The Right to Truth in the Fight Against Impunity

By
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INTRODUCTION

Over the last 20 years the "right to the truth" has been a developing concept in international law. In the context of human rights, families have used it to compel states to provide information about missing relatives. At the outset it is important to distinguish the "right to the truth" as a legally enforceable right in international law, from the broader societal interest in knowing the truth, the belief that democracies function best when their constituents have truthful information.[1] International courts are ever mindful of this collective interest in the truth and do their work cognizant that the interest in truth is always greater than the particular dispute between the parties before them. Most proceedings are held in public, and judgments are public documents. The Inter-American Court of Human Rights (IACtHR), for example, has routinely ordered states to publicly acknowledge their violations of international commitments and to publish the court's findings.[2]

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1. "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 3 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES, at 276 (J.B. Lippincott & Co., 1865) (2010).

2. In his separate concurring opinion in the Bámaca case, Judge Ramírez pointed out that the collective right to the truth was satisfied by an individual's right to effective judicial redress in a public forum. *See* Bámaca-Velásquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R. (ser. C)

This article traces the evolution of the "right to truth" as a concept in international law, considers whether it has a correlation in international criminal law, and suggests some of the synergies that exist between parallel enforcement mechanisms in international criminal law, domestic criminal law and human rights. First and foremost, the work of international criminal tribunals provides reliable findings of fact and collections of evidence for use in domestic courts and other forums. Second, international courts adjudicating a state's obligations under human rights instruments have required states to take specific steps related to the criminal investigation and prosecution of serious violations. If this trend continues, international courts may specifically direct International Criminal Court (ICC) state parties to appropriately investigate serious allegations of criminal conduct or, in the alternative, to refer such allegations to the ICC. Finally, judgments in prominent human rights cases can have a declarative effect with respect to those non-grave breaches of provisions of the Geneva Conventions to the extent that they coincide with the violations of human rights being adjudicated.

I.
THE RIGHT TO THE TRUTH IN INTERNATIONAL INSTRUMENTS

On October 12, 2009, the Human Rights Council (HRC) adopted a resolution on the right to the truth, calling upon states to take a number of steps to facilitate efforts by victims or their next of kin to determine the truth about gross violations of human rights. This document is the most recent of a number of international instruments related to an individual's right to know the truth about gross human rights violations. In its resolution, the HRC emphasized that "the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government."[3]

The principle of the right to the truth can be found in several international conventions. Article 32 of the First Additional Protocol to the Geneva Conventions sets forth the general principles governing a state party's obligations related to the missing and the dead. It states that parties "shall be prompted mainly by the right of families to know the fate of their relatives."[4]

No. 70, ¶¶ 19-21 (Nov. 25, 2000) (Ramírez, J., concurring opinion on the judgment on merits of the *Bámaca Velásquez* case).

3. Human Rights Council Res. 12/12, 12th sess., *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Right to the Truth*, A/HRC/RES/12/12, at 3 (Oct. 12, 2009).

4. Article 32 of Protocol 1 states:

> In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

The Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance adopted by the UN General Assembly in December 2006 affirms "the right of any victim to *know the truth* about the circumstances of an enforced disappearance and the fate of the disappeared person."[5] The right has also been the subject of a number of resolutions and declarations by the General Assembly, the Human Rights Council and other international bodies.[6] While resolutions creating the *ad hoc* tribunals do not contain the phrase "right to the truth," much of their work has involved the determination of the truth based on credible and reliable evidence.

II.
OVERVIEW OF THE LEGAL BASES FOR THE RIGHT TO TRUTH

The right to the truth, as a concept under human rights law, describes several legally enforceable rights that empower next of kin to learn the truth about a family member's fate. It was initially used before the IACtHR by families of people who were disappeared. The principles underlying the right have now been recognized by the European Court of Human Rights (ECtHR) and the Human Rights Chamber of Bosnia and Herzegovina (HRCBiH). The right to the truth derives its legal basis as an enforceable right primarily from two underlying categories of protections found in international conventions:

(i) A state's failure to disclose the fate of a person in the custody of the state constitutes inhuman treatment with respect to family members and is a continuing violation of applicable protections against such treatment.

(ii) A state's failure to adequately investigate and prosecute crimes committed against a person in its custody constitutes a violation of family's right of access to justice.

This first foundation, that a state's failure to disclose the fate of a person in its custody constitutes inhuman treatment with respect to family members and is

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 U.N.T.S. 3.

5. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res A/RES/61/177, UN doc. A/HRC/RES/2006/1 (Dec. 20, 2006) (emphasis added). The United Nations Human Rights Committee in applying the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171, has determined that the next of kin of detained and disappeared family members should be considered victims of ill treatment with a right to learn of their family members' fate. Quinteros v. Uruguay, ¶ 14, Comm. No. 107/1981, U.N. Doc. CCPR/C/OP/2 (1983).

6. *See, e.g.*, Human Rights Council Res. 2005/66, 9/11 and 12/12. Resolution 12/12 "[r]ecognises the importance of respecting and ensuring the right to the truth as to contribute to ending impunity and to promote and protect human rights." Promotion and Protection of All Human Rights, Civil, Political Economic, Social and Cultural Rights, Including the Right to Development, Right to the Truth, U.N. Doc. A/HRC/RES/12/12 (Oct. 12, 2009). These resolutions recognize the existence of the right to truth as a concept under international law.

a continuing violation of applicable protections against such treatment, is conceptually straightforward and widely accepted. The IACtHR in *Blake v. Guatemala* considered whether the family of Nicholas Blake, a journalist, had an independently enforceable right to compel the government of Guatemala to investigate his disappearance. Blake and his photographer companion, Griffith Davis, were two Americans who disappeared while on assignment in 1985. For years the Blake family had, with the assistance of the American Embassy, pursued its own investigation into his disappearance without receiving cooperation from the Guatemalan government. The IACtHR found that not only had the government failed to adequately investigate Blake's disappearance, but it had also obstructed the family's own efforts to ascertain the truth. After having established that Blake was killed in March 1985, seven years before Guatemala accepted the court's jurisdiction, the court declared itself incompetent to decide whether Blake's rights had been violated.[7] It went on to consider whether the government's continued failure to account for what happened to Blake constituted a present and ongoing violation of the family's rights under the American Convention on Human Rights (ACHR). The court found that the continued suffering of the family was the direct result of Blake's forced disappearance and the state's failure to investigate. This conduct constituted a violation of Article 5 in relation to Article 1(1) of the ACHR with respect to his family.[8]

The IACtHR in *Villagran-Morales et al. v. Guatemala,* commonly referred to as the "Street Children" case, found that the forced disappearance of several boys who were subsequently found to have been tortured and murdered caused great suffering to their mothers and consequently was a violation of their mothers' rights under Article 5(2) in relation to Article 1(1) of the ACHR.[9] The IACtHR has consistently applied this reasoning in similar cases.[10]

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7. These were Article 7 (right to personal liberty) and Article 4 (right to life). Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

8. Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 114-16 (Jan. 24, 1998). The court also found that the fact that Blake's corpse had been burned and otherwise mistreated in violation of Guatemalan custom contributed to the family's suffering.

9. Villagran-Morales, et al., Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 177, 253.4 (Nov. 19, 1999). In a joint concurring opinion, three judges argued that the mothers were also victims of the crime: "[I]t is impossible not to include, in the enlarged notion of victim, the mothers of the murdered children." *See id.* (Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli).

10. *See, e.g., See* Bámaca-Velásquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 159-166, 230.2 (Nov. 25, 2000); Mapiripán Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 140-46, 335.1 (Sept. 15, 2005); Pueblo Bello Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 163, 296.3 (Jan. 31, 2006); Baldeón-García v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶¶ 127-30, 218.4 (Apr. 6, 2006); Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶¶ 155-63, 262.3 (July 4, 2006); Montero-Aranguren et al v. Venezuela (Detention Center of Catia), Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 53, 160.2 (July 5, 2006) (Venezuela acknowledged its violation of Articles 5 & 1(1)); Goiburú et al. v. Paraguay (Condor), Inter-Am. Ct.

The European Court of Human Rights (ECtHR) took a similar approach in *Cyprus v. Turkey.*[11] This case concerned the continued failure of Turkey to account for persons last seen in the custody of Turkish troops during its military operations in northern Cyprus in the summer of 1974. The court found that the surviving family members "must undoubtedly have suffered most painful uncertainty and anxiety. Furthermore, their mental anguish did not vanish with the passing of time."[12] The court found that Turkey's persistent failure to account for the missing constituted a "continuing violation of Article 3 of the European Convention on Human Rights (ECHR) with respect to the relatives of the Greek-Cypriot missing persons."[13]

The Human Rights Chamber of Bosnia and Herzegovina, the HRCBiH, has taken a similar course and applied Article 3 of the ECHR to cases brought by the families of the missing seeking information about their loved ones.[14] In the *Srebrenica Cases,* the Chamber considered whether the respondent government of Republika Srpska's failure to inform the families of men missing from Srebrenica and last known to be in the custody of its army constituted "inhuman and degrading treatment" of the families in violation of Article 3 of the ECHR.[15]

While the ECtHR in *Cyprus v. Turkey* accepted that family members of a victim may be the subject of an Article 3 violation, it distinguished those persons whose Article 3 rights had been violated from those persons who, despite suffering significant emotional distress at the disappearance of a relative, were not the subject of a violation. The court drew this distinction based on the "existence of special factors which give the suffering of the person concerned a

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H.R. (ser. C) No. 153, ¶¶ 95-104, 192 (Sept. 22, 2006); La Cantuta v. Perú, Inter-Am. Ct. H.R (ser. C) No. 162, ¶¶ 81-98, 122-29, 254.5 (Nov. 29, 2006); Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 113-14 (Sept. 22, 2009); Chitay Nech et al. v. Guatemala, Inter-Am Ct. H.C.R. ¶ 209 (May 25, 2010); and Manuel Cepeda Vargas v. Colombia, Inter-Am Ct. H.R. ¶ 195 (May 26, 2010). *See also* Las Dos Erres Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 213 (Nov. 24, 2009) ("[T]he impunity that persists in the instant case is experienced by the alleged victims as a new traumatic impact, which has been generated by feelings of anger, frustration and even fear of retaliation due to their search for justice.").

11. Cyprus v. Turkey, 2001- IV Eur. Ct. H.R. 1 (2001).

12. *Id.* ¶ 155.

13. *Id.* ¶ 158. Article 3 of the European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

14. *See, e.g.* Srebrenica Cases, Case No. CH/01/8365, *et al.*, Decision on Admissibility and Merits, Bosnia and Herzegovina: Human Rights Chamber for Bosnia and Herzegovina (Mar. 7, 2003). *See also,* Unković v. Bosnia and Herzegovina, Case No. CH/99/2150, Decision on Review, ¶¶ 101-19 (Hum. R. Chamber for Bosnia and Herzegovina, May 10, 2002). Although the chamber found that Article 3 protected families from the suffering caused by the government's failure to provide information, it did not find that the government's conduct, in this particular case, constituted a violation.

15. *Srebrenica Cases*, Case No. CH/01/8365, ¶191.

dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation."[16] The essence of the Article 3 violation is not as much the actual disappearance but rather in the state's reaction to the family's efforts to obtain information.[17]

The HRCBiH, in an effort to bring greater precision to the task of identifying claimants who were the subject of Article 3 violations, articulated two sets of factors to be examined by the court, one related to the claimant and the other to the respondent. With respect to the claimant these factors include: gravity of the emotional distress; relationship to the missing person; whether the claimant witnessed the underlying criminal act; and efforts made by the claimant to learn the fate of their loved one.[18] With respect to the respondent, these factors include: the respondent's response to inquiries; efforts to conduct a meaningful investigation; the amount of information provided; the credibility of any explanations offered; and the respondent's role in the underlying criminal act.[19]

It is now settled law that a state's continued refusal to investigate facts surrounding a serious violation of a human right constitutes inhuman treatment with respect to the victim's family and hence an ongoing violation of their protection against such treatment. Article 5 of the African Charter on Human and People's Rights would afford a similar basis for claims under a right to the truth.[20]

The second basis upon which families have demonstrated a legally enforceable right to compel a state to provide information about a missing relative rests upon the state's obligation to provide effective access to justice through a judicial determination of their rights. With respect to the relatives of Blake, the IACtHR found that they had an enforceable right under Article 8(1)

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16. *Cyprus*, 2001- IV Eur. Ct. H.R. 1, ¶ 156.

17. *Id.* ¶ 157 ("In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time.").

18. *Unković*, Case No. CH/99/2150, ¶ 114.

19. *Id.* ¶ 115.

20. Article 5 states:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal states. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986). It is important to note that the definition of "inhuman treatment" under human rights law is different from the definition used in international criminal law. In international law, inhuman treatment has been defined as "acts or omissions that cause serious mental or physical suffering or injury or constitute a serious attack on human dignity." Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 442 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

of the Convention[21]:

> [A]rticle 8(1) of the Convention also includes the rights of the victim's relatives to judicial guarantees, whereby "[a]ny act of forced disappearance places the victim outside the protection of the law and causes grave suffering to him and to his family." . . . Consequently, Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death . . . effectively investigated by the Guatemalan authorities [and] to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained.[22]

The court, in its admittedly broad interpretation of Article 8(1), relied on what it considered the "letter and spirit" of the article when considered in the context of Article 29(c)'s interpretive mandate that no provision of the convention be understood as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democratic form of government."[23] The court did not find any violation of Article 25(1)'s right to effective judicial recourse, given the Blake family's failure to initiate formal proceedings before any Guatemalan court.[24]

In cases where families have sought judicial recourse, courts have consistently found that the failure to meaningfully investigate a disappearance constituted a violation with respect to next of kin of "the right to a fair trial and the right to judicial protection enshrined in Articles 8(1) and 25(1) of the ACHR in relation to the general obligation to respect and guarantee the rights embodied in Article 1(1) thereof."[25]

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21. Article 8(1) of the American Convention on Human Rights states:

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

American Convention on Human Rights, *supra* note 7 (emphasis added).

22. Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 97 (Jan. 24, 1998) (quoting Article 1(1) of the American Convention on Human Rights).

23. *Id.* ¶ 96. Judge Alejandro Montiel-Argüello, in his dissent, disagreed with this broad interpretation and characterized what happened to the *Blake* family differently from the majority: "What we have before us, then, is not a violation of a right, but the consequence of a violation." *See id.* ¶ 11 (Montiel-Argüello, J., dissenting).

24. *Id.* ¶¶ 114-16. The court did not find a violation of Article 25(1)'s right to an effective remedy because the Blake family never initiated any judicial action before a Guatemalan court. *Id.* ¶ 104.

25. Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 262.4.(July 4, 2006); *See also id.*, ¶¶ 170-206; Villagran-Morales, et al., Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 253.6 (Nov. 19, 1999); Bámaca-Velásquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 195, 230 (Nov. 25, 2000); Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 51.2(c) (Mar. 14, 2001); Mapiripán Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 195-241, 335.5 (Sept. 15, 2005); Pueblo Bello Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 169-212, 296.4 (Jan. 31, 2006); Baldeón-García v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶¶ 139-69, 218.5 (Apr. 6, 2006); Montero-Aranguren et al v. Venezuela (Detention Center of Catia), Inter-Am.

The ECtHR came to a similar conclusion with respect to Article 13 of the ECHR – the parallel provision to Articles 8 and 25 of the ACHR. In *Cyprus,* the court concluded that Turkey's failure to provide Greek-Cypriots with a remedy to contest interference with their rights under Article 8 of the ECHR and Article 1 of Protocol 1 constituted a violation of Article 13.[26]

Although the ECtHR found that Turkey failed to provide an effective remedy for claimants to pursue their rights under Article 8 of the ECHR, it deemed it unnecessary to make specific findings as to whether Article 8 had itself been violated, as the protected right was sufficiently similar to the protections granted under Article 3 for which the Court did find a violation.[27] The HRCBiH would, on its own initiative, consider whether Article 8 of the ECHR applied when family members sought information about the missing. The Chamber relied in large part on an ECtHR case, in which the court found that a state's refusal to give the claimant access to official records of his foster care constituted a breach of Article 8 when it determined:

> [T]hat information concerning the fate and whereabouts of a family member falls within the ambit of "the right to respect for his private and family life," protected by Article 8 of the Convention. When such information exists within the possession or control of the respondent Party and the respondent Party arbitrarily and without justification refuses to disclose it to the family member, upon his or her request, properly submitted to a competent organ of the respondent Party or the Red Cross, then the respondent Party has failed to fulfill its *positive* obligation to secure the family member's right protected by Article 8.[28]

The Chamber characterized the obligation as a positive one, requiring a state to actively investigate the matter and to provide the family with information.[29] The IACtHR has noted that the obligation of a state to meaningfully investigate gross human rights violations is not discharged by a non-governmental truth commission, however thorough its work may be.[30]

Ct. H.R. (ser. C) No. 150, ¶¶ 53, 160.2 (July 5, 2006); Goiburú et al. v. Paraguay (Condor), Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 111-33, 192 (Sept. 22, 2006); and La Cantuta v. Perú, Inter-Am. Ct. H.R (ser. C) No. 162, ¶¶ 81-98, 135-61, 254.6 (Nov. 29, 2006).

26. Cyprus v. Turkey, 2001- IV Eur. Ct. H.R. 1, ¶192 (2001). Articles 7 and 26 of the African Charter provide a similar legal basis.

27. *Id.* ¶ 161.

28. Unković v. Bosnia and Herzegovina, Case No. CH/99/2150, Decision on Review, ¶ 126 (Hum. R. Chamber for Bosnia and Herzegovina, May 10, 2002) (emphasis added).

29. *See* Srebrenica Cases, Case No. CH/01/8365, *et al.*, Decision on Admissibility and Merits, Bosnia and Herzegovina: Human Rights Chamber for Bosnia and Herzegovina, ¶ 181 (Mar. 7, 2003) ("[T]he Chamber concludes that the respondent Party has breached it positive obligations to secure respect for the applicants' rights protected by Article 8 of the European Convention in that it has failed to make accessible and disclose information requested about the applicants' missing loved ones."). Having found that Republika Srpska had breached its obligations under Articles 3 and 8 with respect to the survivors, the Chamber found that such survivors had the right to "an effective remedy" as guaranteed by Article 13 of the ECHR. *Id.* ¶ 192.

30. *See* Las Dos Erres Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 232. (Nov. 24, 2009).

Where legislation, such as an amnesty law, interferes with this right of access to justice, the IACtHR has found a violation of Article 2 of the ACHR. In *La Cantuta*, the court found that the failure of Peru to amend its amnesty laws constituted a breach of Article 2 in relation to Articles 8 and 25, as well as Articles 4, 5, 7 and 1, to the detriment of the families.[31]

A. The Right to the Truth as the Right of Access to Justice

The Inter-American Commission on Human Rights (Inter-American Commission) has alleged on several occasions that there exists an autonomous right to the truth in the ACHR. The IACtHR considered this position in *Blanco-Romero et al. v. Venezuela*, when the Inter-American Commission asserted that Venezuela's failure to account for three men who disappeared in 1999 constituted a violation of this autonomous right. Despite Venezuela's acknowledgement that it had violated the right to the truth with respect to the families of the men, the court stated:

> The Court does not consider the right to know the truth to be a separate right enshrined in Articles 8, 13, 25 and 1(1) of the Convention, as alleged by the representatives, and, accordingly, it cannot find acceptable the State's acknowledgment of responsibility on this point. The right to know the truth is included in the right of the victim or of the victim's next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution.[32]

The IACtHR made similar findings in *Castillo-Páez v. Peru.*[33]

In 2001, in the case of *Barrios v. Peru,* the state recognized its responsibility under international law with respect to the killing of fifteen people by members of its military intelligence. In acknowledging the veracity of the facts as alleged, and recognizing the violations of international law, Peru accepted that it had violated the right to the truth with respect to the families of the victims. The court pointed out in its decision that despite this acknowledgement by Peru:

> [T]he right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.[34]

By framing the right to the truth in the broader context of the right of access to justice, the court is able to require states not only to adequately

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31. La Cantuta v. Perú, Inter-Am. Ct. H.R (ser. C) No. 162, ¶ 189 (Nov. 29, 2006).

32. Blanco-Romero v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 62 (Nov. 28, 2005).

33. Castillo-Páez v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 86 (Nov. 3, 1997).

34. Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 48 (Mar. 14, 2001). *See also* Pueblo Bello Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 219 (Jan. 31, 2006); Chitay Nech et al. v. Guatemala, Inter-Am Ct. H.C.R. ¶ 206 (May 25, 2010).

investigate the circumstances surrounding a gross violation but also to mandate that they undertake prosecutions and disciplinary actions warranted by the investigation. By requiring a full exposition of the clandestine event in the venue of a public domestic proceeding, the court ensures not only the right to truth but the right to justice. In other words, the families of victims not only have the right to know the truth but also have the right to know that justice has been done.

In *Bámaca-Velásquez v. Guatemala,* the Inter-American Commission described the right as one held by family members as well as by society as a whole.[35] The commission characterized the collective nature of the right as the right of society to "have access to essential information for the development of democratic systems."[36] The IACtHR implicitly rejected the enforceability of this collective aspect of the right.[37]

However, in November 2009, the court in *Los Dos Erres* returned to the collective dimension of the right, noting its importance, but suggesting that it was already served by remedies the court ordered on behalf of the individual claimants.[38]

> The Court considers that in a democratic society the truth on grave human rights violations must be known. This is a fair expectation that the State must satisfy, on

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35. Bámaca-Velásquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R., (ser. C) No. 70, ¶ 197 (Nov. 25, 2000).

36. *Id.*

37. *Id.* ¶¶ 199-202. The importance of the collective dimension of the right to the truth and its place under the ACHR was discussed more fully in Judge Ramírez's concurring opinion:

> 19. [T]he so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the right to know the reality of what has happened constitutes a human right that is immediately extended to the judgment on merits and the reparations that arise from this.
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> 20. In the Court's judgment to which this opinion is associated, the Court has confined itself to the individual perspective of the right to the truth, which is the one that is strictly linked to the Convention, because it is a human right. Accordingly, in this case, this right is contained or subsumed in another that is also a subject of this judgment: that corresponding to the investigation of the violating facts and the prosecution of those responsible. Thus, the victim – or his heirs – has the right that the investigations that are or will be conducted will lead to knowing what "really" happened. The individual right to the truth follows this reasoning, which is supported by the Convention and, is based on this, by the Court's recognition in its judgment.

See Separate Concurring Opinion of Judge Sergio Garciá Ramírez on the Judgment on Merits of Bámaca Velásquez v. Guatemala, No. 70, ¶¶ 19-21. Judge Ramírez went on to point out the court's order requiring a public investigation "also allows society's demand to know what has happened to be fulfilled."

38. These remedies included: conducting an investigation; publishing the IACtHR's judgment (factual sections); showing a documentary about the massacre; conducting a public ceremony; building a monument commemorating the event; and creating a web page. Las Dos Erres Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 310 (Nov. 24, 2009).

> the one hand, through the obligation to investigate the human rights violations, and on the other hand, through the public disclosure of the results of the criminal and investigation processes. This requires the State to procedurally determine the patterns of joint action and of all of the people who in some manner participated in said violations, and their corresponding responsibility, as well as to redress the victims of the case.[39]

III.
OVERVIEW OF THE JURISPRUDENCE OF INTERNATIONAL CRIMINAL TRIBUNALS

A. The International Criminal Tribunal for the former Yugoslavia Facilitates Victims' Access to Truth

Early in its work, the ICTY appreciated its important role in establishing the truth based upon credible and reliable evidence.[40] While adjudicating contested facts based upon reliable evidence remains a paramount task in the ICTY's work, there are limitations on the scope of its inquiry. These limitations are described in its foundational documents.

The UN Security Council, having determined that widespread violations of international humanitarian law in the former Yugoslavia constituted a serious threat to international peace and security, concluded that taking effective measures to bring the perpetrators of these crimes to justice would contribute to the restoration and maintenance of peace.[41] In adopting the Statute of the

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39. *See also id.* ¶ 149.

40. Larry D. Johnson, a lawyer who worked on the original design of the ICTY, offered his perspective in a reflection ten years after the ICTY's establishment: "One of the Tribunal's major contributions to reconciliation in the region is to uncover the facts, find the truth, hold perpetrators accountable and refute those who deny that such atrocities ever occurred." *See* Larry D. Johnson, *Ten Years Later: Reflections on the Drafting*, 2 J. INT'L CRIM. JUST. 368, 378 (2004).

The Trial Chamber in *Akayesu* described this process:

> In its assessment of the evidence, as a general principle, the Chamber has attached probative value to each testimony and each exhibit individually according to its credibility and relevance to the allegations at issue. As commonly provided for in most national criminal proceedings, the Chamber has considered the charges against the accused on the basis of the testimony and exhibits offered by the parties to support or challenge the allegations made in the Indictment. In seeking to establish the truth in its judgment, the Chamber has relied as well on indisputable facts and on other elements relevant to the case . . . .

Prosecutor v. Akayesu, Case No. ICTR IT-96-4-T, Judgment, ¶ 131 (Sept. 2, 1998).

41. *See* S.C. Res. 808, U.N. Doc. S/RES/808(808) (Feb. 22, 1993):

> *Determining* that this situation constitutes a threat to international peace and security,
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> *Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,
>
> *Convinced* that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace . . . .

Tribunal, the UN Security Council stated it was establishing "an international tribunal for the *sole purpose* of prosecuting persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia."[42]

The UN Security Council designed the ICTY in such a way that it had jurisdiction to adjudicate the criminal responsibility of perpetrators. Implicit in this jurisdiction was that such a tribunal would adjudicate based upon the truth as revealed by a careful examination of credible and reliable evidence. Although it might be argued that peace and security would have been equally served by a more comprehensive fact-finding process such as a truth commission, the Security Council placed the truth-finding process within the walls of a courtroom in which individual criminal responsibility would be determined.[43] Implicit in its choice was the Security Council's determination that the ICTY's ability to impose punitive sanctions on those most responsible for violations of international law would contribute to the restoration of peace and security.

The truth-seeking process in the *ad hoc* tribunals is bounded by the criminal responsibility of the individual before the court with respect to the specific crimes charged. The parameters of the exercise are no broader. An international criminal trial will not inquire or adjudicate matters not directly related to the crimes charged in the indictment; it will not inquire or adjudicate the responsibility of those other than the persons charged in those crimes unless absolutely necessary.[44] What it will do is carefully examine the allegations in an

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Similar rationale was applied in the case of Rwanda. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

42. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (emphasis added). *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 12, U.N. Doc. S/25704 (May 3, 1993) ("The Security Council's decision in resolution 808 (1993) to establish an international tribunal is circumscribed in scope and purpose: the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.").

43. While the UN Security Council did establish a Commission of Experts as an impartial fact-finding body, such was done with a view toward providing the Secretary-General with reliable information related to ongoing violations of international law. *See* S.C. Res. 780, ¶ 4, U.N. Doc. S/RES/780 (Oct. 6, 1992).

44. It would be fundamentally unfair to require a defendant to face factual allegations any broader than those directly related to the crimes with which he is charged. This is true even if a defendant welcomes the opportunity to do so. On 15 February 2010, the *Karadžić* Chamber held a hearing during which Karadžić stressed his desire that the trial explore the entire Yugoslav crisis. He was reminded by Judge Kwon that the purpose of the trial was confined to whether he was guilty of the crimes charged in the indictment. *See,* Prosecutor v. Karadžić, ICTY, Case no. IT-95-5-T, Feb. 15, 2010, transcript at 764.

> **Karadžić:** We have to establish all the facts of the events and actually shed full light on the events in Srebrenica. So it is very important where the weapons came from and it is important because we want to show and we want to question how unbiased can representatives of such countries be as witnesses in this trial.
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> **Judge Kwon:** Mr. Karadžić, I would like to remind you that the purpose of this trial is to judge whether you are guilty of charges as alleged in the indictment. And this is not

indictment and adjudicate the truth of those allegations based upon reliable evidence – and to the high standard of proof beyond reasonable doubt.

Despite this statutory limitation, the tribunal acknowledged its broader "truth finding" role early in its work. In 1996, when the prospect of bringing Radovan Karadžić and Ratko Mladić before the International Tribunal for the former Yugoslavia seemed unlikely, the Trial Chamber held a hearing pursuant to Rule 61 of the Rules of Procedure and Evidence, during which the Chamber reviewed the evidence supporting the indictment. In its decision the Chamber stated:

> Rule 61 proceedings permit the charges in the indictment and the supporting material to be publicly and solemnly exposed. When called to appear by the Prosecutor, the victims may use this forum to have their voices heard and to live on in history. International criminal justice, which cannot accommodate the failures of individuals or States, must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility.[45]

The ICTY, within both the confines of its mandate from the Security Council and within the confines of adjudicating the criminal responsibility of individuals, has made an important contribution to both the right to the truth held by the families of victims and the broader societal interest in the truth about the conflict.[46] To date, the work of ICTY has resulted in the indictment of 161 persons. It has completed 88 trials and concluded the cases against 121 defendants. Defendants have included low-level camp commanders, former heads of state, and military chiefs. Judges of the Tribunal have considered evidence and made factual findings related to events prior to the conflict in 1989 and up until after the Kosovo conflict in 1999. All aspects of the war have been examined in careful detail.

During the course of these trials the sworn testimony of victims, co-perpetrators, international interlocutors, and defendants have been recorded. In some cases defendants have pled guilty, expressing remorse for the crimes they committed. The ICTY has gathered and preserved large volumes of documentary evidence. These documents include military records, transcripts of official meetings, and the intercepted communications of key protagonists. Exhumation work has helped identify and return the mortal remains of thousands of victims. The Office of the Prosecutor has its own demographic unit that has recently completed a comprehensive study of all available data

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> an opportunity for you to produce a white book of all the events that took place at the time. And I would advise you to concentrate on defending yourself against the charges in the indictment.

45. Prosecutor v. Karadžić and Mladić, Case no. IT-95-5-R6, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996).

46. For an overview of the contribution of the *ad hoc* tribunals' to the broader societal interest, *see* NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 53-56 (2007).

regarding the number of people killed, missing or displaced.[47] This work has been painstakingly undertaken and represents the most reliable report of the number of people affected by the conflict. Early judgments of both *ad hoc* tribunals made comprehensive findings related to the conflicts in general.

One of the important contributions of the *ad hoc* tribunals is their findings with respect to non-state actors. In both the former Yugoslavia and Rwanda, many of the crimes were committed by paramilitary organizations that did not have clear ties to the state. Such groups have featured prominently in trials at both *ad hoc* tribunals and in judgments containing factual findings that may be relevant to issues of state responsibility in other forums.

Some defendants in the process of pleading guilty have given firsthand accounts of the crimes they participated in and some have identified the location of mass graves.[48] Trial chambers have recognized the important historical significance of this.[49] Emir Suljagić, a journalist and one of the few men to survive Srebrenica, commented on the significance of Dragan Obrenović's plea:

> [T]he confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgement I have been looking for these past eight years. While far from an apology, these admissions are a start. We Bosnian Muslims no longer have to prove we were victims. Our friends and cousins, fathers and brothers were killed – and we no longer have to prove they were innocent.[50]

The *ad hoc* tribunals have together built a considerable body of jurisprudence that has brought maturity to the work of the Nuremberg and Tokyo Tribunals. Crimes that were vaguely defined in international law now have precise definitions with clear examples guiding their application. Crimes of sexual violence and crimes against women now have a clear place among other international crimes. The work of the tribunals is accessible to the families of victims and others through comprehensive outreach initiatives, such as a web portal in the native languages of victims and regional programs designed to

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47. Jan Zwierzchowski and Ewa Tabeau, *The 1992-95 War in Bosnia and Herzegovina: Census Based Multiple System Estimation of Casualties Undercount* (Feb. 1, 2010) (unpublished manuscript presented at the conference on "The Global Costs of Conflict" at the German Institute for Economic Research) (on file with author).

48. Prosecutor v. Momir Nikolić, Case no. IT-02-60/1-S, Sentencing Judgment, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia 2 Dec. 2003). *See generally* COMBS, *supra* note 46.

49. Prosecutor v. Momir Nikolić, ¶ 145.

> The Trial Chamber finds that Momir Nikolić's guilty plea is significant and can contribute to fulfilling the Tribunal's mandate of restoring peace and promoting reconciliation. The recognition of crimes committed against the Bosnian Muslim population in 1995 – crimes that continue to have repercussions into the present – by a participant in those crimes contributes to establishing a historical record.

See also Prosecutor v. Dragan Obrenović, Case no. IT-02-60/2/S, Sentencing Judgment, ¶ 116 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 2003).

50. Emir Suljagić, *Truth at The Hague,* N.Y. TIMES, June 1, 2003, at 13, *available at* http://www.nytimes.com/2003/06/01/opinion/truth-at-the-hague.html.

disseminate information about the tribunals' work.

1. *Victims' Formal Rights Before the International Criminal Court*

The International Criminal Court has formally granted victims the right to participate in trials even if they are not called as witnesses. This right of participation is a fundamental shift from the ICTY approach adopted from adversarial systems in which the prosecutor is considered the representative of "the people," including the victims of crimes. This shift is due to an evolving concept of restorative justice which in part seeks to empower victims with an active role in criminal proceedings.[51]

The precise form a victim's participation should take in order to remain consonant with other important objectives of the criminal justice process, such as a fair trial for the accused, was the subject of much debate in the Rome Conference. This debate has continued in the jurisprudence of the court. In the *Lubanga* case, the Appeals Chamber resolved some of the conflicting positions and brought greater clarity to what qualifies a person as a "victim" within the meaning of the Article 68(3) of the statute and rules 85 and 89(1) of the Rules. It gave the following definition of a victim with the right of participation:

> (i) "Victim," when used to refer to a natural person, identifies those persons who have suffered either direct or indirect harm which has a demonstrable link to the crimes charged.[52]
>
> (ii) "Victim," when used to refer to an organization or institution, identifies those entities which have suffered direct harm which has a demonstrable link to the crimes charged.[53]

The Appeals Chamber went on to find that in order to give meaningful effect to Article 68(3) of the Statute, victims should have the right to tender evidence in the case or oppose the admission of evidence tendered by another party.[54] The right is not an unfettered right, and victims must demonstrate how their particular interest in the evidence or issue under consideration by the chamber is affected by the outcome.[55] What impact victim participation will

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51. *See, e.g.*, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res A/RES/40/34 (Nov. 29, 1985).

52. Prosecutor v. Lubanga, Case no. ICC-01/04-01/06OA9OA10, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 38, 64 (July 11, 2008). In paragraph 32, the Appeals Chamber used the example of a child soldier to illustrate the difference between direct and indirect harm – the child soldier suffers direct harm while his parents suffer indirect harm.

53. *Lubanga*, ¶ 30.

54. *Id.* ¶¶ 97-98.

55. *Id.* ¶ 99. In paragraph 104, the Appeals Chamber gave its approval to the procedure devised by the Trial Chamber in which six factors would delineate a victims right to participate: i) a discreet application; ii) notice to the parties; iii) demonstration of the personal interests that are

have on judgments rendered by the ICC remains to be seen, but incorporating victims into the very process of a criminal trial adds an entirely new dimension to international criminal trials.

IV.
IDENTIFYING THE SYNERGIES

The comprehensive battle against impunity is fought on many fronts. Some approach the problem from the perspective of individual responsibility for international or domestic crimes. Others approach it from the perspective of a state's international commitments. Cases can be initiated by international prosecutors against individuals, by one state against another state, or by an individual claiming a violation of a recognized human right. While each of these mechanisms has proven effective on its own, synergies exist between them, facilitating each individual effort and creating new avenues to combat impunity. The following are some of the synergies that exist between these different mechanisms.

A. Synergy No. 1: The Work of International Criminal Courts can be the Basis of Domestic Criminal Prosecutions and Cases Adjudicating State Responsibility

The adjudication of an individual's criminal responsibility makes a number of constructive contributions to the right to the truth in both the individual and collective sense of the right. All of the ICTY's judgments are public. They set out in detail the trial chamber's assessment of the evidence it considered. These judgments, whenever possible, make specific findings as to the identities of living or deceased victims, unless their identity is protected, as well as to the crimes perpetrated against them. Given the ICTY's mandate to focus on those most responsible for these crimes, trials have most often focused on the individual responsibility of senior political, military, and police officials.

The findings of the ICTY are carefully reasoned, and other international courts have relied upon them when adjudicating claims of state responsibility. For example, the International Court of Justice (ICJ) in the *Bosnia v. Serbia* genocide case relied upon final judgments of the ICTY. The court commented that, "it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial."[56] Similarly, the HRCBiH relied on factual

affected by the specific proceedings; iv) compliance with disclosure obligations and protective measures; v) determination of the appropriateness of the proposed participation; and vi) consistency with the rights of the accused and a fair trial. For a more detailed discussion of victim participation at the ICC, *see* Matthew Gillett, *Victim Participation at the International Criminal Court*, 15 AUSTL. INT'L L.J. 29 (2010).

56. Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 1, ¶ 223 (Feb. 26, 2007).

findings of the *Krstić* chamber in the *Srebrenica Cases*.[57] The judgments of international criminal courts can and should be employed by persons alleging state violations of international covenants whenever relevant. International human rights courts employing lower standards of proof than those used in criminal trials can safely rely on the findings in these criminal judgments.

What use a domestic criminal court can make of these judgments is less clear. Although international criminal courts assess evidence at the same high standard as national courts, fairness requires that a defendant have a meaningful opportunity to examine and contest the evidence. While it would be unfair for a national court to rely on findings particular to the defendant before it, such courts could take judicial notice of ancillary facts not directly related to the defendant's responsibility. For example, facts related to the context and character of the overall conflict.

In addition to judgments, the evidence adduced during an international criminal trial is often of a type and quality that makes it valuable in other proceedings. This is particularly true in cases addressing state responsibility. When the UN Security Council established the *ad hoc* tribunals it required that member states cooperate with the tribunals.[58] This has given judges the power to compel states to provide documents. Some of these documents have proven to be very probative of core issues related to the conflict and are documents which, absent an order of the court, may never have been made public. Although this power has most often been invoked by the Prosecution with applications under Rule 54 *bis*, it has also been used effectively by defendants.[59]

In addition to the judgments and evidence adduced at trial, the Office of the Prosecutor (OTP) has undertaken comprehensive investigations into important events that took place during the Balkan conflict. The ability of an international prosecutor to collect evidence from a variety of sources is an important tool in truth-seeking, and one not ordinarily available to individual complainants in human rights cases. The OTP now has a formidable collection of evidence covering the entire period of the conflict.

In its work, the ICTY has undertaken large exhumation projects to recover, identify, and forensically examine mortal remains. It has worked in cooperation with Physicians for Human Rights, the International Commission on Missing

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57. *See, e.g.*, Srebrenica Cases, Case No. CH/01/8365, *et al.*, Decision on Admissibility and Merits, Bosnia and Herzegovina: Human Rights Chamber for Bosnia and Herzegovina, ¶¶ 15-28 (Mar. 7, 2003).

58. Article 29 of the ICTY Statute states:

> 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
>
> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber . . . .

59. Radovan Karadžić currently has several pending Rule 54 *bis* applications seeking to compel a number of states to produce documents he argues are essential to his defense.

Persons, and national missing person commissions. This combined work has enabled the return of the remains of thousands of victims, along with detailed information about how they died, to the victims' families.

Most of this evidence will be stored in publicly accessible archives. While the full significance of this evidence may only be appreciated after years of scholarly study, some evidence such as the "Scorpion" video depicting the summary execution of men and boys from Srebrenica has the power to immediately and dramatically alter the public discourse.[60] Discussions are presently underway to determine where a repository of the Tribunal's archives will be located and how it will be administered.[61] While the physical location of the archive is still to be decided, there is a firm institutional commitment to the principle that it will be accessible to all.[62]

Access to this archive will help close an impunity gap that presently exists with respect to perpetrators of serious crimes in the former Yugoslavia. Many of these perpetrators now live among the Yugoslav diaspora. They have escaped justice before the ICTY because they fall below the threshold for prosecution established by the UN Security Council. They continue to escape justice where they currently live because local authorities do not know about their past or because an investigation into crimes in the former Yugoslavia is beyond the local officials' capacity. Cooperation that helps local law enforcement build upon the work of the ICTY can close this gap for many perpetrators.

ICTY evidence is already being used for defendants that, despite having been indicted in the ICTY, have been referred to national courts pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence.[63] Most of these

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60. See, e.g., Sara Darehshori, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch Report July 7, 2009), § 8, *available at* http://www.hrw.org/en/node/84262/section/11 (last visited Nov. 5, 2010):

> Other new material was revealed for the first time in the Milosevic trial, including the "Scorpion video" that showed members of the notorious "Scorpion" unit, believed to have been acting under the aegis of the Serbian police, executing men and boys from Srebrenica at Trnovo. The video had an enormous impact on Serbia. As part of trial coverage, it was aired as news on a number of Serbian national television stations and reached a broad audience, sending shockwaves through society. The airing of the video engendered a great deal of national discussion about atrocities that many people in Serbia had previously denied.

61. Patrick Robinson, President, Int'l Crim. Trib. for the Former Yugoslavia, Comments at the Conference Assessing the Legacy of the ICTY (Feb. 23, 2010). The archives will include not only evidence introduced during trials but also evidence collected by the Prosecution in investigations and which can appropriately be placed in an archive.

62. *Id.*

63. See, e.g., Prosecutor v. Todović, Case No. IT-97-25/1 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 4, 2006). For a full discussion of factors considered by the referral bench, *see* Prosecutor v. Milan Lukić, Case No. IT-98/21/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* (Int'l Crim. Trib. for the Former Yugoslavia Apr. 5, 2007). The referral was reversed on appeal. Prosecutor v. Milan Lukić, Case No. IT-98-32/1-AR11 *bis* (Int'l Crim. Trib. for the Former Yugoslavia July 11, 2007).

cases have gone to special war crimes chambers of the national courts of the former Yugoslavia. Unlike the ICTY, these courts are able to prosecute perpetrators at any level, and there is no time limit during which they must complete their work.

In other cases that were not subject to ICTY indictments, the OTP has cooperated with national prosecutors by making evidence available to them and facilitating communication with witnesses. For example, the OTP gave the Scorpion video and related evidence to Serb prosecutors who commenced their own investigation into the murders depicted on the video. Most of the perpetrators of those murders have since been convicted before the courts of Serbia.[64] This collaboration between international and domestic criminal courts has resulted in a number of important prosecutions before national courts in the former Yugoslavia.

The potential for investigations built, in part, on the evidence collection of the ICTY is not limited to countries of the former Yugoslavia. National investigators and prosecutors of other countries can search this collection for evidence related to persons currently living within their own borders who may have committed crimes in the former Yugoslavia. These efforts may culminate in criminal prosecutions, extraditions, and administrative proceedings related to residency permits.

B. Synergy No. 2: International Courts Adjudicating State Responsibility can Order a Variety of Remedial Measures

Once international human rights courts find a state in violation of international commitments, they look to a range of measures to remediate the harm suffered by the claimants. While recognizing the impossibility of returning a claimant to their status prior to the violation, courts have employed a broad range of remedial measures.[65] Courts have ordered states to:

(i) Conduct full and meaningful investigations and prosecute or punish those responsible for crimes;[66]

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64. Merdijana Sadović, *Scorpions Judgment Sparks Debate in Serbia and Bosnia,* Institute for War and Peace Reporting, Apr. 16, 2007, http://iwpr.net/report-news/scorpions-judgment-sparks-debate-serbia-and-bosnia.

65. Srebrenica Cases, Case No. CH/01/8365, *et al.*, Decision on Admissibility and Merits, Bosnia and Herzegovina: Human Rights Chamber for Bosnia and Herzegovina, ¶ 205 (Mar. 7, 2003).

66. *See* Castillo-Páez v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 90 (Nov. 3, 1997); Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 124.3 (Jan. 24, 1998); Paniagua-Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 181.6 (Mar. 8, 1998); Villagran-Morales, et al., Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 253.8 (Nov. 19, 1999); Bámaca-Velásquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 230.8 (Nov. 25, 2000) (requiring public dissemination of investigations results); Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 51.5 (Mar. 14, 2001); Pueblo Bello Massacre v. Columbia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 296.7, 296.10 (Jan. 31, 2006) (requiring search for missing pursuant to international norms);

(ii) Release information related to missing persons;[67]

(iii) Require a public act of apology or acknowledgement of the violation;[68]

(iv) Publish the judgment of the court;[69]

(v) Compensate victims or the class of people affected by the violation;[70]

(vi) Reimburse claimants for the costs associated with bringing their claim;[71]

(vii) Improve security measures to allow the return of displaced persons;[72]

(viii) Take measures to ensure there is no re-occurrence of the violation;[73]

(ix) Invalidate existing domestic law and require changes to national legislation;[74]

Baldeón-García v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 218.8 (Apr. 6, 2006); Ximenes-Lopes v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 262.6 (July 4, 2006); Montero-Aranguren et al v. Venezuela (Detention Center of Catia), Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 160.7 (July 5, 2006); Goiburú et al. v. Paraguay (Condor), Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 192.5 (Sept. 22, 2006) (The investigation is to include the "masterminds" of the crime. The court also required that the investigation's results be published and that Paraguay collaborate with neighboring countries in the prosecution of related Condor cases); La Cantuta v. Perú, Inter-Am. Ct. H.R (ser. C) No. 162, ¶ 254.9 (Nov. 29, 2006); Manuel Cepeda Vargas v. Colombia, Inter-Am Ct. H.R. ¶ 265.8 (May 26, 2010); Chitay Nech et al. v. Guatemala, Inter-Am Ct. H.C.R. ¶ 309.12 (May 25, 2010); Cyprus v. Turkey, 2001- IV Eur. Ct. H.R. 1, ¶ 388.II.2 (2001); and *Srebrenica Cases*, ¶¶ 220.7-8.

67. *See* Aloeboetoe et al. v. Suriname, Inter-Am. Ct. H.R. (ser. C) ¶ 109 (Sept. 10, 1993); *Pueblo Bello*, ¶ 296.9; *Montero*, ¶ 160.8 (locate and deliver mortal remains to family); *Goiburú*, ¶ 192.6; *La Cantuta*, ¶ 254.10 (locate mortal remains); *Srebrenica Cases*, Case No. CH/01/8365 at ¶¶ 220.3, 7.

68. *See Pueblo Bello*, ¶ 296.13; *Baldeón*, ¶ 218.5; *Montero*, ¶ 160.12; *Goiburú*, ¶ 192.7; *La Cantuta*, ¶ 254.11; *Manuel Cepeda Vargas*, ¶ 265.11; *Chitay Nech*, ¶¶ 309.15-16; and *Srebrenica Cases*, Case No. CH/01/8365 at ¶ 220.3.

69. *See Pueblo Bello*, ¶ 296.15; *Baldeón*, ¶ 218.9; *Ximenes*, ¶ 262.7; *Montero*, ¶ 160.13; *Goiburú*, ¶ 192.8; *La Cantuta*, ¶ 254.13; *Manuel Cepeda Vargas*,¶ 265.10; and *Chitay Nech*, ¶ 309.14.

70. *See Aloeboetoe*, ¶ 116 (creation of trust fund for victims and opening of a school). *See also Blake*, ¶ 124.4; *Paniagua*, ¶ 181.6; *Villagran*, ¶ 253.6; *Bámaca*, ¶ 230.9; *Barrios Altos*, ¶ 51.6; *Pueblo Bello*, ¶¶ 296.11 (provision of medical/psychological care for next of kin), 296.16-17; *Baldeón*, ¶¶ 218.12 (medical/psychological treatment for next of kin), 218.13-14; *Ximenes*, ¶¶ 262.9-10; *Montero*, ¶ 160.14; *Goiburú*, ¶¶ 192.9, 192.13-14; *La Cantuta*, ¶¶ 254.14 (medical treatment), 254.16-17 (monetary damages) and *Chitay Nech*, ¶ 309.18. *Srebrenica Cases*, Case No. CH/01/8365 at ¶ 220.10 (payment of money into a communal fund).

71. *See Aloeboetoe*, ¶¶ 110-111; *Blake*, ¶ 124.4; *Pueblo Bello*, ¶ 296.18; *Baldeón*, ¶ 218.15; *Ximenes*, ¶ 262.11; *Montero*, ¶ 160.14; *Goiburú*, ¶ 192.14; *La Cantuta*, ¶ 254.18; and *Chitay Nech*, ¶ 309.18.

72. *See Pueblo Bello*, ¶ 296.12.

73. *See Castillo-Páez v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 90 (Nov. 3, 1997).

74. *See BarriosAltos*, ¶ 51.4.; *Montero*, ¶ 160.9; *Goiburú*, ¶ 192.12 (adapt existing legislation

(x) Institute measures to ensure greater compliance by the state and submit to oversight by the court;[75] and

(xi) Establish memorials commemorating the underlying event.[76]

The first four of these remedies result in direct benefits with respect to satisfying society's interest in the right to the truth, while the others contribute to combating impunity.

Compelling a state to undertake a full and fair investigation is a powerful measure with the potential to shed light on an important historical event. In the *Srebrenica Cases,* the HRCBiH took the unprecedented step of giving the Republika Srpska detailed instructions on the nature and scope of the investigation required. The court ordered Republika Srpska not only to investigate the identity of the perpetrators of the *Srebrenica* massacre, but also to investigate its own role and responsibility in the massacre and subsequent cover-up. The chamber directed Republika Srpska to investigate "present and former members of the RS Army who may have relevant personal knowledge of the Srebrenica events."[77] The chamber gave Republika Srpska six months to complete the investigation and provided a list of the organizations to which the results were to be disclosed.[78]

In *Las Dos Erres Massacre v. Guatemala,* the IACtHR has recently given Guatemala detailed guidance about the manner in which the investigation and prosecution of persons responsible for the massacre should be undertaken.[79] This guidance requires the state to, *inter alia,* investigate the "masterminds" of the massacre; investigate particularly egregious acts perpetrated against women; initiate disciplinary, administrative, or criminal cases as provided in domestic legislation; and ensure that sufficient resources are provided "to perform the tasks adequately."[80]

The IACtHR has, over time, increasingly made *obiter dicta* references to

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to bring definition of "torture" into compliance with human rights instruments). The authority to order legislative changes derives from a state's obligation under Article 2 of the IACHR to adopt "such legislative or other measures as may be necessary to give effect to those rights or freedoms."

75. *See Pueblo Bello,* ¶ 296.8; *Ximenes,* ¶ 262.8 (develop education program for mental health workers); *Montero,* ¶¶ 160.10 (bring prisons up to international standards), 160.11 (train members of armed forces); *Goiburú,* ¶ 192.11 (permanent human rights training programs); *La Cantuta,* ¶ 254.15 (permanent human rights training for army, police, prosecutors and judges).

76. *See Pueblo Bello,* ¶ 296.14; *Baldeón,* ¶ 218.11 (park or school commemorating victim); *Goiburú,* ¶ 192.10; *La Cantuta,* ¶ 254.12.

77. Srebrenica Cases, Case No. CH/01/8365, *et al.,* Decision on Admissibility and Merits, Bosnia and Herzegovina: Human Rights Chamber for Bosnia and Herzegovina, ¶ 212 (Mar. 7, 2003).

78. *Id.*

79. Las Dos Erres Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 233 (Nov. 24, 2009).

80. *Id.*

the fact that some events it has examined were violations of international humanitarian law in addition to violations of the ACHR.[81] There is, in fact, a great deal of overlap between gross violations of human rights and violations of international criminal law. In the future, the court may be faced with a case that includes crimes within the jurisdiction of the ICC. Given the IACtHR's developing practice of setting the criteria for particular investigations, it will be interesting to see if the court ever puts the onus on a state to either investigate and prosecute a case domestically or to make a referral to the ICC pursuant to Article 14 of the Rome Statute.

C. Synergy No. 3: Right to the Truth Cases can have a "Piggyback" Effect Resulting in Adjudications of Other International Obligations

Through right to the truth litigation, individuals have been able to invoke the provisions of other international conventions apart from the particular convention under which the case was initiated. This creates new avenues to enforce the obligations contained in these other conventions. For example, the Inter-American Convention to Prevent and Punish Torture obliges state parties to undertake a number of measures to prevent and punish acts of torture.[82] In *Villagran*, the Inter-American Commission alleged that Guatemala, in addition to violating the ACHR, had also violated the Inter-American Torture Convention. Given this allegation, the court considered whether it had competence to consider the claim. After finding itself competent, it held that in addition to violations of the ACHR, Guatemala had violated Articles 1, 6, and 8 of the Inter-American Torture Convention.[83] Similarly, in *Las Dos Erres,* the court found the state had violated article 7(b) of the Convention of Belém do Pará, otherwise known as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[84]

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81. Judge Rámila, in his concurring opinion to the *Las Dos Erres* case, analyzes the crimes committed during the massacre in terms of violations of international humanitarian law and concludes that despite the court's lack of jurisdiction to adjudicate violations of the Geneva Conventions or the Genocide Convention it can and should consider the fact that the alleged acts also violated international humanitarian law as an aggravating factor. *See Las Dos Erres,* Concurring Opinion of Ramón Cadena Rámila, Judge *ad hoc,* § 1(b).

82. Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S 67, 25 I.L.M. 519.

83. Villagran-Morales, et al., Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 239-52 (Nov. 19, 1999). In *Bámaca,* the court found violations of Articles1, 2, 6 and 8 of the torture convention. Bámaca-Velásquez v. Guatemala, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 215-23 (Nov. 25, 2000). In *Baldeón*, the court found violations of Articles 1, 6 and 8 of the torture convention. Baldeón-García v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 169 (Apr. 6, 2006). *See also Las Dos Erres*, ¶ 141.

84. *Las Dos Erres,* ¶ 15. Article 7(b) of the Convention of Belém do Pará June 9, 1994, 33 ILM, 1534. states:

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate

In *Bámaca,* the Inter-American Commission argued in its final oral submissions that the IACtHR should adjudicate whether there had been a breach of Common Article 3 of the Geneva Conventions pursuant to Article 29 of the ACHR.[85] The state agreed, noting that the IACtHR had "extensive faculties of interpretation of international law and could [apply] any other provision that it deemed appropriate."[86] While the court declined to specifically apply the provisions of the Geneva Conventions, it did find that it had the competence to make findings with respect to the parity between the Geneva Conventions and provisions of the IACtHR, and went on to identify parallel provisions.[87] The court's analysis of its competence to apply the Geneva Conventions was limited to its interpretation of the conventions as treaty instruments; it did not consider the issue from the perspective of international customary law and whether the customary nature of the Geneva Conventions gave the court competence to apply them in the case before it. Despite its findings being limited to identifying similarities between the conventions, such findings in and of themselves have an important declarative effect.[88]

In *Villagran,* the IACtHR considered the American Convention on Human

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such violence and undertake to:

[...] (b.) apply due diligence to prevent, investigate and impose penalties for violence against women.

85. *Bámaca,* ¶ 203(c). Article 29 of the ACHR states in relevant part:

No provision of this Convention shall be interpreted as:

[...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

86. *Id.* ¶ 204. In the past, the court has looked to the Geneva Conventions for guidance on how to interpret the IACtHR. *See Case of Las Palmeras,* Inter-Am. Ct. H.R., Preliminary Objections Judgment, (ser. C) No. 67, ¶¶ 32-34 (Feb. 4, 2000).

87. *Bámaca,* ¶¶ 208-09:

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular common Article 3.

88. The enforcement provisions of the Geneva Conventions only apply to grave breaches. *See, e.g,* Geneva Convention Relative to the Treatment of Prisoners of War (III) art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. These enforcement provisions are incorporated by reference into Additional Protocol I through Article 85. Non-grave breach provisions, while still applicable law, have no enforcement provision. *See also* CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 114 (2008). States do have an affirmative obligation to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches" and alleged violations of them may be the basis of a complaint lodged by the ICRC or other state parties. If international human rights courts were to conduct comparative analyses, similar to that of the IACtHR, with respect to non-grave breach provisions of the Geneva Conventions such provisions would have greater effect. For example, a court might find that a state party to the Geneva Conventions did not comply with Section III of Protocol I with respect to a family's right to know. Such a finding would encourage greater compliance with this provision of Protocol I.

Rights (ACHR) Article 19's provision extending special protection to children.[89] The IACtHR in interpreting this general provision noted that Guatemala ratified the United Nations Convention on the Rights of the Child, and that Article 19 of the ACHR must be interpreted in light of this convention.[90] In defining the scope of "measures of protection" of Article 19 of the ACHR, the court incorporated the standards of many Articles from the Convention on the Rights of the Child.[91] Such reliance strengthens the normative effect of the Convention on the Rights of the Child and fosters greater uniformity between the protections of different international instruments.

V.
CONCLUSION

Impunity is fought on many fronts, employing diverse bodies of law. Right to the truth litigation has proven to be an effective means of both remediating harm caused to individuals and satisfying society's interest in the truth about gross violations of human rights. International criminal courts have, for their part, contributed reliable factual findings and large bodies of evidence that can and have been used, in turn, by individual claimants or state parties seeking to hold a state accountable for its international obligations. The outreach programs and closing strategies of these tribunals both envisage the full and fair dissemination of not only the judgments tendered by these institutions but also the underlying sources of evidence as well. The widespread availability of these materials enables domestic prosecutors working with limited resources to undertake investigations of possible perpetrators living within their jurisdictions, thereby closing an important impunity gap.

International courts charged with enforcing the provisions of international human rights instruments have increasingly ordered states to implement remedial measures with respect to serious violations of human rights. In some cases, states have been ordered to conduct investigations and prosecutions. If this trend continues, international courts may consider whether a state party to the ICC, having been found incapable of conducting the necessary investigation, may be directed to refer such a case pursuant to Article 14 of the Rome Statute. Finally, in those cases in which parity exists between the alleged violation of a human right and the violation of a non-grave breach of the Geneva Conventions, adjudication of whether there was a violation of the human right can have an important declarative affect with respect to the non-grave breach provision, which has no international enforcement mechanism.

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89. Article 19 reads: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state."

90. Villagran-Morales, et al., Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 183-94 (Nov. 19, 1999).

91. Articles 2, 3, 6, 20, 27, and 37. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/144/149 (Nov. 20, 1989).

As the fight against impunity takes place on several fronts, it is important to recognize and exploit the synergies that exist between these efforts. Doing so will facilitate the fight against impunity overall.