POSITIVE OBLIGATIONS IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Laurens Lavrysen*

Abstract

The present article examines the concept of positive obligations in the case law of the Inter-American Court of Human Rights (the Court). From its first contentious case of Velásquez-Rodríguez v. Honduras on, the Court has clearly rejected the classical negativistic position that human rights only give rise to negative obligations to refrain from acting in such a way that violates human rights. Instead the Court has interpreted the American Convention on Human Rights (ACHR) as also giving rise to positive obligations that require actions by the state to actively protect against human rights violations. Based on Articles 1(1) and 2 ACHR in conjunction with specific ACHR rights, the Court has recognised a wide array of positive obligations, including obligations to prevent, investigate, punish and provide reparations for human rights violations, as well as obligations to fulfil human rights (in particular the right to a ‘dignified’ life) and to provide substantive equality. The paper argues that the Court’s positive obligations case law clearly illustrates that the Court is acting at the forefront of developments in international human rights law. Moreover, it is argued that if the Court pursues the Drittwirkung approach proposed in its Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants, the ACHR has the potential of “constitutionalising” nearly all dimensions of human conduct.

* Laurens Lavrysen is a Ph.D. Researcher at the Human Rights Centre of Ghent University. He works on a Ph.D. on Positive Obligations under the European Convention on Human Rights. His research is funded by the Research Foundation Flanders (FWO) and takes place within the framework of the European Research Council funded project “Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning”. <Laurens.Lavrysen@UGent.be>.
1. INTRODUCTION

In international human rights law, a distinction is made between negative and positive obligations. Negative obligations require the state to refrain from acting in such a way that violates human rights, whereas positive obligations require actions by the state to actively protect against human rights violations. Based on the classical liberal philosophy underlying civil and political rights, international human rights law has historically been biased towards interpreting these rights in a predominantly negativist way, favouring negative obligations over positive ones.

From its first contentious case of Velásquez-Rodríguez v. Honduras on, the Inter-American Court has however rejected this negativist position, recognizing that in order to realize the effective enjoyment of human rights, the state must comply with both negative and positive obligations, thereby principally placing positive obligations on the same footing as negative ones. In what follows, this paper will first provide a discussion of the Court’s general approach to positive obligations, before discussing specific positive obligations recognized in different areas of the Court’s jurisprudence.

2. THE GENERAL APPROACH

In the Court’s jurisprudence, the general obligations of Articles 1(1) and 2 of the American Convention on Human Rights (ACHR) are the prism through which the Court recognizes concrete obligations under specific human rights. In other words, the general obligations of both provisions are present in every specific human right.1 According to the Court’s jurisprudence, these articles are therefore crucial to attribute international responsibility to states for their actions or omissions violating human rights.2

Article 1(1) ACHR encompasses two broad general obligations: the obligation on states to “respect” the rights and freedoms recognized in the ACHR and the obligation to “ensure” to all persons within their jurisdiction the free and full exercise of these rights and freedoms. The Court clarified the meaning of these terms in Velásquez-Rodríguez v. Honduras. The obligation to respect, on the one hand, is related to the limits placed on the exercise of public authority,3 and can thus be considered as the classical negative obligation on the state to refrain from acting in such a way that violates ACHR rights. This obligation is based on the recognition that the ACHR encompasses certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power: “these

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2 IACtHR (Judgment) 15 September 2005, Case of the "Mapiripán Massacre" v. Colombia, para. 107.
3 IACtHR (Judgment) 29 July 1988, Velásquez-Rodríguez v. Honduras, para. 165.
are individual domains that are beyond the reach of the State or to which the State has but limited access. 4 The obligation to ensure, on the other hand, implies the obligation on states “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.” 5 This broad positive obligation requires states to undertake all actions which are necessary to enable individuals under their jurisdiction to exercise and enjoy their human rights. 6

According to the Court, these general obligations under Article 1(1), in conjunction with specific ACHR rights, generate specific obligations, the content of which depends on the specificities and circumstances of each case. For this reason, the Court has refrained from defining state obligations under the ACHR in a numeros clausus manner. 7 The Court has nonetheless indicated that the broad and open-ended obligation to ensure at least generates the specific positive obligations to “prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.” 8 In order to establish international responsibility, it is sufficient that the state was under any of these specific positive obligations and that it failed to comply with them, 9 even if the human rights violations results from the acts of a private or unknown person. As the Court held in Velásquez-Rodríguez v. Honduras, “[a]n illegal act which violates human rights and which is initially not directly imputable to a State […] 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.” 10

Article 2 ACHR, in turn, requires states to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms recognized in the ACHR. According to the Court, this obligation is two-fold: it requires “on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those

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5 IACtHR (Judgment) 29 July 1988, Velásquez-Rodríguez v. Honduras, para. 166.
7 IACtHR (Judgment) 28 January 2009, Perozo et al. v. Venezuela, para. 129.
8 IACtHR (Judgment) 29 July 1988, Velásquez-Rodríguez v. Honduras, para. 166.
9 IACtHR (Judgment) 30 November 2012, Santo Domingo Massacre v. Colombia, para. 162.
10 Ibid., para. 172.
guarantees.” The first obligation is the negative obligation to refrain from enacting or upholding norms or practices that in themselves violate human rights. In this respect, the Court has recognized that norms and practices can per se violate Article 2 ACHR, regardless of whether or not they were enforced in the case at hand. The second obligation, on the other hand, is the positive obligation for the state to “adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system.”

The adoption of “the necessary legislative, administrative, or other measures” by the state can thus be considered as being instrumental to the effective protection of human rights. According to the Court, this obligation is not limited to the need to adapt the domestic constitution or law, “but must rather permeate all the legal provisions of a statutory or regulatory nature and translate into the effective enforcement, in practice, of the human rights protection standards.” In this respect, the standard that emerges from the Court’s Article 2 jurisprudence is the principle of effectiveness: “[t]his general obligation of the State Party implies that the measures of domestic law must be effective (the principle of eff et utile).” The principle of effectiveness however transcends Article 2, as the Court considers that it “crosscuts the protection due to all the rights recognized in the Convention,” thereby elevating it to a general principle of ACHR law.

Related to both provisions is the obligation for domestic judges to apply “conventionality control” of the domestic legal provisions which are applied to specific cases, taking into account both the text of the ACHR and the interpretation thereof made by the Court. According to the Court, when the legislative power fails to comply with its obligation under Article 2 ACHR, domestic judges are still bound by Article I(1) ACHR to ex officio harmonize domestic norms with the ACHR, within the context of their respective spheres of competence and the corresponding procedural regulations.

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11 IACtHR (Judgment) 30 May 1999, Castillo Petruzzi et al. v. Peru, para. 207.
12 IACtHR (Judgment) 12 November 1997, Suárez-Rosero v. Ecuador, para. 98.
13 IACtHR (Judgment) 5 February 2001, Case of “The Last Temptation of Christ” (Olmedo-Bustos et al. v. Chile), para. 87.
14 IACtHR (Judgment) 31 August 2001, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 138.
16 IACtHR (Judgment) 23 November 2010, Rosendo Cantú et al. v. Mexico, para. 219.
17 Ib., para. 123.
18 IACtHR (Judgment) 23 November 2010, Vélez Loor v. Panama, para. 287.
3. SPECIFIC POSITIVE OBLIGATIONS

This section will provide an overview of how the general obligations under Articles 1(1) and 2 ACHR translate into specific positive obligations crosscutting different areas of the Court’s jurisprudence. First the four positive obligations recognized in Velásquez-Rodríguez v. Honduras will be discussed: the obligation to prevent, investigate, punish and provide reparations. Subsequently, the obligation to fulfil will be examined, as well as the obligation to provide substantive equality.

3.1. OBLIGATION TO PREVENT

In Velásquez-Rodríguez v. Honduras, the Court held that “[t]he State has a legal duty to take reasonable steps to prevent human rights violations.” According to the Court, “[t]his duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights”. This positive obligation to prevent is open-ended in scope in the sense that the Court held that “[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.”

The obligation to prevent requires both general and specific actions from the state. The general obligation relates to the need to develop a legal and administrative framework that prevents human rights violations. The specific obligation, however, requires the state to provide operational prevention measures in case of a specific risk of a human rights violation.

3.1.1. General obligation to prevent

First of all, the obligation to prevent requires the development of an adequate legal and administrative framework to prevent human rights violations. This obligation is based on both Article 1(1) ACHR – requiring states to ensure that ACHR norms operate within their jurisdiction – and the closely related obligation under Article 2 ACHR to adopt legislative or other measures to give effect to the rights and freedoms recognized in the Convention. The need to develop an appropriate legal framework relates to the prevention of human rights violations by both state agents and by private actors.

With respect to the prevention of human rights violations by state agents, the obligation to develop a legal framework can be considered as an extension of the

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23 Ibid., para. 175.
24 Ibid.
25 Ferrer Mac-Gregor, supra n. 1, p. 155.
26 Ibid., pp. 155–156.
27 E.g. IACtHR (Judgment) 7 June 2003, Juan Humberto Sánchez v. Honduras, para. 110.
negative obligation to respect. In the case of *Montero-Aranguren et al. v. Venezuela*, the Court has, for example, held that Article 4 (the right to life) in combination with Article 1(1) ACHR obliges states to develop an appropriate legal framework to regulate the use of lethal force and firearms.\(^{28}\)

Regarding the prevention of human rights violations by private actors, in its Advisory Opinion on the *Juridical Condition and Rights of Undocumented Migrants*, the Court has linked this obligation with the *Drittwirkung* theory, “according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.”\(^{29}\) This is not a strict application of the *Drittwirkung* theory, since individuals can only claim that the state has failed in its (general or specific) obligation to prevent human rights violations, rather than entitling individuals to directly invoke ACHR provisions in their interpersonal relations. This “indirect” protection in interpersonal relations is “based on the fact that it is the State that determines the laws that regulate the relations between individuals […]; hence, it must also ensure that human rights are respected in these private relationships between third parties; to the contrary, the State may be responsible for the violation of those rights.”\(^{30}\)

In the context of employment relationships – relations between private parties – the Court, for example, held that private law must regulate the employer–worker contractual relationship in such a way that it conforms to human rights standards.\(^{31}\) Moreover, in line with the general obligation under Article 2 ACHR, not only must states adopt norms and practices conducive to the prevention of human rights violations, they must also eliminate and refrain from adopting norms and practices that contribute to the risk of human rights being violated. This was, for example, at issue in some Colombian massacre cases, in which the Court held that the Colombian legal framework had, for many years, encouraged the formation of paramilitary groups, thereby objectively creating a dangerous situation in violation of the general obligation to prevent.\(^{32}\)

The general protection offered by the legal and administrative framework must be “integral”: it requires both the prevention of risk factors and the strengthening of institutions that could provide an effective response to human rights violations.\(^{33}\) With respect to the prevention of violations of Article 4 ACHR (the right to life), the Court has, for example, held that states “must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the

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28 IACtHR (Judgment) 5 July 2006, *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, para. 75.


30 Ibid., para. 147.

31 Ibid., paras. 147–148.


right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, or by individuals”. In this respect, the general obligation to prevent is a prerequisite for the state to effectively discharge its positive obligations to investigate, punish and provide reparations.

As part of its legal framework, the state must also establish procedures that allow individuals to complain about violations of their human rights. In Xákmok Kásek Indigenous Community v. Paraguay, the Court held that “Article 25 of the Convention [the right to judicial protection] is closely related to the general obligations contained in Articles I(1) and 2 thereof, which attribute protective functions to the domestic law of the States Parties.” Therefore, according to the Court, “the State has the responsibility to design and establish an effective legal remedy, as well as to ensure the due application of the said remedy by its judicial authorities.” If such an effective legal remedy does not exist, the state is under an obligation to create one. Based on Article 2 ACHR, the Court has, for example, required the establishment of such procedures in cases concerning land claims by indigenous peoples, acquisition of nationality and access to information.

The general obligation to protect goes further than simply requiring the adoption of legal norms and procedures. It also requires states to tackle social and cultural obstacles for the enjoyment of human rights, as well as to promote a culture of human rights among its agents and the population at large. A culture of human rights, for example, requires states to facilitate the work of human rights defenders and to strengthen freedom of expression by fostering informative pluralism. Promoting a culture of human rights is also crucial to achieve substantive equality (see infra section 3.4). In the Cotton Field case, the Court, for example, held that “the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case.” According to the Court, “[t]he creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.” To tackle these stereotypes, the Court ordered the

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35 IACtHR (Judgment) 24 August 2010, Xákmok Kásek Indigenous Community v. Paraguay, para. 141.
36 Ibid.
37 E.g. IACtHR (Judgment) 17 June 2005, Yakye Axa Indigenous Community v. Paraguay, para. 102.
38 IACtHR (Judgment) 8 September 2005, Girls Yean and Bosico v. Dominican Republic, para. 239.
39 E.g. IACtHR (Judgment) 19 September 2006, Claude-Reyes et al. v. Chile, para. 137.
40 Medina Quiroga, supra n. 6, p. 20.
41 IACtHR (Judgment) 6 July 2009, Escher et al. v. Brazil, para. 172.
43 IACtHR (Judgment) 16 November 2009, González et al. (“Cotton Field”) v. Mexico, para. 401.
44 Ibid.
state to provide transformative reparations under Article 63 ACHR, in particular to provide public officials with training programmes and courses on human rights and gender and to offer a programme of education for the general public of the region concerned, to overcome the situation of discrimination against women.\textsuperscript{45} In the case of Atala Riffo and Daughters \textit{v.} Chile, the Court similarly ordered reparations with a transformative purpose in order to “promote structural changes, dismantling certain stereotypes and practices that perpetuate discrimination against LGBT groups.”\textsuperscript{46} Finally, in Furlan and Family \textit{v.} Argentina, the Court stressed the need to promote social inclusion practices concerning persons with disabilities and to adopt affirmative measures to remove social barriers to their effective enjoyment of human rights.\textsuperscript{47}

3.1.1.1. Criminal law

Ever since its first case, the Court has emphasized that effective prevention of human rights violations may require recourse to criminal law. In Velásquez-Rodríguez \textit{v.} Honduras, the Court held that the obligation to prevent human rights violations requires that “any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.”\textsuperscript{48} In Fornerón and Daughter \textit{v.} Argentina, the Court has held that “criminalization is an appropriate way to protect certain rights”,\textsuperscript{49} stressing in particular “the obligation to criminalize the ‘sale’ of children, whatever the purpose or form.”\textsuperscript{50} In cases of forced disappearances and torture, the Court not only requires states to criminalize these conducts, but also that the way these crimes are defined in domestic law is at least equally comprehensive as those established in the applicable international norms – in particular the Inter-American Convention on Forced Disappearance of Persons\textsuperscript{51} and the Inter-American Convention to Prevent and Punish Torture\textsuperscript{52} – that establish minimum standards with regard to the correct definition of these crimes.\textsuperscript{53}

In Albán-Cornejo \textit{et al.} \textit{v.} Ecuador, a medical negligence case, the Court elaborated on the need for criminal law protection in cases concerning the right to life (Article 4 ACHR) and the right to humane treatment (Article 5 ACHR). The Court held that, as far as substantive criminal law is concerned, states must enact adequate criminal law

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\item \textsuperscript{45} Ibid., paras. 541, 543.
\item \textsuperscript{46} IACtHR (Judgment) 24 February 2012, Atala Riffo and Daughters \textit{v.} Chile, para. 267.
\item \textsuperscript{47} IACtHR (Judgment) 31 August 2012, Furlan and Family \textit{v.} Argentina, para. 134.
\item \textsuperscript{48} IACtHR (Judgment) 29 July 1988, Velásquez-Rodríguez \textit{v.} Honduras, para. 175.
\item \textsuperscript{49} IACtHR (Judgment) 27 April 2012, Fornerón and Daughter \textit{v.} Argentina, para. 140.
\item \textsuperscript{50} Ibid., para. 139.
\item \textsuperscript{51} Inter-American Convention on Forced Disappearance of Persons, adopted at Belém do Pará on 9 June 1994 by the General Assembly of the Organization of American States.
\item \textsuperscript{52} Inter-American Convention to Prevent and Punish Torture, adopted at Cartagena de Indias on 9 December 1985 by the General Assembly of the Organization of American States.
\item \textsuperscript{53} E.g. IACtHR (Judgment) 22 September 2006, Goiburú \textit{et al.} \textit{v.} Paraguay, para. 92.
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descriptions, in accordance with the principle of criminal legality and the requirements of punitive law in a democratic society, and which are adequate, from a penal perspective, for the protection of goods and legal interests.\textsuperscript{54} According to the Court, since there is no binding agreement at the international level on the formulation of criminal law provisions in cases of medical malpractice, it is up to the states themselves to decide on the best way to respond in this area. Therefore the Court considered that it was not strictly necessary for the state to include specific criminal law provisions concerning medical malpractice, as long as general descriptions (such as injuries or murder) suffice to take into account the seriousness of the crime, the circumstances in which it was committed and the responsibility of the perpetrator.\textsuperscript{55}

It is unclear from the Court’s jurisprudence exactly how far the obligation to criminalize human rights violations stretches. While the Court’s recognition of the obligation to criminalize in \textit{Velásquez-Rodríguez v. Honduras} seems to suggest that this obligation covers each and every human rights violation,\textsuperscript{56} analysing the Court’s jurisprudence teaches us that the Court has not insisted on criminal law protection in cases of “less serious” human rights violations, such as, for example, a denial of access to information\textsuperscript{57} or the adjustment of salary of a worker,\textsuperscript{58} affecting respectively the freedom of expression (Article 13 ACHR) and the right to property (Article 21 ACHR) of the applicants. The seriousness of human rights violations thus seems to be a relevant factor to distinguish those human rights violations that require a criminal law approach from those that do not.\textsuperscript{59} It is, however, not clear where exactly the Court would draw the line. While Articles 4 (the right to life) and 5 ACHR (the right to human treatment) generally would require criminal law provisions, it is not clear whether this holds true for each and every violation of these provisions – for example, unintentional violations. Criminalization, however, is not restricted to these provisions: the case of \textit{Forneron and Daughter v. Argentina} illustrates that very serious violations of other human rights – in particular of Article 19 (the rights of the child) – may also require deterrence by criminal law.

The lack of certainty concerning the exact extent of this obligation is particularly problematic in the light of the clear tension that exists between on the one hand the need for a punitive human rights law to prevent human rights violations, and on the other the tendency in human rights law towards a restrictive approach to criminal law. Some have argued that a generalized penal approach to human rights – prioritizing

\textsuperscript{54} IACtHR (Judgment) 22 November 2007, \textit{Albán-Cornejo et al. v. Ecuador}, para. 135.
\textsuperscript{55} Ibid., para. 136.
\textsuperscript{57} E.g. IACtHR (Judgment) 19 September 2006, \textit{Claudio-Reyes et al. v. Chile}.
\textsuperscript{58} IACtHR (Judgment) 4 March 2011, \textit{Abrill Alosilla et al. v. Peru}.
\textsuperscript{59} Similarly Ferrer Mac-Gregor, \textit{supra} n. 1, p. 159, holding that the obligation to investigate and punish only arises in cases of serious human rights violations.
victims’ rights over defendants’ rights – risks sacrificing the latter, contrary to the
traditional position in human rights law to strongly focus on the protection of
defendants against abuses of power by the state in the course of the criminal process.60
Indeed, in its criminal law jurisprudence, the Court itself has stressed the need for a
minimum penal law. In the case of Kimel v. Argentina, concerning the conviction of a
journalist for defamation, the Court, for example, held that in accordance with “the
principle of minimum penal law typical of democratic societies, criminal proceedings
should [only] be resorted to where fundamental legal rights must be protected from
conducts which imply a serious infringement thereof and where they are proportionate
to the seriousness of the damage caused.”61 According to the Court, “[t]he broad
definition of the crime of defamation might be contrary to the principle of minimum,
necessary, appropriate, and last resort or ultima ratio intervention of criminal law.”62
Despite the fact that the Court recognized that the defamation proceedings served the
protection of a Convention right – in particular the right to have one’s honour
respected, protected by Article 11(1) ACHR – the Court considered that this did not in
itself justify resorting to criminal sanctions. Such sanctions can only be justified in
the light of “the extreme seriousness of the conduct of the individual who expressed
the opinion, his actual malice, the characteristics of the unfair damage caused, and
other information which shows the absolute necessity to resort to criminal proceedings
as an exception.”63
If the Court would explicitly restrict the need for criminal law protection to the most
serious human rights violations, it could find the middle ground between punitive
human rights law and minimum penal law. This would also be in line with the approach
taken by the European Court of Human Rights, which has restricted the obligation to
provide criminal law protection to cases concerning the most serious violations of human
rights:64 intentional violations of the right to life (Article 2 ECHR)65 or very serious cases
of death by negligence;66 torture, inhuman or degrading treatment or punishment
(Article 3 ECHR);67 slavery, servitude and forced or compulsory labour (Article 4
ECHR);68 and the most serious violations of the right to respect for private life (Article 8
ECHR), “where fundamental values and essential aspects of private life are at stake.”69

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60 See Basch, supra n. 56.
61 IACtHR (Judgment) 2 May 2008, Kimel v. Argentina, para. 77.
62 Ibid., para. 76.
63 Ibid., para. 78.
64 Generally, see L. Lavrysen, “Protection by the Law: The Positive Obligation to Develop a Legal
Framework to Adequately Protect ECHR Rights”, in Y. Haeck and E. Brems (eds.), Human Rights
65 ECtHR (Judgment) 17 January 2002, Case No. 32968/96, Calvelli and Ciglio v. Italy.
66 ECtHR (Judgment) 30 November 2004, Case No. 48939/99, Öneryildiz v. Turkey.
67 ECtHR (Judgment) 4 December 2003, Case No. 39272/98, M.C. v. Bulgaria.
68 ECtHR (Judgment) 26 July 2005, Case No. 73316/02, Siliadin v. France.
69 ECtHR (Judgment) 26 March 1985, Case No. 8978/80, X and Y v. the Netherlands, para. 27.
3.1.1.2. Regulating and monitoring public services

The Court has accepted that, while rendering public services is one of the objectives of the state, such services may nonetheless be delegated to private entities through so-called outsourcing. In such cases, however, states “continue being responsible for providing such public services and for protecting the public interest concerned.”70 Therefore, states remain under an obligation to regulate and monitor the rendering of services of public interest, such as health, by private or public entities.71 In the field of health care, the Court held in the case of Suárez Peralta v. Ecuador that “States must establish an adequate normative framework that regulates the provision of health care services, establishing quality standards for public and private institutions that allow any risk of the violation of personal integrity during the provision of these services to be avoided.”72 In addition, the Court considers the state to be under an obligation to “create official supervision and control mechanisms for health care facilities, as well as procedures for the administrative and judicial protection of victims, the effectiveness of which will evidently depend on the way these are implemented by the competent administration.”73

3.1.2. Specific obligations to prevent

In certain cases, states may be under a specific obligation to provide operational prevention measures in cases of a specific risk of a human rights violation. This obligation is particularly prominent in the Court’s case law on the protection of the right to life (Article 4 ACHR). According to the Court, the “active protection of the right to life by the State does not only involve legislators, but all State institutions and those who must protect security, both its police forces and its armed forces.”74 Preventing violations of the right to life thus requires more than the mere presence of an adequate legal and administrative framework: already in Velásquez-Rodríguez v. Honduras, the Court recognized that states are under a positive obligation to take reasonable steps to prevent situations that could result in the violation of the right to life.75 The Court however stressed that “the existence of a particular violation does not, in itself, prove the failure to take preventive measures.”76

With respect to the right to life, the court drew inspiration from the test developed by the European Court of Human Rights in the case of Osman v. the United Kingdom77 in order to delineate international responsibility in cases of failure to take operational

70 IACtHR (Judgment) 4 July 2006, Ximenes-Lopes v. Brazil, para. 96.
71 IACtHR (Judgment) 22 November 2007, Albán-Cornejo et al. v. Ecuador, para. 119.
72 IACtHR (Judgment) 21 May 2013, Suárez Peralta v. Ecuador, para. 132.
73 Ibid.
74 IACtHR (Judgment) 7 June 2003, Juan Humberto Sánchez v. Honduras, para. 110.
75 IACtHR (Judgment) 29 July 1988, Velásquez-Rodríguez v. Honduras, para. 188.
76 Ibid., para. 175.
77 ECtHR (Judgment) 28 October 1998, Case No. 23452/94, Osman v. the United Kingdom.
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prevention measures. In Pueblo Bello Massacre v. Colombia, the Court held that a state does not have 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.”78 In Sawhoyamaxa Indigenous Community v. Paraguay, the Court held that there will therefore be a violation of Article 4 ACHR when, “at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.”79 According to the Court, the obligation of prevention is one of means and not of results,80 and it “must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities”, “[t]aking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available.”81

The Court has not explicitly applied the Sawhoyamaxa test in every area of the ACHR, such as, for example, with respect to the specific preventive obligation to protect the freedoms of movement,82 association83 or expression.84 However, the broad formulation of this principle in the Cotton Field judgment – in which the test was applied to examine the obligation to protect women against violations of their rights to life (Article 4 ACHR), humane treatment (Article 5 ACHR) and liberty (Article 7 ACHR)85 – does seem to suggest that the Sawhoyamaxa test is a general principle that is relevant for the examination of the specific preventive obligation under all Convention provisions.

3.2. INVESTIGATION, PUNISHMENT AND REPARATIONS

In Velásquez-Rodríguez v. Honduras, the Court recognized the need to investigate, punish and provide reparations (either restoring a right or providing compensation) in every case where human rights have been violated.86 These obligations are related

78 IACtHR (Judgment) 31 January 2006, Pueblo Bello Massacre v. Colombia, para. 123.
80 IACtHR (Judgment) 16 November 2009, González et al. (“Cotton Field”) v. Mexico, para. 279.
82 E.g. IACtHR (Judgment) 27 November 2007, Valle Jaramillo et al v. Colombia.
83 E.g. IACtHR (Judgment) 29 November 2012, García and Family v. Guatemala.
84 E.g. IACtHR (Judgment) 3 September 2012, Vélez Restrepo and Family v. Colombia.
85 IACtHR (Judgment) 16 November 2009, González et al. (“Cotton Field”) v. Mexico, para. 280.
86 IACtHR (Judgment) 29 July 1988, Velásquez-Rodríguez v. Honduras, para. 166.
to the need to combat impunity – being “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for the violations of the rights protected by the American Convention” – since impunity fosters chronic recidivism of human rights violations.87

While these obligations are based on Article 1(1) in conjunction with the substantive right that must be ensured,88 the Court generally examines the content of these obligations under Articles 8 (the right to a fair trial) and 25 ACHR (the right to judicial protection).89 Article 25 ACHR guarantees the right of access to justice.90 According to the Court, this right obliges states to provide effective judicial remedies to victims of human rights violations, remedies that must be substantiated in accordance with the rules of due process of law provided in Article 8 ACHR.91 In Las Palmeras v. Colombia, the Court held that “Article 8(1) of the American Convention, in relation to Article 25(1) thereof, gives the victims’ relatives the right to have the victims’ death effectively investigated by the State authorities; to have the persons responsible for these unlawful acts prosecuted; where appropriate, they have the right to have the proper punishment applied to the responsible parties, and they are entitled to be compensated for the damages and injuries they have suffered.”92

According to the Court, these remedies must be both accessible and effective.93 The former condition requires both the need for the state to provide these remedies in its domestic law – as part of the above-discussed general obligation to provide a legal framework to prevent human rights violations – and the adoption of positive measures to facilitate access to justice when a vulnerable individual is faced with obstacles in seeking such access.94 Effectiveness, however, requires that a judicial remedy is capable of producing the result for which it was conceived, “in other words, the remedy must be capable of leading to an analysis by the competent court to establish whether there has been a human rights violations and of providing reparations.”95

Under Article 8 ACHR, the Court has held that “victims of human rights violations, or their next of kin, should have wide-ranging possibilities of being heard and acting in the respective proceedings to clarify the facts and punish those responsible, and to seek due reparation.”96 According to the Court, states must therefore ensure that “the victims can present arguments, receive information, provide evidence, make

87 IACtHR (Judgment) 8 March 1998, Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala, para. 173.
88 IACtHR (Judgment) 1 July 2006, Ituango Massacres v. Colombia, para. 297.
89 E.g. IACtHR (Judgment) 4 July 2007, Escué-Zapata v. Colombia, para. 42.
90 IACtHR (Judgment) 28 November 2002, Cantos v. Argentina, para. 52.
91 IACtHR (Judgment) 26 June 1987, Godínez-Cruz v. Honduras, para. 93.
92 IACtHR (Judgment) 6 December 2001, Las Palmeras v. Colombia, para. 65.
93 IACtHR (Judgment) 6 August 2008, Castañosa Gutman v. Mexico, para. 103.
94 E.g. IACtHR (Judgment) 23 November 2010, Vélez Loor v. Panama, para. 152.
95 IACtHR (Judgment) 6 August 2008, Castañosa Gutman v. Mexico, para. 118.
allegations, and, in synthesis, defend their interests.”97 In the Court’s jurisprudence, the right of victims to participate in proceedings is linked to the need to make their right to know the truth effective.98

Under Articles 8 and 25 ACHR, the Court has developed some criteria to verify whether the state has duly complied with its obligations to investigate, punish and provide reparations.

3.2.1. Investigate

According to the Court, “[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”99 The Court has held that “in cases of extrajudicial executions, forced disappearances and other [serious] human rights violations, the State has the obligation to initiate, *ex officio* and immediately, a genuine, impartial and effective investigation, which is not undertaken as a mere formality predestined to be ineffective.”100

The Court has stressed that “the principle of effectiveness […] should permeate the development of such an investigation.”101 Therefore, states “must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings.”102 In order for the state to maintain its punitive power to repress serious human rights violations,103 all measures intended to prevent the investigation and punishment of those responsible for serious human rights violations are inadmissible, including amnesty provisions,104 statutes of limitations105 and “sham double jeopardy” resulting from a first trial in breach of due process of law.106

The Court has held that the investigative authorities must be independent and impartial.107 In order to be effective, the investigation must be carried out with due diligence, i.e. the investigative authorities must, within a reasonable time, take all necessary measures to try and obtain results.108 The investigation must take place within the jurisdiction of the ordinary courts, the military jurisdiction should have a restrictive and exceptional scope and cannot be considered as the competent

98 E.g. IACtHR (Judgment) 30 August 2010, *Fernández Ortega et al. v. Mexico*, para. 183.
100 IACtHR (Judgment) 31 January 2006, *Pueblo Bello Massacre v. Colombia*, para. 143.
103 IACtHR (Judgment) 2 September 2010, *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, para. 207.
105 IACtHR (Judgment) 2 September 2010, *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, para. 207.
jurisdiction to investigate, prosecute and punish the perpetrators of human rights violations. The state must coordinate between the different state organs and institutions with investigative powers, and all state authorities are under an obligation to collaborate with the investigative authorities, including supplying them with access to all relevant information. In this respect, the Court has held that “public officials and individuals who hinder, deviate or unduly delay investigations to clarify the truth about the facts must be punished.”

With respect to the gathering of evidence, the Court has stressed that investigative authorities must take into account international standards such as the Minnesota Protocol (UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions) and the Istanbul Protocol (UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). Evidence must be evaluated as a whole, taking into account their mutual relationship and the way in which some evidence supports or does not support other evidence. According to the Court, it is important that no omissions are made in gathering evidence or in the development of logical lines of investigation. In this respect the Court has held that the investigation must be carried out “taking into account the complexity of the facts, the context in which they occurred, and the patterns that explain why the events occurred.” The Court has further held that “the State must take all necessary measures to protect judicial officers, investigators, witnesses and the victims’ next of kin from harassment and threats which are designed to obstruct the proceedings, prevent a clarification of the events of the case, and prevent the identification of those responsible for such events.”

3.2.2. Punish

The Court has held that Articles 8 and 25 ACHR give the victims or their relatives the right, “where appropriate, [...] to have the proper punishment applied to the

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110 IACtHR (Judgment) 26 May 2010, Manuel Cepeda Vargas v. Colombia, para. 216.
111 IACtHR (Judgment) 4 September 2012, Río Negro Massacres v. Guatemala, para. 209.
114 IACtHR (Judgment) 16 November 2009, González et al. ("Cotton Field") v. Mexico, paras. 300, 301 and 310.
115 IACtHR (Judgment) 23 November 2011, Lysias Fleury et al. v. Haiti, para. 121.
116 IACtHR (Judgment) 19 November 1999, Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala, para. 233.
118 Ibid.
119 IACtHR (Judgment) 11 May 2007, Rochela Massacre v. Colombia, para. 171.
responsible parties.” 120 This obligation requires that all the masterminds and the actual perpetrators of human rights violations need to be punished. 121 In order to allow the state to effectively punish perpetrators and to prevent impunity, all states parties to the ACHR must collaborate with each other, either by way of extradition or by prosecuting and punishing the perpetrators themselves. 122

Serious human rights violations require criminal rather than mere disciplinary punishments. According to the Court, disciplinary proceedings “can complement but not substitute completely the function of the criminal jurisdiction.” 123 Moreover, the obligation to punish is governed by the principle of the proportionality of the punishment. In Rochela Massacre v. Colombia, the Court clarified that “the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the [perpetrator] acted, which in turn should be established as a function of the nature and gravity of the events.” 124 Accordingly, “States must ensure that the sentences imposed and their execution do not constitute factors that contribute to impunity.” 125

3.2.3. Provide reparations

Furthermore, the Court has held that “one of the affirmative measures that States Parties are required to take to fulfil their [obligation to ensure] consists in providing effective judicial remedies in line with the rules of due process, and seeking the restoration of the violated right, if possible, and reparation of any damage caused.” 126 While the obligation to provide reparations is thus based on Article 1 ACHR, the Court will examine the fulfilment of this obligation in the context of Articles 8 and 25 ACHR. The obligation is related but distinct from the one enshrined in Article 63 ACHR – which entitles the Court to order the state to provide reparations if it finds a violation of one of the ACHR rights or freedoms – in the sense that the principle of subsidiarity requires the state to make reparations at the domestic level before and regardless of whether the case ends up in the Inter-American system. 127 The Court has nonetheless drawn inspiration from its extensive Article 63 jurisprudence to examine the obligation to provide reparations under Articles 8 and 25. As under Article 63, the reparations must be comprehensive, which requires “measures of rehabilitation, satisfaction and guarantees of non-repetition.” 128

120 IACtHR (Judgment) 6 December 2001, Las Palmeras v. Colombia, para. 65.
121 IACtHR (Judgment) 6 April 2006, Baldeón-García v. Peru, para. 94.
123 IACtHR (Judgment) 31 January 2006, Pueblo Bello Massacre v. Colombia, para. 203.
125 IACtHR (Judgment) 26 May 2010, Manuel Cepeda Vargas v. Colombia, para. 150.
126 IACtHR (Judgment) 22 November 2007, Albán-Cornejo et al. v. Ecuador, para. 61.
127 IACtHR (Judgment) 30 November 2012, Santo Domingo Massacre v. Colombia, para. 142.
128 IACtHR (Judgment) 1 July 2006, Ituango Massacres v. Colombia, para. 341.
3.3. OBLIGATION TO FULFIL

Based on Article 1 ACHR, the Court has recognized that states must adopt all positive measures required to fully ensure the effective exercise of the rights enshrined in the ACHR.\textsuperscript{129} This corresponds to the obligation to fulfil from the respect/protect/fulfil framework\textsuperscript{130} in international human rights law, which requires states to both facilitate the enjoyment of human rights and to provide certain goods, if necessary, for the enjoyment of human rights. The obligation to fulfil is particularly important with respect to certain rights which are inherently positive – in the sense that they cannot be exercised without the state developing a legal framework regulating the effective enjoyment of these rights – such as the political rights of Article 23\textsuperscript{131} and the right to nationality under Article 20 ACHR (\textit{inter alia}, requiring states to prevent, avoid and reduce statelessness).\textsuperscript{132}

The area in which the Court has recognized the most expansive obligations to fulfil is undoubtedly the right to life (Article 4 ACHR), in particular with respect to the derived right to have access to conditions that guarantee a ‘dignified’ life,\textsuperscript{133} encompassing aspects of human well-being traditionally considered to belong to the sphere of economic and social rights. In the case of \textit{Yakye Axa Indigenous Community v. Paraguay}, the Court has held that, in order to generate minimum living conditions that are compatible with the dignity of the human person, “the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk.”\textsuperscript{134} Under Article 4 ACHR, the Court has recognized that states may be under obligations to provide access to adequate water, food, health care and education.\textsuperscript{135}

3.4. SUBSTANTIVE EQUALITY

Article 1 ACHR requires states to respect and ensure the rights enshrined in the Convention “without discrimination”. In the Advisory Opinion on the Juridical


\textsuperscript{130} See e.g. \textit{The Right to Adequate Food and to be Free from Hunger}, Updated study on the right to food prepared by Mr. A. Eide, UN Doc E/CN.4/Sub.2/1999/12.

\textsuperscript{131} E.g. IACtHR (Judgment) 23 June 2005, \textit{YATAMA v. Nicaragua}, para. 201.

\textsuperscript{132} IACtHR (Judgment) 8 September 2005, \textit{Girls Yean and Bosico v. Dominican Republic}, para. 140.

\textsuperscript{133} IACtHR (Judgment) 19 November 1999, \textit{Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala}, para. 233.

\textsuperscript{134} IACtHR (Judgment) 17 June 2005, \textit{Yakye Axa Indigenous Community v. Paraguay}, para. 162.

Condition and Rights of Undocumented Migrants, the Court recognized that the principle of non-discrimination requires more than mere formal equality – prohibiting arbitrary differentiation of treatment but also obliges states to provide differential treatment in order to achieve equality in practice, i.e. substantive equality. According to the Court, “States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws.” Therefore, “States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.” In a later case, the Court held that this affirmative concept of the right to equality requires states “to create real equal conditions towards groups who have been historically excluded or who are exposed to a greater risk of being discriminated.”

The Court has recognized the positive obligation to take measures to achieve equality outcomes in cases concerning internally displaced persons. According to the Court, “the differentiated situation of displaced persons places States under the obligation to give them preferential treatment and to take positive steps to revert the effects of said condition of weakness, vulnerability, and defencelessness, including those vis-à-vis actions and practices of private third parties.” Similarly, the Court has held that the de facto discrimination of the members of marginalized indigenous communities requires the state to take the necessary positive measures to reverse their social exclusion. In the case of discrimination of persons with a mental disability, the Court has similarly recognized that substantive equality aims at social inclusion. Accordingly, “States have the obligation to promote the inclusion of persons with disabilities through equality of conditions, opportunities and participation in all spheres of society.”

4. ENHANCED PROTECTION

The Court applies certain techniques in order to reinforce the need for positive measures of human rights protection. A first technique is referring to Inter-American

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136 IACtHR (Judgment) 31 August 2012, Furlan and Family v. Argentina, para. 267.
138 Ibid., para. 104.
139 IACtHR (Judgment) 31 August 2012, Furlan and Family v. Argentina, para. 267.
140 IACtHR (Judgment) 15 September 2005, Case of the “Mapiripán Massacre” v. Colombia, para. 179.
141 IACtHR (Judgment) 24 August 2010, Xákmok Kásek Indigenous Community v. Paraguay, para. 274.
142 IACtHR (Judgment) 31 August 2012, Furlan and Family v. Argentina, para. 135.
conventions concerning particular human rights violations, such as the obligations to prevent, investigate and punish torture, forced disappearances and violence against women and the obligation to bring the legal framework in line with these conventions. Two other techniques are holding the state in a special guarantor position vis-à-vis the victim, and recognizing the need for enhanced protection vis-à-vis particularly vulnerable groups or individuals in a situation of vulnerability.

4.1. SPECIAL GUARANTOR

The Court has recognized that, with respect to the human rights of children, Article 19 ACHR requires that "the State must assume a special position as guarantor with greater care and responsibility and must take special measures aimed at the best interest of the child." Because of this special guarantor position, states are under the obligation to adopt special protection and assistance measures in favour of children under their jurisdiction. The Court has similarly applied this special guarantor position in order to provide enhanced human rights protection in cases concerning prisoners’ rights. This special guarantor position is based on the special relationship of subordination between the person deprived of his liberty and the state, characterized by the particular intensity with which the state can regulate this person’s rights and the fact that the prisoner himself or herself is prevented from satisfying his or her basic needs. Because of this special guarantor position, the Court has interpreted Article 5(2) ACHR – which obliges states to treat persons deprived of their liberty with respect for the inherent dignity of the human person – in an extensive manner, encompassing a whole range of standards on prison conditions, requiring, inter alia, the provision of adequate water, food, health care, education, work and recreation.

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144 E.g. IACtHR (Judgment) 19 November 1999, Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala, para. 244–246.

145 E.g. IACtHR (Judgment) 22 November 2005, Gómez-Palomino v. Peru, para. 95.

146 E.g. IACtHR (Judgment) 16 November 2009, González et al. ("Cotton Field") v. Mexico, paras. 253–258 and 287.

147 E.g. IACtHR (Judgment) 22 September 2006, Goiburú et al. v. Paraguay, para. 92.


149 IACtHR (Judgment) 31 August 2010, Rosendo Cantú et al. v. Mexico, para. 201.

150 IACtHR (Judgment) 18 September 2003, Bulacio v. Argentina, para. 133.

151 IACtHR (Judgment) 14 May 2013, Mendoza et al. v. Argentina, para. 188.

152 For an overview, see IACtHR (Judgment) 27 April 2012, Pacheco Teruel et al. v. Honduras, para. 67.
4.2. VULNERABILITY

Just like its European counterpart, the Court is increasingly using the concept of vulnerability as a criterion to enhance human rights protection vis-à-vis individuals considered to belong to a vulnerable group or being in a situation of vulnerability. The Court has, inter alia, recognized the vulnerability of children, women, human rights defenders, indigenous communities, displaced persons, people with mental disabilities, groups of people who live in poverty and undocumented migrants. Furthermore, the Court has, inter alia, recognized that detention − in particular illegal or arbitrary − forced disappearance, statelessness and the lack of recognition of personality before the law are situations that place the individuals concerned in a situation of vulnerability.

The Court has applied the concept of vulnerability to place the state under enhanced positive obligations. According to the Court, “any person who is in a vulnerable condition is entitled to special protection.” The Court has even gone further, developing a general obligation on the state to tackle vulnerability in all its facets. Accordingly, states “must abstain from acting in a way that fosters, promotes, favors or deepens such vulnerability and it has to adopt, whenever appropriate, the measures that are necessary and reasonable to prevent or protect the rights of those who are in that situation.” When the vulnerability is the result of de facto discrimination, the vulnerability approach requires the state to strive to substantive equality. With respect to the de facto discrimination of displaced persons, the Court has, for example, held that “this situation obliges the States to grant the displaced preferential treatment and to adopt positive measures to reverse the effects

154 IACtHR (Judgment) 26 September 2006, Vargas-Areco v. Paraguay, para. 77.
155 IACtHR (Judgment) 16 November 2009, González et al. (“Cotton Field”) v. Mexico, para. 408.
156 IACtHR (Judgment) 27 November 2012, Castillo Gonzáles et al. v. Venezuela, para. 124.
158 IACtHR (Judgment) 15 September 2005, Case of the “Mapiripán Massacre” v. Colombia, para. 175.
159 IACtHR (Judgment) 4 July 2006, Ximenes-Lopes v. Brazil, para. 106.
160 IACtHR (Judgment) 30 November 2012, Santo Domingo Massacre v. Colombia, para. 273.
161 IACtHR (Judgment) 23 November 2010, Vélez Loor v. Panama, para. 98.
163 IACtHR (Judgment) 27 November 2008, Ticona Estrada et al. v. Bolivia, para. 60.
164 IACtHR (Judgment) 8 September 2005, Girls Yean and Bosico v. Dominican Republic, para. 142.
165 IACtHR (Judgment) 29 March 2006, Sawhoyamaxa Indigenous Community v. Paraguay, para. 188.
166 IACtHR (Judgment) 4 July 2006, Ximenes-Lopes v. Brazil, para. 103.
168 Similarly, with respect to the ECtHR, see Peroni and Timmer, supra n. 153.
of this situation of vulnerability and defencelessness, including vis-à-vis acts and practices of individual third parties.”

5. CONCLUSION

The Court has adopted a modern and holistic understanding of human rights protection, dismissing the traditional position that human rights are predominantly negative, but instead accepting that the effective protection of the rights guaranteed by the ACHR requires states to comply with both negative and positive obligations. According to Melish and Aliverti, “the two dimensions form an indissoluble whole, reinforcing the primordial role of the state as ultimate guarantor of the human rights of all persons within its jurisdiction.”

Its record regarding positive obligations reveals that the Court clearly acts at the forefront of developments in international human rights law, particularly illustrated by far-reaching positive obligations to guarantee a life in dignity, to tackle vulnerability and to achieve substantive equality by fighting de facto discrimination and striving for social inclusion. As illustrated by the generalised Drittwirkung approach proposed in the Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants, the ACHR has the potential to “constitutionalise” nearly all dimensions of human conduct. Clearly there remain certain areas of the Court’s jurisprudence in which the potential to develop positive obligations has not been fully exploited. From a comparative perspective, in the light of the European Court of Human Rights’ expansive positive obligations case law concerning Article 8 ECHR, the right to private life enshrined in Article 11 ACHR clearly appears to be underexplored. Only recently, in the IVF case, did the Court for the first time accept innovative and far-reaching positive obligations under Article 11, recognizing in particular “the right to have access to the best health care services in assisted reproduction techniques.”

Taking into account the open-ended conception of the concept of private life endorsed by the Court – encompassing “aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world” – Article 11 ACHR has the potential to become as important a source of positive obligations as its European counterpart.

170 Melish and Aliverti, supra n. 148, p. 122.
172 IACtHR (Judgment) 28 November 2012, Artavia Murillo et al. (‘In vitro fertilization’) v. Costa Rica, para. 150.
173 Ibid., para. 143.
One could also expect from future case law to be more sophisticated with regard to the exact boundaries of positive obligations. While the obligation to investigate and the specific obligation to provide operational protection are fairly detailed, the boundaries of state responsibility remain unclear in other areas of the Court’s positive obligations case law, which holds particularly true with respect to the obligation to criminalize human rights violations. A relevant principle to delineate state responsibility could be the one proposed by Ferrer Mac-Gregor: human rights protection must be proportionate to the threat to individuals’ human rights.\textsuperscript{174} The Court already applies the principle of proportionality in certain conflicting rights cases concerning the need to balance the right to communal property and the right to private property,\textsuperscript{175} or the need to balance freedom of expression and the right to have one’s honour respected.\textsuperscript{176} While the question about the exact boundaries of state responsibility may have been less urgent in the past, since most cases concerned gross human rights violations in which state responsibility was obvious, the need for such criteria to delineate state responsibility will clearly become more pressing if the Court chooses to move further down the path towards fully “constitutionalising” all areas of human conduct.

\textsuperscript{174} Ferrer Mac-Gregor, supra n. 1, p. 158.
\textsuperscript{175} IACtHR (Judgment) 29 March 2006, Sawhoyamaxa Indigenous Community v. Paraguay, para. 138.
\textsuperscript{176} IACtHR (Judgment) 2 May 2008, Kimel v. Argentina, para. 51.