

An approach to the state responsibility by an omission in The Inter- American Court of Human Rights Jurisprudence*

Una aproximación a la responsabilidad del Estado por omisión en la jurisprudencia de la Corte Interamericana de Derechos Humanos Community

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Resumen

El presente artículo busca analizar los desarrollos jurisprudenciales de la Corte Interamericana de Derechos Humanos en relación con la responsabilidad estatal, centrándose en los casos donde dicha responsabilidad ha sido declarada en razón de una omisión atribuible al Estado. El presente análisis propuesto, se realizará a partir de las sentencias contenciosas expedidas por la Corte IDH, buscando identificar las principales líneas de argumentación en los casos más representativos. El análisis jurisprudencial propuesto no será exhaustivo pero será ilustrativo con relación a los principales desarrollos en la materia.

Palabras clave: Corte Interamericana de Derechos Humanos, responsabilidad estatal, omisión, derechos humanos.

Abstract

This paper will analyze the jurisprudential development and doctrine of the Inter-American Court of Human Rights in relation to the international responsibility of the state, focusing on the cases where the liability was held because of an omission imputable to the state. The analysis will be done from its pronouncements under its contentious functions, seeking to identify the main lines of argument and the most representative cases. The jurisprudential search is not going to be exhaustive, but illustrative of the major developments of the idea of state responsibility based on an omission of the state.

Key words: Inter- American Court of Human Rights, state responsibility, omission, human rights,

Introduction

A successful system of human rights protection should be founded on a clear accountability system. The consecration of rights is not useful if it does not specify the process of responsibility when those rights are violated. International human rights treaties are the recognition of essential standards for the development of societies, which are based on the most basic values of human beings. But this development is only authentic if the establishment of rights is strengthened with the creation of mechanisms for its protection and a due process of responsibility for violations of these globally accepted demands. As a consequence, it is impossible to think of an international law of Human Rights without an international responsibility system.

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Over the years, the International Human Rights Law has become a fundamental and mandatory normative category, which should be respected at all times and everywhere. It is evident that ~~national~~ states have incorporated slowly in their systems the institutional mechanisms for the protection and defense of basic human rights, but the rapid development and advancement in their recognition and protection has been mainly internationally. Accordingly, the development of state responsibility because of wrongful actions or omissions has also emerged from the international level, both from the doctrine and from practice.

This paper will analyze the jurisprudential development and doctrine of the Inter-American Court of Human Rights in relation to the aforementioned international responsibility of the state, focusing on the cases where the responsibility was held because of an omission imputable to the state. The analysis will be done from its pronouncements under its contentious functions, seeking to identify the main lines of argument and the most representative cases. The jurisprudential search is not going to be exhaustive, but illustrative of the major developments of the idea of state responsibility based on an omission of the state.

On this issue of state's responsibility by omission within the Court, it will be pertinent to examine some of the most important cases in which the Court has ruled about state's responsibility for the acts committed by private parties. This situation clearly represents a responsibility not based on the commission of an act by the state's officials, but because the state failed to comply with a specific duty. This paper will analyze the merits of cases such as Velasquez Rodríguez, La Rochela, Pueblo Bello, and 19 merchants, between others.

To develop this topic, this paper will first analyze the basic structure of rights. Thus, we will introduce the concept of "right to something", which is understood as a legal

relationship where we find two subjects and an object. This paper will see how that object, which is composed of positive and negative obligations, is the basis for the emergence of state responsibility. Then, secondly, this paper will briefly discuss the rules on international responsibility of the state based on the general rules arising from case law and doctrine. This section will describe the basic elements of this responsibility and its emergence both in relation to acts and omissions of the state.

The third section will focus on the responsibility of the state because of an omission. In particular this section will explain the general scenarios in which this kind of responsibility can appear and its relation to the international positive obligations that the state has assumed to be part of the international community. Here, cases of direct responsibility for omissions and indirect responsibility cases in which the state is responsible for acts committed by private individuals will be identified. Finally, the most important jurisprudence of the Inter-American Court of Human Rights will be presented, seeking to understand how this thematic has evolved in the Americas. This analysis will facilitate the proposal of some conclusions that analyze the extent to which the Court can go further in the establishment of the responsibility of the states because of a possible omission in fulfilling their obligations to protect anyone who is in their jurisdiction.

Rights: negative and positive obligations

To understand the different obligations that are implicit in a right, it is necessary to focus on the theory of subjective rights. The first issue that must be recognized about the concept of subjective rights is that there is no consensus or unanimity about its meaning and structure, despite being a highly analyzed thematic with an important relation to human rights and fundamental rights. However, numerous analyzes are in favor of its existence and importance.



Generally, this type of right is understood as the particular situation in which there is a person or group of persons who have the faculty to demand certain behavior from another in relation to an objective right –a right that is recognized in a rule or norm-. However, others -traditional natural law scholars- believes that individuals' rights do not depend on the creation or not of rules of substantive law, because they consider them as faculties and powers inherent to the human condition.

Under this paper, without getting into that discussion, we will define subjective right as the formal quality attributed to A (legal subject) in a situation S to determine and demand a specific behavior of B (legal subject), and to determine it imperatively (De Luca, 1997: 58). From there, it follows the idea of triadic relations as the foundation of rights, which can be analyzed under Robert Alexy's (1993) proposals.

Accordingly, Alexy developed the idea of subjective rights as legal positions or legal relations¹, where he described the following categories of relations or positions between the individuals and the state: (i) Right to something (ii) Liberties (iii) Powers. These categories are set forth as a triadic structure composed of an active subject (AS), a passive subject or holder of the obligation (PS), and an object (O). Let us, therefore, move to the analysis of the right to something, only category of the three that is relevant in this paper. Following the author (Alexy, 1993, p. 186-210) a right to something can be raised as follows: (1) *a* has in relation to *b* a right to *G*, statement that under the triadic relation structure can be expressed as *RabG*, where *a* is the holder of the right, *b* is the recipient of the obligation and *G* is the object.

Thus, within the rights to something, we can find rights of *a* to expect and demand from *b* the enforcement of negative actions. This type of

¹ These legal positions and relations are not just those that arise explicitly from legal obligations enshrined in rules, but also those that can be ascribed to one or more standards according to valid reasons generated by rational arguments.

action is based upon an object, which content is a positive or negative obligation to do something by the recipient of the obligations. It is a duty to do or not to do certain conduct. Consequently, these are the rights that are set to protect the individual against the state's actions. These actions are mainly individual rights to prevent the development of impediments to individuals' liberty because of arbitrary actions of the state, and rights related to personal property.

In addition, within the rights to something, there are different obligations to the receptor of the right of those that were described above. The holders of the right can also expect and demand the creation and implementation of affirmative or positive actions. These types of actions, in turn, can be subdivided into factual positive actions and normative or regulatory positive actions.

First, the factual positive actions are impositions to the recipient of the right in order to perform certain activities or materialize some facts in favor of the holder. An example is the right to social security, in which the state is required to create the means and opportunities for the entire community, especially health. Second, the rights to affirmative regulatory actions concern the right of individuals to live in a country where the state develops and enforces rules to protect their rights. The right to these types of actions is primarily aimed at the state to regulate an activity or specific events that affect or could affect an individual's legal status.

Then, the general object of a right is composed of various demands addressed to the recipient about doing, allowing, or omitting to do something. The analysis of the object of the right is usually based upon what the rules explicitly established, but also in the interpretation of what is implicitly inside of those regulations.



Internationally wrongful acts of the state

Responsibility is the necessary corollary of a right, and all rights imply the existence of a responsibility of someone to comply with the obligation. Therefore, if the responsibility as an obligation is not met, this implies necessary reparation. Responsibility is based upon the idea that every normative relation in the field of rights and obligations involves two or more subjects- active subject and passive subject as previously explained- and that this relation is built upon the idea of reciprocity. Thus, any disruption in this balance implies the need for its restoration.

International law also has developed these basic principles of law. The analysis of the idea of international responsibility of the state has become more important with the advances of the human rights protection agreements. Traditionally, claims of responsibility were brought between states through diplomatic channels or other direct communications, or before an international court or tribunal, but there is now the possibility in some cases for individuals or corporations to access regional human rights tribunals and bring state responsibility (Crawford, 2013, p. 100). Therefore, today the issue of state responsibility under international law of human rights is essential to give them a genuine effect. Thus, the state is responsible for an action or omission in violation of any internationally recognized rights. This responsibility is the consequence of the existence of international obligations that the states must comply with because of the existence of a right whose holder expects and can demand that it be met.

Accordingly, in the international human rights law, we are again in front of a triadic relation where the individuals are the active subjects and the states are the passive ones. In consequence, the active subject can demand from the state a specific behavior and if the state does not respond in accordance to it, it will be

responsible and possibly liable for the violation of international law.

As recognized by jurisprudence and doctrine, international responsibility is a basic principle of international law, according to which a breach of international law by a state entails its international responsibility (Vienna Convention, 1961, Art. 26). This breach could be based on actions or omissions, or on a combination of both, which constitute an internationally wrongful act. According to United Nations (2012, p. 12) "There is an internationally wrongful act of a state when conduct consisting of an action or omission: (a) is attributable to the state under international law; and (b) constitutes a breach of an international obligation of the state."

An action or omission is attributable to the state because of the behavior of its agents or representatives. All the organs of the state are bound by the international obligations of the state. Thus, an "Act of the state" as a general rule is a conduct attributed to the state only because of the actions or omissions of the people who represent the "organs of government, or others who have acted under the direction, instigation or control of those organs" (United Nations, 2012, p. 27). Generally, the identification of the agents of the states and its organs is based on the internal law, which must determine the structure of the state².

It is fundamental to mention that the international responsibility of the state arises regardless of the level within the government at which the person who committed the wrongful conduct is located. Also, it is important to emphasize that the state may be held liable even if the person who committed the conduct exceeded their powers or went against the instructions of their superiors.

² The establishment of the internal structure of the states is not a topic of international law. But international law identifies certain activities as inherently public and therefore attributable to the state regardless of their definition under the internal structure of the state. For example the police functions.



In addition, sometimes the state may be responsible for the actions of private individuals who are not empowered with government authority but who are involved, for example, in a violation of human rights. According to international jurisprudence, as we are going to discuss below, this can happen when the state tolerates, controls, directs, or allows such acts, which is known as a way of international responsibility of the state for omission.

As a consequence, the state can be responsible for such acts when it does not take all the measures that are required to prevent those negative effects regarding an existing right. Also, the state can be bound by the conduct of a person or entity that, although not being part of the state's organs, is empowered by domestic law to exercise faculties, powers, and activities of the government authority (United Nations, 2012, p. 51).

As previously discussed, the second condition for the existence of an internationally wrongful act of the state is that the conduct that is attributable to the state constitutes a breach of an international obligation of that state. As United Nations hold it, "The terminology of breach of an international obligation of the state is long established and is used to cover both treaty and non-treaty obligations." (2012, p. 14). Hence, there is a breach of international law because the existence of a conduct that does not conform to the international obligations, regardless of the origin or character of such obligation³.

This characterization of a wrongful act focuses its attention exclusively on the international law and the international obligations. For this reason, the state cannot use the internal law as an excuse to violate an international obligation (Vienna Convention, 1961, Art. 27) and the

3 Obligation may be established by customary law, treaties or general principles of international law. Most obligations are enshrined in treaties unilaterally accepted by states. Generally customary law and general principles are used for the interpretation activity.

state will not avoid international responsibility for a wrongful act based on the internal law of that state. Finally, the state only can breach an international obligation that existed at the moment when the conduct was committed; the present conduct is not bound by future obligations. With the fulfillment of these two elements, international responsibility can be upheld.

Responsability because an omission

Although Article 12 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ILC, 2001) only refers to "acts" of states expressly in its definition of breach, Article 2 makes clear that both acts and omissions by state organs can amount to conduct that is internationally wrongful. State responsibility is frequently invoked on the basis of an omission and some authors held that in principle there is no reason to distinguish between the two (Latty, 2010, p. 355). Actually, some of the most relevant international cases about state responsibility are based on an omission. For example the *Corfu channel case* in which the International Court of Justice (hereinafter ICJ) held (1949, p. 22-23) that Albania was responsible based on an omission of a state who knew, or must have known, some risks within its territory and communicated them to other states⁴.

Also, the *Case Concerning United States Diplomatic and Consular Staff in Tehran* is an important international precedent. In this case a group of protesters attacked the U.S. Embassy in Tehran, occupied it and took diplomatic personnel as hostage. At the time of the attack, Iranian government forces did not intervene to protect diplomats and subsequently approved the attack. Consequently, the ICJ (1980) stated that, even though the behavior of the protesters

4 "Albania's obligation to notify shipping of the existence of mines in her waters depends on her having obtain knowledge of that fact in sufficient time before October 22nd; and the duty of the Albanian coastal authorities to warn the British ships depends on the time that elapsed between the moment that this ships were reported and the moment of the first explosion...In fact, nothing was attempted by the Albanian authorities to prevent the disaster." ICJ. (1969) *Corfu Channel Case*, April 9, p.22-23

was not primarily attributable to the state, the refusal or negligence to give protection to the diplomatic corps established the Iranian state's international responsibility.

The ICJ, in these two cases, established that the insufficient control of the non-state actor's actions, which affected the security and integrity of aliens, established the responsibility of the state. Initially, international jurisprudence only referred to this type of international responsibility when the acts were against foreigners, but with the development of the jurisprudence of international human rights, the idea of responsibility by omission is extended to citizens of the same state.

The idea of omission as the reason for an international state's responsibility reminds us of the importance of the positive obligations of the state, both factual and normative. Likewise, this type of responsibility also refers to the idea of due diligence of the state⁵. As professor Lysén stated (1997, p. 91), "The main issue here, whether the breach of duty alone may suffice (objective responsibility), or if also negligence or intent (fault or *faute*) relative to the breach must be shown on the part of the state in order to constitute an internationally wrongful act or omission (subjective responsibility)."

International jurisprudence and doctrine have favored the idea of objective responsibility because, otherwise, the subjective responsibility would involve the analysis of mental aspects of the agent who performed the conduct. In Crawford's words, "state responsibility is predicted on a principle of "objective" liability, in the sense that once the breach of an obligation owed under a primary rule of international law is established, this is *prima facie* sufficient to engage the secondary consequences of

⁵ Due diligence based on knowledge and due diligence based in the duty to prevent wrongful acts by taking the appropriate measures, the proper steps as satisfactory as possible. See BARNIDGE, Robert P. (2008), *Non-state actors and terrorism: applying the law of state responsibility and due diligence principle*, T.M.C Asser Press, The Hague.

responsibility" (2013, p. 61). Thus, a single breach of an international law obligation is sufficient to uphold responsibility. Accordingly, the intention or fault is not analyzed to determinate the existence of responsibility, but it could be taken into account in a process for determining compensation and remedy.

Specifically, we can talk about human rights violations by omission when the state fails to meet its responsibilities to effectively implement these rights or to protect them from non-state actor's actions. In these cases there are facts that clearly demonstrate that the state or its organs already knew of the risks and did not act in a diligent way to prevent the negative effects. These situations describe the violation of positive factual obligations of the states. Also, the state can be held responsible based on an omission, when it does not develop its internal law to protect those rights. The state must create and implement law that clearly establishes the limits and duties of the government, the limits, duties and rights of individuals, and the mechanisms to protect them or guarantee remedy in case of a violation.

It is important to note that the responsibility of the state, because of the actions of non-state actor, is generally related with these types of omission, especially when there is an omission to comply with the factual positive obligations. Since the appearance of the basic ideas of the emergence of the state, it is stated that the main reason for the existence of the state is the protection of individuals (Hobbes, 2001, p. 141). Accordingly, one of the principle duties of the state is the protection of the citizens and all people under its jurisdiction, a duty that requires positive actions in relation to the non-state actor's actions. Indeed, in general terms, this international responsibility stems from the fact that the state has failed to provide the necessary protection to the population to enjoy full rights.

Inter-american jurisprudence: the responsibility of the state because of omission conducts.

The OAS Charter does not advance beyond the generic consecration of primary obligations for the observance and protection of rights by all states parties. In this sense, the responsibility that derives from the breach of these obligations -by action or omission attributable to the state-, will be ruled by the application of the general principles of international responsibility of the states collected by the international doctrine and jurisprudence.

By ratifying the American Convention, states assume responsibilities to the entire American community, particularly undertake the duty to ensure some rights to all human being - domestic or foreign- under its jurisdiction. It is important to highlight that the Convention does not create rights in favor of the states, but in favor of individuals. Consequently, the rights established in the Convention generate a legal relation between the individuals within the jurisdiction of a state (AS) and that state (PS), which must comply with the obligations created by the rights in favor of those individuals (O). If the state does not act in conformity with these obligations, it can be held internationally responsible for wrongful acts. The Inter-American Court of Human Rights (hereinafter I/A Court H.R.) has introduced in its decisions the general principles of state's international responsibility that were previously exposed (I/A Court H.R., 2001, p. 72).

Human Rights treaties use a variety of verbs to describe the obligation that they impose to the states. The American Convention, in article 1, requires the state's parties to respect and guarantee the rights proclaimed in the treaty⁶.

⁶ American Convention. Article 1. The states parties to this convention undertaken to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

This article is fundamental to determinate -under the inter-American system- whether a violation of a human right, recognized by the Convention, can be attributable to the state.

The first of these obligations -respect- is a typical negative obligation of not to do, which results seek to impose some limitations on the exercise of public power. The second one -guarantee- is a positive obligation, which implies the duty of the state's parties to organize its government, and in general, all the structure of the state, so that they are capable of ensuring the free and full exercise of the human rights. The state must create the conditions for preventing, investigating, judging, and punishing any violation of the rights recognized by the American Convention. Also, states must try to restore the right that had been violated and repair the damage caused by the violation of human rights (I/A Court H.R., 1988, p. 164-166).

Article 2 of the American Convention is also important for determining when an act is attributable to the state. This article established that "where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State's Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms" (1969). This article is really important because it expressly determines, as mandatory, the normative positive obligations of the state, so to create the internal rules that are necessary for the protection of the recognized rights of the Convention.

The I/A Court H.R. has interpreted this article in different decisions and has held that it has two concrete consequences. The first one is that every state party must eliminate from its internal law all the rules and the practices that constitute a violation of the rights established in

the Convention. The second one is the duty or obligation to develop all the internal rules for the effective protection, respect, and guarantee of those rights. But the Court has been emphatic saying that “the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation –it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.” (I/A Court H.R., 1988, p. 167)

According to these two articles and the general international principles of the responsibility of the state, the I/A Court of Human Rights has held the existence of state responsibility based on an omission in many decisions. In this topic, the most representative case of the Inter-American system of human rights is the Velásquez Rodríguez Case in which the Court established the general principles about responsibility of the state, mainly regarding the wrongful acts based on the omission to fulfill the duty to guarantee the free and full exercise of the rights. Here, this paper will present others cases related with this type of responsibility. In other to present the I/A Court jurisprudence this paper will divide the exposition of the most relevant cases as follows:

Direct responsibility of the state (unlawful violation of human rights which is directly attributable to a state) based upon the inconformity of the duty to regulate the mechanisms for the protection and effectiveness of the Convention’s rights.

In the case of *Pacheco Teruel et al. v. Honduras* the I/A Court of Human Rights reminded the state’s parties of the general obligation of the state to adapt its domestic law to the provisions of the American Convention in order to guarantee the rights established therein. In this regard, the Court emphasizes that the principle of criminal legality requires that the definition of an offense must use clear, precise terms that plainly describe the conducts liable to

punishment, establish their elements, and allow them to be distinguished from conducts that are not punishable or unlawful conduct penalized by non-criminal measures. Any ambiguity in the definition of offenses leads to doubts and allows the authority to use its discretion, which is particularly undesirable when establishing the criminal responsibility of the individual and penalizing this with punishments that severely affect fundamental rights such as life or liberty (I/A Court H.R., 2012, p. 107-109).

In this case, because of the weakness of the law which did not conform with the American Convention parameters, the state was found responsible and the Court established Honduras a period of one year to change its Law on the National Penitentiary System, the Special Regulations for the Operation of the system, and the Prison Administration Manual and to amend the article 332 of the Criminal Code.

In this case, it is clear how the Court, in addition to reviewing the facts and conditions in which the prisoners were in Honduras, made a revision of the existing regulations for the protection of prisoners’ rights in this specific state. Moreover, they also analyzed the criminal rules concluding the existence of international responsibility by omission of the state because of a breach of the normative positive obligations imposed by Article 2 of the American Convention on Human Rights.

The OAS members were clever to include article 2 in the American Convention because it will be very difficult to introduce genuine positive changes in the protection of human rights in the Americas if the member states do not change their domestic law. The development of International human rights law must be incorporated in the internal law seeking to create legal and practical instruments to ensure and respect those rights.

Direct responsibility of the state because of the failure to investigate, prosecute and punish

the violation of the rights. In addition, the failure to guarantee the right to an effective remedy for the victims.

In the case of the *19 Merchants v. Colombia*, the I/A Court of Human Rights stated that, for establishing the violation of the rights to a due process and the access to justice, it is necessary that the state, under the due diligence principle, avoid impunity. In this case the Court defined impunity as: “the overall failure to investigate, pursue, capture, prosecute and punish those responsible for violating the rights protected by the American Convention.” (I/A Court H.R., 2004, p. 260). In the specific case the Court spoke about the legal obligation of the state to perform a serious investigation, which must be developed in concordance with the right of victims and their families to a fair trial under reasonable deadlines, the clarification of the facts and the necessary remedy to the victims. In the same sense, in the case of *La Rochela v. Colombia*, the Court maintained that:

According to the American Convention, the state’s parties are obliged to provide effective judicial recourses to the victims of human rights violations (Article 25), and that this recourse must be provided in conformity with the due process of law (Article 8(1)). Both of these obligations fall within the general state obligation to guarantee the free and full exercise of the rights recognized by the Convention to all those within their jurisdiction (Article 1(1)) [...] The Court finds that, upon an analysis of the lack of due diligence exercised by those who conducted the official investigations, the ineffectiveness of these criminal proceedings is clearly demonstrated. This lack of due diligence is manifested in the unreasonable length of the proceedings; the failure to adopt the necessary measures to protect against the threats which arose during the investigations; the delays, obstacles and obstructions which arose during the proceedings, and the grave omissions in the development of logical lines of investigation. (I/A Court H.R., 2007, p. 145-147)

In these two cases the facts and the decision of the Court illustrate the types of omissions that state’s parties must avoid. In them it can be seen how a state party was held responsible because its government did not meet the obligations of the state to investigate, punish those responsible for the violation of the right, and compensate the victims. Here there are failures, such as unjustifiable time lapses for investigation, investigation which was concluded without punishment for the perpetrators, misuse of military criminal justice, and lack of enforcement of the rights of victims to truth and remedy, between other omissions. These cases represent the violation of the factual positive obligations of the state in relation to the individuals rights recognized in the American Convention.

Indirect responsibility of the state (the unlawful violation of human rights is not directly attributable to a state) for complicity or tolerance with private individuals who commit human rights violations.

The I/A Court H.R. has recognized that in some cases the state can be responsible for the violation of human rights committed by private individuals or entities. The general rule is that only the actions or omission of the agents or representatives of the state are attributable to the state, but when the violation of human rights by private individuals is committed with the help, tolerance, complicity or abetting behavior of the state, those are imputable to the state party. So, the Court has analyzed this responsibility since the Honduran cases (I/A Court H.R., 1988b y 1989) which introduced the notion of international responsibility for the tolerance and support of its agents to individuals who violate the rights human.

A good example of this jurisprudence is the case of *Case of the Mapiripán Massacre v. Colombia* in which was proved that the Colombian army supported the paramilitary group that perpetrated the Massacre. Also, the

state agents tolerated all the illegal preparative conducts of this group and were involved in the transportation of the members of this illegal group. In the words of the Court,

The incursion of the paramilitary in Mapiripán was an act that had been meticulously planned several months before June 1997, carried out with logistic preparatory work and with the collaboration, acquiescence, and omissions by members of the Army. [...] Omissions by the VII Brigade are not merely non-fulfillment of its legal duty to control the area, but rather, according to the Attorney General's Office, they involved "abstaining from action, necessarily in connivance with the illegal armed group, as well as effective positive attitudes tending to enable the paramilitary to attain their objective, as they undoubtedly would not have been able to act without that support. [...] The Court notes that, while the acts that took place between July 15 and 20, 1997, in Mapiripán, were committed by members of paramilitary groups, the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance, expressed through several actions and omissions, of the Armed Forces of the State."⁷ (I/A Court H.R., 2005, p. 96)

In this case the responsibility is based upon actions and omissions of the state, here the Colombian agents tolerating and supporting an illegal action of a private group against the population. The omission of control of this group and the omission of effective answer to protect the community constituted a clear violation of the state's obligations under the American Convention. In consequence the state has violated its international obligations through actions committed by third parties in which the state's agents were part or tolerated its occurrence. This wrong behavior of the representatives of the states must be proven and must represent a significant omission of preventing and protecting people under the jurisdiction of the state. The *Rochela case* (I/A

⁷ Id. parr.120

Court H.R., 2007)) and the *19 Merchants case* (I/A Court H.R., 2004) also have important references to this type of responsibility.

Indirect responsibility of the state for lack of diligence to prevent acts of individuals that violate the rights enshrined in the convention.

There is a second scenario in which the state can be responsible for the violation of human rights committed by a private actor. This scenario is based upon the failure of the state to act with due diligence to prevent those private individual's actions that constitute a violation of the rights recognized by the American convention. Therefore, the responsibility of the state is an evident consequence of the omission of fulfilling a positive obligation, which is the protection of all the people under its jurisdiction. The I/A Court has stated in a different decision that the state is obligated to prevent all action that could interfere in the full and effective enjoyment of the American convention's rights.

It is also in the *Honduran Cases* that the I/A Court first introduced this type of responsibility. As Hannum (2011: 373) recalled us, "The Velásquez Rodríguez judgment addresses the duty to prevent human violations, which raises the question of what standard of care should be imposed on a government." In this case the Court established that the obligation to prevent the violation of human rights either by the state's agents or private individuals is within article 1 of the American Convention. In the Court's words:

An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." (I/A Court H.R., 1988, p. 172)



In this specific situation we are not in front of an aiding and abetting conduct of the state. Here, the state fails to protect the community because its agents did not comply with their duty to ensure the free and full exercise of the rights recognized by the Convention to every person subject to the state's jurisdiction. As a matter of fact, this situation illustrates clearly the main purpose and reason of existence of the state: the protection of all the population under its jurisdiction. The absence of due diligence to prevent has been recognized by the Court mostly in two ways: (i) when the state does not act diligently even though they have the knowledge of the existence of an specific, immediate and determinate risk, or (ii) when perpetrated by private entities to which the state has delegated the provision of public services.

The first situation can be understood from the *Pueblo Bello v. Colombia case*, in which the Court decided that,

[E]ven though the January 1990 massacre in Pueblo Bello was organized and perpetrated by members of a paramilitary group, it could not have been carried out if there had been effective protection for the civilian population in a dangerous situation that was reasonably foreseeable by the members of the Armed Forces or state security forces. It is true that there is no evidence before the Court to show that the state was directly involved in the perpetration of the massacre or that there was a connection between the members of the Army and the paramilitary groups or a delegation of public functions from the Army to such groups. However, the responsibility for the acts of the members of the paramilitary group in this case in particular can be attributed to the state, to the extent that the latter did not adopt diligently the necessary measures to protect the civilian population in function of the circumstances that have been described." (I/A Court H.R., 2006, p. 140)

The facts in this case are similar to the other massacres in Colombia, but what is different in this case is that the Court did not find sufficient evidence to conclude that the state's agents or representatives had acted in favor of the paramilitary group. The important issue here is how the state protected the civil population in relation to the risks that they have to face because of the particular Colombian context.

Also, in the *La Rochela case* the I/A Court provided a very interesting reflection about the obligation of the state to protect and be diligent with the prevention of the violation of rights committed by private people. In this case, the state was found to be responsible because it failed to provide the necessary protection to a group of investigators - state agents-who had to face great risks investigating previous violations of rights committed by a paramilitary group in alleged collusion with state officials. In conformity the Court said,

The events described in the instant case occurred in a context of violations against judicial officers designed to impede them in their duties and to intimidate and discourage them, in order to achieve impunity for gross violations of human rights. It was in this context of risk for judicial officers that the state failed to adopt the necessary measures to guarantee the safety of the members of the Judicial Commission while they were performing their duties." (I/A Court H.R., 2007, p.81)

To decide this type of responsibility of the state, the Court has precised that the state can be held responsible because of failing to prevent and ensure the effective exercise of rights only when the state acknowledge the existence of risks that constitute real danger to the population. Accordingly, in the *Pueblo Bello's case* the Court determined,

A State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction. Indeed,

the nature erga omnes of the treaty-based guarantee obligations of the States do not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State.” (I/A Court H.R., 2006, p. 123)

As a result of this complementarity, the human rights protection regulatory framework is designed to protect the individual from the different public authorities, but not from others individuals. As a general principle, this type of care corresponds to other jurisdictions, such as criminal or civil jurisdiction of each state. In this regard, the jurisprudence of the Inter-American Court has been consistent in stating that the court does not have the duty to analyze the criminal responsibility of individuals for violations of human rights, but the responsibility of the state regarding the American Convention rights.

Since *Velasquez Rodriguez* case, the Court has continued to apply this principle which the international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible (I/A Court H.R., 1988, p. 134).

Now, the lack of positive measures of protection and prevention of the possible violations of human rights committed by private

entities, to which the state has delegated the provision of public services, can also constitute a breach of the international obligations of the state under the American Convention. Indeed, if the state decides to delegate some of its public duties, it must be especially diligent in preventing these entities from violating the rights established in the Convention. The government must regulate these kinds of delegations in a clear and complete way and it must execute permanent surveillance and monitoring.

Finally it is useful to remember that the cases of *Velasquez Rodriguez* and *Godínez Cruz* (two of the Honduran cases) provided the general basis in jurisprudence about responsibility of the state. In them we can find all the general principles of international state responsibility and more interestingly for this paper, the general principles about responsibility because of an omission. For instance, these two cases describe the obligations of the state under article 2, the positive obligation to investigate, prosecute, punish and remedy, and the obligation to prevent (I/A Court H.R., 1988, p. 184-85).

Conclusion

After all we have described, it is clear that international jurisprudence has actively created rules about international responsibility of the states. It is thanks to the jurisprudence and the great work of the courts -including the I/A Court of human rights- that the international sphere has established basic principles on this subject. In general it can be concluded that international responsibility arises when the state breaches any of its international obligations by an action or omission that is attributable to it. In this regard, it should be noted that the obligations of the state have different sources, namely, international custom and treaties. Also, as a general rule, the state is responsible only for the violations of rights committed by its agents or representatives. However, as we saw, it might respond something for the acts of private individuals.



The international responsibility of the state could not be determined in the absence of binding international obligation. Also, obligations would not exist without the correlative existence of a right. Therefore, one cannot speak of responsibility, without the creation and consecration of rights, neither can one could speak of effective rights without a specific and active accountability system, which is the only way to ensure its fulfillment.

As we see the existence of a right create a legal relation between two subjects who are in legal positions: (i) to demand and expect a specific conduct, and (ii) to comply with some duties or obligations. In general, the recognition of a right supposes the existence of negative and positive obligation as the object of the above legal relation. As it was explained, the positive obligations require from the state a specific behavior, a duty to do something to protect the population under its jurisdiction, and to ensure the effective and free exercise of that right. Accordingly, the international jurisprudence has decided that the state is not only responsible for its acts, but also for its omissions.

The I/A Court has held some state members responsible based upon an omission; but this omission may have occurred in different ways. A first example is the failure of the state to regulate the conditions for the effective and free exercise of the rights recognized in the Convention. A second one is when the state tolerates or omits to act under an abetting attitude in relation with human rights violations committed by third parties. A third is when the state ignored its obligations to investigate, prosecute and punish individuals who violate human rights. A fourth example is when the Court has held responsible the state due to failure to implement all necessary measures to prevent the commission of such violations.

The Honduran cases are the most relevant jurisprudence in this topic under the inter-American system of human rights, but the sad

reality of Colombia and its massacres has also given illustrative facts about the responsibility of the state because of an omission. Through all of these cases we can see how the role of the state is fundamental in the protection of the most basic rights of people. Without a successful government and a pertinent protection system, populations will become more vulnerable to the risks that they have to face from living in society. This reasoning leads us to remember Hobbes ideas, who understood that the individuals gave up part of their freedom to set up a state that would protect them against the hazards that are inherent of the state of nature, where the strongest person subjected the weakest in favor of his own interests.

Within the precedent of the Court, the decisions that are most interesting about the responsibility of the state are those based in the failure to create and implement the necessary measures for the development of individuals in a context that ensure the protection of their rights. In this regard, it may be considered that the Court could be more demanding with states and spread the analysis of service failures.

Consequently, the I/A Court may go further to analyze the conditions of the cases to turn attention on structural failures against adequate protection of rights. Given that the Court's jurisdiction is complementary to the internal systems of each state, further analysis would not only be about reparation but also about substantive changes to improve the system of internal and external protection, which necessarily implications for the prevention of acts that violate rights.

Thus, with the establishment of the monopoly of force in the hands of the state and its territorial control, the state must diligently protect the population not only against extraordinary risks that were known by its representatives, but also address pertinent measures against the general risks that arise from normal life in society. This means principally the design of citizen security

strategies to prevent the violation of human rights because of inadequate resolution of social conflicts.

It is interesting to see that the I/A Court's case law analyzes not only the measures that the states designs to protect people against gross human rights violations or to protect population from extraordinary risks, but also analyzes how the state designs and implements the protection of the human rights in daily life. The prevention of quotidian violence has a big impact in the prevention of gross violations of human rights.

Finally, this paper dares to suggest that behind the demands of compliance with the positive obligations of rights such as life, personal integrity, liberty and property, there is also a right to personal safety, which requires further independent recognition. A right to personal security is understood as the absence of objective risk or fear of being attacked by another person through the use of illegitimate violence. However, under the general international law, the right to personal security is tied to other rights, such as personal freedom, so understanding the mandate requires the state to only refrain from violating the physical integrity and freedom of the individual.

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