Spring 2015

# Transitional Justice and Judicial Activism— A Right to Accountability?

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Victims of systemic rights abuses, their families, and non-governmental organizations are turning to international and regional human rights tribunals to address the failure of states to investigate, prosecute, and remedy past human rights violations. In many cases this relates to acts that occurred decades ago and for which a previous repressive regime was responsible. In other cases there may be powerful interests within the state, such as the police or security service, that are complicit with the violations in question. This Article explores the historical and political contexts in which these cases have arisen, how the courts approach the question of state responsibility under the relevant human rights treaties (the American Convention on Human Rights, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights) and the implications for transitional justice, as they raise common issues of what makes for accountability following state wrongs.

I argue that there is a new accountability emerging: one that is closely associated with global and international criminal justice, which raises issues that go to the relationship between the domestic, political, and judicial institutions engaged in transitional justice and the supranational tribunals in question. When issues in question involve violations that have occurred in the context of previous oppressive regimes, to what extent can supranational judicial intervention unblock or improve transitional justice processes? What are the risks of intervening in such processes, which often involve complex exercises in reconciliation and compromise between antagonists in past conflicts? What remedies are appropriate and legitimate given the relative competence and legitimacy of domestic institutions and supranational courts, understood in context? Moreover, which institution decides? At a time when such judicial intervention is gaining traction,

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48 Cornell Int'l L.J. 385 (2015)

this Article proposes principles that should be of relevance to transnational courts and other actors in their consideration of such problems.



## Introduction

What might be conceived of as a "right to accountability"[1] has emerged in the rulings of the Inter-American system,[2] Europe's human

1. Compare to Robert Keohane's pluralistic theory of accountability. *See* R. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1123-24 (2003) (defining accountability to include two essential features: information and sanctions). *See also* Andreas Schedler, *Conceptualizing Accountability*, *in* THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 13, 23 (Andreas Schedler et al., eds. 1999).

2. For an account of some of the doctrinal developments, see Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 2 (2013); *see also* JESSICA ALMQVIST & CARLOS ESPÓ-

rights system, and UN human rights bodies,[3] as well as the International Criminal Court (ICC).[4] This right implies a set of obligations on the state, largely read into prevailing treaty rights protections involving personal security, such as the right to life, whether under the International Covenant on Civil and Political Rights or the European or Inter-American conventions on human rights.[5] Individuals, typically families of presumed victims of human rights abuses (particularly disappearances and similar violations of personal security, whether by state or non-state actors) are found to be entitled to have the allegations of wrongdoing investigated and, if substantiated, prosecuted. They may also be entitled to reparations and other remedies regarding the acts in question or the failure to account for them over significant periods of time. This is an important and increasingly prominent dimension of the combined internationalization and judicialization of transitional justice.

The jurisprudence of the regional rights tribunals has its origins—especially in the first landmark cases—in transitional justice, and is a problem arising in periods of regime change; but also, sometimes protracted over decades and often recurring over the passage of time.[6] In contexts associated with weak and failing states, these individual rights problems often raise complex questions of state responsibility when they are adjudicated in international fora. Historically, these situations, as difficult as they might have been, were resolved largely in domestic fora; for example, both South Africa and Argentina's transitional justice arrangements were the product of multiple stages of political bargaining and, particularly in South Africa, processes of constitution-making, including processes of democratic ratification, and consensus over commitments concerning

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SITO, THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN (2012).

3. *See* Office of the High Comm'r for Human Rights (OHCHR), Comments on the Nepal *Commission on Investigation of Disappeared Persons, Truth and Reconcilation Ordinance-2069* (2013); U.N. Human Rights Committee, *Concluding Observations on the Second Periodic Report on Bosn. & Herz.* (2013); *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN. 1/Rev. 1 (1994); Human Rights Committee, *General Comment No. 20, Art. 7* ( 44th sess. 1992); *see also* Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26,2004); *Nepal: Truth & Reconciliation Law Betrays Victims*, HUMAN RIGHTS WATCH (2013) [hereinafter HUMAN RIGHTS WATCH, *Nepal*], *available at* http://www.hrw.org/node/114432 (discussing the inclusion of amnesty provision in the "Truth, Reconciliation and Disappearance Ordinance," which was passed in Nepal by President Ram Baran Yadav on March 14, 2013).

4. *See infra* Part VI (proposing some of the relevant normative considerations such as the complementarity subsidiarity principles).

5. *See infra* Part III.

6. *See infra* note 13. For example, after the original transition, Argentina is at present carrying out prosecutions decades after the military-era violations occurred. *See e.g.*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, *On-Going Trials in Argentina: E.S.M.A.*, http://www.ecchr.de/argentinia_2/articles/update-trial-openings-buenos-aires.html.

what values should guide the transition.[7]

At present, however, supranational norms[8] are being imposed upon these processes (or sometimes even offered as a substitute where they have not occurred or have broken down): regional human rights courts and the UN Committee on Civil and Political Rights[9] are requiring that states undertake particular measures to ensure what might be denoted as a "right to accountability" with respect to abuses that occurred during the prior regime. This Article identifies this procedural turn and evaluates some of the tensions and distortions resulting from conceptualizing accountability in terms of individual human rights claims and related state responsibilities.

This Article begins by addressing the conundrum of accountability as it arises in the instant contexts—namely, adopting a transitional justice perspective. Next, in Part II, it turns to issues of jurisdiction, particularly characteristic of cases like these involving the passage of time, and the judicial innovations taken to review these cases. Part III addresses the changing law of state responsibility and what it takes to trigger this right of accountability. Part IV explores the nature of the duty of accountability, starting with investigations and ending with judicial interventions ordering prosecutions. In Part V, I discuss the role of context in judicial interpretation, and the tensions between regional and international frameworks. Lastly, in Part VI, I propose a series of normative principles, which bear on how to think about this line of adjudication and should offer direction towards resolving the dilemma of the judicial confrontation with past political wrongdoing.

The emergence of a "rights" approach at the supranational level has a number of important implications: it means a shift in the relevant decision-makers, institutions, and processes, as well as a restructuring and narrowing of the relevant questions. Further, the emphasis shifts from political and social goals of transition, to other more limited aims such as procedural justice for victims and their families as a separate and more concrete objective, one ostensibly required under international and regional human rights instruments.

The normative question of what the relationship of the judiciary to political branches should be is a perennial one for constitutional democracies, and in the human rights area the problem tends to be conceptualized through an analogy to the problem of constitutional review in a domestic

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7. For an illustration on the case law, see Azanian Peoples Org. and Others v. President of the Republic of S. Afr. 1996 (8) BCLR 1015 (CC). *See also* Azanian Peoples Org. and Others v. Truth and Reconciliation Commission 1996 (4) SA 562 (CC) (upholding amnesty agreement against victim's challenge). One might interpret the later change in Argentine policy to be reinforced by constitutional change in the country and related case law, where the constitution was amended to specify the relevance of international sources. *See* CONST. NAC. (Arg.). *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) [hereinafter TEITEL, TRANSITIONAL].

8. *See* Ruti G. Teitel, *Editorial Note– Transitional Justice Globalized*, 2 INT'L J. OF TRANSITIONAL JUST.1, 1 (2008).

9. *See* OHCHR, *supra* note 3.

system. But is this frame of analysis applicable here without modification or adjustment? The domestic judiciary is, after all, embedded within a particular political and constitutional system, often with checks and balances, and a structured ongoing dialogue with the political branches. The supranational rights institutions stand, by contrast, aloof from the domestic politics of transitional justice and indeed from what might be called the politics of transitional constitutionalism generally. How then to understand their contribution, and their legitimacy relative to that of domestic institutions?

The prevailing commentary on these judicial developments tends to evaluate these emerging trends from a human rights perspective where individual injury and repair is key. When it comes to human rights, where universal elements to the underlying norm—or at least moral foundations to those norms—is a basic intuition, we should not be entirely surprised to see that tribunals in different regions tend to cite and even to follow one another's decisions.[10] The demonstrable concern for persons and peoples in international law cuts across multiple legal orders, including the regional and international discussed here.[11]

## I. The Core Problem of Accountability: Disappearances as Emblematic

The "right to accountability" jurisprudence derives from a puzzle of repression that was associated with the repressive policy of disappearances. In the last decades of the twentieth century and in the beginning of the twenty-first century, there was an emerging phenomenon of "disappearances," particularly in Latin America. These refer to abductions, torture, government condonation, denials, and often executions. The disappearances adopted as a matter of state policy to terrorize political opposition that characterized military rule throughout Latin America have come to be recognized as egregious crimes against humanity, and this recognition is set out in recent treaties such as the Rome Statute establishing the ICC;[12] it has also appeared in case law, like *Velasquez-Rodriguez v. Honduras,* and has also been documented by truth commissions in the region, such as the landmark Argentine commission, known as Nunca Mas.[13]

These situations pose a conundrum of rule of law. Typically the state denies any involvement with the disappearance, and the victims' families and others who seek accountability have at best circumstantial evidence of the culpability or complicity of the state. Therefore, unless there is some form of accountability (at least an investigation), state responsibility cannot be established; but if state responsibility can only be established

10. *See* discussion of *Varnava infra* Part II.

11. *See generally* RUTI G. TEITEL, HUMANITY'S LAW (2011) [hereinafter TEITEL, HUMANITY'S].

12. *Id.* at 5–7.

13. *See* Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 153 (July 29, 1988). *See also Commission Nacional Sobre La Desaparicion De Personas, Nunca Mas* (1986).

*through* accountability, how is it possible to impose in the first place, on principles of international law, or a duty upon the state to launch that process of accountability?

While the Latin American cases are connected to a historical pattern of oppressive military rule, the context of the European jurisprudence is rather different: the context is counter-terror responses to insurgent or separatist movements, and the increase in weak and fragile states in areas in flux have led to increased recourse to courts for judicial protection under the European Convention.[14] For example, an increasing number of cases involving disappearances are now arising out of the so-called war on terror in Turkey,[15] as well as the former Soviet Union's Islamic periphery.[16] Similarly, in a number of cases coming out of the Chechnya conflict, there have been repeated instances of forced disappearances during Russian operations in 2001, for example, *Isayeva v. Russia* and *Barzorkina v. Russia*.[17]

Disappearances present a problem for assessing responsibility for many reasons: most obviously, because of the absence of critical evidence, such as the body of the disappeared, and due to government denials of responsibility, the usual order of remedies (habeas, exhaustion of government remedies, finding of government responsibility, and reparations) is frustrated. A typical and central feature of disappearances is that they are usually accompanied by recurring government denials of wrongdoing; therefore, the absence of immediately or initially available evidence along with the denials that appear to close the door to the gathering or disclosure of such evidence results in a lack of opportunity for domestic accountability.[18] Perhaps most obvious, yet at the same time most troubling, is that the disappeared cannot represent themselves. As reflected in the case law, they find a voice when represented by NGOs, as well as by next of kin. By now, these are added voices, which in turn are generating new demands for accountability, and arguably new rights for next of kin and others—informing a distinctive conception of justice.[19]

## II. Jurisdiction, the Passage of Time and the Quandary of the Wrongful Act

In this Part, I take up the problem these cases present for obtaining jurisdiction over wrongdoing after an extended passage of time.[20] An important dimension to the relevance of context in the emergence of the

14. *See, e.g.*, El-Masri v. the Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. Ct. H.R. 80 (2012). *See also* Anguelova v. Bulgaria, App. No. 38361/97 Eur. Ct. H.R. 311 (2002).

15. *El-Masri*, App. No. 39630/09 Eur. Ct. H.R. at para. 192.

16. *See, e.g.*, *Turkmenistan: End Enforced Disappearances*, HUMAN RIGHTS WATCH (Aug. 29, 2014), http://www.hrw.org/news/2014/08/28/turkmenistan-end-enforced-disappearances.

17. Bazorkina v. Russia, App. No. 69481/01 Eur. Ct. H.R. 9 (2006); Isayeva v. Russia, App. No. 57950/00 Eur. Ct. H.R. (2005).

18. *Id.*

19. *See* discussion *infra* Part VI(d).

20. *See* Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 4–28 (1992).

new duties of accountability has been elaborated in accountability over time. A crucial contextual dimension of the Latin American disappearances cases is that they are often brought to the courts by NGOs as petitioners, or lawyers for victims' families, after a protracted period of delay during which successive administrations have failed to respond to wrongdoing.[21] It is this impunity through protracted inaction that has become the core problem the regional rights systems have had to confront—how to wrestle with this kind of domestic political failure or failure of the rule of law.

There is an evolving conceptualization of the nature of wrongful action at stake in these cases that seems to cut across the judicial systems. In both the Inter-American and European rights systems, the judiciary refers to the complex nature of disappearances and have observed approvingly that there is agreement on the complex, multiple, and continuous character of the breach, one which seems to incorporate understandings of the violation in terms of rights to accountability;[22] that is, they appear to have come up with a consolidated doctrine.

Starting with the landmark case of *Velasquez-Rodriguez*, wherever the issue has arisen, the rights courts rely on both a number of international conventions and comparative law across judicial systems.[23] The judicial conclusion that the disappearance is a "complex" offense and involves multiple ongoing breaches referring to systemic denials and failure to prevent, investigate, and punish has a number of important effects for the establishment of the evolving duty of accountability—laying the bases for jurisdiction and reparation over time.[24]

The conceptualization of the offense has implications for the characterization of the political and legal context of the case law, as well as for the requirement of exhaustion, ordinarily a predicate to access the regional rights systems. Thus, in *Velasquez-Rodriguez*, the Inter-American Court of Human Rights (IACHR) emphasized the relevance of the political context. In the court's words, "the investigation committees created by the government and armed forces did not produce any results. The judicial processes have proceeded slowly . . . with a clear lack of interest."[25]

In a similar way, in *Baysayeva v. Russia*, the European Court of Human Rights (ECHR), in evaluating the rule of exhaustion as to domestic remedies, asserted that according to the European Convention Article 35(1):

> There is no requirement that recourse should be had to remedies which are inadequate or ineffective[26] . . . the rule of exhaustion of domestic remedies

21. For a comprehensive discussion of these petitions, see Patricia P. Zuloaga, Dissertation Presentation at NYU JSD Forum (2012).

22. *See* Heliodoro Portugal v. Panama, Preliminary objectives, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 111, n. 70 (Aug. 12, 2008) (citing *Kurt v. Turkey* and other ECHR cases).

23. *See id.* at paras. 34, 111.

24. *See* Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 147 (July 29, 1988)

25. *Id.*

26. *See* Baysayeva v. Russia, App. No. 74237/01 Eur. Ct. H.R. at para. 104 (2007).

> must be applied with some degree of flexibility and without excessive formalism, the rule of exhaustion is neither absolute nor capable of being applied automatically . . . it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate.[27]

In so holding, the regional rights court relied on prior cases coming out of southeastern Turkey, such as *Aksoy v. Turkey*, involving detention without judicial access, and allegations of torture in the context of Kurdish separatist terrorism.[28]

As to the question of the relevance of the passage of time for accountability, remarkably in *Heliodoro Portugal*, the IACHR adjudicated the dispute even though the original disappearance and extrajudicial execution occurred prior to the state party, Panama, agreeing to be subject to the court's jurisdiction. Grounding jurisdiction on the theory that the disappearance itself was a continuing wrongful act, the court drew on the principle of the continuing breach of state responsibility rather than fully conceiving the failure to provide accountability as an autonomous internationally wrongful act—which, of course, obviously continued up to the time the petition was brought, and persisted until and unless there was state explanation.[29]

By way of comparison, the International Convention for the Protection of All Persons from Enforced Disappearances, as well as Article 7 of the Statute of the ICC, provide that one of the elements of the wrongful act of the "forced disappearance of persons" is "refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person which place such a person outside the protection of the law."[30] Here, one can see that there is a basis in treaty law for finding that the right to accountability is a primary obligation. This, however, would seem to apply only under these instruments where attribution of the original abduction, arrest, or detention to the state is possible—in other words, where these occur. As to disappearance itself, at least two dimensions or stages are distinguished: "forced disappearances of persons" means "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons, acting with the authorization, support or acquiescence of the State." Importantly, the judicially-crafted right to accountability as a primary obligation extends further to situations where attribution to the state ordinarily cannot necessarily be established (and may even be intended to overcome the evidentiary difficulties of the attri-

27. *Id.* at para. 105.

28. Aksoy v. Turkey, App. No. 21987/93 Eur. Ct. H.R. at para. 53 (1996).

29. *See* Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶¶ 34, 111 (Aug. 12, 2008). *See also* Goiburú v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 153 (2006) (noting that these are long postponed claims).

30. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. UN Doc A/61/488 (Dec. 23, 2010).

bution exercise, given the context).[31]

The American Convention itself contemplates attribution in order to establish the wrongfulness of the original act of forced disappearances: the "deprivation of liberty through the direct intervention of State agents or their acquiescence," that the IACHR refers to as "the refusal to acknowledge the detention and to reveal the situation or the whereabouts of the interested person."[32] Hence, in *Gomes Lund*, the court held that it was independently wrongful for the state to refuse "to acknowledge the detention and to reveal the situation or the whereabouts of the interested person" by implication, whether or not the original act can be attributed to it.[33] The court in *La Cantuta v. Peru*, however, relied on a very broad view of attribution under the American Convention, distinguishing sharply from what would ordinarily be required to establish responsibility under international criminal law. In that case, the IACHR declared:

> International liability of the States arises automatically with an international wrong attributable to the State and, unlike under domestic criminal law, in order to establish that there has been a violation of the rights enshrined in the American Convention, it is not necessary to determine the responsibility of its author or their intention, nor is it necessary to identify individually the agents who are attributed with the violations. *In this context, the Court ascertains the international liability of the State in this case,* which may not be made modeled after structures that belong exclusively to domestic or international criminal law, which in turn defines responsibility or individual criminal liability; nor is it necessary to define the scope of action and rank of each state officer involved in the events.[34]

In *Goiburú*, the IACHR indicated the importance of considering the "context" of the disappearance case brought before them and referred to the increase in "[t]he State's international responsibility,"[35] "because the facts occurred within the framework of Operation Condor" and "due to the failure to comply with the obligation to investigate them effectively."[36] The definition or characterization of the wrongful act is what gives rise to the particular obligations identified in these cases—in other words, the "recognition of the continuing or permanent nature of the forced disappearance of persons."[37] Indeed, as the *Goiburú* court established, during the 1970s, "the intelligence services of several countries of the Southern cone, established a criminal inter-state organization with a complex assemblage, the scope of which is still being revealed today; in other words there was a systematic practice of 'state terrorism at an inter-State level.'"[38] This trans-

31. *See Heliodoro Portugal*, Inter-Am. Ct. H.R. No. 186. *See also Goiburú*, Inter-Am. Ct. H.R. No. 153.

32. *See* Gomes Lund v. Brazil, Preliminary objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 103–104 (2010).

33. *See id.* at para. 104.

34. La Cantuta v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C), No. 162, ¶ 156 (2006) (emphasis added).

35. *See Goiburú*, Inter-Am. Ct. H.R. No. 153 at paras. 86–94.

36. *See id.*

37. *See id.* at para. 80.

38. *Id.* at para. 72.

national policy of repression is conceived by the court as in "absolute contradiction to the principal objects and purposes of the organization of the international community" whether in the various international bodies and the American Convention itself.

The *Goiburú* court's observation engages the particular *telos* of the regional human rights court when violations are perpetrated in a transnational, regional way: "the 'situation of general impunity' conditions the protection of the rights in question,"[39] "[f]orced disappearance . . . reproduces the conditions of impunity."[40] Hence, one can see that the relevant context for the court includes the transnational dimensions of these crimes, which are conceived of as violations *erga omnes*, and triggers the responsibility of other states and the international community as a whole.[41]

In another more recent case, *Gomes Lund*, involving claims with respect to disappearances in Brazil,[42] the IACHR observed that the operative definition of the phenomenon included "the unlawful detention by agents or governmental agencies or organized groups of private individuals acting in the name of the state or counting on its support, authorization or consent."[43] The court observed that the act of disappearance commences with the "deprivation of liberty," is "followed by the lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared persons are found and the true identity is revealed with certainty." Hence, one can see the ways that state responsibility plays a role in the definition of the wrongful act; accordingly, the wrongful act is being redefined in terms of the refusal of the state to acknowledge its responsibility under the primary obligation. Moreover, the failure to provide acknowledgment or information, often in an ongoing way, can be seen as the continuation of the wrongful act.[44]

The newfound characterization of international wrongfulness in terms of accountability has been pivotal to recent cases involving disappearances, even where they may have occurred decades ago. Throughout Latin America, the IACHR has been ruling on responsibility, even for kidnappings that occurred close to half a century prior to the human rights litigation.[45] Thus, in the landmark case of *Heliodoro Portugal*, the IACHR evaluated whether it had jurisdiction to hear a case involving an abduction

39. *Id.* at para. 88.

40. *Id.* at para. 89.

41. *Id.* at para. 93.

42. On Brazil's disappearance policy, see Gomes Lund v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 30, n.32 (2010); The International Center for Transitional Justice, *ICTJ Welcomes the Historic Final Report from Brazil's National Truth Commission* (Dec. 10, 2014), *available at* https://www.ictj.org/news/ictj-welcomes-historic-final-report-brazil%E2%80%99s-national-truth-commission (regarding the most recent "release of the final report of Brazil's National Truth Commission after two and a half years of work to unveil the truth about serious human rights violations that took place in the country between 1946 and 1988, especially during the military dictatorship of 1964 to 1985").

43. *See* Nitay Nech v. Guatemala, Preliminary objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 102 (May 25, 2010).

44. *Id.* at paras. 103–104.

45. *Id.*

that occurred at the hands of state officials in 1970, decades before Panama had accepted the jurisdiction of the court.[46] Despite the extended passage of time, the court concluded that the breach could not be considered as merely involving a detention or loss of life; rather, "the deprivation of liberty of the individual must be understood merely as the beginning of the constitution of a complex violation that is prolonged over time until the fate and whereabouts of the alleged victim are established."[47] In *Heliodoro Portugal*, the IACHR held that the deprivation of liberty by state agents, without information being provided on an individual's whereabouts, initiated the individual's forced disappearance; this violation continued over time after 1990—until his remains were identified in 2000, three decades after the abduction.[48] Relying on a combination of concepts, including composite and continuing breach, it regarded the failure to acknowledge or explain as an element of an ongoing internationally wrongful act, referring to forced disappearance as an "autonomous offense of a continuing or permanent nature with its multiple elements."[49] It also observed that "the general obligation to ensure the human rights embodied in the Convention, contained in Article 1(1), gives rise to the obligation to investigate violations of the substantive rights that should be protected, ensured or guaranteed . . . ."[50] While in some regard, the passage of time might make imposing accountability more difficult, raising issues about the credibility of evidence has, conversely, opposite consequences for assessing the duty of accountability. Indeed, a very long period of non-accountability points to the kind of political failure or deeply rooted pathology of impunity that makes supranational judicial intervention more plausible and legitimate.[51]

One can see this dimension of the passage of time in the case law of the ECHR as well.[52] Consider the protracted delay between the original detention and the state inquiry: this gap in accountability played an important role for the ECHR in *Timurtas v. Turkey*, where it held that the investigation into the disappearance was considered "inadequate and therefore in breach of the State's procedural obligations to protect the right to life."[53] Moreover, such delay was considered to justify judicial intervention: "[T]he lethargy displayed by the investigating authorities poignantly bears out the importance of the prompt judicial intervention required by Article 5, 3 and 4 of the Convention which, may lead to the detection and prevention of life-threatening measures in violation of the fundamental guarantees contained in Article 2 . . . ."[54]

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46. Heliodoro Portugal v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 111, n. 70 (Aug. 12. 2008).

47. *Id.* at para. 112.

48. *Id.* at para. 113 (referring to the violation of Article 7 of the Convention).

49. *Id.* at para. 112.

50. *Id.*

51. *See* Laurel Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163 (2009).

52. *Id.*

53. Timurtas v. Turkey, 94 Eur. Ct. H.R. 221 at paras. 88–90 (2000).

54. *Id.* at para. 89.

In *Varnava and Others v. Turkey*, the ECHR followed the logic regarding the passage of time taken by the IACHR in *Heliodoro Portugal*. In a dispute involving a disappearance that occurred in 1974, the ECHR invoked the IACHR and the UN Human Rights Committee, noting that they "apply the same approach" to the "procedural aspect of disappearances" examining allegations of denial of justice or judicial protection, "even where the disappearance occurred before recognition of its jurisdiction."[55] Ultimately, such cases point us in the direction of recognizing an independent feature of the right of accountability.

## III. Supranational Judicial Interpretation: Generating New Duties to Accountability

In all of the cases discussed, there is some alleged human rights abuse in the past that triggers state responsibility to investigate, prosecute, and remediate. Ensuing changes in the conceptualization of state responsibility, particularly those that go beyond stated requirements regarding state action in the law of attribution,[56] are emblematic of these complex cases of disappearances where attribution questions are very difficult, though also arising in the "war on terror."[57] Indeed, there are clear similarities between the practices of disappearances and those of rendition in the issues of ongoing government cover-up, the attempt to evade public scrutiny, and the hiding of identities of perpetrators and victims.[58] In these circumstances—notwithstanding the challenge of attribution—the case law appears to point to the elaboration of new duties, informing rights of prevention and accountability, investigation, repair, and even particular punishment or other remedies, such as the erection of monuments and museums.[59]

Indeed, in order to craft a "right" of accountability, the courts have had to overcome a variety of doctrinal obstacles, and have been innovative with respect to issues such as standing, attribution to the state, and evidentiary burdens, as well as the requirement to exhaust local remedies.[60] The result has been a continuous expansion of state responsibilities ostensibly derived from the protection of the core human right to life. This is a development that is occurring not only in regional human rights litigation but in other fora as well, such as the UN Human Rights Committee, and is

55. Varnava and Others v. Turkey, 2009-V Eur. Ct. H.R. 13 at para. 147 (2009). There was also a dissent against finding jurisdiction. *Id.*

56. THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford et al. eds. 2010).

57. *See* El-Masri v. the Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. Ct. H.R. 80 (2012).

58. On some of the similarities between "renditions" and "disappearances," see Amnesty Int'l, *USA: Below the Radar: Secret Flights to Torture and "Disappearance*, AMR 51/051/2006 (April 4, 2006).

59. *See* Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153 (2006); La Cantuta v. Peru, Inter-Am. Ct. H.R., Series C, No. 202, ¶ 254 (2006) (order to erect the memorial "The Crying Eye").

60. *See* discussion *infra* Part VI(d).

reinforced by the growing consensus on state responsibility to prosecute in international criminal law.[61]

A. The Changing Law of State Responsibility and the Role of Context

In this subpart, I explore the jurisprudence on the "right to accountability" from the perspective of state responsibility in international law. The basic premise of state responsibility in general in international law is that a state is responsible for remedying every internationally wrongful act that is attributable to it.[62] The ILC Articles on State Responsibility codify general international law with respect to so-called secondary obligations—the remedial consequences that flow from the violation of a primary norm—while also providing rules on attribution to the state of acts and omissions that may be internationally wrongful. The distinctiveness of the right to accountability that is evolving in recent jurisprudence can be appreciated when we examine the challenges of state responsibility in the contexts in question, especially disappearances.

One way of conceptualizing the obligation of the state to investigate, prosecute, and remediate is as a secondary obligation that flows from a past violation of international human rights law (for example, the alleged original act of disappearance and torture). This approach of course depends on a finding that the original act was internationally wrongful. But, in the contexts in question, often the evidence is inadequate to make such a finding with the required certainty. If someone disappears, there may only be circumstantial evidence at best that the disappearance is attributable to an act or omission of the state. Proving direction, control,[63] or endorsement is very difficult, especially given the way in which collusion between dictatorships and various non-state groups worked in Latin America to produce the oppression in question.

Generally speaking (though not always), the judicial bodies in question have sought to bypass these or the complexities of state responsibility by conceiving the obligation to investigate, prosecute, and remediate as an autonomous primary obligation rather than as a secondary obligation that flows from a previous internationally wrongful human rights violation. In this way, it is possible to find that there is "a right to accountability" regardless of whether it can be established that the original human rights abuses were themselves internationally wrongful acts engaging state responsibility. And, it is this conceptualization—again, driven in signifi-

61. *See* U.N. Human Rights Committee, *Concluding Observations on the Second Periodic Report on Bosn. & Herz.*, (106th sess. 15 October–2 November 2012), CCPR/C/HIB/CO/2 (Nov. 13, 2013); Pablo de Grieff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/21/46 (Aug. 9, 2012); HUMAN RIGHTS WATCH, *Nepal*, *supra* note 3.

62. Judge Trindade's separate opinion calls for greater convergence regarding trends of international responsibility for state crime and individual criminal responsibility for grave human rights, and Judge Trindade notes that the trend has been to individuate responsibility for state crimes with loss of public dimension, for example in the form of public hearings. *See Goiburú*, Inter-Am. Ct. H.R. No. 153.

63. *See* International Law Commission arts. 5, 8, 11.

cant measure by the complexities of state responsibility in this context—that plunges judicial bodies into the oversight of transitional justice broadly understood, moving well beyond simply remedying past internationally wrongful acts. At the same time, in some of the cases, one sees alternative, more cautious, fact-specific theories of continuing or composite breach, or context-based evidentiary presumptions of state involvement or complicity, which suggest that some judges may not be entirely comfortable with the very broad implications of crafting an autonomous primary obligation of accountability.

The logic of a separate primary obligation of accountability is already present in the landmark case *Velasquez-Rodriguez*, the first contentious case involving disappearances in the IACHR,[64] and can be seen in subsequent cases in that system.[65] With these preliminary observations about context and state responsibility in mind, we can now examine from a comparative perspective the manner in which "the right to accountability" has been articulated in the jurisprudence.

Let us begin with two cases (one European, one Latin American) where the judiciary grapples with the problem of international responsibility in context. Under the "right to life" in the European Convention, the ECHR recognized affirmative accountability-related obligations that clearly go beyond the admittedly general language of the Convention. This is true as well of the "right against torture and inhumane treatment," which is an even more general provision of the Convention: Article 3. Thus, in *Finogenov and Others v. Russia*, a case involving Chechen separatists and hostage-taking, the ECHR held that there had been a violation of Article 2 of the European Convention, and found, among other violations, a lack of "effective investigation." In such circumstances, the court asserted that the "authorities were under an obligation to carry out an effective official investigation in order to provide a 'satisfactory and convincing' explanation of the victims' deaths and the degree of the authorities' responsibility for it."[66] The court went on to refer to the investigators' failure "to establish certain facts which in the court's opinion were relevant and even crucial for addressing the question of the authorities alleged negligence."[67] Indeed, one can see that the internationally wrongful act the court identified here as giving rise to state responsibility is the flawed investigation of the disappearance.

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64. Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R (ser. C) No. 4, ¶ 126 (July 29, 1988) (discussing the standard of proof for cases involving the "official practice of disappearances"); *id.* at para. 155 ("forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention").

65. *See id.* at para. 153; Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 111, n. 70 (Aug. 12, 2008). *See also* Timurtas v. Turkey, 94 Eur. Ct. H.R. 221 at paras. 88–90 (2000); Varnava and Others v. Turkey, 2009-V Eur. Ct. H.R. 13 at para. 147 (2009).

66. *See* Finogenov and Others v. Russia, App Nos. 18299/03, 27311/03 Eur. Ct. H.R. at para. 273 (2011). *See also* El-Masri v. the Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. Ct. H.R. at para. 104 (2012); Anguelova v. Bulgaria, App. No. 38361/97 Eur. Ct. H.R. 311 (2002).

67. *Finogenov*, Nos. 18299/03, 27311/03 Eur. Ct. H.R. at para. 280.

One should consider *Goiburú*, where the IACHR justified its intervention in Paraguay's decades-long, systemic "culture of impunity" which gave rise to "heightened state responsibility."[68] The regional rights court characterized the facts of the case as having occurred within the context of a systematic pattern or practice that had been applied or tolerated by the state—thus setting up the applicability of a heightened responsibility standard. According to the IACHR:

> This case has unique historic importance: the facts occurred in the context of the systematic practice of arbitrary detention, torture, execution and disappearance perpetrated by the intelligence and security forces of the dictatorship of Alfredo Stroessner, under "Operation Condor," whose characteristics and dynamics have been described in the proven facts . . . .[69] In other words, the grave acts took place in the context of the flagrant, massive and systematic repression to which the population was subjected on an inter-State scale, because State security agencies were let loose against the people at a transborder level in a coordinated manner by the dictatorial Governments concerned . . . the context in which the facts took place permeates and conditions the State's international responsibility in relation to its obligation to respect and safeguard the rights embodied in Articles 4, 5, 7, 8 and 25 of the Convention, with regard to both the aspects acknowledged by the State and those that will be determined in the following chapters on merits and reparations.[70]

Here, the court effectively seems to be taking judicial notice of pervasive state involvement in the initial pattern of wrongful acts, pointing to a heightened state responsibility that is not necessarily predicated upon individual inquiry into attribution. In *Gomes Lund*, the IACHR, in evaluating Brazil's disappearance policy including the extermination of guerillas and military denial, recognized the systematic pattern or practice tolerated by the state and embedded the relevant state obligation in its interpretation of the wrongful act. As the *Gomes Lund* court asserted, "the enforced disappearance constitutes a multi-offensive violation of various rights protected by the American Convention including the 'refusal to acknowledge the detention and to reveal the situation or the whereabouts of the interested person.'"[71] While these rights may not be stated as such in the Convention, they emerge through judicial interpretation of the implicated rights and obligations.

In the next subpart, I turn to the evidentiary challenges these cases present and how the courts have responded to them by making findings about the general political or historical context, or political culture, thereby reflecting another form of contextualization.

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68. *See id.*

69. *See, e.g.*, Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 62–63 (2006).

70. *See id.*

71. *See* Gomes Lund v. Brazil, Inter-Am. Ct. H.R. (ser. C.) No. 219, ¶ 103 (2010).

B. Triggering State Responsibility and Shifting the Evidentiary Burden

One of the consequences of the adoption of a right to accountability is the shift in the understanding of proof and evidence. The phenomenon of disappearance in full daylight crystallizes this dimension of the problem of accountability. In *Velasquez-Rodriguez*, the IACHR characterized the kidnappings as occurring in "broad daylight"; that is, in full view, and then followed by disappearance and denial. The recognition of systematic practices—along with the apparent impossibility of accountability—have rendered these human rights abuses not just violations of physical integrity, but also problems of the defiant absence of state acknowledgment and other follow-on practices. Yet, the conundrum these cases raise is how to advance accountability where the state denies any responsibility, or where the facts could lead to a finding of an internationally wrongful act.

Here, again, we see the power of the technique of characterizing the continuing failure of accountability as an autonomous internationally wrongful act. In *Velasquez-Rodriguez*, the IACHR combined the notion of the failure of accountability being an independently wrongful act under the Convention with theories of continuing and composite breach.[72] While it characterized "the forced disappearance of human beings as a multiple and continuous violation of many rights under the Convention," it went on to declare that the rights at stake relate to personal liberty but also to "access to a competent court."[73]

Along these lines, consider Brazilian disappearance policy in *Gomes Lund* involving extermination of guerillas in the region, where the military engaged in blanket denial of involvement.[74] Here, the IACHR noted that a "systematic pattern or practice . . . tolerated by the state" was a characteristic of enforced disappearances. In *Goiburú*, the IACHR emphasized that the "grave acts" took place in the context of flagrant, massive, and systematic repression. Furthermore, "this operation also benefited from the general situation of impunity of the grave human rights violations that existed at the time."[75] State involvement and complicity was a fundamental feature of this context: "The context in which the facts took place permeates and conditions the State's international responsibility in relation to its obligation to respect and safeguards the rights embodied in Articles 4, 5, 7, 8 and 25 of the Convention."[76]

In *Isayeva*, a leading case of forced disappearance arising in the context of the Chechnya conflict, the ECHR took a different route to the evidentiary challenge of attribution by reversing the burden of proof on attribution. Attribution is distinct in Latin America: where disappearances occur in "broad daylight," kidnappers will be presumed to be agents of the state. The theory in the Latin American context is that, but for the partici-

72. *See* Velásquez-Rodríguez v Honduras, Inter-Am. Ct. H.R. (ser. C). No. 4, ¶¶ 149, 153 (July 29, 1988).
73. *Id.* at para. 155.
74. *Gomes Lund*, Inter-Am. Ct. H.R. No. 219 at para. 90.
75. *See Goiburú*, Inter-Am. Ct. H.R. No. 153 at para. 73.
76. *Id.* at para. 62.

pation or at least acquiescence of the state, no one would risk such an operation given the high chance of detection by the authorities.[77] In *Timurtas*, a case arising out of a disappearance in Turkey, the ECHR linked international responsibility to Article I of the Convention, a general provision requiring state parties to give full effect to the treaty. The ECHR said that where someone taken into custody in good health is then found to be injured, it is incumbent upon the state to provide a plausible explanation, failing which an issue arises under Article 3 of the Convention.[78]

One could read this jurisprudential move in either of two ways. First, the court could be establishing an evidentiary presumption that if someone is injured on the state's watch, the injury is attributable to the state, to which the burden shifts to provide a plausible explanation. Alternatively, one could see the court as reaching for an autonomous obligation of accountability for harm to detainees regardless of whether the acts themselves that directly cause the harm are attributable to the state. The ECHR, here, refers to the landmark IACHR decision in *Velasquez-Rodriguez* and the way the violation of the right to life can be shown as a consequence of a forced disappearance.[79]

Consider *Kilic v. Turkey*, a case involving complaints against Turkey's state security forces, including a failure to investigate. In this case, the ECHR observed that there were common features of a number of situations where public prosecutors had failed to investigate cases allegedly involving members of the security forces, giving rise to the strong implication that there was a pattern of intentionally covering up actions of state security.[80] In this regard, there are relevant precedents arising out of cases involving the war on terror, requiring a right to an effective investigation and reading "anti-impunity" into general provisions of the European Convention on Human Rights. In *El-Masri*, the ECHR concluded "that the summary investigation that has been carried out in this case cannot be regarded as an *effective* one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth."[81]

### C. In Whose Name: A Right to Accountability Beyond the Disappeared?

Yet another dimension of the right to accountability goes to the parameters of enforcement, and the question of who can exercise or enforce such rights. While, as discussed above, the foundation of the right doctrinally rests to a significant extent on an expansive view of the responsibilities of

77. *Id.* at para. 117.

78. *See supra* discussion accompanying Timurtas, note 53.

79. *See* Timurtas v. Turkey, 94 Eur. Ct. H.R. 221 at para. 80 (citing Velazquez-Rodriguez, inter alia).

80. Kilic v. Turkey, App. No. 22492/93 Eur. Ct. H.R. at para. 73 (2000).

81. *See* El-Masri v. the Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. H.R. Rep. at para. 193 (2012); Anguelova v. Bulgaria, App. No. 38361/97 Eur. Ct. H.R. 311 at para. 140 (2002).

the state to protect the "right to life,"[82] the suggestion is that it is the victim whose right to accountability is violated in these cases. There is also a tendency to allow not only next of kin to have standing to enforce the right on behalf of the victim, but also to see the right to accountability as a right that next of kin also possess themselves.[83]

One issue is the risk in simply equating the conception of transitional justice with the currently recognized rights of victims and their families, which seems to be part of a broader phenomenon of the trend towards judicialization. The focus on victims is almost an essential byproduct of these petitions because accountability is being demanded and argued in terms of the rights belonging to the victims and their families. There is, of course, also the question of how close the connection between the petitioner and the victim has to be in order for petitioners to have standing to make claims on the victims' behalf.

The victim's focus often lends a partial and particular perspective on what normatively is at stake in these cases.[84] Given the broader social harm that characterizes systemic wrongdoing, to what extent is the human rights paradigm apt to deal with this phenomenon? Victims and their survivors raise questions regarding the scope of the implicated right; in other words, in litigation where rights to accountability to "next of kin" are often extended.[85] In this formulation, we can see the influence of human rights litigation as well as the centrality of the victim and her justice. The courts are again interpreting the general rights provisions of the treaty schemes, such as regarding the denial of humane treatment to apply to next of kin because of their assessment of the effects of state inaction upon investigations and access to justice.[86]

Beginning with the fundamental "right to life" for "next of kin," the courts have ultimately read other duties for actors into broader principles and rights, such as the right to an investigation. For example, in *Kilic*, the ECHR interpreted the obligation to protect life under Article 2, read together with the state's general duty under Article 1 "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention," as requiring 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."[87] As to the rights of victims' families, the ECHR read the Convention's remedial Article 13 to require a thorough and effective inves-

82. *See* Finogenov and Others v. Russia, App. Nos. 18299/03, 27311/03 Eur. Ct. H.R. at para. 273 (2011). *See also* Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C.) No. 153, ¶¶ 62–63 (2006).

83. *See Anguelova*, App. No. 38361/97 Eur. Ct. H.R. at para. 140 ("In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.").

84. *See* La Cantuta v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 254(12) (2006) (ordering remedy of memorial).

85. *See Goiburú*, Inter-Am. Ct. H.R. No. 153; Baysayeva v. Russia, App. No. 74237/01 Eur. Ct. H.R. at paras. 139–43 (2007) (finding violation of applicant's husband right to be protected from inhuman treatment).

86. *See Baysayeva*, App. No. 74237/01 Eur. Ct. H.R. at para. 104.

87. Kilic v. Turkey, App. No. 22492/93 Eur. Ct. H.R. at para. 78 (2000).

tigation for the victim's brother: "[E]veryone whose rights and freedoms . . . are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The court recognized that "Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention's rights and freedoms in whatever form they might happened to be secured in the domestic legal order . . . ."[88] While Contracting States have "some discretion as the manner in which they conform to their Convention obligations under this provision . . . its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State . . . ."[89]

Drawing on structural arguments, where the importance of the right at stake matters, the ECHR interpreted the parameters of the Convention's remedy: "Given the fundamental importance of the right to protection of life, Article 13 requires in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure . . . ."[90] Thus, *Kilic* shows how the court moves from the "right to life" to imply a right to investigation that is linked to the other rights provisions in the convention. The court appears to be giving a teleological reading to these other rights provisions.

## IV. The Obligation to Accountability in Context

In this Part, I move from issues of jurisdiction and attribution in these complex disappearance cases to the question of the relevant obligation of accountability once a question is before the courts. What standard of conduct does the recognition of the right to accountability imply? While the enforcement of protection of a right to life would imply the existence of *some* justice system, under the Conventions this would seem to be a fairly general duty. In what sense are these universals[91] and, if related to context, then the question becomes, "what counts?" Is state inaction the relevant factor? The courts could assess or view political failure in a number of different ways, for example, in terms of unwillingness or incapacity.[92] Just how does context get brought in? Is its use in defining how much the state is required to do, or which failures engage its responsibility under the relevant norms? Or is it used in deciding what remedies are now required to repair the failures? This is relevant to the extent to which the right to accountability can legitimately constrain political and judicial decision-making at the local level. It may be relatively easy to say that the right to accountability has been violated when there is a complete unwillingness to

88. *Id.* at para. 91.
89. *Id.*
90. *Id.*
91. *See* TEITEL, HUMANITY'S, *supra* note 11.
92. *See* Kevin Davis and Benedict Kingsbury, Obligation Overload: Adjusting the Obligations of Fragile or Failed States, NYU Hauser Globalization Colloquium (2010).

launch any kind of accountability process whatsoever, a sign of a kind of persistent pathology of political culture. But where something is being done or planned to address past wrongdoing by domestic institutions, then the questions of how to evaluate its adequacy and, related to this, what degree of deference to afford domestic decision makers, become acute.

One of the major developments in the current jurisprudence is the turn to criminal law enforcement, apparently requiring as a part of state responsibility that the state undertake to investigate and prosecute individuals, to specify the nature of the relevant offenses, and to specify the particular courts in which such prosecution should take place. Hence, one of the important effects of the trend toward judicialization of these issues has been the individuation of accountability for systemic rights-violating policy in cases of serious rights violations. This individualization is reinforced by related state accountability to organize their judicial apparatus in order to make this happen. Typically states criminalize offenses and assure enforcement of punishment, as a start.[93]

### A. Is There a "Human Right" to Retributive Justice and, Likewise, a State Duty to Prosecute?

The above analysis has considered cases conceptualizing the right to accountability in terms of an obligation to investigate. I now turn to cases that go much further to provide that there is an apparent "duty to prosecute." One can see that at the present moment, the IACHR is more willing to move in this direction than the ECHR. Nevertheless, there are signs of the potential for further consolidation of doctrine.

While one can see that a duty to investigate is, broadly speaking, compatible with and arguably can be supportive of non-criminal law transitional justice processes such as truth commissions, establishing a duty to prosecute implies tilting the transitional justice process towards a particular instrument or approach. The implications for politically bargained amnesties are serious; moreover, how a duty to prosecute interacts with traditional understandings of prosecutorial discretion and how it impinges on prosecutors' decisions—such as to how to allocate scarce resources—requires careful consideration.

For example, in *Goiburú*, the IACHR held that there were violations of peremptory norms of international law (*jus cogens*) involving, in particular, the prohibition of torture and forced disappearance of persons.[94] These offenses are included among the behaviors deemed to harm essential values and rights of the international community. These behaviors entail the activation of national and international measures, instruments, and mechanisms to ensure their effective prosecution and the sanction of the authors, so as to prevent impunity.[95] Given the gravity of these offenses, the norms of international customary and treaty-based law establish the obligation to

93. *See supra* Part III.C.
94. Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C.) No. 153, ¶ 93 (2006).
95. *Id.* at para. 128.

prosecute those responsible.[96] This acquires particular relevance in cases such as *Goiburú*, where the facts occurred in the context of the systematic violation of human rights—offenses constituting crimes against humanity. This designation gives rise to the state's obligation to ensure that such conduct is criminally prosecuted and the perpetrators punished. This goes to the issue of whether, as a general matter, the duty of accountability for violations of *jus cogens* can in and of itself be seen as a *jus cogens* obligation (as in the *Germany v. Italy* case).[97] In *Margus*, the court invoked custom to justify extending the obligation to punish beyond the case of torture (where the *jus cogens* status of the norm is clear) to war crimes generally.[98]

By analogy, if one considers the relationship of this human rights jurisprudence to that evolving under international criminal law, these jurisprudential developments seem compatible with the codification of offenses under the Rome Statute where "unwillingness" or "inability" to prosecute becomes the basis for possible ICC admissibility (where other jurisdictional requirements are met).[99] Consider, if there were no sense of a primary domestic responsibility to prosecute and punish these offenses, to what extent would ICC jurisdiction on 'complementarity' grounds make sense?

In several cases in the Americas there has been a significant effect of adjudication in the regional rights court on the duty to prosecute on local amnesty laws. In *Barrios Altos*, the IACHR found a "self amnesty law" to be in violation of the Convention. Indeed, where the perpetrators use their power to acquire immunity for themselves is the least controversial case—a travesty of the rule of law.[100] Yet, even after a long passage of time, issues might arise as to whether other rule of law values of stability might not be undermined even if there are elements of real illegitimacy and a lack of rule of law in the initial acts. Thus, these questions come up in a later case regarding Chilean amnesty, *Almonacid-Arellano v. Chile*, concerning amnesty for events that took place in 1974.[101] The IACHR held that the murder at issue was a crime against humanity and its punishment was therefore "obligatory pursuant to the general principles of international law."[102] Interpreting across tribunal precedents, the court looked at the constitutive instruments of the international criminal tribunals, as well as

96. *Id.*

97. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, paras. 92–97 (Feb. 3).

98. *See* Margus v. Croatia, 2014 Eur. Ct. H.R. para. 130 (2014).

99. *See* Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 3 (providing that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . . ."); *id.* at pmbl. (stating that "the International Criminal Court . . . shall be complementary to national criminal jurisdictions . . . .").

100. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 75, ¶ 42 (March 14, 2001).

101. *See* Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (series C) No. 154, ¶¶ 44–45 (Sept. 26, 2006).

102. *Id.* at para. 99.

the UN Report on Sierra Leone (among others), and concluded that amnesties have been ruled out in the case of such serious crimes, including crimes against humanity.[103] Drawing added support from the American Convention, Article I requires states to promise to protect these rights: "[C]rimes against humanity are crimes which cannot be susceptible of amnesty."[104]

After *Barrios Altos* and other IACHR decisions involving adjudication in the context of counter terror rights abuses,[105] one can see the impact beyond their original political context. The effect was felt in Argentina in 2005, where its Supreme Court held in *Simon* that there was a progressive evolution of the international law of human rights and that human rights had constitutional rank after its 1994 constitutional reform. Therefore, the state had to reconcile its amnesty laws with the regional rights court's 2001 *Barrios Altos* ruling. Going beyond the facts of *Barrios Altos*, the IACHR in *Vargas-Areco v. Paraguay*[106] similarly required that

> the Court restate . . . the obligation of the State of Paraguay to adopt, within a reasonable time, all measures necessary to identify, impose liability upon and punish the perpetrators of the violations committed in the instant case as regards to criminal proceedings and any other matters resulting from the investigation of the events.[107]

Elaborating on the meaning of accountability in these contexts, the IACHR held in *La Cantuta* that a truth and reconciliation commission did not satisfy the right to accountability, and in *Goiburú* it held that Paraguay's amnesty policy posed an obstacle to the vindication of the right to accountability. Paraguay had promulgated a law to compensate victims of human rights violations, and established a "Truth and Justice Commission to investigate facts that constitute or could constitute human rights violations committed by State or para-State agents between May 1954 and until the promulgation of the Act."[108] These measures were recognized by the court; the IACHR observed that "these laws reflect a willingness to investigate and repair certain harmful consequences of what the State acknowledges were grave human rights violations perpetrated systematically and extensively." Moreover, the court further recognized that the state showed "good faith" in submitting its acquiescence, and that it had helped "define its own historical memory"; nevertheless, it went on to assert that the acts

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103. *Id.* at paras. 95–96, 107–09.

104. *Id.* at paras. 110–114.

105. *See* Martin Bohmer, *The Use of Foreign Law as a Strategy to Build Constitutional and Democratic Authority*, 77 Rev. Jur. U.P.R. 411, 430–32 (2008) (alluding to the *Simon* case and impact of regional IACHR decisions in Argentina). For critique of these developments, see Fernando F. Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 Am. U. Int'l L. Rev. 195 (2007). *See also* Robert Gargarella, *Justicia penal internacional y violaciones masivas de derechos humanos*, in De La Injusticia Penal A La Justicia Social 105 (Roberto Gargarella ed., 2008).

106. *See* Vargas-Areco v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155 (Sept. 26, 2006).

107. *Id.* at para. 155.

108. Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 68 (2006).

of forced disappearances involved an ongoing complex set of criminal acts, citing a range of international case law which applied to the continuing offence "so long as the facts have not been clarified."[109] The court went on to find that the norm of the obligation to investigate and punish those responsible is *jus cogens*.[110]

Indeed, even where the state had convened domestic prosecutions, the regional rights court often challenged these, observing that what is missing is the appropriate characterization of the breach: namely, there was a disparity between the way the facts were categorized domestically as opposed to the way they would be thought of internationally (for example, defined as offenses of "torture" and "forced disappearances"). "International law establishes a *minimum* standard with regard to the correct definition of this type of conduct and the *minimum* elements that this must observe revolve around the understanding that criminal prosecution is a fundamental way of preventing future human rights violations."[111]

Turning to the European jurisprudence, the ECHR tends to use such terms as requiring "effective" and "independent" investigations; the court then asserts that the first implies an obligation of result, the latter an obligation of conduct. These rights of investigation appear to imply the potential of further judicial intervention and in some cases appear to gesture to the necessity of protection via a criminal justice system.

The European context involves one of ongoing democracy-building and of strengthening the rule of law, which is very clear as to countries such as Turkey and Russia. For example, in *Aksoy*, where an individual had an arguable claim that he was tortured by agents of the state, according to the court, an "effective remedy" entailed a thorough and effective investigation capable of leading to the identification and punishment of those responsible (in addition to compensation where appropriate).[112] This was made very clear in *Osman v. United Kingdom*, where the ECHR asserted that "[i]t is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life" by putting in place a generally effective criminal justice system.[113]

There are many complexities in assessing what must be done in any particular case or set of cases. In *Kaya v. Turkey*, which involved killing in violent clashes with security forces, the ECHR asserted: "This involves a primary duty on the State to secure the right to life by putting in place

109. *Id.* at para. 83.

110. *Id.*

111. *Id.* at para. 92 (emphasis added).

112. Aksoy v. Turkey, App. No. 21987/93 Eur. Ct. H.R. at para. 25 (1996); Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1, 36 (1998) (entailing a thorough and effective investigation capable of leading to the identification and punishment of those responsible); Kilic v. Turkey, App. No. 22492/93 Eur. Ct. H.R. at para. 62 (2000) ("This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.").

113. *See* Osman v. United Kingdom, 1998-VIII Eur. Ct H.R. at para. 115 (1998).

effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions."[114]

## V. Judicial Interpretation of the Human Rights Instruments in the Relevant Political Context: a Teleological Approach?

The Latin-American case law reflects the political realities of shared repressive practices which, from the vantage point of hindsight, were continent-wide phenomena endemic in the region's "dirty wars." Indeed, IACHR's case law explicitly takes into account the regionalism of the policy as well as the commitment to political transformation. Thus, for example, in *Goiburú*, which involved a Paraguayan who disappeared in Argentina with the involvement of Argentina's military, the IACHR observed the regional character of the repression as a yet another added basis for the court to review state repressive practice in the context of systemic repression in the state as well as in the region.[115]

There is also the broader relevance of context in the European human rights system. At its origins, the European Convention expressly referred to the post war democratization moment as set out in its preamble, and the text was adopted and animated at a time of democratic transformation.[116] With the passage of time and changes in the region, the European regional rights institution now reflects other democratization aims, such as that of ECHR supervision of younger democracies to meet the standards of mature democracies. This is seen in how much (though not all) of the case law on disappearances comes out of Turkey-Cyprus and Russia-Chechnya. In situations lacking a stable constitutional court, what role for judicialization in the court's interpretation of militant democracy? Certainly one can see this in earlier case law involving Turkey's constitutional constraints on party formation where the ECHR upheld constraints of political association in the name of democracy.[117] In *Timurtas v. Turkey*, the ECHR refers to the jurisprudence of the IACHR,[118] but also invokes European values.[119] In *Timurtas*, the ECHR reiterated its reasoning from *Kurt* and *Cakici v. Turkey*, stressing the fundamental importance of the guarantees contained in

114. Kaya v. Turkey, 2000-III Eur. Ct. H.R. at para. 85 (1997).

115. *See* Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153 (2006).

116. *See* European Convention on Human Rights pmbl., Nov. 4, 1950, E.T.S. No. 005 ("Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy . . . [b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law . . . .").

117. *See* United Communist Party of Turk. v. Turkey, 1998-I Eur. Ct. H.R. *See also* Refah Partisi v. Turkey, 2003-II Eur. Ct. H.R.

118. *See* Timurtas v. Turkey, 94 Eur. Ct. H.R. 221 at paras. 79–80, fn. 1 (2000); Gomes Lund v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 102–107 (2010). *See also* Velasquez-Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

119. *See* Grainne de Burca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 26–31 (2010) (discussing the impact of regional values on cases of international law).

the Convention's Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities.[120] In *Cakici*, the court asserted that the right to life:

> . . . ranks as one of the most fundamental provisions in the Convention and, together with Article 3 of the Convention, enshrines one of the basic values of the democratic societies making up the Council of Europe . . . . The obligation imposed is not simply concerned with intentional killing resulting from the use of force by agents of the State but also extends, in the first sentence of Article 2 §1, to imposing a positive obligation on States that the right to life be protected by law. This requires by implication that there should be some form of effective official investigation when individuals have been killed as result of the use of force.[121]

Legal protection implies procedural obligations. This judicial characterization of the relevant obligation elides the "Catch 22" posed by disappearances. Where there is an "unacknowledged detention," the court recognizes the engagement of responsibility of the respondent state for his death.[122] The logic follows the reasoning of *Velasquez-Rodriguez*, the earliest case on the matter in the IACHR.[123]

The underlying human rights violations that lead to the assertion of a violation of the right to accountability tend to be of a more contemporary vintage in the European context; examples include Bulgaria and the former Yugoslavia.[124] The ECHR has read such legal protection obligations in construing the "right to life" also in cases involving freedom from torture, even when it is unclear whether or not there is state action; this matters less because the courts read procedural rights into Article 13.

In particular, one can see this in recent case law involving abuses in the counterterror campaign, where in addition to the substantive protections, the ECHR recognizes that the right to protection from torture assumes other rights of what they call anti-impunity or accountability.[125] In *El-Masri*, a case involving detention and secret rendition, the state, having been alerted to the allegations:

> . . . should have endeavored to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. . . . [W]hile there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations . . . may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient

120. *See* European Convention on Human Rights, *supra* note 116, at art. 2(1).

121. Cakici v. Turkey, 1999-IV Eur. Ct. H.R. at para. 86.

122. *Id.*

123. *See Velasquez-Rodriguez*, Inter-Am. Ct. H.R. No. 4 at paras. 153-159.

124. Anguelova v. Bulgaria, App. No. 38361/97 Eur. Ct. H.R. 311 at para. 140 (2002).

125. *See* El-Masri v. the Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. Ct. H.R. 80 at para. 192 (2012).

> element of public scrutiny of the investigation or its results to secure accountability *in practice* as well as in *theory* . . . .[126]

Reaffirming the purposes for such requirements, the court said that "impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system." It went on to find that "the inadequate investigation . . . deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal."[127]

The jurisprudence is informed by an understanding of the original mandate of these tribunals as contributing to the rebuilding of the rule of law and stability after periods of widespread political violence and oppression in the region. Thus, consider the post-World War II origins of the European human rights system, and now its renewed salience in the post-Cold War era.[128] Relatedly, consider that the International Criminal Tribunal for the former Yugoslavia had as its stated goal "the restoration and maintenance of the peace" in the region.[129] Therefore, in interpreting the contours of its jurisdiction in *Prosecutor v. Tadic*, the Tribunal's Appellate Chamber sought to understand the authority it exercised expressly in light of the values that it was created to serve and, implicitly, the agreed importance of these to the international community.[130] This kind of substantive, values-based interpretation is important to understanding the legitimate exercise of public authority by international adjudicators in the human rights and international criminal law fields.

### A. Cross-judging: Adjudication Across Human Rights Systems

I now turn to practices across human rights systems, which inform the consolidated doctrine discussed here. Institutions as diverse as the IACHR, the ECHR, the United Nations Human Rights Committee, (arguably) the International Court of Justice,[131] and even the ICC, in applying a cluster of norms relating to "complementarity," have been conceptualizing state responsibility's relation to past human rights abuses in terms of the duty to investigate, prosecute, and remediate.[132] "Cross-judging"[133]—as I

126. *Id.* (emphasis added) (citing *Case of Al-Skeini and Others v. United Kingdom*, App. No. 55721/07 Eur. Ct. H.R. (2011)); *Anguelova*, App. No. 38361/97 Eur. Ct. H.R.; Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* (Mar. 30, 2011).

127. *Id.*

128. *See generally* JOSEPH WEILER, THE CONSTITUTION OF EUROPE (1999).

129. *See* S.C. Res. 827, ¶ 6, U.N. Doc. S/RES/827 (May 25, 1993).

130. *Id. See* Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995).

131. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf.

132. *See* Rome Statute, *supra* note 99, at pmbl. (referring to jurisdiction along complementarity basis).

133. *See generally* Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented But Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959 (2008-2009).

have defined it in a co-authored article of that name—refers to the fact that the approaches of these various tribunals can be self-reinforcing even where they do not explicitly cite or engage in "dialogue" with one another. To appreciate the rise of judicial activism on this front in the IACHR, for example, it is important not just to see the particular context of the American regional human rights regime but also the broader picture just described, and the cross-judging between these courts that appears to have led to the consolidated doctrine regarding accountability in situations of disappearances analyzed here.

Across judicial systems, as discussed above, one can see that there are increasing numbers of disappearance cases both within repressive regimes, as well as in situations of conflict and post-conflict, such as in Chechnya and in contexts of protracted transition.[134] With new actors in the system, as rights holders as well as duty bearers, there are evident consequences for the way international human rights law is made and for related policy sounding in transitional justice. These international human rights cases across tribunals appear to offer relevant sources of law norms regarding the meaning of rights enforcement and protection in transition.

While international law is often characterized as decentralized and lacking in legal integration vis-à-vis domestic law, a countertrend can be identified as "cross-judging," the regular invocation of authority across regions, often outside of hierarchic or other conventions relating to uses of precedent or sources of law.[135] Political and legal context can play an important role in these cases, with an impact on the merits. This development is illustrated in the case law explored here regarding the consolidation and cross-referencing of doctrine across judicial systems concerning accountability for disappearances. So far, there is more cross-judging in the Americas than in Europe. For years, the IACHR relied frequently upon rulings by the ECHR, though recent case law regarding extreme violations reflects the reverse invocation of authority.[136] For example, consider *Margus v. Croatia*, where the ECHR relies on IACHR amnesty doctrine.[137]

Paying attention to both political and legal context in transnational interpretation and comparative law may well contribute to a better understanding of this jurisprudence, because it can help us understand just when, where, and on what basis cross-judging is being deployed.[138] For example, one could see the relevance of judicial contextualization and of contextual similarities in relying on Latin American amnesty cases, wherever similar facts rise out of the Balkans conflict.[139] Cross-judging can

134. *See generally* Bazorkina v. Russia, App. No. 69481/01 Eur. Ct. H.R. (2006) ; Isayeva v. Russia, App. No. 57950/00 Eur. Ct. H.R. (2005).

135. *See* Teitel & Howse, *supra* note 133.

136. For overturning the Croatian amnesty act insofar as it was wrongly applied to war crimes and relying on *Barrios Altos v. Peru*, see Margus v. Croatia, 2014 Eur. Ct. H.R.; Varnava and Others v. Turkey, 2009-V Eur. Ct. H.R. at para. 147.

137. *Margus*, 2014 Eur. Ct. H.R.

138. *See* Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2571–72 (2004).

139. *See Margus* 2014 Eur. Ct. H.R. at 19 (citing *Barrios Altos*).

illuminate where a rights court is deploying a contextual approach, reflecting the relevance of human rights-related authority beyond the particular regional system. In *Gomes Lund*, the IACHR engaged in the judicial practice of interpretation across jurisdictions,[140] relying in part on case law from the ECHR, such as *Kurt v. Turkey*.[141] There, the court asserted that its jurisprudence had been a precursor to the "consolidation of a comprehensive perspective on enforced disappearances,"[142] and in doing so, the court appears to take judicial notice of the widespread systemic nature of such politically authorized violence.[143]

Cross-judging reveals the salience of other contextual dimensions regarding disappearances, such as the impact of the passage of time on the duties of accountability. Landmark case law in Latin America characterized disappearances as "permanent and ongoing," allowing jurisdictional authority despite the passage of time. For example, in *Goiburú*, the court explicitly refers to international case law defining the phenomenon, citing to ECHR cases such as *Cyprus v. Turkey*, *Ivan Smvers*, and *Varnava*. This aspect of the case law reflects the transnational, cross-regional element of rights discourse, as well as appreciation of the distinctive evidentiary and related issues that disappearances pose for accountability, even in different historical contexts.[144]

## VI. Normative Considerations and Principles

Given the complexity and sensitivity involved in regional and international tribunals interacting with domestic institutions—which are concerned with transitional justice or managing security issues with profound political dimensions—what kind of criteria might be appropriate in shaping dialogue between the tribunals and domestic authorities? In what follows, I offer a number of suggestions, informed by the approach to transitional justice developed in my earlier scholarship emphasizing the character of transitional justice as simultaneously both legal and political. The proposed factors identify variables that are of particular relevance to these contexts reckoning with accountability relating to transitional justice, not merely context for transnational courts' legitimacy (such as Slaughter & Helfer with multidimensional factors of comparative legitimacy, and, more recently, Von Bogdandy and Venzke who take account of the transnational judiciary's shifting functionalities).[145]

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140. *See* Teitel & Howse, *supra* note 133, at 962–63.

141. Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1, 36 (1998).

142. *See* Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 153 (July 29, 1988).

143. *See* Gomes Lund v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 103–04 (2010).

144. *See also* David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 407–10 (2006).

145. *See* Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 52–53 (2013); Ruti Teitel, *LJIL Symposium: A Consideration of 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority'*, OPINIO

### A. The Relevance of Context and Capacity

Regional and international tribunals should clearly distinguish between different contexts that have resulted in failures to investigate, prosecute, and remediate. Many, but far from all, of the Latin American cases arose out of a situation where there was complete failure to take any steps toward accountability over decades, despite regime change.[146] Indeed, in this regard, there is a clear correlation between weak states and exogenous international actors' (including courts') involvement in transitional justice.[147] That is, it is far less likely the other way around. The question is what to make of this. It appears that, as an empirical matter, it is in situations of weak and failed states that the courts may have the greatest legitimacy in intervening: breaking political impasse, or at a minimum, signaling abject political failure or political pathologies that are at odds with the development of a human rights culture.

Taking note of context in this way requires a method for assessing weaknesses in the rule of law. One way of doing so would be to take into account the kinds of indicators that have been developed by political scientists.[148] In this area, rule of law appears to have become both the independent and dependent variable. Indeed, one can see that over recent decades, there has arguably been a shift in the nature of the relevant states embarked on these sorts of decisions, a phenomenon upon which I elaborate below.

### B. From Strong- to Weak-State Transitional Justice

Of late, we are seeing a shift from strong- to weak-state transitional justice, with an impact on international judicial intervention.[149] This shift presents a number of consequences of transitional justice. Fletcher and Weinstein conclude, "In all the weak states, the legal system is one institution that is consistently compromised."[150] Often beset by corruption, government interference, poorly trained judges, and lack of due process, these states often fail to operate under rule of law.[151] In looking at the strength

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JURIS (Apr. 9, 2013, 12:00 PM), http://opiniojuris.org/2013/04/09/ljil-symposium-a-consideration-of-on-the-functions-of-international-courts-an-appraisal-in-light-of-their-burgeoning-public-authority; Caron, *supra* note 144, at 422.

146. *See, e.g.*, TEITEL, TRANSITIONAL, *supra* note 7, at 4 (discussing revival of human-rights prosecutions in Argentina after thirty years of junta rule).

147. On the problem of evaluation, see Marek Kaminski & Monika A. Nalepa, *Judging Transitional Justice: An Evaluation of Truth Revelation Procedures* 3 (UC Irvine Center for the Study of Democracy, Working Paper No. 10-01-2004, 2004), *available at* https://escholarship.org/uc/item/9w9270cf (challenging the normative analysis of transitional justice along rule of law lines).

148. On the definition of weak states, see Erick Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527, 549 (2005). *See also* Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SEC. 85, 86–90, 120 (Fall 2004).

149. *See* Fletcher et al., *supra* note 51, at 198–201.

150. *See id.* at 196 (defining weak states as states lacking human resources necessary for a functioning democracy).

151. *Id.* at 197.

of domestic and international justice mechanisms:

> [A] clear trend that emerges from the case studies is that either international pressure or a history of a strong judicial system, with respect for the rule of law, is essential to vigorously implement transitional justice measures such as trials and truth commissions. A country that is more developed appears to have greater leeway to institute its own measures.[152]

Conversely, it is worth considering what light recognizing these new obligations might shed on the current understanding of the meaning of human rights protection and the strength of a human rights enforcement system. Recognizing these new rights and obligations can reveal something about the changing view of human rights and its relationship to state responsibility laws. In other words, insecurity can mean politically authorized violence, but it can also mean (sometimes problematically) an authorized absence or meaningful lack of legal protection.

### C. Partial Compliance/Partial Impunity—Towards a Continuum of Accountability?

Greater care might be taken, however, in intervening where some accountability process has started but has been interrupted or delayed. There may be a number of political and institutional reasons at play, and ideally the court should arguably have an appreciation of these reasons before deciding whether and how to intervene.

There are some judicial opinions that gesture along these lines. In *Goiburú*, for example, the IACHR describes the relevant facts as having occurred within the context of a systematic pattern tolerated by the state; thus, setting up the applicability of a heightened responsibility. As the IACHR explained:

> This case has unique historic importance: the facts occurred *in the context* of the systematic practice of arbitrary detention, torture, execution and disappearance perpetrated by the intelligence and security forces of the dictatorship of Alfredo Stroessner, under "Operation Condor," whose characteristics and dynamics have been described in the proven facts.[153] In other words, the grave acts took place in the context of the flagrant, massive and systematic repression to which the population was subjected on an inter-State scale, because State security agencies were let loose against the people at a trans-border level in a coordinated manner by the dictatorial Governments concerned. . . . The Court . . . finds that the context in which the facts took place permeates and conditions the State's international responsibility in relation to its obligation to respect and safeguard the rights embodied in Articles 4, 5, 7, 8 and 25 of the Convention, with regard to both the aspects acknowledged by the State and those that will be determined in the following chapters on merits and reparations.[154]

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152. *Id.* at 198.

153. *See* Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No 153, ¶ 62 (2006) (internal cross-references omitted).

154. *See id.*

There are situations where the state in question has already taken some steps towards accountability, and the issue before the court becomes whether these steps are sufficient to discharge its obligations under the treaty. Where there is evidence of good faith on the part of the state in some of these situations, the court might remind the state of its responsibilities under the treaty without engaging in a fine-grained judicial determination of exactly what steps must be taken, signaling that the norms of the Convention are at issue but that the state in question has some flexibility to determine the way forward, given the evolving context.[155] One should reconsider along these lines the judicial treatment of justice mechanisms discussed above in *Goiburu*, *La Cantuta*, and *Gomes Lund*.[156]

### D. Structural Considerations: the Relevance of Principles of Subsidiarity and Deference

Both the ECHR and the IACHR have recognized that international human rights systems are subsidiary to domestic systems.[157] Moreover, some appreciation of the nature of the normative relationship is already implied or referenced in the preamble to the American Convention on Human Rights, which refers to international protection as "reinforcing or complementing the protection provided by the domestic law of the American states."[158] One might see the requirement of exhaustion of local remedies as itself reflecting or embodying the principle of subsidiarity.

In *Baysayeva*, the ECHR suggested:

> [T]he rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism; the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case.

This means, in particular, that the court must take realistic account not only of the existence of formal remedies in the legal system of the contracting state concerned, but also of the general context in which they operate.[159] Here, one can see that even in order to decide threshold jurisdictional issues, as courts are required to do within the treaty system, courts must evaluate the relevant political context, and factor it into their

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155. On the problem of compliance in the Americas with IACHR prosecution orders, see Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions* (2010) 12 INT'L J. ON HUM. RTS. 8 (2010) (referring to widely shared resistance to compliance in particular to orders to prosecute).

156. La Cantuta v. Peru, Inter-Am. Ct. H.R., (ser. C) No. 162, ¶ 156 (2006) (emphasis added).

157. *See* Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 438 n.222 (2009). *See also* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 38 (2003).

158. Organization of American States, American Convention on Human Rights pmbl., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

159. Baysayeva v. Russia, App. No. 74237/01 Eur. Ct. H.R. at para. 104 (2007).

decision-making concerning whether to take jurisdiction and within what limits.

Where the right to accountability is being applied in transitional contexts, it may be useful to look beyond the exhaustion of local remedies as a formal doctrine of subsidiarity, and to consider the politics of transitional justice and the recognition of a related margin of appreciation granted to domestic and judicial institutions. For example, some ECHR cases have addressed a range of concerns involving forms of transitional justice, such as lustration purges of Communist and other parties, and degrees of judicial deference to the political party's policy in the relevant state (as in Turkey).[160] To what extent can human rights systems, functioning within regional treaty systems but committed largely to universal human rights, adequately take into account their relevant political contexts?

This concern still leaves open the question of the state's relative capacity to prosecute at a given point in time, as opposed to earlier or later in a transitional process that can be extended, interrupted, or restarted. Judicial intervention at the supranational level may trigger a requirement of a large number of prosecutions, especially in transitional contexts, and in the context of fragile or weak states. This raises the issue of "obligation overload," as articulated by Davis and Kingsbury.[161]

There are real dilemmas and tensions raised by this line of decisions in international rights tribunals. New obligations generated by the judicialization of decision-making concerning justice for past repression arguably involve preempting a set of questions that had been previously seen as a matter of state discretion and political imperative. To decide is to choose the means to advance and protect rights adherence. To what extent does this trend suggest that the state signatory's commitments to adherence and to treaty compliance with domestic effects are now being fully decided by a foreign judiciary? What is the significance of the direction of the judicial orders in these cases? This raises issues about the potential fallout of the judicialization of historically political questions of transitional justice.

### E. Regional Repression, Regional Judicial Response

In Latin America, for example, many of the repressive policies were themselves regional, as the "dirty wars'" persecutory policy was adopted to combat an ostensible regional threat of terrorism. The *Goiburú* opinion recognized that there was complicity, or coordination, between different states and their repressive elements in the region, what was known as "Operation Condor." The transnational persecution policy embedded in "Operation Condor" was justified, the court asserted, because of the seri-

160. Ruti Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, 29 MICH. J. INT'L L. 49, 62–65 (2007).

161. *See* Davis & Kingsbury, *supra* note 92.

ousness of the offense and because the judicial opinion can itself offer a form of remedy.[162]

Here, one can imagine a federalism-type model whereby the regional rights courts mediate between the international-universal and the domestic-local; that is, an approach whereby the model is adapted to a sense of common problems or challenges shared by states in the region that have suffered from a similar past of oppression and similar political pathologies. This approach is reflected in those cases where one can see the regional courts pursuing a teleological (or functional) approach where regional values are being applied to regional problems. Indeed, there are instances where one might imagine that the regional courts could offer a mid-level normativity between international and domestic, especially where states in the region have suffered from a similar past of oppression and political pathology.[163]

### F. The Complementarity Principle—Generalized

Another potential guiding principle here would be "complementarity," by way of analogy with the principle of jurisdiction in the ICC—namely providing that supranational judicial intervention into cases of transitional justice should take better account of prevailing efforts toward justice of different sorts and levels, particularly at the domestic level. In some part, this relates to the earlier exhaustion requirement contemplated regarding admissibility in these Conventions.[164]

As to the "complementarity" norm's meaning, there is little guiding scholarship or case law although there are a variety of positions staked out, including that of "proactive complementarity."[165] Nevertheless, this system also cannot help but raise the question of exactly what duties are triggered, and what rights are protected where states have signed on to commitments to complementarity in the Rome Treaty. Beyond issues of capacity, what is the relevance of legal culture, traditions, and other commitments? An instance of the problem is underway in contemporary situa-

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162. *See, e.g.*, Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153 (2006).

163. *Id.*

164. Article 46 of the American Convention on Human Rights provides:

> (1) Admission by the Commission . . . shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law and (2) The provisions of paragraph 1.a . . . shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Organization of American States, American Convention on Human Rights art. 46, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

165. *See generally* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008).

tions before the ICC, such as the situation in Kenya in the context of its post-election violence. The evolving practice of the ICC and its Prosecutor's Office has begun to shed light on these questions. Of course, properly understood, acknowledgment of potential degrees of complementarity complicates any facile understanding of subsidiarity. Indeed, one might consider these principles as offering alternative approaches to the relationship of the local and the global when it comes to legal intervention.[166]

G. Political Processes of Deliberation and Consensus

The question of how much deference to give to political agreements on questions of justice may well have to take into account the legitimacy of the relevant political processes and agreements at stake. Where judicial intervention would destabilize agreements that have followed regular legislative standards and included the relevant stake holders, there are competing rule of law considerations in this destabilization of existing law (*Planned Parenthood v. Casey* provides a poignant example).[167] Existing statutes of limitations on crimes might offer just one example of such a recognized reliance interest.[168]

A factor for courts to consider is the extent to which these judicial interventions may pose issues going forward regarding state sovereignty and the parameters of political judgment. The jurisprudential developments appear to involve a fundamental redirection of decision-making regarding transitional justice, from the political to the judicialized. There is an evident narrowing of governmental latitude on the question of how to respond to human rights abuses in the context of past conflicts that have left many collective and individual wounds, and sometimes, fractured societies.

This raises the question of the extent to which domestic mechanisms established through political bargaining and deliberation might satisfy the right to accountability. Consider contemporary case law arising out of the Latin American "dirty war" period discussed above; the IACHR held that amnesty policies contravened the American Convention because such laws blocked investigation, and although the country had continued to defy the holding of reinstating criminal jurisdiction, it had nevertheless recently established a truth commission. Hence, in *La Cantuta*, the IACHR rejected

166. *See* LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 18–19 (Rosalind Shaw & Lars Waldorf eds., 2010); Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity, Comm'n on Human Rights, Principle 20, U.N. Doc. E/CN.4/2005/102/Add.1; ESCOR, 61st Sess. (Feb. 8, 2005) (by Diane Orentlicher).

167. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.").

168. For a discussion of Hungarian statute of limitations legislation, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2022–30, 2052 (1997) (arguing that in periods of political change, law is used to play multiple roles, both constraining and enabling).

the Peruvian Truth Commission as inadequate. Moreover, in instances where the state had initiated truth commissions and prosecutions, such as Paraguay, these too were considered unsatisfactory in part because of the failure to characterize the crime adequately. In *Goiburú*, the court asserted that "[i]nternational law establishes a minimum standard with regard to the correct definition of this type of conduct and the minimum elements that this must observe in the understanding that criminal prosecution is a fundamental way of preventing future human rights violations."[169] In *Gomes Lund*, regarding Brazil, the IACHR found that the practice of disappearances itself reflected a violation of a "duty to organize the state" in a way that guarantees rights recognized in the Convention.[170] In recent years, Brazil convened a truth commission which has just issued its report and recommendations,[171] and one wonders whether this would meet the demand of the IACHR.[172] There is considerable pushback from some scholars in the region and a number of state parties to the convention as to whether the IACHR has gone too far.[173]

In the context of the various rights systems wrestling with disappearance and repressive politics, what, if any, political space remains for state-by-state determinations regarding the appropriate direction of accountability? To what extent are there principles that might mediate the demands of human rights and those of transitional politics? One wonders what remains of the South African experience today– perhaps exceptional in garnering a very high level of consensus of a constitutional nature *and* highly inclusive transitional justice processes, which afforded full investigation of the relevant political offenses. Arguably, the courts should take into account the nature of the process that has produced alternatives to criminal justice forms of accountability, including conditional amnesties. Thus, the inquiry would ask, for example, to what extent was the transitional justice decision-making process inclusive, was there extensive deliberation, transparency, or, on the other hand, elements of intimidation or undue influence of holdover officials? The phenomenon here discussed concerns states in fragile political contexts that often have been seen to involve difficult dilemmas and delicate balancing of interests.[174]

Judicialization risks blindness to or even marginalization of the chal-

169. *See* Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153 (2006)

170. *See* Gomes Lund v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 103–04 (2010).

171. *See* Press Release, Organization of American States, IACHR Welcomes Brazil's Truth Commission Report and Calls on the State to Implement its Recommendations (Dec. 12, 2014), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2014/151.asp (describing the Brazilian Truth Commission's latest report, which revealed names of "377 public officials responsible for human rights violations committed at 230 different locations within country during period investigated" and noted that 434 persons were killed or forcibly disappeared).

172. *Id*. *See* Paulo Abrao & Marcelo D. Torelly, *Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice*, *in* AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 178–81 (Francesca Lessa & Leigh A. Payne eds., 2012).

173. For critique of these developments, *see* Basch, *supra* note 105.

174. *See* TEITEL, TRANSITIONAL, *supra* note 7, at 40–41.

lenge of accountability as specifically a challenge of transitional justice.[175] The IACHR has said on multiple occasions that the political conditions in a country do not affect the state's obligations. For example, the *Goiburú* court said, "[i]t was only after 1989, when the Stroessner dictatorship fell, that the investigations in the facts of this case started. Nevertheless, the conditions in a country however difficult, do not release a State Party to the American Convention from its treaty-based obligations."[176] In characterizing the offense as ongoing, the successor regime is also implicated until it meets these obligations. Moreover, even where there had been "acquiescence" by Paraguay, the IACHR held that it was important to have a forum where the actual facts could be made public—namely, via judicialization.[177]

The conclusion arrived at in *Goiburú*—that international law constitutes the "minimum"—suggests that, in the court's view, there is very little room for state-by-state determination of what constitutes the appropriate response in these transitional justice-related cases. What space might be left regarding states' implementation of the means to assure right protections under these treaties? Are all amnesties, no matter whether conditional on particular political tradeoffs, off the table? Is there really a human rights obligation to prosecute all those responsible? To what extent are there any areas of transitional justice that can be left to political judgment?

Moreover, the move to the human rights courts, judicialization, and the ensuing individuation of remedies poses a challenge to the survival of the collective dimensions of transitional justice. The problem raised by individuation through litigation was underscored by Justice Trindade in *Goiburú* writing separately on the trends of "criminalization of grave human rights responsibility," and "international responsibility aggravated by state crime."[178] He calls for a greater convergence between these two, observing that the trend of the IACHR has been to individual criminalization of responsibility of state crimes, resulting in a loss due to the absence of a public hearing. Consider also the trade-offs involved in the judicial rejection of truth commissions as inadequate to discharge responsibility for the right to accountability, as in the case of Peru where an individual record was preferred to a broader societal one.

## Conclusion: Relative Institutional Legitimacy

The complex normative challenges and choices discussed above may ultimately lead us toward a different way of posing the question of democracy—one that brings in considerations broader than democratic consent, such as the relative competence or legitimacy of international courts and

175. *Id.*
176. *See* Goiburú v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153 (2006).
177. *Id.*
178. *Id.*

tribunals. As I elaborated in *Humanity's Law*,[179] the primacy that attaches to human security in the framework of norms currently animating international legal authority may reflect recognition that human security—including elements of legal security (rule of law)—is a predicate for the fulfillment of a broader range of rights, including democratic rights. In this light, it is worth looking at the rise of international adjudication in the post-Cold War world along with the increasing attention on the problem of weak and failed states. The decisions of international adjudicators in the international criminal law and human rights law areas often respond directly to political and legal institutional failures, or gaps at the state level. The authority of international adjudicators may thus be seen as relative to that of other institutions. One can say that this is explicitly contemplated by the conception of "complementarity" that governs the exercise of jurisdiction by the ICC, legitimating the intervention of the court on the basis of the unwillingness or incapacity of domestic institutions. The burgeoning caseloads of the IACHR and the ECHR are concomitant with problems emerging from weak domestic legal systems and specific threats to the rule of law domestically.[180] The role of judicial review and its legitimacy is at the same time circumscribed by principles of admissibility and substantive jurisdiction, and further relativized by domestic politics and the vision of threshold guarantees of the community delimited by the regional covenants.

A final point should be considered that is related to the observation that substantive values have a role in legitimating the authority of international adjudicators. Consider just how judicial discourse shifts power on the one hand—apparently superficially to itself by promoting judicial accountability—and, on the other, by empowering non-state actors who in turn become agents of legitimacy by addressing themselves in various ways to international courts and tribunals, and being addressed by them. International courts and tribunals are well-situated to supply a rights-based discourse at least partly detached or autonomous from national political cultures and constitutionalisms—universal, secular, transnational—and with the authority of high human values. In a world that is interdependent, but not politically integrated, there may be a need for a potentially universal discourse that can still function in a context between different persons—one that comprehends wrongdoing and can be diffused through multiple institutions that would otherwise be isolated or fragmented. It would be a discourse that allows recognition of individual rights, and attribution of individual responsibility and accountability with or without the state, arguably allowing for some change. International adjudicators are

179. *See generally* TEITEL, HUMANITY'S, *supra* note 11.

180. *See, e.g.*, Baysayeva v. Russia, App. No. 74237/01 Eur. Ct. H.R. at 1 (2007); Bazorkina v. Russia, App. No. 69481/01 Eur. Ct. H.R. at 3 (2006); Isayeva v. Russia, App. No. 57950/00 Eur. Ct. H.R. at 3 (2005); Timurtas v. Turkey, 94 Eur. Ct. H.R. at 2–4 (2000); Kurt v. Turkey, 1998-III Eur. Ct. H.R. at 3–5 (1998); Cakici v. Turkey, App. No. 23657/94, Eur. Ct. H.R. at 3 (1999); Aksoy v. Turkey, App. No. 21987/93 Eur. Ct. H.R. at 3.

better situated than many other international institutions to supply this discourse, and the discourse is arguably a source of self-legitimization for international courts.

In sum, given the above analysis of the interpretive and discursive role played by international judiciaries, there are good reasons to be comfortable with current answers to the legitimacy question. Indeed, perhaps, dealing with this question has always been to a greater or lesser degree a relative matter.[181] In some regard, this Article addresses an interaction between legal conceptions of accountability and relevant political conceptions.[182] While, in certain circumstances, we might imagine the legal conception should win out and that political accountability should yield, the result of that inquiry will depend on context. On the other hand, what does not follow is automatic displacement of a worked-out political consensus on what is just with a judicial understanding.

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181. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 30 (2d ed. 1986).

182. *See* Keohane, *supra* note 1.