the IACtHR decided to diverge from its previous practice on this point, nor does any other part of the judgment. This lack of substantive discussion of what, in retrospect, constitutes an important step in the IACtHR's case law may be partly explained by the fact that, at the time, this step would have seemed mostly symbolic. The Court had already established in *Velásquez Rodríguez* that states have an obligation under the ACHR to investigate and

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28 *See* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, p. 5, citing Viviana Krsticevic, 'Reparation in the Inter-American system', (2007) 56 *American Univ. Wash C.L.* 1375, p. 1419.

29 IACtHR *El Amparo v. Venezuela (reparations and costs)*, judgment of 14 September 1996. *See also* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, p. 8.

30 IACtHR *El Amparo v. Venezuela (reparations and costs)*, 14 September 1996, para. 61.

31 Idem, para. 64, under 4.

prosecute human rights violations. The fact that this obligation was now reiterated in the operative paragraph, in the list of reparations ordered to the state, does not, at first glance, seem to add much to that fact.

The real relevance of the *El Amparo* reparations judgment only becomes apparent in retrospect, in light of two important subsequent developments in the Court's case law. Firstly, it represents a first step in what Anja Seibert-Fohr sees as the promotion, by the IACtHR, of a remedial rationale for the obligation to investigate and prosecute human rights violations.[32] By this, Seibert-Fohr refers to the idea that investigation and prosecution is necessary not only in the interest of society and general prevention of human rights violations, but (also) in the interest of individual victims in order to remedy the violation of their rights. Prior to *El Amparo*, the obligation to investigate had only been discussed in terms of a duty incumbent on the state, which flows from its position as guarantor of human rights within its territory.[33] This duty is general in nature, based on the harmful effects of impunity to society as a whole and not dependent on the individual victim in the case at hand. However, by ordering investigation and prosecution in a specific case in order to remedy the wrongs done to a particular victim or set of victims, the Court goes one step further. It recognizes that the application of the criminal law serves not just the general interest, but also the interests of the individual victim. Ultimately, this development would lead the IACtHR to recognize the victim's right to justice, which will be further discussed in the next section.

Secondly, the move to include investigation and prosecution in the list of reparations proved to be especially relevant in the context of the supervision of compliance procedure, which the IACtHR began to develop in the years after *El Amparo*.[34] As noted by Alexandra Huneeus, the supervision of compliance proceedings constitute a separate and open-ended stage of the litigation before the IACtHR, during which all the parties in the proceedings

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32 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 59-68, 190-192 and 281-285.

33 *See for example* IACtHR *Vera Vera v. Ecuador (preliminary objection, merits, reparations and costs)*, 19 May 2011, para. 88.

34 *See* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, pp. 9-12. The supervision of compliance proceedings are not explicitly provided for in the ACHR. However, the IACtHR bases its mandate to monitor compliance with its judgments on Article 65 ACHR, which reads:

> "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

According to the Court, this provision implies its mandate to monitor compliance, as it would not be possible for the Court to inform the General Assembly of the state of compliance with its judgments and to make recommendations unless it monitors compliance. *See* IACtHR *Baena-Ricardo et al. v. Panama (competence)*, 28 November 2003, para. 91.

(state, Commission and victims) report on the progress of the state's compliance with the reparations ordered by the Court, and the Court, in turn, "move[s] the parties toward overcoming obstacles to implementation".[35] These proceedings are conducted on the basis of the list of reparations ordered by the Court in its reparations judgment.[36] Including investigations and prosecution of serious human rights violations in that list, as has been the Court's standard practice since the *El Amparo* reparations judgment, therefore "opens the way for a proactive review of national prosecutions of international crimes".[37]

In this way, the *El Amparo* reparations judgment provided the basis for what Huneeus has described as the IACtHR's 'quasi-criminal jurisdiction', i.e. the open-ended review of domestic prosecutions of serious human rights violations.[38] According to Huneeus, three characteristics make this quasi-criminal jurisdiction of particular interest to the fight against impunity: firstly, the depth of the scrutiny the IACtHR applies to domestic proceedings and the level of detail of the follow-up orders issued during the supervision of compliance proceedings. Secondly, the fact that the supervision of compliance stage often takes place in parallel to domestic prosecution and therefore allows the IACtHR to review them as they unfold. In contrast, Huneeus notes, the review of domestic proceedings in the IACtHR's judgments on the merits is necessarily retrospective in nature. Thirdly, while the merits stage of the litigation before the IACtHR is adversarial, the supervision of compliance stage is dialogic. It intends to "foster dialogue among public authorities and civil society actors" in order to help overcome obstacles to the domestic investigation, prosecution and punishment of serious human rights violations.

In short, the IACtHR's consistent practice of ordering investigation, prosecution and punishment as a form of reparation to victims, in combination with its practice of supervising compliance with those orders, has considerably expanded the Court's involvement in and review of domestic accountability processes. Moreover, it marked the first step in a development which has seen the Court increasingly conceptualizing the need for investigation and prosecution of human rights violations as flowing (also) from the rights and interests of the individual victim, rather than (exclusively) from the interest of society in preventing further violations.

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35 A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44, p. 10.

36 As noted by Huneeus, the merits and reparations stages of the litigation before the IACtHR, which used to be separate, have become integrated. In effect, proceedings before the Court now exist of two stages: one concerning preliminary objections, merits and reparations and one concerning compliance. Idem, p. 9.

37 Idem, p. 10.

38 *See generally* A.V. Huneeus, 'International criminal law by other means: the quasi-criminal jurisdiction of the human rights courts', (2013) 107(1) *AJIL* 1-44.

2.3 To separate human right('s violation): the victim's right to justice

This move towards recognition of the individual victim's interest in the criminal investigation and prosecution of the violation of their human rights continued after *El Amparo*. Confronted with the continuous stream of victims seeking justice through the Inter-American system and their testimony on the many ways in which they were denied justice by their home state, the IACtHR has recognized a right of victims to have access to (criminal) justice. It did so under two provisions which have traditionally been associated more with the rights of the defendant in a criminal trial: articles 8(1) and 25 ACHR.

Article 8(1) ACHR protects the right to due process of law, or, in other words, the right of every individual to have their case heard within a reasonable time by a competent, independent and impartial tribunal.[39] While the protection afforded by Article 8(1) extends to the determination of rights in any type of legal proceedings, not just those of a criminal nature, Article 8 as a whole is clearly geared towards the protection of the rights of the *accused* in a criminal trial and includes all the traditional fair trial guarantees. Article 25 ACHR, meanwhile, provides the right to judicial protection of rights through a prompt and effective remedy. This provision essentially codifies the typically Latin American legal concept of the *amparo*, which gives every individual the possibility to enforce their rights through the courts.[40] This is a very broad guarantee and it has is often called upon by defendants in order to enforce their fair trial rights over the course of the proceedings against them.

The Court first applied these provisions in favor of the *victim* in a criminal investigation in the case of *Genie-Lacayo v. Nicaragua*. The case concerned the killing of a young man at the hands of military personnel on 28 October 1990 and the criminal investigation and prosecution which followed. Although the Court could not look into the killing of the material victim, which happened before Nicaragua accepted the Court's jurisdiction

39 Article 8(1) ACHR reads:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

40 *See* K. Sikkink, 'Latin American Countries as norm protagonists of the idea of international human rights', (2014) 20(3) *Global Governance* 389-404, p. 398. The special relevance of the amparo within the Latin American legal system and culture is illustrated by Judge García Ramirez' separate opinion in the case of *Tibi v. Ecuador*, where he describes it as "a precious guarantee, which is exactly, the "guarantee of guarantees," the "right that serves all rights"" and "the culmination of a protective system that ultimately places its expectations in a means of defense that all may resort to and that all may satisfy". IACtHR *Tibi v. Ecuador (preliminary objections, merits, reparations and costs)*, 7 September 2004, separate opinion Judge García Ramirez, para. 45.

on 12 February 1991, the Commission did request it to consider whether the procedural rights of the young man's family members, particularly those of his father, had been violated "as a result of the Judicial Branch's reluctance to prosecute and punish those responsible" for the murder.[41]

The Court accepted this request by the Commission and analyzed the procedural rights of the victim's family under Article 8 ACHR. Its analysis starts from the acknowledgment that Article 8 protects the right to due process of law, "which consist of the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other measure."[42] Accordingly, the Court noted that:

> "In order to establish violation of Article 8, it is necessary, first of all, to establish whether the *accusing party's procedural rights* were respected *in the trial to determine those responsible* for the death of young Genie-Lacayo."[43] [emphasis added]

In this paragraph the IACtHR thus explicitly accepted the notion that the 'accusing party' – i.e. the victim or their family members – has certain rights under the ACHR in the proceedings initiated as a result of their complaint. This is a controversial position which has, as a result, been severely criticized by a number of legal scholars from the region.[44] However, the controversiality of this position is not recognized in the judgment itself and the Court provided no explanation or justification for it. It simply proceeded to analyze whether the (lack of) actions of the authorities in the investigation into the death of the material victim have violated the accusing party's rights under Article 8(1) and comes to the conclusion that this is indeed the case. Those violations came about through the actions of certain military authorities, who obstructed the trial and refused cooperation, making the collection of evidence next to impossible for the responsible judges,[45] and through the "excessive delays" which had occurred at various stages in the proceedings.[46]

Genie-Lacayo thus established that, according to the Inter-American Court, victims have certain rights in the context of criminal proceedings. However, this case concerned the position of the victim in a criminal investigation which, though ineffective, had already been initiated by the state. The Court, therefore, did not have to address the fundamental question of

41 IACtHR *Genie-Lacayo v. Nicaragua (preliminary objections)*, 27 January 1995, para. 2.
42 IACtHR *Genie-Lacayo v. Nicaragua (merits, reparations and costs)*, 29 January 1997, para. 74.
43 Idem, para. 75.
44 These critiques will be discussed in detail below in chapter 4 of this study.
45 Idem, para. 76.
46 Idem, para. 80.

whether victims of human rights violations also have the right to an investigation in the absence of such initiative by the competent authorities. Or, in other words: whether victims have the right to access to criminal justice. The answer to that question came one year later, in the case of *Blake v. Guatemala*. This case concerned the disappearance and killing of Nicholas Chapman Blake, a journalist and US citizen, at the hands of agents of the Guatemalan state. While the abduction and murder took place in1985, before Guatemala accepted the Court's jurisdiction in 1987, the Court found that it did have jurisdiction over the case, because both the underlying disappearance and the resulting lack of an investigation continued well into the 1990s. In its handling of the case, the Court thus limited itself only to those elements. In the context of the denial of justice perpetrated against Nicholas Blake's relatives, the Court said:

> "This Tribunal considers that Article 8(1) of the Convention must be given a broad interpretation based on both the letter and the spirit of this provision …. Consequently, Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained."[47]

That such a right exists is not directly evident from the text Convention. Taken together, Articles 8(1) and 25 protect the right to access to fair and effective judicial protection of rights. While the language of these provisions makes it clear that the remedy should be judicial, i.e. before a competent court or tribunal rather than another, less formal type of institution,[48] it is less clear that the remedy should necessarily be of a penal nature. Thus, some states have argued before the Court that the victims' right to a remedy had been – or could have been – satisfied through other, non-criminal avenues, like civil or administrative proceedings. However, the Court has consistently denied such claims.[49] It seems to take the position that certain rights can only be effectively protected – and remedied – through the appli-

47 IACtHR *Blake v. Guatemala (merits)*, 24 January 1998, paras. 96-97. Note that these considerations of the Court relate exclusively to the victim's rights under Article 8(1), and not under article 25. As in *Genie-Lacayo*, the Court in the case of *Blake* still made a rather strict division here between the two provisions, interpreting article 25 to extend only to the remedy of *amparo* and not to criminal proceedings. This strict division was given up in later case law. *See supra* n. 29.

48 *See* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), paras. 26.06-26.09.

49 *See for example* IACtHR *Moiwana community v. Suriname (preliminary objections, merits, reparations and costs)*, 15 June 2005, paras. 144-147 and IACtHR *The "Mapiripán massacre" v. Colombia (merits, reparations and costs)*, 15 September 2005, paras. 211-214.

cation of criminal law. Thus, as noted by Anja Seibert-Fohr, the IACtHR is the only human rights institution that recognizes "an individual right to criminal prosecution and punishment", or, in other words, a "right to justice" under Articles 8(1) and 25 ACHR.[50]

To be clear, the emergence of the right to justice has not replaced its counterpart, the duty of states to investigate, prosecute and punish such violations. Nor has it made the investigation of human rights violations dependent on the victims invoking their right to justice. To the contrary, the Court has consistently held that the state should "assume this duty [to investigate, prosecute and punish human rights violations, HB] as a legal obligation"[51] and start its investigation "ex oficio and without delay" and not "as a mere reaction to private interests, which would depend on the procedural initiative of the victims or their family members".[52] And as the Court noted, this, in turn, is "not contrary to the right of the victims of human rights violations or their family members to be heard during the investigation and the judicial proceedings, as well as their right to participate extensively in them".[53] In other words, while the state's obligation to investigate prosecute and punish and the victim's right to justice may rely on two different rationales,[54] they are, in the eyes of the IACtHR, two sides of the same coin and exist side by side.[55] As the Court noted it in the case of the *Serrano-Cruz sisters v. El Salvador*:

50 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 190-191.

51 *See for example* IACtHR *Kichwa indigenous people of Sarayaku v. Ecuador (merits reparations and costs)*, 27 June 2012, para. 265.

52 *See for example* IACtHR *Zambrano Vélez et al. v. Ecuador (merits reparations and costs)*, 4 July 2007, paras. 119-120.

53 Idem, para. 120.

54 As noted by Anja Seibert-Fohr, the obligation to investigate, prosecute and punish is based primarily on the need to protect society as a whole through general prevention. The right to justice, on the other hand, is based on a remedial logic, in which investigation, prosecution and punishment of human rights violations serves the individual interest of the victim to have their rights vindicated. *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 190.

55 Burgorgue-Larsen and Úbeda de Torres note that there have been fluctuations over time in the extent to which the Court would emphasize either the victim's right or state's obligation to investigate and prosecute human rights violations. In the first years after Blake v. Guatemala, under the presidency of Judge Cançado Trindade, the Court tended to focus more on the victim's rights under articles 8(1) and 25. More recently, there has been a tendency to stress the state's obligation under Article 1(1) ACHR in combination with the violation of a material right protected by the Convention. *See* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.14. The latter line of reasoning is closer to the ECtHR's case law on positive obligations under Articles 2 and 3 ECHR. However, notwithstanding such changing preferences, the Court's overall case law points in the direction of accepting investigation and prosecution as both a right of victims and a duty of the state.

> "*[T]he next of kin of the alleged victims have the right to expect, and the States the obligation to ensure*, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next of kin repaired.[56] [emphasis added]

In short, the IACtHR has approached the question of investigation and prosecution of human rights violations from different angles: starting in its very first judgment in the case of *Velásquez Rodríguez*, the Court has consistently held that states have a legal obligation to investigate, prosecute and punish human rights violations under Article 1(1) ACHR. Later, beginning with its reparations judgment in the case of *El Amparo*, it began to develop a more victim-centered approach to the issue, recognizing that investigation and prosecution serves not only the interest of society, but that of individual victims as well. As a consequence, it began to order the investigation, prosecution and punishment of human rights violations as a reparation measure. Combined with the IACtHR's rigorous supervision of compliance procedure, this became the basis for its 'quasi-criminal jurisdiction'. The move to a more victim-oriented approach eventually culminated in the Court's recognition of the victim's rights to justice, which exists next to the state's obligation to investigate prosecute and punish.

3 The duty to prosecute, the right to truth and the crime of enforced disappearance

Parallel to and in close relation with the obligation to investigate, prosecute and punish, the Court has developed another legal concept of relevance to the investigation and prosecution of human rights violations: the right of victims to know the truth about the violations committed against them. Both the duty to prosecute and the right to truth, in turn, have been developed by the IACtHR in large part in response to cases concerning one particular type of human rights violation: the enforced disappearance of

56 IACtHR *Serrano-Cruz sisters v. El Salvador (merits, reparations and costs)*, 1 March 2005, para. 64. In some cases, this dual nature of the duty to prosecute has had concrete legal effects. For example, in its famous judgment in the case of *Almonacid-Arellano et al. v. Chile*, which concerned the legality of the self-amnesty promulgated by the Pinochet regime in the final days of its reign, the Court decided that the promulgation and upholding of the amnesty law violated the State's duty to investigate, prosecute and punish those responsible for the crimes committed during the military dictatorship, while the application of the law to the detriment of the individual victims violated their right to justice. IACtHR *Almonacid-Arellano et al. V. Chile (preliminary objections, merits reparations and costs)*, 26 September 2006, paras. 105-129. This judgment, and the distinction described here, will be discussed in detail below in sections 2.1 and 2.2 of Chapter 3.

persons.[57] Even the IACtHR's very first judgment in the case of *Velásquez Rodríguez* concerned a case of enforced disappearance committed by, or with the approval of, the government of Honduras. The parallel development of these three concepts is only logical given the severity of the practice of enforced disappearance and its wide application on the Latin American continent in the decades leading up to the start of the IACtHR's operation. Under their national security doctrines, the military dictatorships of the Cold War era had used enforced disappearances on a large scale to suppress political dissidents and prevent any type of opposition to their rule. The *juntas* of the southern cone even joined forced in 'Operation Condor' to create a coordinated international practice of enforced disappearance, so that wanted 'terrorists' who had fled one country could be apprehended in another.[58] Moreover, there are important conceptual linkages between the crime of enforced disappearance, the right to truth and the duty to prosecute.[59] This section will explore those linkages and how they affected the IACtHR's understanding of and case law on the obligation to investigate, prosecute and punish.

3.1 The crime of enforced disappearance and the emergence of a right to the truth

While the practice of enforced disappearance is surely much older, its legal definition as a violation of human rights and, eventually, an international crime was only developed towards the end of the 20th century, largely in response to the repressive policies enacted by the military dictatorships in Latin America.[60] The monitoring by the IACmHR and the UNCmHR of

57 *See* Concurring opinion of Judge Hernán Salgado Pesantes to IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, stating that "[t]he *right to the truth* has been shaped in a historical context where the State's abuse of power has caused serious conflicts, particularly when the forced disappearance of persons has been used by State agents". *See also* P. Galain Palermo, 'Relaciones entre el "derecho a la verdad" y el proceso penal. Analisis de la jurisprudencia de la Corte Interamericana de Derechos Humanos", in: K. Ambos, E. Malarino and G. Elsner (eds.), *Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II* (Konrad Adenauer Stiftung, 2011), 249-282.

58 M.L. Vermeulen, *Enforced disappearance – determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012), p. 5-8.

59 *See generally* P. Galain Palermo, 'Relaciones entre el "derecho a la verdad" y el proceso penal. Analisis de la jurisprudencia de la Corte Interamericana de Derechos Humanos", in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II (Konrad Adenauer Stiftung, 2011), 249-282.

60 *But see* B. Finucane, 'Enforced disappearance as a crime under international law: a neglected origin in the laws of war', (2010) 35(1) *Yale Journal of International Law* 171-197, arguing that the criminalization of enforced disappearance under international law is actually older than commonly assumed and that it has its roots in International Humanitarian Law and its protection of the family and familial integrity.

the developing human rights situation paved the way for the adoption of several international instruments on the phenomenon.[61] All of these instruments contain their own definitions of enforced disappearance which, while containing the same basic elements, are not completely identical.[62] This section will focus on the concept as defined in the context of the IAHRS, particularly the definition provided by Article II of the Inter-American Convention on Forced Disappearance of Persons, which the IACtHR applies in its case law, and the further clarifications provided by the Court.

The Inter-American definition of enforced disappearance contains the following elements: 1.) any deprivation of liberty; 2.) by a state agent or person acting on behalf or with acquiescence of the state; 3.) followed by denial of the detention and/or a lack of information on fate and whereabouts of the victim; 4.) as a result of which the victim remains outside the protection of the law. Moreover, ever since its judgment in the case of *Velásquez Rodríguez* the IACtHR has consistently described enforced disappearance as "a multiple and continuous violation of many rights under the [ACHR] that the States Parties are obliged to respect and guarantee".[63] The recognition of enforced disappearance as a 'multiple' human rights violation means that this act "violates various legal interests and rights" including the right to physical liberty, the right to life and the right to humane treatment of both

61 The UNCmHR's monitoring of the situation in Chili, for example, moved the UNGA to adopt Resolution 33/173 of 20 December 1978, condemning the practice of enforced disappearance. As a result of this resolution, Felix Armacora was appointed by the UNCmHR as an independent expert to study the phenomenon. The presentation of his expert report, in turn, led to the establishment of the UN Working Group on Enforced and Involuntary Disappearance. *See* UNGA 'Report of the expert on the question of the fate of missing and disappeared persons in Chile' (21 November 1979) UN Doc. A/34/583/Add.1.

62 The relevant human rights definitions of enforced disappearance are found in: 1.) the fourth preambular paragraph and Article 1.2 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance; 2.) Article 2 of the 1994 Inter-American Convention on Forced Disappearance of Persons; and 3.) Article 2 of the 2006 International Convention on the Protection of All Persons from Enforced Disappearance.With regard to the UN Declaration, the drafters decided not to include a proper definition of enforced disappearance in the text of the Declaration, so as not to restrict the WGEID in its working methods. However, the preamble reflects "the main elements of what constitutes a disappearance". R. Brody, 'Commentary on the draft UN "Declaration on the protection of all persons from forced or involuntary disappearance"' (1990) 8(4) *Netherlands Quarterly of Human Rights* 381-394, p. 386.
Enforced disappearance is also separately in Article 7(2)(i) of the Rome Statute, which lists it as a crime against humanity.

63 IACHR *Velásquez Rodríguez v. Honduras*, 29 July 1988, para. 155.

the material victim and their family and loved ones.[64] That it is recognized as a 'continuous' (or 'permanent') violation of human rights means that a disappearance, which starts at the moment when the material victim is deprived of his liberty, continues to be committed until the moment they are released, or until the moment that the fate and whereabouts of the victim or their mortal remains can be determined.[65]

The third element of its definition, the element of secrecy, can be regarded as the defining element of enforced disappearance. It is what sets enforced disappearance apart from other human rights violations such as arbitrary detention or extrajudicial execution. It also constitutes the conceptual link between enforced disappearance and the right to truth.[66] The simple denial on the part of the state that the disappeared person is in its custody or that it has any knowledge of their fate and whereabouts has several important effects: 1.) in the first stages of the disappearance it withholds the protection of the law from the material victim; 2.) in the later stages of the disappearance it shields state agents from prosecution for the illegal acts they committed; and 3.) throughout the disappearance it inflicts additional suffering on the victim's next of kin and terror on society as a whole. The denial of information can continue long after the material victim has been killed, keeping the next of kin in an enduring state of uncertainty about their loved one's fate and whereabouts, which has been recognized by the Court as a violation of their right to humane treatment under Article 5 ACHR.[67]

The secrecy element to enforced disappearance and its brutal effects on the material victims, their next of kin and society as a whole, form the background in response to which the Inter-American human rights institutions have developed the victims' right to know the truth. The idea first surfaced

64 K. Ambos, 'Latin American and international criminal law: introduction and general overview' (2010) 10(4) *International Criminal Law Review* 431-439, p. 433. *See also* J.L. Modolell González, 'El crimen de desaparición forzada de personas según la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 198-199.

65 *See for example* IACtHR *Heliodoro Portugal v. Panama (preliminary objections, merits, reparations and costs)*, 12 August 2008, para. 112. *See also* J.L. Modolell González, 'El crimen de desaparición forzada de personas según la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 206-208.

66 *See* P. Galain Palermo, 'Relaciones entre el "derecho a la verdad" y el proceso penal. Analisis de la jurisprudencia de la Corte Interamericana de Derechos Humanos", in: K. Ambos, E. Malarino and G. Elsner (eds.), Sistema Interamericano de protección de los derechos humanos y derecho penal internacional – Tomo II (Konrad Adenauer Stiftung, 2011), 249-282, pp. 259-263.

67 This was first recognized in IACtHR *Blake v. Guatemala (merits)*, 24 January 1998, paras. 114-116.

in Latin America in the 1980s.[68] In those years, the question whether to 'forget' the systematic practice of enforced disappearances committed by past regimes or to confront it was hotly debated among both academics and politicians.[69] Recognizing that trying to forget the past without fully clarifying it would mean that the suffering of those whose loved ones had been disappeared would continue, the Inter-American Commission and, with time, the Court, chose the latter.[70] In the same way that the duty to prosecute arose as the logical antidote to structural impunity, the right to truth serves to break the crippling secrecy through which practices of enforced disappearance control society. This close connection between the practice of enforced disappearance and the emergence of the right to truth is underscored by the first two cases in which the question of the existence of a right to truth was put before the IACtHR: The cases of *Castillo Paéz v. Peru* and *Bámaca Velásquez v. Guatemala*. Both cases concerned the forced disappearance of (suspected) members of subversive groups by the state's armed forces.

3.2 Legal basis of the right to the truth and its link to the duty to prosecute

It was the Inter-American Commission that pushed for the recognition of the right to truth as an autonomous right under the ACHR, based on the right to information and freedom of expression contained in Article 13 ACHR. It picked up the concept, which until then had been elaborated by legal scholars and human rights activists, in the latter half of the 1980s and started using it in the exercise of both its political function and its judicial function.[71] It wasn't until the 1997 judgment in the case of *Castillo Paéz v. Peru*, however, that the Court had the opportunity to respond to this conception of the right to truth as an autonomous right. When it did, it responded in the negative.

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68 The idea of a 'right to know the truth' is by no means exclusive to the Latin American region and the Inter-American human rights system. For example, the *1997 Joinet Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* include both a collective and individual right to the truth (Principles 1 and 3), a corresponding collective 'duty to remember' past human rights violations and the duty for states to give effect to the right to the truth. *See* Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (2 October 1997). However, for the purpose of this chapter I will focus on the development of the right to truth and its meaning within the Inter-American system.

69 L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), paras. 27.01-27.02.

70 Idem, paras. 27.03-27.05.

71 Idem, para. 27.06, explaining that in this way the Commission "attempted to be the link between theory (legal scholarship and doctrine) and practice (the courts).

The case concerned the abduction and disappearance of Ernesto Rafael Castillo-Paéz, a young man suspected of being a member of the Shining Path subversive group. He was last seen on 21 October 1990 while being arrested by Peruvian police officers and placed in the trunk of a patrol vehicle, after which they drove off with him to an unknown location.[72] The legal proceedings initiated against the police officers suspected of having been involved in Ernesto's disappearance did not lead to any results and the fate he suffered after his arrest was never clarified nor were his remains found. When the Commission initially submitted the case to the Court in January 1995, it did not address the right to truth, but based the complaint on a violation Articles 7, 5, 4, 8 and 25 in relation to Article 1(1),[73] which are the standard provisions invoked in cases of enforced disappearance. However, when it submitted its final arguments to the Court in June 1997, the Commission chose to add new arguments relating to two more violations, one of which was a violation of the right to the truth to the detriment of Ernesto Castillo.[74] It based this violation on the lack of efficacy of the investigation and judicial proceedings into his disappearance and the state's obstruction of this process.[75] The Court noted that the Commission claimed this violation "without citing any specific provision of the Convention, while pointing out that this right has been recognized by several international organizations".[76] The Court's response to the Commission's attempt at legal innovation was short and clear:

> "The … argument refers to the formulation of a right that does not exist in the American Convention, although it may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this case by the Court's decision to establish Peru's obligation to investigate the events that produced the violations of the American Convention."[77]

While this statement seemed to leave no room for debate, that did not stop the Commission from trying again to have the right to truth recognized as an autonomous right in the case of *Bámaca Velásquez v. Guatemala*. Efraín Bámaca was a commander of a guerilla group fighting the Guatemalan military dictatorship during the country's civil war. He was wounded and captured during an armed encounter on 12 March 1992.[78] In contrast to the Castillo-Paéz case, the Court was able to uncover some of the cruel fate that befell Efraín Bámaca after his arrest through the testimony of several

72 IACtHR *Castillo-Paéz v. Peru (merits)*, 3 November 1997, para. 43(d) and (e).
73 Idem, para. 1.
74 Idem, para. 34. The other violation claimed by the Commission in its final arguments was a violation of Article 17 ACHR, right to family life.
75 Idem.
76 Idem, para. 85.
77 Idem, para. 86. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), paras. 27.07 – 27.08
78 IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 121(h).

guerilla members who had been captured by the military and were forced to work as informants. The Court established that Efraín Bámaca was kept alive for at least a number of months after his capture.[79] He was moved between several military bases and installations, interrogated and tortured severely. He was last seen alive around 18 July 1992 in the infirmary of a military base in San Marcos, tied to a metal bed.[80] After his disappearance, Bámaca's next of kin started a campaign to establish his fate and whereabouts, initiating *habeus corpus* proceedings, special pre-trial investigations and filing criminal complaints.[81] The Guatemalan authorities, on their part, denied having captured Bámaca and did everything in their power to obstruct any investigations into the case or efforts to locate his mortal remains.[82]

Among other violations, the Commission claimed that "as a result of the enforced disappearance of Bámaca Velásquez, the State violated the right to truth of the next of kin of the victim and of society as a whole".[83] This time, the commission did base its claim on the provisions of the ACHR, claiming that the right to truth is protected Articles 1(1), 8, 25 and 13 of the American Convention.[84] In responding to the Commission's claim, the Court recognized, at least implicitly, the existence of a right to the truth under the ACHR.[85] It also recognized that, through its obstruction of the investigation, the state "prevented Jennifer Harbury and the victim's next of kin from knowing the truth about what happened to him". However, the Court declined to find a separate violation of the right to truth, because:

> "the right to the truth is *subsumed* in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."[86] [emphasis added]

79 Idem, para. 121(i)-(l).
80 Idem, para. 121(l).
81 Idem, para. 121(m).
82 In one particularly spectacular episode, which illustrates the resolve on the part of the state to prevent the truth about the case from coming out, the then Attorney General of Guatemala flew in on a helicopter, accompanied by 20 military men, to stop the exhumation of a body which was thought to be that of Efraín Bámaca. *See* IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, para. 73 and p. 28 (testimony Jennifer Harbury). However, not all the domestic authorities obstructed the investigations, and some even undertook considerable efforts to clarify the case. For example, then Human Rights Ombudsman Ramiro de Léon Carpio worked closely together with Bámaca's next of kin to locate his remains. Such efforts towards clarification of the case came at a considerable riks to those individual state agents, as is illustrated by the murder, on 20 May 1998, of Shilvia Anabella Jerez Romero, the prosecutor assigned to investigate the case.
83 Idem, para. 197.
84 Idem.
85 Idem, paras. 199-202.
86 Idem, para. 201.

Thus, according to the Court, the right to truth logically has the same basis in the Convention as the duty to prosecute, being Articles 1(1), 8(1) and 25 ACHR.

The findings of the IACtHR in the case of *Bámaca Velásquez v. Guatemala*, which have been upheld in later case law,[87] make clear that there exists, in the eyes of the Court, an inextricable link between the victim's right to truth and the state's duty to prosecute / the victim's right to justice, both conceptually and in its practical application.[88] As the Court expressed it in

87 The first case upholding the reasoning from the *Bámaca Velásquez* case was the Court's famous judgment in the case of *Barrios Altos v. Peru*. *See* IACtHR *Barrios Altos v. Peru (merits)*, 14 March 2001, para. 45-49. Since then, it has been repeated in a long line of cases. For an enumeration of these cases up to 2014, *see* IACtHR *Rodríguez Vera et al. (disappeared from the Palace of Justice) v. Colombia (preliminary objections, merits, reparations and costs)*, 14 November 2014, para. 509, fn. 789. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American C ourt of Human Rights – case law and commentary* (OUP, 2011), para. 27.09.

88 The Inter-American Commission, on the other hand, has maintained its position that the right to the truth is an autonomous right under Articles 1(1), 8(1), 13 and 25 ACHR and has continued to request the Court to make findings to this effect. The only case so far in which the Court has followed this reasoning by the IACmHR, to an extent, has been the case of *Gomes Lund v. Brazil*. The case concerned the disappearance of 70 (suspected) members of a subversive group between 1972 and 1975, under the Brazilian military dictatorship, and the subsequent lack of investigation and prosecution of these disappearances. In this case, the criminal investigations had been blocked by the Brazilian amnesty law and were therefore unable to proceed. However, the family members had also initated separate legal proceedings to gain access to information concerning the disappearances from the authorities. Under these circumstances, and after again emphasizing the close links between the right to truth and the right to access to justice, the Court held that, even if the criminal investigations could not go forward, the victims had a right to the truth, and therefore to acces to the relevant documentation, under Article 13. *See* IACtHR *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil (preliminary objections, merits, reparations and costs)*, 24 November 2010, para. 201. However, this judgment has remained an exception in the IACtHR's case law. In subsequent cases, the Court has re-emphasized the links between the right to truth and the right to justice, stating that the former is subsumed in the latter. See for example IACtHR *Rodríguez Vera et al. (disappeared from the Palace of Justice) v. Colombia (preliminary objections, merits, reparations and costs)*, 14 November 2014, paras. 509-511. In that case, the criminal investigations into the disappearances at issue, while ineffective, were still ongoing. Under those circumstances, the Court considered that "anyone, including the next of kin of the victims of gross human rights violations, has the right to know the truth, according to Articles 1(1), 8(1), 25, as well as in certain circumstances Article 13, of the Convention […]. However, it considers that, in this case, the right to know the truth is subsumed basically in the right of the victims or their family members to obtain from the competent organs of the State the clarification of the acts that violated human right and the corresponding responsibilities, by the investigation and prosecution established by Articles 8 and 25 of the Convention, which also constitutes a form of reparation." In conclusion, it seems that the IACtHR generally regards the right to truth as being subsumed in the right to access to justice. It will only find a separate violation of that right in cases where criminal investigation are blocked completely and it is therefore impossible to provide reparation for the violation of the right to truth through that avenue.

its judgment in the case of *Palma Mendoza v. Ecuador*, the right to access to justice and the right to truth "are closely related, and usually have reciprocal impact".[89]

On the one hand, the right to truth serves as one of the philosophical foundations underlying the duty to prosecute and the victim's right to justice.[90] At the same time, the Court sees the application of justice – more specifically: the state's effective investigation of the facts – as the primary road to satisfying the victim's right to know the truth.[91] As Judge García Ramírez explained in his concurring opinion to the *Bámaca Velásquez* judgment: "the victim – or his heirs – has the right that the investigations that are or will be conducted will lead to knowing what "really" happened."[92] In short, the link between the right to truth and the duty to prosecute is so intimate that the former is considered to be subsumed in the latter, while the latter represents the most appropriate path to satisfaction of the former.

3.3 Implications for the duty to prosecute

Its notion of an intrinsic link between the right to truth and the obligation to investigate, prosecute and punish has important implications for the way the IACtHR approaches criminal justice, and the criminal investigation in particular. According to Álvaro Paúl, the right to truth, "a paramount value of the Inter-American system", forms the "lens" through which the IACtHR

89 IACtHR *Palma Mendoza v. Ecuador (preliminary objection and merits)*, 3 September 2012, para. 85.

90 *See* A. Paúl, 'The admissibility of evidence before the Inter-American Court of Human Rights' (2017) 13(2) *Revista Direito GV* 653-676, p. 665, arguing that the IACtHR has "extracted, as a consequence of the right to the truth, a duty to investigate and punish".

91 *See for example* IACtHR *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil (preliminary objections, merits, reparations and costs)*, 24 November 2010, para. 201.

92 IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, concurring opinion Judge García Ramírez, para. 20. In a way, this position had been foreshadowed bythe Court in its *Velasquez Rodríguez* judgment, when it stated that the investigation in question should not be a mere formality, but should entail "an effective search for the truth by the government". IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 177. *See also* T.M. Antkowiak, 'Truth as right and remedy in international human rights experience' (2002) 23(4) *Michigan Journal of International Law* 977-1013, p. 990.

views the application of criminal justice.[93] This, in turn, has important practical consequences for the way in which the IACtHR has formulated state's obligations under the ACHR in this area, two of which will be discussed here.

Firstly, the IACtHR has consistently held that criminal investigations should be undertaken with the aim of discovering the whole truth and be conducted in such a way that it might realistically lead to the discovery of that truth. In this context, the relation between the right to truth has practical implications not only for the question how the state should investigate (its working methods) but also for the question *what* it should investigate. The latter question relates to the scope of the investigations or, in other words, how much truth the state should aim to uncover. This issue was discussed at length in the case of the *La Rochela Massacre v. Colombia*, which concerned the murder of a judicial commission working on the investigation of a prior massacre.[94] The Court saw a clear connection between these two cases, as the judicial commission had been murdered exactly because of their investigative work. It chastised the state for considering these two cases entirely separately[95] and for dealing with them in an *ad hoc*, fragmented fashion. The Court remarked that:

> "[i]n cases of grave violations of human rights, the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory and complete way.

93 A. Paúl, 'The admissibility of evidence before the Inter-American Court of Human Rights' (2017) 13(2) *Revista Direito GV* 653-676, pp. 664-665. Paúl makes this argument specifically in relation to the IACtHR's case law on the admissibility of evidence obtained under duress. As Paúl explains, Article 8(3) ACHR provides that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind". Paúl argues that its "lens" of the right to truth moved the IACtHR to adopt a broad and "absolue" interpretation of this provision, according to which any evidence – including secondary evidence – should be exluded when obtained under duress. This firm stance on the exclusion of evidence has been developed by the IACtHR in particular in response to a string of cases in which the confession of guilt has been extracted by the authorities through torture. Thus, this case law on excluding evidence obtained under duress primarily benefits the accused. However, in the famous *"Cotton field"* case, the IACtHR discussed this question from the point of view of the victims of the underlying human rights violations, and held that the 'fabrication of evidence' through torture is not only a violation of the rights of the accused, but that it also "affects the ability of the judicial authorities to identify and prosecute those responsible and to impose the corresponding punishment, which makes access to justice ineffective". IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 16 November 2009, para. 346.

94 The prior massacre had also been brought before the IACtHR, and is the object of the Court's judgmentin the case of the *"19 Tradesmen"*. *See* IACtHR *19 Tradesmen v. Colombia (merits, reparations and costs)*, 5 July 2004.

95 IACtHR *La Rochela Massacre v. Colombia (merits, reparations and costs)*, 11 May 2007, para.162.

> … The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities."[96]

Thus, when dealing with (grave) human rights violations, the investigating state should always be mindful of the context in which these violations are committed and try to uncover as much of that context as possible. In doing so, it should develop "all logical lines of investigation".[97] Only that way can the investigation fully live up to demands put on it by the right to truth.[98] This obligation to search for the whole truth and to develop "all logical lines of investigation" will be discussed below on more detail.[99]

Secondly, the IACtHR's perception of an inextricable link between the right to the truth and the duty to prosecute clearly implies a rejection of the rationale underlying the well-known "truth v. justice dichotomy", which was a prominent theme on the transitional justice debate in the 1990s.[100] This dichotomy is based on the idea that the application of justice and the resulting threat of punishment might dissuade the accused from coming forward with the truth about the human rights violations in which they were involved. Thus, it was thought, the application of criminal justice would actually form an obstacle to truth-finding.

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96 Idem, para. 195. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.28.

97 IACtHR *La Rochela Massacre v. Colombia (merits, reparations and costs)*, 11 May 2007, para. 158.

98 Some commentators have connected this obligation to investigate the broader historical and political context of particular human rights violations to the 'collective dimension' of the right to truth. *See* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.27-27.28. The distinction between the collective and the individual dimensions of the right to truth was addressed by Judge García Ramírez in his separate opinion to the Bámaca Velásquez case, where he explained that: "[i]n its first acceptation, the so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the right to know the reality of what has happened [to an individual victim, HB] constitutes a human right that is immediately extended to the judgment on merits and the reparations that arise from this." IACtHR *Bámaca-Velásquez v. Guatemala (merits)*, 25 November 2000, concurring opinion Judge García Ramírez, para. 19. Whereas the IACmHR, in its application and final arguments in the *Bámaca Velásquez* case, had relied heavily on the collective dimension of the right to truth, the IACtHR in its judgment focused on its individual dimension, since the convention it upholds confers rights on individuals and not societies as a whole. As Judge García explained in his separate opinion: "the Court has confined itself to the individual perspective of the right to the truth, which is the one that is strictly linked to the Convention, because it is a human right." Idem, para. 20.

99 *See infra* Chapter 3, Section 4.2.2.

100 *See* K. Engle, 'Anti-impunity and the turn to criminal law in human rights' (2015) 100 *Cornell Law Review* 1069-1127, pp. 1089-1090 and 1097-1099.

Contrary to this thinking, the IACtHR sees the application of criminal justice and the state's effective investigation of the facts as the most appropriate instrument of establishing the truth and, thereby, satisfying the victim's right to truth. Concretely, this has led the IACtHR to reject, on several occasions, the establishment of truth commission as an *alternative* to criminal prosecutions.[101] The Court first had a chance to consider this question in the case of *Almonacid Arellano v. Chile*, which concerned the legality of the Chilean amnesty legislation decreed by the Pinochet regime. Having found this legislation and its application to the case of the petitioners to be in violation of Articles 8 and 25 in relation to Articles 1(1) and 2 ACHR, the Court then went on to consider whether the work of the various Chilean truth commissions could be seen as sufficient reparation for the victims in this case. In this context, the Court stated:

> "[T]he Court wishes to highlight the important role played by the different Chilean Commissions … in trying to collectively build the truth of the events which occurred between 1973 and 1990 …
>
> Notwithstanding the foregoing, the Court considers it relevant to remark that the "historical truth" included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect the truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death…"[102]

The Court again reflected on the relation between historical truth and judicial truth in the case of *Zambrano-Vélez v. Ecuador*. Here, the Court expanded on its reasons for rejecting truth commissions as an alternative for criminal investigations and prosecutions, explaining that:

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101 In this context, it should be noted that the truth commissions set up in Latin America were of a different nature and came about in very different circumstances than the South-African TRC. They were almost invariably 'negative choices', inspired not by the wish to seek reconciliation but by the de jure or de facto impossibility of criminal prosecution due to the continued influence of the perpetrators of the crimes in question on society and politics. In fact, the truth commissions often operated alongside unconditional amnesty legislation, making prosecutions on the basis of their work and conclusions impossible, at least for the time being. In fact, in many cases such legislation had been created by the very people who were responsible for the pardoned crimes, as a result of which they were called 'self-amnesties'. As Naomi Roht-Ariazza put it, the Latin American truth commissions were a last resort, following the logic that, since criminal prosecution were impossible, having a truth commission would be better than having no transitional justice at all.

102 IACtHR *Almonacid-Arellano et al. v. Chile (preliminary objections, merits, reperations and costs)*, 26 September 2006, para. 149-150. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.26.

> "[t]he recognition of historical truths through [a truth commission, HB] should not be understood as a substitute to the obligation of the State to ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means, or as a substitute to the determination, by this Court, of any international responsibility. Both are about determinations of the truth which are complementary between themselves, since they all have their own meaning and scope, as well as particular potentialities and limits, which depend on the context in which they take place and on the cases and particular circumstances which form the object of their analysis."[103]

In short, the Court considers that the establishment of a truth commission is not sufficient in itself to meet the demands put on the states by the right to truth and access to justice as protected by the Convention. At the same time, it does value truth commissions as a complementary mechanism for truth-finding and it has "granted a special value to reports of Truth Commissions as relevant evidence in the determination of the facts and of the international responsibility of the States in various cases which has been submitted before it".[104] However, while judicial investigations are a minimum requirement under the ACHR, instituting complementary, non-judicial truth-finding mechanisms is recommendable, but not required.

4 Triggering the duty to prosecute: only grave human rights violations?

As discussed in the previous section, the IACtHR has developed the duty to prosecute in large part in response to cases of enforced disappearance. That does not mean, however, that this doctrine is only applicable to such cases. To the contrary, the IACtHR has consistently held that *all* human rights violations should be investigated by the state. The IACtHR made first expressed this position in the *Velásquez Rodríguez* judgment, stating:

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103 IACtHR *Zambrano Vélez et al. v. Ecuador (merits, reparations and costs)*, 4 July 2007, para. 128. *See also* L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights – case law and commentary* (OUP 2011), para. 27.26.

104 IACtHR *Zambrano Vélez et al. v. Ecuador (merits, reparations and costs)*, 4 July 2007, para. 128. For example, the Court has in various cases relied heavily on the work of the truth commission the UN instituted to investigate human rights violations committed in Guatemala in the context of the civil war, the so called Commission for Historical Clarification. *See for example* IACtHR *Plan de Sánchez massacre v. Guatemala (merits, reparations and costs)*, 29 April 2004, para. 42.

> "The State is obligated to investigate *every situation involving a violation of the right protected by the Convention*. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[105] [emphasis added]

Thus, in principle, *any* violation of human rights triggers the state's duty to investigate, prosecute and punish that violation, in order to satisfy the victim's right to truth and justice and make reparation. However, if one looks at the entirety of the IACtHR's own case law concerning the duty to prosecute, one will find an interesting contrast between its stated position and its practice. In the great majority of the judgments examined in the context of this study, the IACtHR has applied the doctrine of the duty to prosecute in cases involving the violation of three rights protected by the ACHR: the right to life, the right to physical integrity and the right to personal liberty.[106] Moreover, the IACtHR has only applied the duty to prosecute to violations of the right to personal liberty, where this violation was carried out in close connection to simultaneous violations of the right to life and physical integrity.[107] Thus, while the Court has evidently not been willing to exclude the possibility of finding a duty to prosecute for other types of human rights violations as well, it has in practice limited its application to certain core rights.

This consistent practice on the part of the Court seems to indicate a certain hierarchy or prioritization. Indeed, the IACtHR has recognized repeatedly that the duty to prosecute has a particular relevance in cases concerning violations of the right to life and physical integrity.[108] This prioritization stems from the fact that these rights "have an essential nature in the Convention" because they "form part of the non-derogable nucleus of rights".[109] Moreover, with regard to the right to life in particular, the Court has repeatedly stated that it has a special importance, because its protec-

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105 IACtHR *Velásquez Rodríguez v. Honduras (merits)*, 29 July 1988, para. 176.

106 The only exception to this rule encountered in the context of this study, has been the case of *Escher v. Brazil*, where the IACtHR discussed the state's obligation to investigate, prosecute and punish in relation to a particularly flagrant violation of the right to privacy. *See* IACtHR *Escher et al., v. Brazil (preliminary objections, merits, reparations and costs)*, 6 July 2009.

107 *See for example* IACtHR *Valle Jaramillo et al. v. Colombia (merits, reparations and costs)*, 27 November 2008, paras. 97 and 104-106; and IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 26 November 2009, paras. 247, 287.

108 *See for example* IACtHR *Vargas-Areco v. Paraguay (merits, reparations and costs)*, 26 September 2006, para 74, 75, 79, 80 and 82.

109 IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 26 November 2009, paras. 244.

tion is an essential precondition for the existence of other rights.[110] Thus, the IACtHR seems to suggest that the legal goods protected by these rights are so fundamental that they can only be properly protected and upheld through the application of criminal justice.[111] This prioritization, however, remains implicit and its consequences are unclear. After all, the fact that the IACtHR has only ever applied the duty to prosecute to cases involving the violation of these two core rights does not in itself mean that other human rights violations cannot – under certain circumstances – trigger that duty.

The IACtHR *has* been explicit, on the other hand, in its recognition of a second distinction of relevance in this context: that between 'grave' (or 'gross' or 'serious')[112] violations of human rights on the one hand and 'non-grave' violations on the other. The category of "grave" or "serious" human rights violations was first introduced in the Court's famous judgment in the case of *Barrios Altos v. Peru*. This judgment concerned the legality of the amnesty law introduced to prevent investigations into human rights violations committed by the Fujimori regime. In relation to this law, the Court held that:

> "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for *serious human rights violations* such as *torture, extrajudicial, summary or arbitrary execution and forced disappearance*, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[113] [emphasis added]

110 Idem, para. 245. *See also* IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, para. 39.

111 This line of reasoning resembles the case law of the European Court of Human Rights on the procedural obligations arising from violations of Articles 2 (right to life) and 3 (right to physical integrity) of the European Convention on Human Rights. *See for example* ECtHR *the case of X and Y v. the Netherlands*, 26 March 1985, Application no. 8978/80. The IACtHR itself has referred to this case law by its European counterpart on several occasions, in support of its application of the duty to investigate and prosecute to violations of the right to life. *See for example* IACtHR *Juan Humberto Sánchez v. Honduras (preliminary objection, merits, reparations and costs)*, 7 June 2003, para. 112 and IACtHR *González et al. ("cotton field") v. Mexico (preliminary objection, merits, reparations and costs)*, 26 November 2009, para. 292.

112 All three of these phrases are regularly found in English-language literature on the IACtHR's case law on the duty to prosecute and in the official English translations o fthe IACtHR's judgments. There is no substantive difference between these phrases and all three are proper translations of the phrase "violaciones graves de derechos humanos", which the IACtHR consistently uses in the Spanish versions of its judgments. In line with the official English translations of the IACtHR's judgments, this text will use these phrases interchangeably.

113 IACtHR *Barrios Altos v. Peru (merits)*, 14 March 2001, para. 41.

This paragraph of the *Barrios Altos* judgment makes reference to a special category of 'grave' human rights violations, which includes at least the practice of torture, extrajudicial execution, and enforced disappearance. Moreover, it attaches a clear legal consequence to this new category of human rights violations: when it is determined that a set of facts constitutes a grave violation of human rights, the state should not only investigate the facts effectively in accordance with its internal regulations, but also eliminate any legal obstacles to prosecution that may exist within its domestic legal system.

The requirement to remove legal obstacles to investigation and prosecution, which will be discussed in detail in Chapter 3,[114] thus requires states to go beyond the normal application of their criminal law and actually *alter* their domestic criminal justice systems in order to make prosecution of such violations possible. This dimension of the duty to prosecute entails a much stronger interference in state sovereignty, as it limits the state's freedom to regulate in the area of criminal law. Moreover, it presents a possible conflict with the rights and interests of those accused of committing human rights violations.[115] However, the IACtHR argues that this is warranted in cases of grave human rights violations "in order to maintain the States' punishing authority in force against conduct where the gravity makes repression necessary in order to avoid repeated commission of said conduct".[116] [117]

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114 *See infra* Chapter 3, Section 2.

115 *See infra* Chapter 4, Section 4.

116 IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, para. 117.

117 Not long after the *Barrios Altos* judgment, however, the IACtHR seemed to downplay the disctinction it had made in its Barrios Altos judgment between grave and 'non-grave' human rights violations, and to suggest that the obligation to remove legal obstaces to prosecution relates to all human rights violations. In its judgment in the case of *Bulacio v. Argentina*, concerning the death of a 17-year old as a result of mistreatment by police officers while in custody. In this judgment, the Court held that: "this Court has stated that extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for *human rights violations* are inadmissible. […] In accordance with the obligations undertaken by the States pursuant to the Convention, no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment *of those responsible for human rights violations*. If that were not the case, the rights enshrined in the American Convention would be devoid of effective protection." IACtHR *Bulacio v. Argentina (merits, reparations and costs)*, 18 September 2003, paras. 116-117.
The *Bulacio* judgment was widely criticized for its broad application of the obligation to remove all legal obstacles to investigation and prosecution. *See* P.F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 218-219 and A. Huneeus, 'Courts resisting courts: lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44(3) *Cornel Int'l Law J.* 493 – 533, p. 516 fn. 126.

Thus, the particular nature of grave human rights violations is what triggers the state's obligation to alter their domestic legislation in order to eliminate any legal obstacle to their investigation and prosecution. Yet, the IACtHR has never clarified precisely what types of acts can be qualified as grave human rights violations and what distinguishes them from non-grave violations. Perhaps the most detailed reflection on this issue was provided in the case of *Vera Vera v. Ecuador*, which concerned the death, while in custody, of a detainee as a result of a gunshot wound he had sustained during his arrest.[118] In the proceedings before the Court, the Commission had argued that the facts under consideration amounted to a grave violation of human rights. The Court, however, did not agree with the Commission's assessment. In this context, the Court held that:

> "[A]ny human rights violation involves a level of severity by its own nature, because it implies a breach of certain State obligations to respect and guarantee the rights and freedoms for people. However, this should not be confused with what the Court throughout its jurisprudence has deemed to be "serious violations of human rights" which […] have their own connotation and consequences. To accept the point made by the Commission, that this case is of such gravity that the statute of limitations should not apply, would imply that this procedural concept is not applicable in any case before the Court, as all cases involve violations of human rights and are therefore grave. This is not in-line with the criteria specified by the Court regarding the [obligation to remove legal obstacles to investigation and prosecution, HB]."[119]

According to *Vera Vera*, then, only a limited number of human right violations is recognized by the IACtHR as constituting grave or serious human rights violations, and not all violations of the right to life committed by state agents can automatically be assumed to fall within that category. Ximena

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Following – and perhaps in response to – these critiques, the IACtHR has 'corrected' its reasoning from the *Bulacio* judgment and returned to the wording introduced in *Barrios Altos*, emphasizing that the obligation to remove legal obstacles to investigation and prosecution applies only in cases of grave human rights violations. *See for example* IACtHR *Albán-Cornejo et al. v. Ecuador (merits, reparations and costs)*, 22 November 2007, para. 111; IACtHR *Ibsen Cárdenas and Ibsen Peña v. Bolivia (merits, reparations and costs)*, 1 September 2010, para. 207; IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, paras. 117 – 118 and IACtHR *Suárez Peralta v. Ecuador (preliminary objections, merits, reparations and costs)*, 21 May 2013, paras. 174 – 176. *See also* F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), pp. 223-226 and A. Paúl, 'The American Convention on Human Rights. Updated by the Inter-American Court', (2017) 20 *Iuris Dictio* 53-87, p. 55.

118 IACtHR *Vera Vera v. Ecuador (preliminary objections, merits, reparations and costs)*, 19 May 2011, paras. 46 – 47 and 70 – 72.

119 Idem, para. 118. This quote is largely taken from the official English translation of the judgment. However, the third sentence of this quote has been altered somewhat by the author to better reflect the meaning of the Spanish original text.

Medellín-Urquiaga has suggested, on the basis of an "initial review" of the IACtHR's case law, that it uses three criteria for determining whether a violation qualifies as a grave violations of human rights: "whether it (i) infringes a jus cogens norm; (ii) affects essential values of the international community, or (iii) violates non-derogable rights recognised by international human rights law".[120] However, the IACtHR is far from consistent in its reliance on these criteria. In fact, the only consistent factor in the Court's practice on this point, is its reliance on a (presumably inexhaustive) "list of examples" of acts which can be qualified as grave violations of human rights.[121] This list of examples, which hasn't changed since the *Barrios Altos* judgment, includes only three acts: torture, extrajudicial execution and enforced disappearance. To this date, these are the only three acts which the IACtHR has conclusively recognized as constituting grave violations of human rights.[122]

Finally, some authors have suggested that the category of grave human rights violations can "reasonably be interpreted as referring to crimes under international law".[123] Others, however, have pointed out that, although there is a 'close relation' and substantial overlap between these two categories, they are not exactly the same.[124] According to such authors, the concept of 'grave human rights violations' is broader than 'international crimes', in the sense that grave human rights violations may amount to international crimes, but only if certain additional requirements are met. More precisely, in order for a grave violation of human rights to qualify as an international

120 X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin-American national prosecution of mass atrocities', 46 *Israel Law Review* 3 (November 2013) 405-430, p. 410.

121 F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 215. *See also* X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin-American national prosecution of mass atrocities', 46 *Israel Law Review* 3 (November 2013) 405-430, p. 410.

122 At times, the IACtHR has seemed to suggest that it is moving towards the recognition of forcible transfer of people and/or populations as a grave violation of human rights. *See for example* IACtHR *Chitay Nech et al. v. Guatemala (preliminary objections, Merits, reparations and costs)*, 25 May 2010 and IACtHR *The case of the afro-descendant communities displaced from the Cacarica river basis ("Operation Genesis") v. Colombia* (preliminary objections, merits, reparations and costs), 20 November 2013. However, in these cases the practice of forced displacement was closely related to the commission of acts of extrajudicial execution and/or enforced disappearance, as it was the commission of the latter that provoked the forced disaplacement.

123 F. Parenti, 'La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: K. Ambos and G. Elsner (eds.), *Sistema Interamericana de protección de los derechos humanos y derecho penal internacional* (Konrad Adenauer Stiftung, 2010), p. 215.

124 *See for example* J.P. Pérez-Léon Acevedo, 'The close relationship between serious human rights violations and crimes against humanity: international criminalization of serious abuses', (2017) 17 *Anuario Mexicano de Derecho Internacional* 145-186, pp. 151-155.

crime – particularly a crime against humanity – it has to meet all elements of the crime definition and specifically, it must be committed as part of a pattern of widespread or systemic violations.[125] This interpretation is supported by the case law of the IACtHR itself, which has held that:

> "[w]hen examining the merits in cases of serious human rights violations, the Court has taken into account that, if they were committed in the context of massive and systematic or generalized attacks against one sector of the population, such violations can be characterized or classified as crimes against humanity…"[126]

Thus, while an isolated act of torture, extrajudicial execution or enforced disappearance can be qualified as a grave violation of human rights, it is not a crime against humanity.[127]

In short, while the Court has always maintained that the duty to prosecute exists for any violation of human rights, its practice on the matter has been rather more selective. In effect the Court has only ordered states to open investigations and prosecutions when the underlying facts concerned violations of certain core rights, such as the right to life, physical integrity and personal liberty. Moreover, the obligation to eliminate all legal obstacles to investigation and prosecution, which is an element of the duty to prosecute, applies only to the specific category of 'grave human rights violations'. This category covers acts like enforced disappearance, torture and extrajudicial execution.

5 The IACtHR as part of a developing legal framework against impunity

The previous sections have discussed the context, development, legal basis and scope of states' obligation to investigate, prosecute and punish human rights violations within the Inter-American system. Before delving deeper into this case law to describe the various elements the IACtHR has found to be contained in that overarching obligation – as will be done in the next chapter – it is useful here to contextualize this jurisprudence within the broader international movement against impunity.

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125 Idem, p. 154.

126 IACtHR *Manuel Cepeda Vargas v. Colombia (preliminary objection, merits, reparations and costs)*, 26 May 2010, para. 42

127 *See* J.P. Pérez-Léon Acevedo, 'The close relationship between serious human rights violations and crimes against humanity: international criminalization of serious abuses', (2017) 17 *Anuario Mexicano de Derecho Internacional* 145-186, p. 154 and X. Medellín-Urquiaga, 'The normative impact of the Inter-American Court of Human Rights on Latin-American national prosecution of mass atrocities', 46 *Israel Law Review* 3 (November 2013) 405-430, p. 410.

As shown by Karen Engle, the movement against impunity was starting to pick up steam around the time the IACtHR started its operations.[128] To strengthen its call for states to investigate and prosecute human rights violations, it sought to frame anti-impunity in terms of legal obligations. However, before *Velásquez Rodríguez* it would have been difficult to make such an argument. The obligation to criminalize human rights violations, and investigate and prosecute them when they do occur, existed only under some specific conventions, relating to particular acts. The most famous examples are the obligations to this effect in the UN Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951, and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987.[129] Apart from these important conventions, recommendations by certain human rights bodies, including the UN Human Rights Committee ("HRC"), had called on states to investigate human rights violations more generally, and to bring those responsible to justice.[130] However, the HRC's recommendations contained neither legally binding obligations, nor did they specify exactly what 'bringing those responsible to justice' would entail, and whether it referred specifically to criminal trials.[131]

Against this background, the *Velásquez Rodríguez* judgment provided "'the first truly comprehensive statement of a state's human rights obligations'" in the context of the fight against impunity,[132] and "[set] the stage for a holistic approach to anti-impunity", which combines the obligation to

128 *See* K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 18-21.

129 Apart from these famous and oft-cited examples, Anja Seibert-Fohr notes that several other conventions in force before the delivery of the *Velásquez Rodríguez* judgment contain provisions to the same effect, namely: 1.) the Slavery Convention, in force since 1927; 2.) the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, in force since 1951; and 3.) the International Convention on the Suppression and Punishment of Apartheid in force since 1976. Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969, includes an obligation to criminalize (incitement to) racially motivated hatred and/or violence, but does not define its scope. *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 153-175.

130 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 12-14. As examples of relevant, pre-Velásquez HRC recommendations, Seibert-Fohr mentions, amongst others, HRC *Barbato et al. v. Uruguay*, Communication no. 84/1981, 21 October 1982, UN Doc. CCPR/C/17/D/84/1981; HRC *Quinteros v. Uruguay*, Communication no. 107/1981, 21 July 1983, UN Doc. CCPR/C/19/D/107/1981; and HRC *Baboeram-Adhin et al. v. Suriname*, Communication nos.146/1983, 148/1983 and 154/1983, 4 April 1984, UN Doc. CCPR/C/24/D/146/1983.

131 Idem.

132 M. Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006), p. 8, as cited in: F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17.

investigate, prosecute and punish with the obligation to make reparations to the victims and to provide guarantees of non-repetition.[133] In doing so, the IACtHR gave a significant impulse to the development of the international movement and legal framework against impunity for human rights violations.[134] The judgment obviously had important direct consequences for the states under the IACtHR's jurisdiction, for whom the investigation, prosecution and punishment of human rights violations was now understood to form part of its international legal obligations under the ACHR. Beyond that group of states, however, *Velásquez Rodríguez* has also influenced the approach to 'anti-impunity' taken by other international institutions, including the European Court of Human Rights.[135] For example, in its famous judgment in the case of *McCann and others v. the United Kingdom*, the ECtHR followed the IACtHR's example in finding that the obligation to investigate violations of the right to life should be considered a procedural obligation under the ECHR. And while the ECtHR in *McCann* does not explicitly refer to the *Velásquez Rodríguez* judgment, it does apply a similar logic. According to the ECtHR:

> "the obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State."[136]

Like the IACtHR, the ECtHR has continued to develop its jurisprudence on the obligation to investigate and prosecute human rights violations since then, focusing on the conflicts and challenges particular to its region.[137]

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133 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17.

134 *See* idem, p. 16, noting that the IACtHR, and particularly the Velásquez Rodríguez judgment, has been "central to the development of an anti-impunity jurisprudence firmly structured around" the obligations to investigate, prosecute, make reparations to victims and provide guarantees of non-repetition.

135 *See* K. Engle, 'A geneology of the criminal law turn in human rights', in: K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-impunity and the human rights agenda* (Cambridge University Press, 2016), pp. 35-36.

136 ECtHR (Grand Chamber) *McCann and others v. the United Kingdom*, 27 September 1995, Appl. No. 18984/91, para. 161. In later case law, the ECtHR has clarified that the investigation in question should be capable of leading to the identification and punishment of those responsible for the underying human rights violation, and should, therefore, be of a criminal nature. *See for example* ECtHR Kaya v. Turkey, 19 February 1998, Appl. No. 158/1996/777/978, para. 107. *See also* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p.114.

137 As observed by Anja Seibert-Fohr, the development of the obligation to investigate, prosecute and punish human rights violations by the ECtHR "was accelerated by the Kurdish and Chechnian conflicts". A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 111.

Throughout this process, it has made reference to the jurisprudence of the IACtHR when refining and expanding its interpretation of that obligation on key points, including the autonomous nature of the obligation to investigate, prosecute and punish,[138] the legality of amnesty laws[139] and the continued existence of an obligation to investigate prosecute and punish human rights violations in a situation of armed conflict or occupation.[140] In her comparative study of the obligation to prosecute human rights violations under various international instruments, Anja Seibert-Fohr has observed that the IACtHR's jurisprudence has exerted a clear influence over that of the ECtHR in certain respects.[141]

Another important component of the international framework against impunity is found in the UN Principles to Combat Impunity, a soft law document developed under the auspices of the UN Commission on Human Rights.[142] Being a soft law document, the UN Principles to Combat

138 *See for example* ECtHR (Grand Chamber) *Silih v. Slovenia*, 9 April 2009, Appl. No. 71463/01, paras. 159-160 and ECtHR (Grand Chamber) *Varnava v. Turkey*, 18 September 2009, Appl. No. 16064/90, para. 147. In these decisions, the ECtHR adopted the position, previously accepted by the IACtHR, that the obligation to investigate, prosecute and punish human rights violations is an autonomous duty, which exists separately of the obligation to respect human rights. As a result, the ECtHR, like the IACtHR, now claims jurisdiction over cases in which the underlying human rights violation took place before the ECHR became applicable for the state in question, if the (alleged) violation of the obligation to investigate the underlying human rights violations continued after that date. In such cases, the ECtHR's analysis will be limited strictly to the state's compliance with its procedural obligations under the ECHR. Even though the ECtHR has eventually settled, in this respect, on an admissibility test that differs somewhat from that employed by the IACtHR, its original decision to recognize the obligation to investigate, prosecute and punish as an autonomous obligation seems inspired by the IACtHR's jurisprudence.

139 *See for example* ECtHR (Grand Chamber) *Marguš v. Croatia*, 27 May 2014, Appl. No. 4455/10, paras. 131-139.

140 *See for example* ECtHR (Grand Chamber) *Al-Skeini and others v. The United Kingdom*, 7 July 2011, Appl. No. 55721/07, para. 94. Contrary to the other ECtHR judgments cited above, the *Al-Skeini* judgment 'only' makes reference to the IACtHR's case law in its section on relevant international law and materials, and does not refer back to it in its application of the law to the case at hand.

141 See A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 191-192.

142 The UN Principles were first drafted in the 1990s by the renowned human rights expert Louis Joinet. *Revised final report prepared by Mr. Louis Joinet pursuan to Sub-Commission decision 1996/119*, 2 October 1997, UN Doc E/CN.4/Sub.2/1997/20/Rev.1. It was later revised by Diane Orentlicher, following a resolution of the UN Commission on Human Rights, to reflect later developments in international law and practice and best practices in the area of anti-impunity. *Report of the independent expert to update the Set of Principles to Combat Impunity*, 18 February 2005, UN Doc E/CN.4/2005/102. This updated set of principles was then endorsed by the UN Commission on Human Rights in resolution 2005/81, which noted the UN Principles against Impunity "with appreciation" and called on the UN High Commissioner for Human Rights and other UN bodies to ensure their wide dissemination and their consideration in practice. *Human Rights Resolution 2005/81: Impunity*, 21 April 2005, UN Doc. E/CN.4/RES/2005/81, paras. 20-23. See also D. Orentlicher, 'Prologue', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 1.

Impunity are not legally binding on UN Members States. The Principles do, however, represent an authoritative account of international law and practice and provide a "broad strategic framework" to which states can orient their efforts in the fight against impunity. As such, they are both a "reflection of the global trend towards accountability"[143] and an important point of reference for domestic efforts against impunity.[144] The standards set out by this important, yet non-binding document were influenced greatly by the IACtHR's early case law. As noted by Haldemann and Unger in their commentary to the UN Principles to Combat Impunity:

> "the influence of this framework [the holistic approach to anti-impunity, first articulated in the *Velásquez Rodríguez* judgment, HB] on the international anti-impunity struggle in general, and the Principles in particular, can hardly be overstated. If anything, the Principles are conceptually wedded to such a holistic approach to impunity, which centrally includes, but extends well beyond, the realm of criminal justice."[145]

In short, then, the IACtHR's jurisprudence has played an important role in the development of an international legal (and soft law) framework for the fight against impunity. Its *Velásquez Rodríguez* judgment provided the first articulation of a general obligation on states to investigate, prosecute and punish human rights violations under and thereby, provided the lens through which the fight against impunity would be viewed in legal terms. Moreover, *Velásquez Rodríguez* provided a catalyst for the development of a jurisprudence on the obligation to investigate, prosecute and punish by other human rights institutions, including the ECtHR, and for the development of soft law instruments on the topic, including the UN Principles to Combat Impunity. However, it should be noted that this influence certainly isn't a one-way street. While *Velásquez Rodríguez* may have been its opening salvo, the IACtHR's later case law developed alongside the broader international framework against impunity and has often firmly and explicitly

143 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 5.

144 *See* Independent Study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher, 27 February 2004, UN Doc E/CN.4/2004/88, summary and para 8.

145 F. Haldemann and T. Unger, 'Introduction', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), pp. 16-17. See also N. Roht-Arriaza, 'Principle 1: general obligation of states to take effective action against impunity', in: F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity: a Commentary* (Oxford University Press, 2018), p. 48, noting that the UN Principles were "intended to restate existing law, not make new law" and pointing specifically to the *Velásquez Rodríguez* judgment as a source of existing law in relation to the fight against impunity.

positioned itself within that international movement. For example, as noted by Diane Orentlicher, the IACtHR has been quick to embrace the UN Principles to Combat Impunity, which have become "a key reference in decisions by the supervisory bodies for the American Convention on Human Rights".[146] Through its references to universal human rights instruments and jurisprudence developed by other human rights courts, the IACtHR emphasizes the international agreement on some of the more controversial aspects of its own established case law.[147] At the same time, it has also relied on external references, especially reference to the case law of the ECtHR, when expanding its own interpretation of the ACHR's provisions. According to Gerald Neuman, the IACtHR's "progressive elaboration of rights is supported […] quite often by references to the global and European human rights regimes".[148] This is certainly true for the IACtHR's progressive elaboration of states' obligations in the fight against impunity and the victim's right to justice.[149] The development of legal obligations to combat impunity has thus been a process of international cross-fertilization, in which the IACtHR, due, among other things, to the high incidence of the issue of structural impunity in its case law, has played a leading role.

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146 *Independent Study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher*, 27 February 2004, UN Doc E/CN.4/2004/88, para 8.

147 *See for example* IACtHR *González et al. ("cotton field") v. Mexico (preliminary objections, merits, reparations and costs)*, 16 November 2009, para. 292 and *IACtHR Juan Humberto Sánchez v. Honduras (preliminary objections, merits reparations and costs)*, 7 June 2003, para. 112. In these cases, the IACtHR makes reference to the ECtHR's doctrine on states' procedural obligation to investigate violations of the right to life, in order to emphasize international acceptance of its own doctrine on the obligations ot investigate, prosecute and punish human rights violations. Moreover, the IACtHR has undertaken extensive reviews of international instruments and jurisprudence relating to the obligation to punish international crimes and the legality of amnesty legislation, to support its own previous, and highly controversial decision that amnesty laws violate the ACHR. *See for example* IACtHR *Almonacid-Arellano et al. v. Chile (preliminary objections, merits, reparations and costs)*, 26 September 2006, paras. 95-100 and 105-111 and IACtHR *Gelman v. Uruguay (merits and reparations)*, 24 February 2011, paras. 195-214. For a detailed discussion of the IACtHR's case law on the prohibition of amnesty laws, *see infra* Chapter 3, Section 2.2.

148 G.L. Neuman, 'Import, export, and regional consent in the Inter-American Court of Human Rights', (2008) 19(1) *European Journal of International Law* 101-123, p. 107.

149 *See for example* IACtHR *González et al. ("cotton field") v. Mexico (preliminary objections, merits, reparations and costs)*, 16 November 2009, para. 292, where it held: "The Tribunal finds that […] the obligation to investigate effectively has a wider scope when dealing with the case of a woman who is killed […] within the framework of a general context of violence against women. Similarly, the European Court has said that where an "attack is racially motivated, it is particularly important that the investigation is pursued with vigor and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence." This criterion is wholly applicable when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence."

Because of this process of cross-fertilization, the standards developed through different international regimes to combat impunity are mostly congruent and mutually reinforcing. That does not mean, however, that they are completely identical or that all different regimes and instruments agree on all points. There are some important differences between the jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish and that of other international institutions. In general, it can be said that that the IACtHR has gone further than other regimes in acknowledging the rights of victims in the context of the fight against impunity and in emphasizing the state's duty to punish those responsible for human rights violations.

As noted by Anja Seibert-Fohr, the IACtHR has gone further than other human rights bodies in accepting a remedial rationale for the state's duties in the context of the fight against impunity.[150] As described above, the obligation to investigate, prosecute and punish was originally conceived, in the *Velásquez Rodríguez* judgment and in the case law of other human rights bodies, as a positive obligation based on the need to protect society from further human rights violations. With time, the IACtHR has come to see the investigation, prosecution and punishment of human rights violations also as a right of the victims of those violations, a development other human rights bodies have followed to some extent.[151] The IACtHR accepts this remedial rationale not only for the obligation to investigate human rights violations, but also for the obligation to prosecute and punish those responsible. Other human rights bodies, however, have not gone that far. The ECtHR, for example, has always denied that the ECHR "[entails] a right for an applicant to have third parties prosecuted or sentenced for a criminal offence".[152] Thus, whereas the ECtHR takes the position that "rather than punishment, it is an official investigation that is owed to the victim",[153] the

150 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), pp. 189-196.

151 *See* A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 192, noting that: "[c]riminal proceedings are increasingly seen [by the ECtHR and the UN Human Rights Committee, HB] not only as a measure of prevention, but also as a measure taken in the interest of individual victims. The influence of the Inter-American jurisprudence is evident."

152 *See for example* ECtHR (Grand Chamber) *Giuliani and Gaggio v. Italy*, 24 March 2011, Appl. No. 23458/02, para. 306 and ECtHR (Grand Chamber) *Öneryildiz v. Turkey*, 30 November 2004, Appl. No. 48939/99, para. 96.

153 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 192. *But see* ECtHR (Grand Chamber) *Öneryildiz v. Turkey*, 30 November 2004, Appl. No. 48939/99, para. 95, stating that: "the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law." In other words, while the ECtHR seems to grant greater deference to domestic authorities than the IACtHR in deciding whether the official investigation should lead to proceedings, it will review those proceedings once they have been initiated.

IACtHR believes that victims have a right to justice, which includes the right to demand the prosecution and punishment of those responsible for human rights violations.[154]

Moreover, Seibert-Fohr observes that these differences in legal rationale have "considerable practical relevance" for the way in which the IACtHR's jurisprudence has developed over the years. On the one hand, Seibert-Fohr observes that the IACtHR in general seems to focus more on punishment of those responsible for violations than do other human rights institutions. In her view, the IACtHR has attached an ever greater weight to the duty to punish, which "exists independently of the duty to […] investigate",[155] to the point where "[i]f there was initially a focus on investigation, the duty to punish is currently of equal importance" in the Court's jurisprudence.[156] This, in turn, has led the IACtHR to take a very strong position on certain 'elements' of the overarching obligation to investigate, prosecute and punish, like the prohibition of amnesty laws.[157] Finally, the IACtHR's remedial approach to the investigation and prosecution of human rights violations, in which victim's have procedural rights throughout the proceedings, has led it to "increasingly […] analyze the administration of justice" by domestic authorities.[158]

Thus, in short, the IACtHR's jurisprudence on the obligation to investigate, prosecute and punish human rights violations and the victim's right to justice is part of a developing international legal framework on the state's obligations in the context of the fight against impunity, for which its own *Velásquez Rodríguez* judgment served as an important catalyst. The development of this legal framework has come about through a process of international cross-fertilization, in which the IACtHR has enthusiastically taken part. However, it has been observed by some that its case law goes beyond the international consensus in some respects, particularly where it concerns the acceptance of the victim's right to justice, including the right to demand prosecution and punishment of those responsible for human rights violations.

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154 *See supra* p. 41 and fn. 149. On this point, the IACtHR seems to orient its jurisprudence more on the UN Principles to Combat Impunity, which recognizes and regulates the victim's right to justice in Principles 19-30. Interestingly, the IACtHR's judgment in the case of *Blake v. Guatemala*, in which it first recognized the victim's right to justice, was delivered in January 1998, not long after the UN Principles to Combat Impunity were first published by Louis Joinet.

155 A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford University Press, 2009), p. 54.

156 Idem, p. 191.

157 Idem, pp. 194-195.

158 Idem, pp. 194-195.

6 Conclusion

In its landmark judgment in the case of *Velásquez Rodríguez v. Honduras*, the IACtHR clearly established that states are under an obligation not only to refrain from violating human rights, but also to prevent such violations from occurring and to investigate, prosecute and punish them when they do occur. These obligations flow from Article 1(1) ACHR, which directs states to both respect and ensure the rights enshrined in the Convention. Moreover, *Velásquez Rodríguez* specified that the obligation to investigate, prosecute and punish human rights violations implies not only that states should put in place a legal and institutional framework conducive to such investigation and prosecution, but also that they undertake *effective* investigations whenever human rights violations do occur.

The positive obligation to investigate, prosecute and punish human rights violations recognized in the *Velásquez Rodríguez* judgment was based primarily on a rationale of general prevention. In other words: on the need to protect society as a whole from the further commission of human rights violations. In its later case law, however the IACtHR has slowly moved towards a more remedial – or victim-centered – rationale for this obligation, which recognizes that the investigation and prosecution of human rights violations serves not only a public interest, but also that of the individual victims of the underlying violation. This remedial rationale led the IACtHR first to order the investigation and prosecution of human rights violations as a measure of reparation for the victims in the case of *El Amparo v. Venezuela*. In the late 1990s, the IACtHR ultimately recognized the victim's right to justice under Articles 8(1) and 25 ACHR, which entails the victim's right to have any violation of their rights investigated and those responsible prosecuted and, if appropriate, punished. Moreover, the IACtHR recognizes that victims have procedural rights during any proceedings concerning the violation of their rights which should be respected by the relevant domestic authorities, particularly the right to be informed of (the state of) the proceedings and to participate in them. However, far from replacing the obligation to investigate and punish, the victim's right to justice and its underlying remedial rationale exist next to it, and the two doctrines mutually reinforce each other.

This progressive jurisprudence of the IACtHR on the obligation to investigate, prosecute and punish and the victim's right to justice developed against the background of, and in response to, a context of structural and entrenched impunity in many states under its jurisdiction. At the time the IACtHR began its operations, many Latin American countries were going through complex processes of transition – from civil war to peace and/or from dictatorship to democracy – while simultaneously confronting new challenges to public order and to their justice systems, in the form of growing organized crime. This context goes a long way in explaining the IACtHR's particular focus on the need for states to combat impunity and to investigate and prosecute those responsible for serious crimes – old and

new – who continued to hold great power over Latin American societies and states.

Moreover, many of the cases with which the IACtHR has been confronted throughout its operations, from the late 1980s until today, have concerned systematic violations of the most basic human rights committed by state agents or by groups affiliated to the state, as part of the oppressive tactics of authoritarian regimes. In particular, many breakthroughs in the IACtHR jurisprudence have come in response to cases concerning the systematic practice of enforced disappearance of persons, often targeted at political dissidents. The particular nature of the practice of enforced disappearance has led the IACtHR to develop the concept of a right to truth. This development has taken place parallel and in close relation to the development of the obligation to investigate, prosecute and punish and the victim's right to justice, to which the right to truth is inextricably linked. In fact, the IACtHR sees the victim's right to truth as being subsumed in their right to justice, and believes that the right to truth should be satisfied primarily through the state's effective (criminal) investigation of the facts. As a result, the state's investigation should be such, that it is capable of uncovering the whole truth surrounding the human rights violation in question, taking account the context in which it was committed and with an eye to uncovering any structures or systems which may have been involved in their commission.

Finally, it should be noted that the IACtHR's doctrines of the obligation to investigate, prosecute and punish and the victim's right to justice developed alongside – and as a part of – a broader international movement against impunity. This movement was given a strong impulse by the IACtHR's *Velásquez Rodríguez* judgment, which was a catalyst for the development of further international jurisprudence and soft law instruments as part of a developing international legal framework against impunity. The IACtHR has continued to be an important player in this process, ever pushing the development of the legal framework against impunity forward. At the same time, however, it has been explicit in presenting itself as a part of this international movement, frequently citing other international human rights bodies and international instruments in its own case law.