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⇒ Impunity and the Right to Truth in the Inter-American System of Human Rights

Abstract: During the 1970s and the 1980s, Latin America witnessed widespread violations of human rights. However, from the early 1980s, the beginning of democratic transition in the region led to an intense debate on impunity and the controversial “right to truth”: the right to learn about what had occurred under past repressive rule. The research on impunity and the right to truth in Latin America has mostly been focused on national approaches or the efforts of the UN. Hitherto, the general role of the inter-American human rights system has barely been analysed, despite its remarkable role during the repressive period of the 1970s and early 1980s. Hence, this article will supplement existing research efforts by shedding some light on the performance of the Organisation of American States (OAS) regarding impunity and the right to truth. Whether there was a general strategy in the OAS to address the problem and what perspectives for the inter-American system exist in this regard are some of the main questions addressed by this article.

Keywords: Inter-American human rights system; Right to truth; OAS; Politics; Latin America; 20th century.

I. Introduction

During the 1970s and the 1980s in particular, Latin America witnessed a practically institutionalised violation of human rights on a large scale. However, from the early 1980s, the beginning of democratic transition in the region led to an intense debate on impunity¹ and the controversial “right to truth”: the right to learn about what had occurred under past repressive rule. The research on impunity and the right to truth in Latin America has mostly been focused on national approaches or the efforts of the United Nations, for instance in El Salvador. Hitherto, the general role of the inter-American human rights system has barely been analysed, despite its remarkable role during the repressive period of the 1970s and early 1980s. Hence, this article will supplement existing research efforts by shedding some light on the performance of the Organisation of American States (OAS) regarding impunity and the right to truth.

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¹ The definition of “impunity” in international criminal law is excellently discussed by Ambos (1997).

The extensive debate on how to deal with past abuses in Latin America has established a new policy area: “politics of the past.” Fuchs and Nolte describe “politics of the past” as the “state’s dealing with human rights crimes and violent acts committed in the context of dictatorships or civil wars”. Fuchs and Nolte identify three inter-connected main currents in the debate on past human rights violations: 1) a clear focus on principles and norms, related to the politics of the past, 2) emphasis on the framework of political-judicial coming to terms with the past, which focuses principally on the mode and time lapse of transitions; and 3) the question of whether and how politics of the past have an effect on the future development/consolidation of democracy (Fuchs/Nolte 2004: 65-67). The present article focuses on the first two currents, simply because it is difficult to evaluate the influence of OAS policies on the consolidation of Latin American democracies. Further evaluation of this topic would require a more in-depth analysis that is outside the scope of this article. Using a historical approach, this study will venture to explore to a large extent the political, but also the juridical-normative dimension. In view of the expressly intergovernmental character of the Organisation of American States, which by its very nature had a narrow scope for dealing with the topic, and my stated intent of confining the subject for practical reasons, this article is limited in discussion. The principal aim of this text is to identify and evaluate the undertakings of the inter-American human rights organs, namely the Court and the Commission, and to look at the role of the OAS as a whole regarding human rights abuses under repressive rule. Here, the issue of impunity for past violations and the right to truth are singled out in order to provide a more manageable study and because these still constitute topics that concern Latin American societies today.² In this context, I shall pose the following questions, the answers to which will be summarised in my conclusion:

- 1) What is the legal basis of the right to truth in the inter-American system?
- 2) When did the topic of impunity for abuses under dictatorial rule and the right to truth come onto the OAS agenda and why?
- 3) Who were the main actors facilitating discussion of the topic within the OAS? What was the reaction of the main organs of the OAS and its Member States, especially those particularly concerned with the issue of past human rights violations?
- 4) Have the Inter-American Court and Commission developed a general strategy for dealing with impunity and the truth with regard to the human rights crimes of the 1970s and 1980s?
- 5) Finally, did the OAS approach the problem adequately? Could it have done more?
- 6) What are the perspectives for the inter-American human rights system with regard to impunity and the right to truth?

² Accordingly, other topics involved in coming to terms with the past, including such matters as transitional justice (see Barahona de Brito 2001; Kritz 1995), accountability or compensation payments will not be a main focus.

II. The Organization of American States and human rights violations in Latin America

The OAS was founded in 1948 by twenty Latin American countries and the United States. In 1959, the OAS created the Inter-American Commission on Human Rights (IACHR) as an organ to ‘promote’ human rights, which gradually developed into a real institution for the defence of human rights. During decades of authoritarian rule in the region, the OAS as such was not known as a wholehearted advocate of human rights concerns. At the same time, however, its human rights commission was often able to make a difference. During the 1960s and the 1970s, the IACHR advanced not only its own functions and powers but also the inter-American system of human rights in general. In the 1980s, the IACHR made significant progress in the codification of international human rights law in the hemisphere. Since the beginning of democratic transition in the region during the 1980s, and especially during the 1990s, the Commission’s work has become increasingly case-based and legal (compared with the highly political country reports of the 1970s).

Since the creation of the OAS, but particularly since the IACHR was established in 1959, the inter-American system has drawn attention to the issue of human rights. Due to its exemplary performance, the Commission was elevated to the status of the main organ of the OAS in 1970. Since then, the Commission has been an integral institutional part of the organisation. After the American Convention on Human Rights entered into force in 1978, the Commission also became the institution responsible for the parties to the Convention, and in 1979 the Inter-American Court of Human Rights (IACtHR) was established in the Costa Rican capital, San José.

The 1970s witnessed the Commission’s most prominent period, since on many occasions it courageously highlighted human rights abuses in Chile, Argentina, Paraguay, Uruguay, Haiti and Guatemala. Furthermore, the IACHR also contributed to changes of government in Nicaragua and El Salvador, both in 1979. In the same year, the Commission carried out an on-site investigation in Argentina, considered to be extremely important, and this was followed by a very critical Special Report in 1980. In the 1980s, however, the Commission lost some of its impact in view of the human rights violations during the Central American conflicts. This was in part a consequence of the unilateralist approach of the conservative Reagan administration and its reluctance to directly criticise human rights offenders who were its allies. Nevertheless, in that decade the IACHR began drafting important human rights conventions (Dykman 2004). In the 1990s, the Commission regained its reputation and began to broaden its approach to include the rights of women, children, indigenous peoples, disabled persons, human rights defenders and international humanitarian law. In general, the inter-American human rights system has developed highly judicial procedures. These are mostly based on individual cases, which have become increasingly sophisticated and consequently very time-consuming. However, the Commission has always faced bureaucratic, financial and political obstacles posed by its Member States or coming from within the organisation itself. Human rights have been a pretentious goal, but not necessarily the major aim of OAS politics. In the 1990s, though, the official OAS discourse increasingly upgraded human rights concerns—and this was also expressed in a considerably enlarged IACHR budget.

Accompanying democratization in the region, the inter-American system has since 1991 established remarkable democracy protection mechanisms. The OAS gradually

became an institution for the defence of democratic values in the hemisphere, from the Santiago commitment in 1991 to adopting the Inter-American Democratic Charter in 2001. The institutional improvements designed to protect democratic standards actually proved effective in practice and complemented the inter-American system of human rights.

The sometimes tricky relationship between OAS Member States, who gathered at the annual meetings of the General Assembly, the organisation's political main organ, and the IACHR, was undoubtedly a difficult starting point for the delicate task of dealing with past human rights violations. In the first decade of its existence, the IACtHR suffered from a lack of cooperation on the part of the Commission, and thus handled few cases. Nevertheless, these included the groundbreaking judgements of the 'disappeared' Velásquez Rodríguez and Godínez Cruz in 1988 and 1989 respectively. During the 1990s, the Court was able to significantly improve its legal efficacy as cooperation with the IACHR became more effective.

In summary, the inter-American organs for the protection of human rights—the Court and the Commission—actually pursued the defence of basic rights in Latin America. At the same time the main political organs of the OAS gradually improved their stand on the issue, but had a tendency to maintain their historical reluctance in dealing with unpleasant topics, which also affected the organisation's stand on impunity and the right to truth.

III. The right to truth in the inter-American System

In line with the international doctrine of *pacta sunt servanda*, states have an obligation to comply with international treaties if they are state parties to those treaties. According to article 27 of the 1969 Vienna Convention on the Law of Treaties, after ratification and entry into force, a party to a treaty cannot avoid application of binding law with reference to either its national constitution or the national law as a whole. However, international law is fragmentary in nature and further limited by dualist arguments. Unlike monism, which transforms international law into national law and recognises both as a single judicial system, states that proclaim dualism maintain that there is a difference between domestic jurisdiction and international law, thereby questioning the superior mandatory nature of international treaties in relation to national law. In practice, governments apply this dualist argument in specific cases where domestic law is inconsistent with international law. The practice of the United States has always been an example to explain dualism, since US governments frequently argue the necessity of acting freely at the international level. In contrast to the US, the majority of Latin American states are parties to the American Convention on Human Rights as well as to the United Nations Covenant on Political and Civil Rights. Most Latin American states have chosen the monistic approach and adopted a constitutional provision that makes international human rights instruments a relevant component of their domestic law.

In 1998, dealing with an individual case, the IACtHR defined impunity as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention”.³ This definition is clear-

³ IACtHR (1998d: para. 173); see also IACHR (2001: 35).

ly only applicable to those Member States that are parties to the American Convention on Human Rights. However, the American Declaration provides comparable legal norms in this context. The Court's definition of impunity has been cited in various cases by the Court and the Commission.⁴

Under the American Convention, states are obliged to 'ensure' human rights, a duty that can be interpreted as meaning something stronger than the 'defence' of these rights. Pasqualucci maintains that "[a]lthough the most widely ratified international human rights treaties do not explicitly provide for a right to know the truth, such a right may be considered to arise from the states' conventional duty to ensure human rights" (1994: 330). In its famous judgment in the *Velásquez Rodríguez* case, the Court interpreted article 1 (1) of the Convention as entailing a duty for states to investigate violations and "to identify those responsible".⁵ Although a petition that alleges a human rights violation must first be considered within domestic jurisdiction before the case can be examined in the international realm, there are exceptions in the inter-American system. Neither the Commission nor the Court have dogmatically accepted the argument that all domestic remedies must be exhausted before a complaint can be handled in the inter-American human rights system, since in several states there have been only nominal, but no real legal remedies.⁶ The question, however, remains as to whether it is always desirable to categorically oppose amnesty laws and the lack of punishment for human rights abuses. In some societies, especially after a civil war, prosecuting all human rights offenders would amount to condemning and punishing large parts of the population.⁷ Essentially, according to the dominant literature on transitional justice, the policy of coming to terms with the past consists of political decisions within the outer limits of a given judicial frame.

Since *Velásquez Rodríguez*, the IACtHR has repeatedly ruled, according to article 1 (1) of the Convention, that the duty of the state is to investigate, identify and punish those responsible for human rights crimes.⁸ The Court clearly states: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".⁹ Furthermore, the state has a duty to satisfy the legitimate expectations of relatives to know the fate of victims and to eliminate impunity.¹⁰

On many occasions, the Commission and the Court have derived the 'right to truth' from articles 1 (1), 8 (right to a fair trial) and 25 (right to judicial protection) and at times also from article 13 (freedom of thought and expression) of the Convention.¹¹ The main

⁴ See, for instance, IACHR (1999a: para. 223-225); IACHR (2001: para. 3, 40); IACtHR (1998b: para. 107); Cassel (2001: 369).

⁵ Pasqualucci (1994: 330); IACtHR (1989: para. 174).

⁶ See, for instance, IACtHR (1988: para. 80, 117-119); IACtHR (1990).

⁷ See IACtHR (1998c: para. 6).

⁸ IACtHR (1998a: para. 70); IACtHR (1998b: para. 107).

⁹ IACtHR (1988: para. 174, 176).

¹⁰ IACtHR (1998d: para 173); IACtHR (1999: para. 64); IACtHR (2000: 143).

¹¹ IACtHR (2001a: para. 45); IACHR (2001: 42, 36-41); IACHR (1992a); IACHR (1992b); IACHR (1999b); IACHR (1999c).

pillar is article 1 (1), which is interconnected with the other articles of the Convention. An important operational question is: Which rights should be the subject of investigation? One solution would be to limit the group of rights applicable under the right to truth to non-derogable rights under article 27 (2) of the American Convention: the right to judicial personality, the right to life, the right to humane treatment, freedom from slavery, freedom from ex-post-facto laws, freedom of conscience and religion, the right of the family, the right to a name, the rights of the child, the right to nationality and the right to participate in government (Méndez 1995: 4). It has been disputed whether the fact that these rights are non-derogable actually provides a useful parameter for determining those rights whose violation would require investigation. Furthermore, the creation of a sort of 'hierarchy' of rights is strongly opposed by many scholars of international law (Pasqualucci 1994: 334).

In the inter-American system there is a tendency to connect the right to truth with massive and gross violations of human rights, such as those affecting the right to life and physical integrity or torture. However, as regards children of disappeared persons, the right to a name should also be taken into account (Interviews, May 28, 2004). Furthermore, the practice of forced disappearances should certainly be labelled a crime considered subject to the right to truth. Although it is not explicitly mentioned in classic international human rights treaties, it undoubtedly constitutes a relatively new form of multiple human rights violations, and includes abuse of the rights to life, to humane treatment, to personal liberty and to due process (Pasqualucci 1994: 334). In addition to OAS General Assembly resolutions AG/RES. 666 (1983) (IACHR 1984: 17) and AG/RES. 742 (1985) (IACHR 1985: 12) and the Inter-American Convention on Forced Disappearances (1994), the statute of the newly established International Criminal Court identifies forced disappearances as a crime against humanity.¹²

The quest to establish the right to truth in the inter-American system first began in the second half of the 1980s. In 1986 the Commission declared every society to be vested with an inalienable right to know the truth about past events, including the reasons and the circumstances under which violations took place. The purpose of this was to prevent repetition of those misdeeds (IACHR 1986: 205). In 1988, the Court presented its pioneering judgment in the Velásquez Rodríguez case, in which it concluded that the State of Honduras had violated articles 4 (right to life), 5 (humane treatment), and 7 (personal liberty) of the American Convention, by additional reference to article 1 (1) of the Convention (Rodríguez Rescia 1994: 467). The Court ultimately ordered the State of Honduras to pay compensation to the relatives of the disappeared victims (IACtHR 1988: 590; IACtHR 1989: 747). That case continues to serve as a reference point for matters regarding compensation, but also for the right to truth.¹³

However, the Court's judgment in the Velásquez Rodríguez case did not clearly determine whether names of the perpetrators and the results of investigations should be publicly disclosed or whether those responsible should be punished. The Court's judgment could at least be interpreted as a right to truth for the relatives, if not for society in

¹² *Rome Statute of the International Criminal Court*, as corrected by the procès-verbaux of 10 Nov. 1998 and 12 July 1999, Article 7.

¹³ For instance, see IACHR (2001: 36/37).

general: “Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains” (IACtHR 1988: para. 181, cited in: Pasqualucci 1994: 331). In 2000, the Court stated in the Durand and Ugarte case that every person and society had the right to know the truth (Cassel 2001: 363). Furthermore, the Commission holds that the right to truth constitutes a collective right, which allows society to have access to essential information for the development of democratic systems. At the same time, the individual right of the relatives of victims allows a form of reparation. The Commission further held:

The American Convention protects the right to seek and receive information, especially in the case of grave violations of human rights, such as crimes against humanity, in respect of which the Commission and the Court have held that the State is under an obligation to investigate, for example, the fate of the disappeared (IACHR 2001: 41/42).

Whilst the link between the right to truth and article 25 refers to the individual right and not to collective necessity or even the collective right to know the truth, the IACHR made it clear that it is also society in general, not only the individual, which has the right to know the truth and that justice will be done (IACHR 2001: 42). The repeated reference to the right to truth in the inter-American human rights systems undoubtedly has its roots in the historical experience of massive abuses in the region during the 1970s and 1980s. Whether the inter-American system has developed a strategy for the right to truth since it first addressed the issue will be discussed in the subsequent section.

IV. A general strategy within the inter-American system to deal with impunity and the right to truth

Cassel summarises that in just fifteen years the IACHR and the IACtHR, relying on existing judicial instruments, which were less than explicit, have developed a broad, energetic doctrine in order to put an end to impunity (Cassel 2001: 409). Although the Commission predominantly handles individual cases, its approach also implies a general mandate to increase the awareness of human rights in the hemisphere. In general, the work of the IACHR and the Court, which is recorded in their Annual and Special Reports, already embodies concrete attempts to deal with past crimes, evidenced by the fact that many cases date back to earlier years under dictatorial rule. Additionally, the Commission’s efforts to routinely exhort the governments of the Member States to effectively strengthen their judicial systems also constitutes an indirect, but sometimes also a straight call to properly address past human rights violations. However, at first sight, the IACHR’s activity seemed to be mostly based on an individual case system and did not appear to have a systematic approach anchored in a visible and coherent concept.

In 1986, the Commission for the first time explicitly judged efforts to deal with past human rights violations in a general way:

A difficult problem that recent democracies have had to face has been the investigation of human rights violations under previous governments and the possibility of sanctions against

those responsible for such violations. The Commission recognizes that this is a sensitive and extremely delicate issue where the contribution it—or any other international body for that matter—can make is minimal. The response, therefore, must come from the national sectors, which are themselves affected, and the urgent need for national reconciliation and social pacification must be reconciled with the ineluctable exigencies of an understanding of the truth and of justice (IACHR 1986: 192).

So, it is clear that the IACHR did not consider itself to be the most suitable institution for dealing with past abuses. Furthermore, the Commission stated that only the appropriate democratic institutions (usually the legislature) could determine whether or not to decree an amnesty, whilst “amnesties decreed previously by those responsible for the violations have no judicial validity” (IACHR 1986: 193). The IACHR continued to point out the need to investigate human rights violations committed prior to establishing a new democratic government:

Every society has the inalienable right to know the truth about past events, as well as the motives and circumstance in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future (193).

The Commission went even further and delivered its opinion on the supposed antagonism between dealing with past crimes and the need for national reconciliation:

The Commission considers that the observance of the principle cited above will bring about justice rather than vengeance, and thus neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized (IACHR 1986: 193).

Somewhat contradicting its previous statement that international entities such as the Commission itself could not do much to deal with the past, in 1987 the IACHR announced that it was eager to fight forced disappearances “nationally and internationally”. The Commission further pointed out that those affected were the relatives of the victims and went on to state that “disappearances open deep wounds in the social fabric of the country’s community, which affects political, social and professional circles and ruptures the country’s basic institutions” (IACHR 1987: 277). Accordingly, the General Assembly heeded the Commission’s call and declared that forced disappearances constituted a crime against humanity. This was repeatedly criticised by the US delegation, since the United States feared such a typecast would diminish the definition of crimes against humanity established at the Nuremberg war crimes trials after World War II. At the 1987 General Assembly, the Argentine representative supported the convention on disappearances and emphatically urged inclusion of specific references to the kidnapped children of disappeared parents (OAS 1987a: 120-127; 145). Furthermore, the Paraguayan and Argentine delegations discussed the issue of disappeared Argentine children in Paraguay (OAS 1987a: 202, 205; OAS 1987b: 268-271). The following year, 1988, the IACHR Annual Report included a special study on the fate of minor children of disappeared persons who had been taken from their families (IACHR 1988: 331-345). The Seventeenth Meeting of the General Assembly in November 1987 had asked the Commission to study the issue. Obviously, the motivation to carry out this inquiry also originated in the Argentine experience and endeavours to deal with the past. According-

ly, the report refers primarily to the Grandmothers of the Plaza de Mayo but also mentions Uruguayan children who were abducted while their parents were in exile in Argentina. At the following General Assembly session, the Argentine delegation endorsed the Commission's special report (OAS 1988). The Commission stressed that the relatives of children taken from their natural parents "have the right to insist on knowing the whereabouts of those infants and to participate in their education and upbringing, in the manner that is most conducive to the child's development and welfare" (IACHR 1988: 331-333, 344). With regard to some controversial cases of the children of disappeared persons being raised by the captors of their natural parents, one might wonder if the children in question should also have a right not to know their true identity.¹⁴ In this regard, the Commission held:

In cases where the abduction was committed by a person who participated in the forced disappearance of the true parents, or in their torture or execution, or who became an accomplice to such atrocities, the Commission believes that the child's mental and physical health demands his immediate separation from that family group (IACHR 1988: 345).

At the General Assembly in 1989, IACHR chairman Oliver Jackman gave a remarkable speech on the issue of amnesty laws in which he criticised the fact that, in his opinion, "amnesia" rather than amnesty had been decreed (quoted in: Pasqualucci 1994: 348). In general, the Commission found the amnesty laws adopted in Argentina, Chile, El Salvador and Uruguay to be incompatible with the American Convention on Human Rights (Roht-Arriaza 2001: 42). However, while the IACHR resolution on the Salvadoran amnesty law recommended punishing perpetrators, the resolutions on Uruguay and Argentina did not do so (Cassel 2001). As a rule, the Commission held that in order to be valid, an amnesty must be adopted by a democratic government and cannot preclude investigations into human rights violations, which are necessary to enforce society's right to know the truth and the right of relatives to know what happened to the victims (Cassel 2001: 383). The Court agreed with findings of the Commission in various cases (IACtHR 1998b: 385). Finally, the Court issued a landmark judgment in a Peruvian case: instead of dealing with the cases individually, the Court ruled that the Peruvian amnesty law as such violated the American Convention—independently of its application (Cassel 2001: 388; IACtHR 2001a).

In the 1990s the OAS was busy with its institutional recovery and was eager to play a significant role during the economic integration processes (Summit of the Americas, Mercosur, NAFTA etc.). Consequently, there seemed to be no time to spend on dealing with the burdens of the past. In the early 1990s the Argentine and Chilean delegations stressed their national endeavours to deal with past human rights violations. Representatives of both countries reported the following before the General Assembly: the work of the Rettig Commission (Chile), the National Commission on Forced Disappearances, the

¹⁴ One famous and well-publicised case was that of Mariana Zaffaroni, a native Uruguayan kidnapped during the Argentine dictatorship and brought up by the Argentine intelligence officer Fursi. She was resistant to her natural relatives' efforts to indict her unnatural father, and to getting to know her natural relatives.

creation of genetic data banks as well as trials of junta leaders (Argentina) (OAS 1991a). The Commission was satisfied, and the OAS General Assembly apparently pleased with those domestic efforts to handle past atrocities. This attitude, which can easily be perceived as a passive stand, may have been the reaction considered the most appropriate by the Member States in question. By reporting on their national efforts, the delegations may have been seeking to demonstrate that internal measures would make any international meddling superfluous. Although it seems preferable to strive for a domestic solution to such a delicate matter, the mostly unsatisfactory results must have prompted international action as well.

The Convention on Forced Disappearances

In 1987 the Commission proposed a Convention on Forced Disappearances—certainly a form of legal reaction to the enormous phenomenon of forced disappearances, a human rights crime closely associated with the Argentine dictatorship. Initially, the IACHR still sought “to prevent and punish that abominable practice” (IACHR 1987: 277) but later the words “to prevent and punish” were excised from the title of the draft convention and there remained merely an Inter-American Convention on Forced Disappearances to be discussed. Interestingly, the Inter-American Convention to Prevent and Sanction Torture (adopted in 1987) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) kept the punitive and preventive goals in the titles themselves.

In the early nineties the issue of the Convention on Forced Disappearances finally became a substantial topic for the OAS. This could be seen as the result of the changed regional and international situation after the democratisation processes in the hemisphere and the end of the East-West confrontation. At the 1992 General Assembly in Nassau (Bahamas), a discussion arose as to whether or not non-governmental organisations should be allowed to make observations and commentaries on the Convention. Finally, Uruguay’s proposal, a form of compromise, was accepted. It requested the OAS Permanent Council to utilise the studies and reports of NGOs when it considered them necessary (OAS 1992: 67). In view of the courageous role many non-governmental institutions had played during authoritarian rule, the debate at the General Assembly was somewhat awkward, although a number of doubts raised during the discussion were certainly thoughtful and reasonable. Eventually, the Convention on the Forced Disappearance of Persons was adopted by acclamation in 1994 (OAS 1994).

The final Convention on Forced Disappearances calls the States Parties “[t]o punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories [...]; [t]o cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; [and t]o take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention” (IACHR 1996: 100). The Convention reaffirms the fact that systematic practice of the forced disappearance of persons constitutes a crime against humanity (IACHR 1996: 93). In addition, the ‘due obedience’ defence is categorically precluded and replaced by a right and duty to not obey orders calling for committal of this crime (article VIII). In

addition, no ‘exceptional circumstances’ can be claimed to justify forced disappearances (article X). Article XII deals specifically with the problem of the search for, as well as the identification, location and return of minors taken from their disappeared parents—a clear reference to the Argentine case—and stresses that the States Parties shall give each other mutual assistance in this regard. Finally, the conventions on torture (1985), forced disappearances (1994), and on the prevention, punishment and eradication of violence against women (1994) merit mention since they are also a legal reaction to the human rights crimes of the 1970s and 1980s, although their actual impact remains uncertain.

Although, in the 1990s, the Commission’s Annual and Special Reports began reporting on the issue of impunity, they mostly concerned themselves with the exemption from punishment enjoyed by current state agents and not to crimes committed under authoritarian rule.¹⁵ In this regard, the Commission recommended strengthening the judicial system and requested that the “Member States must put an end to situations of impunity”.¹⁶ The 1999 Annual Report named unpunished state agents in Brazil, Columbia and Mexico.¹⁷ In addition, the Special Reports on the human rights situation in Peru and Colombia (1999) also referred explicitly to the issue of impunity as one of the most serious problems in those countries. However, as mentioned before, these cases referred more to ongoing situations of impunity and did not relate to the human rights crimes of preceding authoritarian regimes, unlike the Report on Paraguay of 2001, which will be analysed later.

In summary, besides the Argentine initiatives to introduce the topic into the inter-American system, as mentioned above, the OAS Member States did not put the issue on the organisation’s agenda as an inter-American subject and instead reported on domestic attempts to deal with the problem. Human rights violations persisted in the 1980s, especially in the Central American armed conflicts, thus keeping the IACHR active. However, in general the human rights organs seemed to support national efforts to seek the truth without becoming politically more ambitious players in this regard. Nevertheless, besides drafting relevant human rights conventions, the Commission and the Court also made clear statements on the issue, including a condemnation of impunity and an endorsement of the right to truth. Besides providing legal guidelines and supporting national endeavours in this regard, however, an apparent reluctance to deal more forcefully with impunity and the right to truth in the region at the inter-American level probably stemmed from the conviction that preventing or at least shedding light on present human rights violations had higher priority at that time. In addition, the Commission may have feared unnecessarily provoking even more resistance to its actions from the OAS Member States by bringing up this highly sensitive issue any more prominently and in a more supranational manner. An inter-American approach to the problem of impunity and the right to truth, including not only legal provisions but also more political proposals, might have been desirable, but this seemed to be beyond the capacities of the human rights organs and the general political will in the inter-American system.

In sum, one can identify a consistent line of argument running throughout the findings and statements of the Commission and the Court, seeking to combat impunity and

¹⁵ See, for instance IACHR (1993a); IACHR (1993b); IACHR (1997a); IACHR (1998a); IACHR (1999c).

¹⁶ IACHR (1997b: 1049); see IACHR (1998b: 1120/1121; 1202, 1204).

¹⁷ IACHR (1999d: 1445, 1499, 1522); see also OAS (1999: 220, 221).

to strengthen the right to truth.¹⁸ The question remains, however, whether there is a coherent strategy for dealing with the issue within the inter-American system or if the human rights bodies of the OAS merely provide a form of guidance for the national context of particular Member States. From a historical view, instead of developing a coherent regional concept, which would also include political instruments, the inter-American human rights system sought to provide a sort of legal framework for the problem and endorsed national processes, which will be analysed in chapter V, in this regard.

V. Impunity and the right to truth in OAS Member States

In this chapter I will illustrate chronologically, without aspiring to be comprehensive, the issues of impunity and the right to truth at the national level, using examples of individual cases or country-specific findings of the Court and the Commission.

Argentina/Uruguay

The IACHR first began studying cases of human rights violations committed under former repressive regimes in the mid-1980s, inspired by NGO activists in Argentina, where the crimes of the dictatorship even led to a trial of the junta members and the establishment of a National Commission on Forced Disappearances, which investigated disappearances occurring during the dictatorship between 1976 and 1983. In 1984, the Commission praised the efforts of Argentina's democratic government regarding its investigation into the fate of the disappeared. In addition, the Commission's Executive Secretary was invited to testify before the Argentine Commission on Forced Disappearances—also a result of the remarkable performance of the Commission during its on-site visit in 1979 and its Special Report of 1980 (IACHR 1984: 83, 85).

In 1992, two important judgments of the IACHR on the famous amnesty laws of 'due obedience' and 'full stop' (both in Argentina), and the so-called 'law of invalidity' (*Ley de caducidad*, in Uruguay) declared them to be incompatible with the American Convention. As usual, the Commission derived a right to truth from the articles 1 (1), 8 and 25 of the American Convention. The IACHR went on to reject the governments' objections. Both governments had argued primarily that since the original human rights violations to which the respective laws refer had taken place before Argentina and Uruguay ratified the American Convention, the latter could not be applied. However, the Commission replied that its judgment referred to the amnesty laws adopted after the ratification of the Convention and thus repudiated the governments' arguments.¹⁹ Although the Commission had feared that the IACtHR would not support this view, the Court endorsed the Commission's finding.²⁰ Despite expressing dissatisfaction with the Argen-

¹⁸ Cassel (2001: 359) calls the jurisprudence developed by the Court and the Commission as the "most restrictive doctrine" as regards impunity in the entire international human rights system.

¹⁹ Interviews (May 28, 2004). See IACHR (1992a: 605-612); IACHR (1992b: 533-539).

²⁰ IACtHR (1993); see also IACtHR (1994).

tine government's inaction in this regard, one commentator describes the IACHR resolution as an "important historical reference" (Slepoy 1999: 26). As a result, many human rights groups have used these judgments as a point of reference.

In 1994, the Argentine government adopted a reparations program to benefit those victims or their relatives who had filed petitions with the Commission in 1991. The petitioners finally reached a friendly agreement with the Argentine authorities. Later, compensation payments to those imprisoned during the dictatorship were extended to those forced to flee the country.²¹

In 1999 the IACHR and the State of Argentina finally reached a friendly settlement in the 'Lapocó' case of a detained woman who had disappeared in 1977, in which Argentina agreed to accept and guarantee the right to truth (IACHR 1999e). This consisted of exhausting all means to obtain clarification of what happened to disappeared persons. The agreement required the government to award exclusive competence to the federal courts to continue the trials for truth and was therefore seen as an official obligation on the state to pursue judicial investigations into the fate of the 'disappeared' persons (IACHR 1999f). Human rights groups consequently celebrated this friendly settlement as a milestone for their cause.

El Salvador

A decisive group within the IACHR showed clear reluctance by seeking not to interfere in national efforts in the early 1990s to reconcile Salvadoran society after a twelve-year civil war. This war claimed up to 70,000 victims and resulted in many atrocious crimes against human rights. The Salvadoran case, however, is very probably an exceptional case in the history of the IACHR (Dykmann 2004). In mid-1991, the Salvadoran government rejected the IACHR's proposal to prepare a Special Report covering the period from 1978 as inappropriate, especially in view of the national reconciliation process. With such a report the IACHR would open wounds and bring back many painful memories which were treated as forgotten by Salvadorans. Furthermore, the government of El Salvador accused the Commission of being ill-informed about the most relevant cases (OAS 1991b; see OAS 1991a: 118-124).

The truth commission, which investigated violent acts during the gruesome civil war in El Salvador, was set up by the United Nations. Why was there never an OAS-sponsored truth commission? On the one hand, the peace negotiations had already been carried out under the supervision of the United Nations. On the other hand, an OAS truth commission would have needed a substantial political mandate from the General Assembly. Although this may have seemed possible at the significant 1991 meeting in Santiago, the generally conservative attitude of the organisation did not permit such a step. Furthermore, the OAS as such has been very much a pro-governmental institution, and has seldom dared to single out and accuse (let alone materially punish) a member for human rights offences. However, the IACHR emphasised the importance of the UN Truth Commission for El Salvador (IACHR 1993c: 185/186), whilst stating that such an investiga-

²¹ See IACHR (1993c: 35-40); Hayner (2002: 176; 292).

tion could not replace the judicial process as a method of revealing the truth (IACHR 1999b).

In 1993, referring to a notorious massacre in 1983 ('Las Hojas'), the Commission further declared the amnesty decree in El Salvador (1993) to be a violation of article 1 (1) of the American Convention. The IACHR recommended that the Salvadoran government "carry out an exhaustive, rapid, complete and impartial investigation concerning the events complained of, in order to identify all the victims and those responsible, and submit the latter to justice in order to establish their responsibility so that they receive the sanctions demanded by such serious actions" (IACHR 1993d: 86/92). The Commission repeatedly criticised the Salvadoran amnesty law of 1993 and called on the government to repeal it (IACHR 1994a: 181/182). The Commission also criticised the amnesty law in its 1994 Special Report on El Salvador and argued that the state was bound by the provisions of the Convention with reference to article 144 (2) of the national constitution and article 1 (1) of the Convention. The IACHR report recommended that the Salvadoran government reopen pertinent criminal and administrative proceedings and carry out new independent investigations "to fully establish the circumstances under which they [the abuses, K.D.] occurred, identify the guilty parties and bring them to trial so that they may receive the punishment that such serious conduct warrants" (IACHR 1994b: 80, 69). Further, the Commission urged the executive to pay compensation to the victims and to adopt measures to prevent a recurrence of similar acts in the future (IACHR 1994b 69-77).

United States

The United States has always been remarkably muted in discussions about past violations of human rights in the hemisphere. This has most probably been the case because exhaustive inquiries would possibly have brought Washington's significant contributory liability to light. In general, the United States has not been very helpful. The rather selective declassification of secret or confidential US documents on Argentina, Chile or El Salvador in recent years has merely served to demonstrate its token interest in the matter. In this context, it is worth considering the following scenario, which has yet to materialise: if the US authorities do not comply with a victim's request to declassify documents relevant to uncovering liability for human rights crimes in Latin America, the victim might turn to the IACHR. It will be interesting to see if this takes place in the near future (Interviews, May 28, 2004).

Peru

In 1998, the Commission sought to have the Peruvian amnesty laws declared invalid and proposed setting up an independent investigative institution to analyse the violence (IACHR 1998c: 1299/1300). Again in 2001, in the 'Barrios Altos' case, the Court held that two Peruvian amnesty laws were generally incompatible with the American Convention (IACtHR 2001b: para. 14-18) and further ordered the State of Peru to provide monetary and non-monetary reparations to the victims or the relatives of the victims who had been killed (IACtHR 2001c). In this judgment the Court explicitly named the 'right

to truth' based on articles 8, 25 and 13(1) of the American Convention (IACtHR 2001a: para. 45, 48, 51; see also para. 41-43). Additionally, the obligatory reference is made to the Court's findings in Velásquez Rodríguez.

Chile

In 1997, the Commission also described the Chilean amnesty law as an infringement of judicial guarantees and a violation of the American Convention of Human Rights (IACHR 1998d). In a 1998 report, the IACHR further declared amnesty laws, referring in particular to the amnesty law drafted by the Chilean military before handing over power to an elected government, to be inconsistent with article 1 (1) of the American Convention. The Commission thus criticised the fact that the Chilean Decree Law 2191 (the self-amnesty of the military government) had not been repealed under the democratic government and continued to be in force after ratification of the American Convention (IACHR 1998d: 41-43). In this case, the Commission was again afraid that the Court would not support its position, though the IACtHR eventually agreed with the Commission's judgment (Interviews, May 28, 2004).

Paraguay

Contrary to the trend of discussing impunity merely in relation to current state agents, the IACHR Special Report on the human rights situation in Paraguay went further and explicitly included a subchapter on cases of impunity for abuses under the dictatorship of General Stroessner between 1954 and 1989 (IACHR 2001: 35-48). After its on-site investigation in Paraguay, although welcoming the national laws promoting human rights, the Commission criticised their practical ineffectiveness. According to the IACHR, Paraguayan courts should have taken the necessary steps and indemnified the victims and their families. The IACHR suggested a truth commission be created to prepare a report on deaths, disappearances, torture and other abuses in Paraguay during that period (IACHR 1999g: 1697/1698). The discovery of the so-called 'archives of terror' in Paraguay, which revealed material documenting human rights abuses by state agents undoubtedly also played a substantial role in the resolute insistence on uncovering the truth about Paraguay's repressive past.

In sum, the inter-American human rights system did support national efforts to combat impunity and strengthen the right to truth in an increasingly consistent manner, although a general concept at the regional level can hardly be ascertained.

VI. Conclusions

1) The right to truth in the inter-American system has been derived from the Commission's and the Court's interlinking of, above all, article 1 (1), and articles 8, 13, and 25 of the American Convention on Human Rights. Furthermore, only massive and gross violations of human rights, such as the interdiction of torture, the right to life and to per-

sonal security, including the crime of ‘forced disappearances’, are considered under a right to truth in the inter-American system, although no explicit doctrine rules out other rights. The Inter-American Commission and the Court of Human Rights have repeatedly stressed the right to truth as a right of both the individual and society in general. Referring to the articles mentioned above and other general statements on impunity and the right to truth, both human rights bodies of the OAS also sought to strengthen the right to truth as common general law in the inter-American system.

2) The debate on impunity in the inter-American system began with the Argentine transition to democracy in the mid-eighties. This is clearly shown by IACHR reports, which explicitly refer to the Argentine experience—the Mothers of the Plaza de Mayo or the fate of children of the disappeared, for instance. Besides the efforts of human rights groups, the discussion emerged because Argentina’s new government appeared, at least initially, to be willing to deal with its sad past at domestic as well as international levels. In addition, the 1979 visit of the IACHR as well as the subsequent Special Report were still considered to be extremely helpful in the fight for human rights in Argentina. The combination of the two, the gratitude shown towards the Commission and Argentina’s own endeavours to come to terms with past abuses eventually helped to introduce the topic into the inter-American system.

3) The main actors dealing with impunity and the right to truth were, of course, the Commission, the Court, human rights NGOs and the states in which massive human rights violations had taken place. Generally, the OAS Member States sought to address the problem almost exclusively at the national level and were usually not interested in dealing with past abuses within the inter-American system. As a rule, what came onto Member States’ agendas were significant socio-economic difficulties, not impunity or disclosure of the truth. The states concerned dealt with the topic where necessary, albeit reluctantly for the most part, but also considered it to be an exclusively domestic matter. Once again, the principle of non-intervention was used to prevent what was assumed would be a more critical investigation of past human rights violations. Unlike Argentina, Chile for example did not show any comparable interest in addressing the matter within the OAS after the country returned to democracy. Interestingly, the United States has turned out to be a non-actor—in contrast to its role during the 1970s and 1980s. Its passivity as regards the efforts to deal with past human rights crimes actually hampers the Latin American quest for truth, accountability and justice.

In contrast to the post-dictatorial governments, national and international human rights groups sought to highlight the issue of past abuses, since the topic was in danger of being marginalised within the national consolidation processes and necessary economic efforts. However, these human rights organisations still faced some scepticism from (inter-) governmental institutions, because they feared that their efforts would weaken the state.

The Court issued the seminal Velásquez Rodríguez and Godínez Cruz judgments in 1988, condemned impunity and also in the following years highlighted and upgraded the vague right to know the truth in judicial terms by endorsing it in several judgments with reference to the interconnected articles 1 (1), 8, 13, and 25 of the American Convention (Cassel 2001: 367).

The Commission was already well occupied with its extensive workload consisting mainly of sophisticated individual cases. In addition, coming to terms with the past

involves a broader historical perspective. The IACHR also condemned impunity as one of the major human rights problems in the region.²² Similarly to the Court, the Commission was keen to strengthen the right to truth by consistently defining and persistently referring to it.²³ Nevertheless, the OAS human rights bodies also appeared hesitant to give the topic more visible prominence in their day-to-day work. The inclusion of a specific chapter on the issue such as the one in the 2001 Paraguay report was an exception; the annual and special reports by and large did not include entrenched sections on the problem of impunity for past violations or on the right to truth.

4) In general, the Commission and the Court sought to address the topic on the basis of their mandates, by means of case judgments including findings of a general nature on the problem of impunity and the right to truth. Still, it is not clear whether the strict reference to the right to truth by the Court and the Commission can really be described as a coherent strategy. In addition to the important resolutions in the late 1990s on amnesty laws in Argentina, Uruguay, El Salvador and Chile, the IACHR began focusing more vigorously on impunity for crimes of past repressive governments. In its judgments, the Commission set examples upon which many human rights groups could draw. The Commission's statement that the right to truth should also be granted to society in general certainly provides a major advance for a broader understanding of such a right, possibly even including revision of the historical version of repressive periods. The Court's groundbreaking judgments in the Velásquez Rodríguez case, as well as those of the past ten years, have certainly fostered the right to truth and challenged the chronic problem of impunity. According to the norms cascade theory of Lutz and Sikkink, repeated reference to the findings of the Commission and the Court may have helped to make the right to truth a factual norm in the inter-American system (Lutz/Sikkink 2000: 655-657). Accordingly, an implicit strategy can be identified throughout the decisions and opinions issued by the two OAS human rights bodies, although no explicit doctrine on the issue had been stated. This might be explained by the fact that these case decisions already constituted guidelines for other cases and both institutions were reluctant to formulate a comprehensive doctrine since this would have given more visibility to the hitherto weak legal basis of the right to truth and would thus have offered more targets for challenge. Nevertheless, the inter-American human rights system certainly provides more workable and well-defined explanations on impunity and the right to truth, particularly when compared with the UN and the European human rights systems (Cassel 2001: 359/409).

5) The reactions of the main OAS institutions to the efforts of their human rights bodies have been, similar to the situation in the 1970s and 1980s, rather disappointing. The old gentlemen's agreement to 'live and let live' was replaced by a silent doctrine of 'not opening the wounds of the past' based on an inter-American consensus on the need for 'national reconciliation'. The issue of past human rights violations at the same time

²² Cassel (2001: 360) points out further that the Court has not dealt with the problem of amnesties as thoroughly as the IACHR.

²³ Whilst the Commission of 2003 apparently embraced two trends in thinking with its two protagonists Juan Méndez and José Zalaquett, the new Commission members have not yet shown whether they will foster a judicial right to truth or will rather advocate a right to truth not bound to strict legal norms (Interviews, May 28, 2004).

also seemed to underline the organisation's less-than-exemplary role during those gruesome decades. In brief, the OAS did not generally present a strategy of how to deal with human rights violations of past regimes either in an inter-American or in a national context. The genuinely conservative character of this intergovernmental body hampered the public treatment of such a sensitive issue.

The OAS as a whole could have done far more than it did. The organisation hardly influenced internal debates within its Member States. While the Court and the Commission are limited in their approaches by their respective mandates,²⁴ the OAS as a political organisation could have translated the major advances in the promotion of democracy and the rule of law and human rights since 1991 into a more courageous concept for dealing with past abuses from an inter-American perspective and not just domestically. Because the OAS as such did not cover itself with glory during the 1970s and 1980s, there should have been a sense of responsibility for handling the issue of past human rights crimes that had an obviously transnational character such as Operation Condor, which served to coordinate the anti-opposition measures of South American dictatorships.

6) Finally, I would like to make some suggestions for the inter-American system.

Because the Commission's mandate entails increasing the awareness of human rights, and since the American Convention calls for these rights to be 'ensured', the highly important issue of impunity for past abuses as well as the right to truth could be included in the IACHR's daily work as well as in its regular reports.

First, the OAS Human Rights Commission should establish the position of a Special Rapporteur for the Right to Truth and Impunity and create a separate section in its Annual and Special Reports covering impunity for abuses committed under authoritarian rule and the right to truth, going beyond existing subchapters such as "administration of justice". Furthermore, the IACHR should even consider a Special Report on Impunity in the hemisphere for crimes under repressive regimes.

Secondly, an Inter-American Truth Commission should be established, either permanently or with a ten-year mandate, to inquire into the structures of command and therefore the relevant internal and transnational liability, as well as in relation to the role of violations committed by foreign state agents.²⁵ The transnational nature of such an institution would give it greater authority in the countries concerned, since its mandate and the guidelines for its proceedings would be determined in general terms. Furthermore, an Inter-American Truth Commission should also prepare a comprehensive approach for the time after Fidel Castro's disappearance from Cuba, in order to deal with abuses committed during the Communist regime's rule on the island since 1959. Moreover, such a Truth Commission or other interdisciplinary inter-American committee could review the textbooks used in the hemisphere from a human rights perspective and should try to set up standardised regulations. This is essential, because an understanding of history passed on through the centuries and based on constructed traditional quarrels still persists in the region: "Truth and justice policies may also have the effect of depriving an old dictatorial elite of its legitimacy and prestige, as well as of discrediting the ideology that sus-

²⁴ However, article 18 of the IACHR's statute also bestows a broader mandate upon the Commission.

²⁵ Although there have been calls to create an international truth commission, a regional body would be more effective, at least from a mid-term perspective.

tained the old regime” (Barahona de Brito/González-Enríquez/Aguilar 2001: 313). Such a project would go beyond the matter of past human rights abuses and include an understanding of the region’s nations (Barahona de Brito 2001: 156-157). In this context, a comprehensive declassification of US intelligence files should be arranged in order to properly interpret the situation as well as to identify the involvement of the United States in Latin America’s so-called dirty wars (Méndez 1997: 281).²⁶

Lastly, one should discuss whether the Commission’s endeavours to establish a legally binding ‘right to truth’ might lead to a compulsory legal instrument such as an ‘Additional Protocol to the American Convention to Endorse the Right to Truth’. The drafting of such a legal document would go beyond the commonly stated acceptance of the right to truth as a customary norm of international law. Nevertheless, as the United Nations discussion on such an international instrument has already outlined the pros and cons, the IACHR seems to be unwilling to draft such a treaty since the disadvantages for the inter-American human rights system appear to outnumber the benefits. Doubts as to whether or not such a document is appropriate derive from the fear that it would diminish the scope of the right to truth rather than enlarge its scope of application (Interviews, May 28, 2004). Additionally, the well-known instability of many judicial systems as well as the lack of independence of some judges might represent major weak points in such endeavours and in implementing a ‘policy of truth’.

Undoubtedly, these proposals would be difficult to implement since the suggestions for institutional innovation would require considerable financial resources, substantial political will and assertiveness. However, the IACHR has previously shown itself able to overcome legal, financial and sometimes political obstacles with its inventiveness. Finally, the OAS could also delve deeper into the issue of past abuses under authoritarian rule as a historical duty resulting from its passiveness regarding human rights violations in past decades.

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²⁶ US human rights organisations began to demand the creation of a US truth commission after US President Clinton apologised for US support for Central American dictatorships. See Barahona de Brito/González-Enríquez/Aguilar (2001: 5, footnote 2).

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