

DUE PROCESS OF LAW FOUNDATION

**Digest of  
Latin American  
jurisprudence  
on international  
crimes**



**DIGEST OF  
LATIN AMERICAN  
JURISPRUDENCE  
ON INTERNATIONAL CRIMES**



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## FOREWORD

# THE IMPORTANCE OF LATIN AMERICAN JURISPRUDENCE IN THE GLOBAL FIGHT AGAINST IMPUNITY

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*“National investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses.”*

—Policy paper, Office of the Prosecutor, International Criminal Court, 2003

On April 7, 2009, former Peruvian president Alberto Fujimori stood expressionlessly before the Penal Chamber of the Peruvian Supreme Court as he was sentenced to 25 years in prison. He was convicted of being the intellectual author of forced disappearances, summary executions, and arbitrary detentions committed during his first term as president, in the early 1990s. The Chamber’s decision—later upheld by the full Court—required the court to grapple with a host of legal issues that are common to trials involving crimes committed in the context of state repression or counterinsurgency wars. Fujimori had never soiled his own hands with the crimes; rather, he had given the orders and controlled the apparatus of repression. This meant that a theory of indirect liability would be needed to tie him to the crimes. The underlying events took place almost 20 years ago, and in the meantime the Peruvian Congress had passed laws amnestying those who took part. For practical and symbolic reasons, it was important to qualify the acts committed as crimes against humanity, yet that crime was not then part of the penal code.

These and similar problems are common to the prosecution of grave human rights violations and international crimes. Despite the existence of international criminal tribunals since the 1990s, the great majority of these crimes will continue to be prosecuted in national courts. The ad hoc tribunals are closing, the United Nations has proven reluctant to adequately fund and support mixed or hybrid tribunals like those of Sierra Leone or Cambodia, and the International Criminal Court has limited jurisdiction and resources and is unlikely to take up more than a handful of cases. Thus, national courts need to be prepared to take the leading role, yet many national judiciaries are facing, often for the first time, a novel set of complex legal issues. Here the experience of national courts in Latin America may be helpful. These courts, confronted over the last decade with new legal questions arising from international as well as national criminal law, have evolved creative and persuasive responses that are applicable to similar issues that may arise elsewhere. The process of learning and sharing among national courts, while in

no way dictating the unique results that each legal system and situation demands, may provide persuasive arguments and solutions for judges, prosecutors, and advocates. That, at least, is the premise of this book.

During the 1970s and 1980s, actions carried out largely—although not exclusively—by security forces led to massive crimes, including murder, forced disappearance, torture, massacres, arbitrary detentions, kidnappings of children, and other acts throughout the region. During that period, the courts, with a few exceptions, could not or did not play a rights-protective role. The jurisprudence of that time indicates that courts routinely denied habeas corpus requests and played a passive role with respect to the political branches of government.

Eventually, civilian governments came to power, but they were slow to adopt measures to investigate past crimes or provide redress for victims. The trial of the juntas in Argentina and the subsequent trial of Bolivian dictator Luis García Meza were notable exceptions, but for the most part governments eschewed prosecutions. They retained or put in place amnesty laws that precluded investigation and prosecution of the security forces. Even in those countries without formal amnesty laws, a combination of other legal obstacles and an inhospitable political and security climate made judicial action against past human rights violators rare.

This panorama has changed over the last decade. Multiple factors explain this shift. Perhaps the most important was the debate within each country about the need to (re)establish the rule of law for everyone. Groups of family members of the disappeared, journalists, lawyers, and human rights organizations all played important roles over decades to document the cases, push judges to assume their role as protectors of rights, and change the political and legal conditions that impeded the ability to prosecute. Even in the most difficult moments, these actors never stopped demanding justice before local courts, traveling to international forums to seek support, and publicizing a reality that many people would rather have ignored or forgotten. The evidence that they managed to obtain and the habeas corpus petitions they filed—even though these were denied at the time—provided useful proof of the events and, many years later, often became the starting point for the work of investigators and judges.

There were additional factors at work. In some cases, the post-dictatorship governments supported the idea of truth, even in the absence of full justice. The first initiative in this direction was the creation of investigative or “truth” commissions, which were acceptable to governments even in situations of limited democracy, elite pacts, or negotiated settlements that excluded the possibility of trials. These commissions played an important role in gathering information, establishing overall patterns of violations, and making visible to the whole society the large number of victims. In these venues the victims were listened to and recognized, which was essential in creating or reinforcing their determination to bring cases before the courts. In some countries, reforms renewed the judiciary, bringing in new judges with more training and interest in international law and human rights. There were changes to the composition of the judicial branch, to criminal procedure codes, and in some cases to the constitution itself. In Argentina, for example, a 1994 reform gave human rights treaties constitutional status. In Colombia, the 1991 constitution gives treaties primacy over conflicting domestic law.

These internal factors were intertwined with external ones. The process of human rights codification began to bear fruit in the 1980s, when the treaties previously signed finally entered into force. Where the governments had not already done so, the new post-armed conflict or post-dictatorship governments acceded, as some of their first acts, to the corpus of human

rights treaties. In particular, most countries in the region became parties to the American Convention on Human Rights, and the Inter-American Court of Human Rights began to operate.

In its first adversarial case, the Inter-American Court established, as a bedrock principle, the obligation of States to investigate, prosecute, punish, and repair grave human rights violations. The Court's jurisprudence, along with the reports and recommendations of the Inter-American Commission on Human Rights, eventually began to penetrate the thinking of many prosecutors and judges and began to be reflected in the decisions of national courts. Since then, in its jurisprudence on forced disappearances, summary executions, and torture, and on the importance of respecting and ensuring the rights of victims, the Inter-American Court has set the standard followed by many judges in the region. Of particular relevance were the decisions in the cases of *Barrios Altos* (Peru) and *Almonacid Arrellano* (Chile), in which the Court held that amnesties and other limiting devices like statutes of limitations could not override the duty to investigate, prosecute, and punish those responsible, nor the duty to provide reparation to the victims. Numerous national courts have cited the Court's decisions. Decisions on the right to truth and on the broad scope of remedies have also been important for national judges. Along with the Court, the Inter-American Commission has consistently encouraged governments to combat impunity more effectively, using its public hearings, reports, periodic meetings with justice sector officials, and capacity-building efforts toward that end. The role of the Commission in the negotiation of friendly settlements has demonstrated to governments that improving the quality of national justice systems may help them avoid having to defend large numbers of cases before the inter-American system.

The last two decades have also seen a significant change in the importance of international tribunals and in the development of international criminal law. In 1993, for the first time since Nuremberg, an international tribunal was created to adjudge genocide, crimes against humanity, and war crimes—in this case, in the former Yugoslavia. A year later, the UN Security Council again created an international tribunal, this time for Rwanda. The work of these tribunals began to give concrete answers to some of the issues and dilemmas involved in cases of international crimes and violations of international humanitarian law. It also showed that it was possible to create and operate an international court that, although not free of problems, complied with international standards of legality and due process.

Nonetheless, the tribunals had limits. They were slow and expensive, using funds that, according to critics, could better have been spent (re)building national justice systems. They were far away from the scene of the crimes, which made it hard for victims and the population generally to understand and follow the proceedings. They did not necessarily have a broader impact on impunity, and the populations of the targeted regions did not always see them as impartial and independent. All these critiques led to a reassessment of the importance of strengthening national courts.

The approval of the Rome Statute and the establishment of the International Criminal Court (ICC) in 1998 was a result. The essence of the Statute, unlike the prior tribunals created by the Security Council, was that international jurisdiction was to be complementary to national jurisdiction; the Court can act only when national courts are unable or unwilling to do so. The starting place is national courts. This means that States Parties to the ICC must modify their internal law to make sure they can prosecute the crimes listed in the Statute. Although the ICC will not have jurisdiction over crimes committed before 2002, and thus will not be

able to investigate the crimes of the Latin American dictatorships, the process of formation and development of the Court has created a space for dialogue among legal professionals, and broader sectors as well, regarding the need for justice for the worst international crimes. Latin Americans played an important role in the negotiations and setting up of the Court, and almost all States in the region are parties to the Rome Statute.

Another factor that helped change the panorama was the 1998 arrest of former Chilean dictator Augusto Pinochet. The arrest warrant was issued by a Spanish judge, Baltazar Garzón, for the crimes of genocide, terrorism, and torture committed against Spanish and Chilean citizens. Spain's universal jurisdiction statute covered a handful of particularly grave international crimes, even when neither the accused nor the victim was a Spanish citizen. As is now well known, Pinochet decided to travel to the United Kingdom and was arrested in London. During the extradition hearings, the British House of Lords twice approved his extradition to Spain on charges of torture and conspiracy to torture. After over a year under house arrest, Pinochet was returned to Chile, ostensibly because of his health problems. The Pinochet case was widely known in Latin America and contributed to changing the views of lawyers, judges, activists, and state officials on the possibilities of international justice. If someone as powerful as Pinochet could face justice, why couldn't others who had also ordered murders and disappearances? And if Spanish and British courts thought that the accusations of torture and disappearance were credible and could be prosecuted even against a former head of state, many years after their occurrence, why couldn't local courts begin to investigate and prosecute their own nationals accused of similar atrocities?

All these factors, some with more weight than others in each country, led to the reopening of judicial investigations, the formulation of charges, and the eventual trials of individuals accused of committing grave violations of international human rights and international humanitarian law. Many of these criminal cases confronted similar problems. To begin with, how should the crimes be characterized? Were they common crimes under the existing penal code—murder, aggravated kidnapping, and the like—or international crimes? If the former, how could the courts then deal with the problems of statutes of limitations, amnesties, or official immunities, among others? If, on the other hand, the acts were characterized as international crimes, how could the accused be tried, consistent with principles of legality and the prohibition on *ex post facto* law, for crimes that at the time they were committed were not specifically defined in the local penal code? What was the role of treaty and customary international law in answering these questions? This raised a series of complications regarding the role of international law, both treaty and customary, which had common aspects even though it varied depending on the national legal system. Many of the cases involved the direct responsibility of the perpetrator, but in other cases the accused had given orders or formed part of a chain of command. These cases needed a theory of indirect or command responsibility capable of linking the accused to the commission of the prohibited acts.

Latin American national courts, with imagination and rigor, began to solve these and other problems in concrete cases. Sometimes they had the help of *amicus curiae* briefs or drew on ideas that emerged from conferences, workshops, publications, and other ways of sharing knowledge. Frequently the decisions reflected the particularities of each country, but many were also useful and relevant to solving similar problems in neighboring States. These cases are ongoing and will probably continue for another few years. There are countries in the region, no-

tably in Central America, that are just beginning to come to terms with the past from a judicial standpoint, a process that is much more advanced in the Southern Cone countries. There is an indirect dialogue among judges and lawyers on the best way of resolving some of the common legal issues that arise, in which the jurisprudence and arguments made in one country may be useful in another, taking into account each country's particularities. This process of exchange and mutual influence has taken place through the study of other courts' sentences, seminars, and courses, through the joint work of judges in cases involving extradition or judicial cooperation, as well as in periodic meetings of judiciaries and of networks of lawyers and activists. The process of sharing across borders is facilitated by the fact that many of these arguments are based on international law, which is common to national legal systems and serves as a common guidepost for all.

Along these lines, the Supreme Court of Argentina held that, even though the charged crimes were common crimes under the penal code, they were at the same time crimes against humanity, which made them not subject to amnesties or statutes of limitations. The Chilean Supreme Court defined enforced disappearances as permanent (continuing) crimes, using as part of its argument the International Convention on the Protection of All Persons from Enforced Disappearance, which Chile at the time had not yet ratified. The Colombian Constitutional Court contributed a number of decisions on the interrelationship between national law and Inter-American Court jurisprudence. And the Supreme Court of Peru, in its sentence of Alberto Fujimori for crimes committed in the Barrios Altos, La Cantuta, and SIE Basements cases, developed in great detail the issue of the indirect criminal responsibility of civilians for subordinates. In almost every country in the region there are valuable decisions on these subjects.

These decisions deserve to be more broadly disseminated, read, and discussed both within Latin America and throughout the rest of the world. They are an important contribution to the development of a truly international criminal law. They may be of use to the existing, and to any future, hybrid or mixed tribunals, and to the judges of the International Criminal Court. They may provide inspiration, and perhaps even lines of argument or jurisprudential backing, to national courts in Africa and elsewhere that are starting to seriously tackle the problem of impunity. After all, in the end it will be in national courts where most of international criminal law will continue to be made. In that context, the work of Latin American courts takes on universal value.

This book is an effort to gather and systematize the work of national courts and tribunals in Latin America on issues of international crimes and the fight against impunity. It is organized by topic and not by country, so that those confronting a particular legal problem can easily find what has been said about it. Because of space constraints, the facts surrounding each case have only been included to the extent necessary to make the legal rulings understandable. It is a shame that there was no space here to tell each story in full, to narrate the struggles of the survivors and the families, and to unspool the human drama that underlies each of the decisions summarized—but that would take another whole book. We hope that this effort will strengthen the possibilities for effective justice, so that in the future neither the courts nor the societies of which they form part will ever again have to confront such serious and heartbreaking crimes.





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The Center for Civil and Human Rights at Notre Dame was the institution chosen by DPLF to serve as consultant. Ximena Medellín Urquiaga, research associate at the Center, is the author of the digest; she developed its methodology and format, compiled and systematized the jurisprudence, and wrote the analytical commentary, working in consultation with the editors and translator.

María Clara Galvis, a specialist in international and inter-American law, edited the Spanish version of the digest and worked with the author to develop the commentary; she also coordinated production of the English version. Gretta Siebentritt translated the entire digest from Spanish to English, and Cathy Sunshine edited the English version of the work.



## INTRODUCTION

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Approximately ten years ago, in an article on the development of national and international jurisprudence regarding amnesty laws, Naomi Roht-Arriaza concluded that “to date, there has been little study of the permeability of international law-based rules and ideas of accountability into the jurisprudence of national courts.” Specifically, Roht-Arriaza raised the following concerns:

In particular, to what extent have these rules and norms influenced courts, when asked to rule on the legality of measures to limit accountability, in countries where massive human rights violations have taken place? Which arguments have been successful over time, and which have not? A detailed study of the court decisions in this area can help advocates refine their arguments, and help scholars evaluate to what extent, and on what terms, emerging international law principles influence national judiciaries. National court decisions will also be one element in discerning to what degree customary law obligations are emerging in the area of accountability. In addition, such study will illuminate the evolving role of the judiciary in situations of transition.<sup>1</sup>

In the decade since this was written, more work has been done on Latin American jurisprudence in relation to international human rights law and international crimes. But there is, to date, no compilation available of the judicial decisions of Latin American courts and tribunals that specifically relates these decisions to international crimes. This study is intended to fill this gap and to contribute to the promotion of judicial practice and academic analysis within the framework of questions such as those posed by Roht-Arriaza ten years ago.

This digest was produced by the Due Process of Law Foundation in collaboration with the Center for Civil and Human Rights of the University of Notre Dame Law School, with financial support from the United States Institute of Peace (USIP). It offers key excerpts from the jurisprudence issued by national Latin American courts that is relevant to criminal prosecution of international crimes and to the grave human rights violations that constitute these crimes. The excerpts from judicial decisions have been translated from Spanish to English and are organized by topic. They are framed by analysis that explains their content in light of international law, criminal law, and international criminal law.

This digest is intended as a practical tool that litigators, judges, and other judicial operators can use in the presentation and resolution of cases related to international crimes and grave human rights violations in light of the overlap between these two normative systems. The publication may also serve as a basis for the development of academic studies, courses, workshops, or training seminars on these issues and assist in the legislative implementation process of international laws. More broadly, the purpose is to promote national, regional, and international knowledge of the jurisprudential criteria developed by national Latin American

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1 Naomi Roht-Arriaza and Lauren Gibson, “The Developing Jurisprudence on Amnesty,” *Human Rights Quarterly* 20, no. 4 (1998): 845–46.

courts. These courts have overcome juridical and political challenges in order to bring justice to societies that have experienced what the international community has recognized as the most atrocious crimes.

## SELECTION OF TOPICS FOR INCLUSION

This study is centered on the judicial decisions of Latin American courts and tribunals related to genocide, crimes against humanity, and war crimes. Although in practice it is not always easy to make a sharp distinction between grave human rights violations and international crimes, the digest focuses primarily on the latter and not on grave human rights violations.

A general selection of the topics most relevant to these three categories of crimes was first carried out by the project's Advisory Board in coordination with Notre Dame's Center for Civil and Human Rights. A decision was made to give priority to six topics: (i) definitions and elements of the crimes; (ii) forms of criminal intervention, particularly co-perpetration, indirect perpetration, and command or superior responsibility; (iii) exercise of jurisdiction in cases concerning international crimes and modes of cooperation and criminal assistance, particularly with respect to extradition; (iv) how underlying conduct that violates national law can be subsumed under crimes characterized under international law (subsumption); (v) the principle of legality; and (vi) validity of amnesty laws and similar provisions. These topics provided the basis for determining the structure of the digest.

Other issues were also recognized as important during the selection process: for example, the international mechanisms that have influenced Latin American jurisprudence, the value of the decisions issued by these mechanisms, and the different principles or norms concerning the incorporation of international law within national judicial systems. Although a discussion of these issues could enhance our understanding of the jurisprudence presented in the digest, time constraints and limitations on the project's financial and human resources dictated the decision not to address these issues directly.

## IDENTIFICATION AND COMPILATION OF JUDICIAL DECISIONS

Once the priority topics had been identified, criteria were set for the selection of rulings from Latin American courts and tribunals. The rulings included in this digest can be grouped into four categories:

- Rulings that establish individual criminal responsibility for one or more crimes under international law, or for an ordinary crime under domestic law that was qualified by a local tribunal as an international crime.
- Rulings derived from the submission of various forms of appeal (*recursos de hecho, de apelación, de excepciones de previo y especial pronunciamiento*) as well as from other legal remedies protecting fundamental rights (*acciones de amparo, recursos de tutela, habeas corpus*), where, even if the criminal responsibility of a person is not determined, norms directly related to crimes under international law are interpreted and/or applied.

- Rulings derived from constitutional review processes, whether for international treaties or national laws, that are directly related to crimes under international law, including, for example, constitutionality studies for the Rome Statute of the International Criminal Court.
- Rulings where, although there is no explicit mention of crimes under international law, the tribunal itself characterizes the facts as part of an armed conflict, a systematic or widespread attack against a civilian population, or a dictatorial regime, and where the court also establishes some relevant criteria for the juridical regime applicable to international crimes.

There is, to date, no public database that includes all or even a substantial number of Latin American rulings related to international crimes. The identification and compilation of rulings therefore required an extended search process that entailed use of different specialized databases, consultations with litigators and experts in different countries, consultations with government and judicial authorities, and use of public information systems developed by judiciaries themselves.

One essential criterion for inclusion of a ruling was whether it was possible to access the complete text of the ruling. Moreover, the text had to come from a source with absolute credibility and reliability. With these criteria in mind, we chose to disregard several sources that provided only summaries or extracts or that did not allow for verification of the authenticity and integrity of the text.

The websites of national judiciaries, particularly in Argentina, Costa Rica, Colombia, Peru, and Panama, were rich sources of data. Governmental systems providing access to public information, particularly Mexico's, were also employed. Databases consulted in the process of compiling the rulings included (i) "National Implementation: National Case Law" of the International Committee of the Red Cross; (ii) "Oxford Reports on International Criminal Law" and "Oxford Reports on International Law in Domestic Courts"; (iii) "Legal Tools" of the International Criminal Court; and (iv) "HuriSearch" of the Human Rights Information and Documentation Systems, International.<sup>2</sup>

Litigators and other experts on jurisprudence in the different countries helped us compile texts of the most relevant rulings and verify the preliminary list of rulings for each country. We thank, in particular, Hugo Relva (Argentina and other countries in the Southern Cone), Carolina Varsky (Argentina), Elizabeth Santalla (Bolivia), Juan Guzmán (Chile), Cath Collins (Chile), María Clara Galvis (Colombia and Peru), Naomi Roht-Arriaza (Colombia, Chile, and Honduras), Lucy Turner (Guatemala), Salvador Herencia (Ecuador), Ezequiel Gonzales Ocantó (Panama, Bolivia, and Guatemala), Michelle Reyes Milk (Peru), Diego Camaño (Uruguay), and María Daniela Rivero (Venezuela).<sup>3</sup>

Lastly, we used bibliographic works on national jurisprudence as supplementary references in order to identify or verify the relevance of the rulings collected. Among the most useful were the publications of the Latin American Study Group on International Criminal Law, headed

2 These databases are available at, respectively: (i) <http://www.icrc.org/ihl-nat>; (ii) <http://www.oxfordlaw-reports.com/> (by subscription); (iii) <http://www.legal-tools.org/en/go-to-database/>; (iv) <http://www.huridocs.org/>.

3 The country name refers to the country on which the person was consulted and does not necessarily correspond to the person's nationality.

by Kai Ambos and sponsored by the Konrad Adenauer Foundation. Other publications produced by the Rule of Law Program of that same foundation were also crucial for the development of this project.

## SELECTION OF DECISIONS FOR INCLUSION

In the process of identifying and compiling the rulings, we were able to locate a very large number of decisions, exceeding our expectations at the start of the project. This was the first positive result of the research, confirming the richness and abundance of jurisprudence on international crimes that has been produced by Latin American courts and tribunals in the past ten years.

Although all the decisions identified satisfied the criterion mentioned in the previous section, that is, a reliable version of the full text of the decision was available, limitations on space and resources meant that only a small number of the rulings could be included in the digest. We therefore established two basic selection criteria. First, and most importantly, we sought to present a *representative sample of the juridical arguments developed throughout the whole region*. Methodologically, this meant that we opted to limit the number of decisions from certain countries with a higher volume of rulings, or where accessing rulings was easier, in order to allow for inclusion of rulings from countries with less judicial production or more restricted access to the rulings of their courts. Similarly, as the systematization process progressed we granted priority to decisions that addressed topics not yet included or sufficiently developed in the digest. Rulings that were identified late in the process, when a representative sample of jurisprudence from a specific country had already been compiled, or that treated topics already adequately addressed in comparison to others under study, were often omitted.

The second criterion was *the legal value of the ruling*. Rulings by supreme courts or constitutional courts were prioritized, as they generally represent the final word in the determination of a legal issue at the national level. This tended to ensure that the interpretation employed in the paragraphs selected for inclusion in the digest was not overturned or repealed (in the same process) by an appeals body. Because of this criterion, the study only employed rulings issued by lower courts that had been ratified by a supreme court decision or that had become final decisions because—according to information available at the time—they were not the object of other appeals before a superior organ. The study tried to limit the number of separate opinions and dissenting opinions contained in the selected decisions. In few exceptional cases, opinions were included as a complement to other rulings, but only when the concrete paragraphs did not include the dissenting criteria and could be understood as the development of criteria that the majority had upheld in this or other rulings issued by the same organ.

The selection of rulings was complemented by a process similar to *snowball sampling*, an investigative technique used in the social sciences to determine the sample for a specific study when the sample universe cannot be determined *a priori*. This technique is employed primarily when the type of sample (or material) with which one seeks to work is particularly rare or difficult to obtain, and given time and resource limitations, it would be extremely difficult to apply other techniques to delimit the sample universe. The snowball effect depends on the references that a subject provides—in this case the rulings themselves, or the secondary studies—in order to identify additional material. In other words, as can be inferred from the description concer-



ning the identification and compilation of the rulings, the studies and the rulings themselves became primary references in order to complete the sample used in the study.

## SYSTEMATIZATION AND STRUCTURE OF THE STUDY

The thematic structure of this digest was inspired by two case-law digests compiled by Human Rights Watch that present the judgments of the international criminal tribunals for the former Yugoslavia and Rwanda. Although our study does not present uniform jurisprudence issued by only one organ, the thematic format aids in the reading and consultation of the judgments and allows for comparison of the different criteria developed by Latin American courts and tribunals.

As noted above, the Advisory Board selected the basic topics. During the systematization process, however, flexible criteria were maintained in order to permit incorporation of topics contained in the rulings themselves. We realized early on in the research that each of the decisions addressed several additional topics that were particularly relevant to the subject matter of the study, despite not having been expressly mentioned by the Advisory Board. In this way, the scope of the study was at the same time expanded and deepened in order to include the most innovative and recent theories developed by the courts.

It should be noted that no distinction was made between what the juridical doctrine characterizes as *ratio* or *holding* and *obiter dicta* in the selection of specific paragraphs for inclusion in the digest.<sup>4</sup> This decision was made bearing in mind that *obiter dicta* can constitute auxiliary interpretative criteria of great usefulness for the courts; at times, they have attained a persuasive power that has furthered the development of new jurisprudential lines. In other cases where an *obiter dictum* is clearly incidental, for example when speaking of the historical development of a particular institution, the text might possess a pedagogical value that, given the study's objectives, could not be ignored.

In addition to the judgments presented in the digest, each chapter begins with an introduction to the topic and includes commentary on selected jurisprudential extracts in the chapter. The study presents the rulings of national judicial organs in their own words, but it also seeks to contextualize the rulings within international law or international criminal law in order to facilitate their comprehension.

The commentaries and explanations are intended as a general reference for readers who may not be particularly familiar with international law or with some of the basic concepts in criminal law. In addition, given that all the countries included in this digest belong to the continental or neo-Roman juridical system, we sought to provide explanations that would facilitate the digest's use by those trained in the common law juridical tradition. Nonetheless, the commentaries and explanations are not to be considered as exhaustive or even detailed studies of each of the topics included, nor do they provide detailed analysis of the jurisprudence presented, given space limitations.

<sup>4</sup> In general terms, *ratio* or *holding* is a ruling on a point of law developed by a tribunal and necessary for resolving the judicial controversy. *Obiter dicta* are opinions that are voiced by the judge in the development of the decision but that are not indispensable to the decision.

In order to preserve the integrity of each decision, the editors retained most original variations in the spelling of proper names, the use of legal terminology, and the names of treaties, instruments, or international organs. Readers will, therefore, notice some inconsistencies across the various excerpts. All emphasis is in the original judgments and quotations unless otherwise noted.

Most of the footnotes in the final versions of the rulings have been omitted here in order to encourage a more agile reading of the decisions; dropped notes are indicated with the phrase “footnote omitted.” Occasionally we have added a footnote containing substantive legal information that might illuminate the essence of the jurisprudential criteria. These added footnotes should not be confused with the “editor’s notes,” which are used exclusively to define specific terms and clarify the meaning of an entire paragraph.

This digest seeks to contribute to strengthening the rule of law and democratic regimes in Latin America. Knowing the truth and establishing responsibilities for the perpetration of international crimes and grave human rights violations does not bind us to the past, but rather opens a way forward in building societies respectful of the law and the rights of all people.

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## LIST OF JUDGMENTS

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This study systematized a total of 54 decisions issued by the courts and tribunals of 15 Latin American countries. These judgments are listed below in country sets numbered 1 through 15. Within each country, the judgments are listed in chronological order, numbered with lowercase letters. In order to facilitate cross-reference between the digest entries and the full reference information below, each excerpt in the digest includes the number and letter corresponding to the judgment on this list (e.g., List of Judgments 1.f).

The list contains the complete reference data for each decision. In some cases this includes the name of the *magistrado ponente* (MP), the reporting judge who wrote the opinion. In addition, most of the judgments are followed by a brief summary that provides information about the type of legal remedy at stake (e.g., judgment on individual responsibility, appeal, *habeas corpus* and *amparo*, constitutional review, etc.). When the decision refers to an individual defendant, the summary briefly notes his or her background. In a few cases, the victim is also named.

An abbreviated reference name has been assigned to each decision in order to facilitate its identification in the main body of the digest. These abbreviated names, underlined in the list of judgments, are used throughout the digest instead of the full reference data. Some of the criteria used to assign the abbreviated reference names to the decisions are as follows:

- *Case, followed by the name of the victim, location, event, and/or criminal structure:* Used for decisions dealing with individual criminal responsibility of one or more persons, for one or more specific crimes. In addition, the name(s) of the accused are given inside parentheses.
- *Remedy of unconstitutionality, followed by the article(s) or law(s) that are being challenged:* Used for decisions in which the courts declared the compatibility of a certain legal norm and/or statute with a country's constitution, through a process of abstract constitutional review.
- *Constitutional remedies (amparos), habeas corpus, and other motions, followed by the name of the person who brought the remedy:* Used for decisions issued by the courts on such legal procedures, including also special motions, appeals on constitutional remedies, and review motions.
- *Constitutional review, followed by the name of a treaty or a national bill:* Used for decisions issued by the courts when evaluating the compatibility of a specific international treaty, such as the Rome Statute of the International Criminal Court, and/or of bills for the approval of such treaties, with a country's constitution.

## 1. ARGENTINA<sup>1</sup>

- a. *Motion submitted by the defense of Jorge Rafael Videla — Videla, Jorge Rafael s/ incidente de excepción de cosa juzgada y falta de jurisdicción*, Expediente V.34.XXXVI, Corte Suprema de Justicia de la Nación, 21 de agosto de 2003.

Special appeal brought by the defense of Jorge Rafael Videla against the decision of Chamber I of the National Criminal Appeals Chamber, which confirmed the rejection of the preliminary exceptions of *res judicata* and lack of jurisdiction. Jorge Rafael Videla was one of the leaders of the military coup of March 24, 1976, in Argentina. He was president of Argentina between 1976 and 1981, during the dictatorial period known as the National Reorganization Process. After the fall of the military dictatorship, he was found responsible for the commission of various crimes in the well-known trial of the military juntas (case 13/84). After serving five years of his sentence, he was granted a presidential pardon by President Carlos Saúl Menem. He is currently back in prison facing different criminal processes. This decision pertains to one of them.

- b. *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) — Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros*, Causa no. 259 (Recurso de hecho), Expediente A. 533. XXXVIII, Corte Suprema de Justicia de la Nación, 24 de agosto de 2004.

Appeal motion submitted on behalf of the State and the government of Chile against the decision of Chamber I of the National Criminal Appeals Chamber, which declared the definitive dismissal of the case against Enrique Lautaro Arancibia Clavel for the crime of illicit association, based on application of the statute of limitations. Enrique Lautaro Arancibia Clavel was a member of Chile's National Intelligence Directorate (Dirección de Inteligencia Nacional, DINA) under the *de facto* government of Augusto Pinochet. The main activity of the DINA in Argentina was the persecution of political opponents of the Pinochet regime in exile in Argen-

1 The selection of decisions from Argentina was based on a listing by the Supreme Court of the Nation itself. In one of its most prominent decisions, the Argentine Supreme Court stated in 2007 that “international treaties, [as well as] case law and recommendations of [the relevant] interpretative and monitoring bodies, have led to this Court, through various judgments, to recognize the inapplicability of statute of limitations to crimes against humanity (‘Arancibia Clavel’ [...]); to declare unconstitutional the laws of Full Stop and Due Obedience (‘Simón’ [...]); to recognize the right to the truth about the events that involved serious violations to human rights (‘Urteaga’ [...]); to give the victims a leading role in such processes (‘Hagelin’ [...]); and also to rethink the scope of the guarantee of double jeopardy in order to make it compatible with [these types of crimes] (‘Videla’ [...]).” This paragraph comes from a decision in the “Mazzeo” case, which represents the last piece in the puzzle; in this case, the Supreme Court declared unconstitutional the pardons granted in the late 1980s to several military officers who had been convicted or were on trial then. See *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*, Expediente M. 2333. XLII, Corte Suprema de Justicia de la Nación, 13 de julio de 2007. With regard to the selection of judgments from Argentina, it should be noted that, unfortunately, we could not obtain the full text of the decision issued by the National Criminal Appeals Chamber, dated December 9, 1985, in case 13/84 (the case against the military junta) until very late in the investigation. Therefore, that judgment has not been included in this edition of the digest.

tina and other countries. This particular decision was issued as part of the criminal procedures related to the murder of Carlos José Santiago Prats, minister and army chief in the government of Salvador Allende, and his wife Sofia Ester Cuthbert Chiarleoni, among other crimes.

- c. *Motion submitted by the defense of Julio Héctor Simón* — *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, Causa no. 17.768 (Recurso de hecho), Expediente S. 1767. XXXVIII, Corte Suprema de Justicia de la Nación, 14 de julio de 2005.

Appeal motion brought by the defense of Julio Héctor Simón against the decision of Chamber II of the National Criminal Appeals Chamber, which upheld a lower court decision declaring invalid and unconstitutional several articles of the Full Stop and Due Obedience laws. Julio Héctor Simón was a member of Argentina's Federal Police and a member of a task force assigned to the Argentine First Army Corps. This task force was part of the underground system of persecution of political opponents and was particularly involved with the operation of the secret detention center known as "the Olympus." This particular decision was issued as part of the criminal procedures related to the detention and disappearance of José Liborio Poblete and Gertrudis Marta Hlaczik, and the kidnapping of their baby daughter Claudia Victoria Poblete. In the appeal, the Supreme Court of Justice upheld the decisions of lower courts that declared invalid and unconstitutional several articles of the aforementioned laws.

- d. *Case of "Circuito Camps" and others (Miguel Osvaldo Etchecolatz)* — *Etchecolatz, Miguel Osvaldo (acusado)*, Causa no. 2251/06, Tribunal Oral en lo Criminal Federal (La Plata), 19 de septiembre de 2006.

Judgment on the individual criminal responsibility of Miguel Osvaldo Etchecolatz, who was general director of police investigations for the Province of Buenos Aires from May 5, 1976, to February 28, 1979. In this capacity, Etchecolatz played a central role in the structure of repression established by the police headquarters, known as "Circuit Camps," which included management of several clandestine detention centers. In this judgment the Court finds Etchecolatz to be criminally responsible as co-perpetrator, direct perpetrator, or perpetrator-by-means of various crimes (including homicide, aggravated illegal deprivation of liberty, and torture) committed against Diana Esmeralda Teruggi, Patricia Graciela Dell'Orto, Francisco De Marco Ambrosio, Elena Arce Sahores, Nora Livia Formiga, Margarita Delgado, Nilda Emma Eloy, and Jorge Julio López. According to the court, these offenses amounted to crimes against humanity.

- e. *Case of Poblete-Hlaczik (Julio Héctor Simón)* — *Simón, Julio Héctor (acusado) (Caso Poblete-Hlaczik)*, Causa no. 1.056 y no. 1.207, Tribunal Oral en lo Criminal Federal (Buenos Aires), 11 de agosto de 2006.

Judgment on the individual criminal responsibility of Julio Héctor Simón, who was an officer of the Argentine Federal Police. The Court found him to be criminally responsible as co-perpetrator of the crime of unlawful deprivation of freedom and torture committed against

José Liborio Poblete and Gertrudis Marta Hlaczik, and for kidnapping their daughter, Claudia Victoria Poblete. The Court asserted that these offenses amounted to crimes against humanity.

- f. *Motion submitted by the defense of Santiago Omar Riveros — Mazzeo, Julio Lilo y otros s/ rec. De casación e inconstitucionalidad*, Expediente M. 2333. XLII, Corte Suprema de Justicia de la Nación, 13 de julio de 2007.

Special appeal brought by the defense of Santiago Omar Riveros against the decision of Chamber II of the National Criminal Appeals Chamber, which declared the unconstitutionality of the decree of pardon 1002/89. Santiago Omar Riveros was a general in the Argentine Armed Forces during the military dictatorship. He was responsible for several secret detention sites, including “El Campito” and the military hospital Campo de Mayo. By ruling on the inapplicability of presidential pardons to crimes against humanity, the Supreme Court in this decision opened the way to start new proceedings against Santiago Omar Riveros. To date, he has been found guilty and sentenced to life imprisonment for the death of Floreal Avellaneda, who was kidnapped when he was only 15 years old.

- g. *Motion submitted by Ragnar Erland Hagelin — Hagelin, Ragnar Erland s/ rec. art. 445 bis C.J.M.*, Expediente H. 381. XLII, Corte Suprema de Justicia de la Nación, 2 de diciembre de 2008.

Special appeal brought by Ragnar Erland Hagelin, father of Dagmar Ingrid Hagelin, a young woman who disappeared during the Argentine dictatorship, against the decision of the National Criminal Appeals Chamber that upheld another decision rejecting the reopening of investigations into the disappearance of Dagmar Ingrid. In this decision, the Supreme Court upholds the finding that the friendly settlement between Ragnar Erland Hagelin and Argentina cannot be interpreted as a waiver of his right to initiate a criminal investigation into the disappearance of his daughter.

- h. *Motion submitted by the defense of Miguel Osvaldo Etchecolatz — Etchecolatz, Miguel Osvaldo s/ recurso extraordinario*, E. 191. XLIII, Corte Suprema de Justicia, 17 de febrero de 2009.

Special appeal brought by the defense of Miguel Osvaldo Etchecolatz, requesting the application of the Full Stop and Due Obedience laws, as well as the statute of limitations, to the criminal proceedings against him. The Supreme Court of Justice declared the appeal unsubstantiated since the Court had already ruled on these issues in the decisions “Arancibia Clavel” and “Simón,” referred to above.

## 2. BOLIVIA

- a. *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada)* — *García Meza Tejada, Luis y otros*, Corte Suprema de Justicia de la Nación, 21 de abril de 1993.

Judgment on the individual criminal responsibility of the former de facto president, Luis García Meza Tejada, and the former minister of interior, immigration, and justice, Luis Arce Gómez. The Court found both accused responsible as perpetrators of the following crimes, among others: (i) bloody massacre [*masacre sangrienta*] of several leaders of the Left Revolutionary Movement, (ii) murder of various leaders of the National Council for Defense of Democracy, (iii) organization and integration of irregular armed groups and conspiracy.

- b. *Remedy of unconstitutionality (Article 138 of the Criminal Code)* — *Julio Leigue Hurtado, Diputado Nacional c/ Sandro Giordano, Presidente de la Cámara de Senadores*, Sentencia Constitucional 0034/2006, Expediente 2005-12941-26-RDI, MR. Dra. Martha Rojas Álvarez, Tribunal Constitucional, 10 de mayo de 2006.

Among the norms under review in this remedy is Article 138 of the Criminal Code of Bolivia, which establishes the crime of “bloody massacre.” Although this crime shares some elements with the crime of genocide, as defined by international law, it differs significantly from the latter.

## 3. CHILE

- a. *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepúlveda, et al.)* — Rol no. 517-04, Corte Suprema, Sala Penal, 17 de noviembre de 2004.

Appeals motion brought by the defenses of Juan Manuel Guillermo Contreras Sepúlveda, Marcelo Luis Manuel Moren Brito, Miguel Krassnoff Martchenko, Fernando Eduardo Laureani Maturana, and Gerardo Ernesto Godoy García, against the judgment of the Appeals Chamber in Santiago. All appellants-defendants were officers of the Chilean Armed Forces and of the Chilean Carabineros (Federal Police). Juan Manuel Guillermo Contreras Sepúlveda was head of the National Intelligence Directorate (Dirección de Inteligencia Nacional, DINA) between 1973 and 1977. Marcelo Luis Manuel Moren Brito was chief of the DINA’s Caupolicán Brigade; he was later in charge of the clandestine detention center known as Villa Grimaldi. Miguel Krassnoff Martchenko was an intelligence officer of the Eagle Brigade stationed at Villa Grimaldi; he was also head of the Hawk Group, which was part of the DINA. Fernando Eduardo Laureani Maturana was an agent of the Caupolicán Brigade and head of the Eagle Brigade of the DINA. Gerardo Ernesto Godoy García was a member of the Chilean Carabineros.



- b. *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.)* — Rol no. 24471, Corte de Apelaciones de Santiago, 20 de abril de 2006.

Appeal judgment against the decision declaring the application of statutes of limitations to the criminal procedures regarding the arrest, kidnapping, and disappearance of a group of people, including advisers to President Salvador Allende. All the victims were initially detained at the Palacio de La Moneda on September 11, 1973. The Court determined that the crimes were part of a systematic or widespread attack against the civilian population and, thus, for the purpose of this procedure, such crimes amounted to crimes against humanity. All the defendants in the case were members of the Chilean Armed Forces.

- c. *Application for revocation of immunity of Augusto Pinochet Ugarte (Clandestine Detention Centers of DINA)* — Rol no. 320-06, Corte Suprema, 21 de abril de 2006.

Appeal against the decision denying the request to revoke the immunity of Augusto Pinochet Ugarte, the Chilean army general who led the coup against President Salvador Allende. Pinochet was president of Chile between 1974 and 1990. After leaving the presidency, he continued to occupy other critical official positions such as commander in chief of the Chilean army (until 1998) and became a senator for life under provisions of the 1980 Constitution.

- d. *Case Molco of Choshuenco (Paulino Flores Rivas, et al.)* — Rol no. 559-04, Corte Suprema, Sala Penal, 13 de diciembre de 2006.

Appeal against the decision declaring the application of the statute of limitations to the case against Paulino Flores Rivas, Rufino Rodríguez, and Hernán Salas Carrillo Alarcón. In accordance with the facts of the indictment, on December 23, 1973, the defendants were involved in the murder of two leaders of the Left Revolutionary Movement. This decision reversed the previous ruling by characterizing the facts as crimes against humanity.

#### 4. COLOMBIA

- a. *Remedy of unconstitutionality (Article 25 and other of Decree 2550-1988, Military Code)* — Sentencia C-358/97, Expediente D-1445, MP. Eduardo Cifuentes Muñoz, Corte Constitucional, 5 de agosto de 1997.

The norms under review are 31 articles of the Military Criminal Code regarding, among other topics, the scope of military jurisdiction in Colombia.

- b. *Remedy of unconstitutionality (Article 13 and others of Decree 100-1980, Criminal Code)* — Sentencia C-1189/00, Expediente D-2858, MP. Carlos Gaviria Díaz, Corte Constitucional, 13 de septiembre de 2000.

The norms under review are Articles 13, 15, and 17 of the Criminal Code of Colombia, which establish rules about jurisdiction—territorial and extraterritorial—of Colombian criminal law, as well as certain aspects of the extradition procedure.

- c. *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code)* — Sentencia C-177/01, Expediente D-3120, MP. Fabio Morón Díaz, Corte Constitucional, 14 de febrero de 2001.

The norm under review is Article 322 of the Criminal Code of Colombia, which establishes the criminal definition of the crime of genocide, as established by domestic law. In particular, the petitioner asked the Court to rule on the constitutionality of the last part of this norm: “Whoever with intent to destroy in whole or in part, a national ethnic, racial, religious or political group *acting within the law* [...]” It is alleged that the phrase is contrary to the Constitution and international law because it limits the protection of political groups.

- d. *Case Pueblo Bello (Pedro Ogazza P.)* — Recurso extraordinario de casación, Radicación 14851, Aprobado por acta no. 35, MP. Carlos Augusto Gálvez Argote, Corte Suprema de Justicia, 8 de marzo de 2001.

Special appeal submitted by the defense of Pedro Hernán Ogazza Pantoja against the second-instance ruling handed down by the National Chamber, which found him to be co-perpetrator of the crimes of kidnapping and multiple homicides, arson, and unauthorized use of army uniforms, among others. The facts of the case relate to the slaughter of 43 people in the village of Pueblo Bello, municipality of Turbo, Antioquia, who were arrested, transported to other farms, tortured, killed, and then buried in unmarked graves. These crimes were perpetrated by members of the paramilitary organization created by Fidel Castaño Gil. Pedro Hernán Ogazza Pantoja was in charge of the intelligence for this “operation” and was responsible for naming people who could be regarded as collaborators of the guerrillas and thus should be targeted by the paramilitary organization.

- e. *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán)* — Sentencia SU-1184/01, Expediente T-282730, MP. Eduardo Montealegre Lynett, Corte Constitucional, 13 de noviembre de 2001.

Constitutional remedy brought by Nory Giraldo de Jaramillo against the decisions of the Supreme Judicial Council, which ruled on the conflict of jurisdiction between the military and ordinary tribunals. The facts of the case relate to the conduct of Jaime Humberto Uscátegui Ramírez, brigadier general of the Colombian Army, during the kidnapping, torture, and murder of 49 people in the village of Mapiripán, whose bodies were dismembered and thrown into the Guaviare River. The Supreme Judicial Council had ruled that the defendant’s conduct was

directly related to his military service and therefore was within military jurisdiction. The petitioner contested this finding and argued that the case had to be assigned to an ordinary court.

- f. *Constitutional review of the Rome Statute of the International Criminal Court — Revisión de la Ley 742 del 5 de junio de 2002 “Por medio de la cual se aprueba el Estatuto de Roma de la Corte Penal Internacional, hecho en Roma el día diecisiete (17) de julio de mil novecientos noventa y ocho (1998),”* Sentencia C-578/02, Expediente LAT-223, MP. Eduardo Cifuentes Muñoz, Corte Constitucional, 30 de julio de 2002.
- g. *Remedy of unconstitutionality (Article 220 of Law 200-2000, Code of Criminal Procedures) —* Sentencia C-004/03, Expediente D-4041, MP. Eduardo Montealegre Lynett, Corte Constitucional, 20 de enero de 2003.

The norm under review is Article 220(3) of the Criminal Procedures Code. According to the petitioner, this article limits the ability to review a decision when new evidence and facts point to the guilt of the person who was previously acquitted, to the detriment of the rights of victims.

- h. *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) —* Sentencia C-148/05, Expediente D-5328, MP. Álvaro Tafur Galvis, Corte Constitucional, 22 de febrero de 2005.

The norms under review are Articles 101, 137, and 178, which establish the criminal definitions under domestic law of the crimes of genocide, torture against a protected person, and torture, respectively. In particular, the petitioner argues that the word “grave,” which qualifies the physical and emotional harm in each one of the definitions of the crimes, limits the protection afforded by the said norms.

- i. *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) —* Sentencia C-291, Expediente D-6476, MP. Manuel José Cepeda Espinosa, Corte Constitucional, 25 de abril de 2007.

The norms under review are Articles 135, 156, and 157 of the Criminal Code, as well as Articles 174, 175, 178, and 179 of the Military Criminal Code.

- j. *Case La Gabarra (Luis Fernando Campuzano Vásquez) —* Recurso de casación, Radicación 24448, Aprobado por acta no. 170, MP. Augusto J. Ibáñez Guzmán, Corte Suprema de Justicia, 12 de septiembre de 2007.

Appeal brought by the prosecution and the civil party against the ruling of the Court on Criminal Procedures of the First Circuit of Cundinamarca and the High Court of the same judicial district, which absolved Luis Fernando Campuzano Vásquez, lieutenant of the Colombian Armed Forces, for his responsibility in the crimes of conspiracy and murder. The facts of the case relate to the conduct of Luis Fernando Campuzano Vásquez during a paramilitary attack committed by the United Self-Defense Forces of Colombia on the town of La Gabarra, where

27 people were killed. Luis Fernando Campuzano Vásquez, who was in command of a contingent of the Colombian Army designated to protect the population, never left the military base to defend the inhabitants of the area.

- k. *Appeal motion (Manuel Enrique Torregrosa Castro)* — Recurso de apelación, Radicación 29472, MP. Yesid Ramírez Bastidas, Corte Suprema de Justicia, 10 de abril de 2008.

Appeal brought by the attorney general against the decision of the Chamber for Justice and Peace of the High Court of Barranquilla, which declined to order the exclusion of Manuel Enrique Torregrosa Castro from a list of those eligible for the benefits provided in Act 975 of 2005 (Justice and Peace Act). Manuel Enrique Torregrosa Castro was a member of a paramilitary group in Colombia and, as such, he was supposed to participate in the process of demobilization of such groups, according to the aforementioned act. The request for exclusion is based on the extradition request presented by the U.S. government against Torregrosa Castro to face charges of conspiracy to import and distribute cocaine in the United States. The High Court found that unless Manuel Enrique Torregrosa Castro was actually convicted for those offenses, it could not order his exclusion from the process established by Act 975 of 2005.

## 5. COSTA RICA

- a. *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons* — Sentencia 00230, Expediente 95-006543-0007-CO, Consulta Judicial Perceptiva, Corte Suprema de Justicia, 12 de enero de 1996.
- b. *Constitutional review of the bill to approve the Rome Statute of the International Criminal Court* — Sentencia 09685, Expediente 00-008325-0007-CO, Consulta Judicial Perceptiva, Corte Suprema de Justicia, 1 de noviembre de 2000.

## 6. ECUADOR

- a. *Constitutional review of the Rome Statute of the International Criminal Court* — Caso no. 0005-2000-C1, MP. Hernán Salgado Pesantes, Tribunal Constitucional, 21 de febrero de 2001.

## 7. EL SALVADOR

- a. *Remedy of unconstitutionality (Articles 1 and 4 of the Legislative Decree no. 486, General Amnesty for the Consolidation of Peace)* — Incidente 24-97/21-98, Sala de lo Constitucional, Corte Suprema de Justicia, 27 de septiembre de 2000.

The norms under review are Articles 1 and 4 of Legislative Decree no. 486 (General Amnesty for the Consolidation of Peace), which establish the scope of application of the decree. According to these articles, the amnesty benefits those people accused of political crimes and related offenses, or offenses committed by more than 20 people, all prior to January 23, 1992, whether they have been convicted in the presence or absence, are under process, or have not yet been indicted.

- b. *Habeas corpus submitted by Reyna Dionila Portillo* — Incidente 379-2000, Proceso de Habeas Corpus, Sala de lo Constitucional, Corte Suprema de Justicia, 20 de marzo de 2002.

Habeas corpus brought by Reyna Dionila Portillo on behalf of her daughters Ana Julia and Carmelina Mejía Ramírez. Both minors disappeared after they were taken away by members of the Atlacatl Battalion of the Armed Forces of El Salvador during a raid in October 1981 in Cerro Pando cantón, jurisdiction of Meanguera, department of Morazán.

- c. *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascoechea, et al.* — Incidente 674-2001, Sala de lo Constitucional, Corte Suprema de Justicia, 23 de diciembre de 2003.

Constitutional remedy brought by Juan Antonio Ellacuría Beascoechea and others against the actions of several Salvadoran authorities, including the president and the attorney general. The petitioners argue that the General Amnesty for the Consolidation of Peace has been erroneously applied to the killings of several people, perpetrated on November 16, 1989, in the Universidad Centroamericana “José Simeón Cañas.” As argued by the petitioners, such application goes against a recommendation issued by the Inter-American Commission on Human Rights against the government of El Salvador.

## 8. GUATEMALA

- a. *Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al.* — Expediente 3380-2007, Corte de Constitucionalidad, 12 de diciembre de 2007.

Appeal in a constitutional remedy brought by the representation of Ángel Aníbal Guevara Rodríguez and Pedro García Arredondo against a judicial decision that orders the arrest of both individuals in compliance with an extradition request by the Kingdom of Spain to face charges of kidnapping, terrorism, and murder.<sup>2</sup> The extradition request was part of the process initiated

2 Spain requested the extradition of José Efraín Ríos Montt, Ángel Aníbal Guevara Rodríguez, Oscar

by the criminal complaint filed by Rigoberta Menchú for crimes perpetrated during the internal armed conflict in Guatemala. The request made particular reference to the massacre carried out at the Embassy of Spain in Guatemala in January 1980, as well as to the murder of several Spanish priests and other Spaniards committed between 1976 and 1983. Ángel Aníbal Guevara Rodríguez was a general in the Guatemalan Army and served as minister of defense during the administration of General Romeo Lucas García. Pedro García Arredondo was the chief of the Sixth Command of the National Police during the same government.

- b. *Case Massacre of Río Negro (Macario Alvarado Toj, et al.)* — Expediente 96-2008, Corte de Apelaciones de Cobán, 24 de septiembre de 2008.

Appeal brought by the defense of Macario Alvarado Toj, Francisco Alvarado Lajuj, Tomas Vino Alvarado, Pablo Ruiz Alvarado, Bonifacio Cuxun López, and Lucas Lajuj Alvarado for the murder of Marta Julia Chen Osorio, Demetria Osorio Lajuj, Margarita Chen Uscap, Eusebia Osorio, and 22 other people. All defendants were members of the Civil Self-Defense Patrols who participated in a raid on the village of Río Negro and killed the victims identified by the judgment. All of the victims were Maya women and children.

## 9. HONDURAS

- a. *Constitutional review of the Rome Statute of the International Criminal Court* — Corte Suprema de Justicia de Honduras, fallo de 24 de enero de 2002.

## 10. MEXICO

- a. *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo* — Amparo en Revisión 140/2002, MP. Humberto Román Palacios, Suprema Corte de Justicia de la Nación, 10 de junio de 2003.

Appeal in a constitutional remedy brought by the defense of Ricardo Miguel Cavallo against the decision to extradite him to face charges of genocide, torture, and terrorism<sup>3</sup> before Spanish courts, in exercise of the principle of universal jurisdiction. According to the indictment, Ricardo Miguel Cavallo, a former Argentine military officer, had different roles during the Argentine dictatorship. He was a member of task forces responsible for kidnapping opponents of the government in Argentina and other countries. He was also in charge of implementing a system of “scientific torture” of detainees and disappeared people in the Navy Petty Officers School of Mechanics (Escuela Superior de Mecánica de la Armada, ESMA). Based on the

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Humberto Mejía Vítores, Germán Chupina Barahona, and Pedro García Arredondo. The court ordered the arrest of all these individuals, with the exception of Ríos Montt, who was the *de facto* president of Guatemala from March 23, 1982 to August 8, 1983.

3 In accordance with this decision, issued by the Supreme Court of Justice, the Mexican government only granted the extradition for the charges of genocide and terrorism, thus excluding the charge of torture.

decision of the Supreme Court of Justice of Mexico, Mexico finally granted extradition for the crimes of genocide and terrorism. However, the decision excludes extradition for torture since, according to the decision of the Supreme Court, the statute of limitations had already run on this crime under Mexican law.

- b. *Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.)* — Recurso de apelación extraordinaria 1/2003, MP. Juventino V. Castro y Castro, Suprema Corte de Justicia de la Nación, 5 de noviembre de 2003.

Appeal against the judicial decision that applies statutes of limitations to the procedures against Luis de la Barreda Moreno, Miguel Nazar Haro, and Juventino Romero Cisneros for the crime of unlawful deprivation of liberty against Jesús Piedra Ibarra. This was one of the cases investigated by the special prosecutor appointed to investigate alleged crimes against persons linked to social and political movements of the past.<sup>4</sup> Luis de la Barreda Moreno was the head of the former Federal Security Agency, Ministry of Interior (1947–86), which was responsible for monitoring, analyzing, and reporting information concerning national security. Juventino Romero Cisneros was one of the agents of the Judicial Police of Nuevo León, and was charged as one of the material perpetrators of the unlawful arrest of Jesús Piedra Ibarra.

- c. *Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.)* — Recurso de apelación 1/2004-PS derivado de la facultad de atracción 8/2004-PS, MP. José Ramón Cossío Díaz, Suprema Corte de Justicia de la Nación, 15 de junio de 2005.

Appeal against the judicial decision that applies statutes of limitations to the procedures against Luis Echeverría Álvarez, Mario Augusto José Moya y Palencia, Luis de la Barreda Moreno, Miguel Nazar Haro, José Antonio González Aleu, Manuel Díaz Escobar Figueroa, Rafael Delgado Reyes, Sergio San Martín Arrieta, Alejandro Eleazar Barrón Rivera, Sergio Mario Romero Ramírez, and Víctor Manuel Flores Reyes, for the charge of genocide. The facts of the case relate to the murder of several people during a demonstration on June 10, 1971. Luis Echeverría Álvarez was, at the time, president of Mexico (1970–76). Mario Augusto José Moya y Palencia was the secretary of the interior during the administration of President Echeverría. Luis de la Barreda Moreno and Miguel Nazar Haro were both heads of the Federal Security Agency. José Antonio González Aleu was deputy director of general services of the former Department of the Federal District. Manuel Díaz Escobar Figueroa was the operational head of “the Falcons,” a task force within the Federal Security Agency, whose members were presumed to be the material perpetrators of the massacre. The other defendants were also members of the Falcons.

4 The official name was the “Fiscal especial para la atención de hechos probablemente constitutivos de Delitos Federales cometidos directa o indirectamente por servidores públicos en contra de personas vinculadas con movimientos sociales y políticos del pasado” (Special Prosecutor for Investigating Incidents Probably Constituting Federal Crimes Committed Directly or Indirectly by Public Servants against Individuals with Ties to Social or Political Movements of the Past).



## 11. PANAMA

- a. *Appeal motion (Case Rubén Oscar Miró Guardia)* — Expediente 370 E, MP. Roberto González R., Corte Suprema de Justicia, 27 de abril de 2004.

Appeal filed by Alberto Almanza, general director of the Truth Commission, against the decision declining to reopen the investigation into the murder of Ruben Oscar Miró Guardia. According to the Supreme Court, Miró Guardia was killed during a historical moment in which the organs responsible for the administration of justice “were subject to the decisions of military rule” and therefore “lacked the required independence and impartiality.” On these grounds, the Court ordered the reopening of the investigation

- b. *Appeal motion (Case Gerardo Olivares)* — Expediente 426-E, MP. Esmeralda Arosemena de Troitño, Corte Suprema de Justicia, 3 de Octubre de 2006.

Appeal filed by Rolando Rodríguez, second prosecutor of the Judicial District of Cocle and Veraguas, against the decision declining to reopen the investigation into the murder of Gerardo Olivares V. The lower court had affirmed the application of the statute of limitations to the case and, on those grounds, had ruled against the request to reopen the investigation.

- c. *Appeal motion (Case Cruz Mojica Flores)* — Expediente 636-E, MP. Aníbal Salas Céspedes, Corte Suprema de Justicia, 26 de enero de 2007.

Appeal filed by the representation of Edilberto del Cid Dueñas against the order that rejected the application of the statute of limitations to the criminal procedures for the death of Cruz Mojica Flores. Edilberto del Cid Dueñas was the head of the military brigade “Macho del Monte,” part of the National Guard. The petitioner argues that using the crime of murder to investigate a probable case of forced disappearance, without actual evidence that the person has died, constitutes a violation of due process and of the spirit of the Inter-American Convention on Forced Disappearance of Persons.

## 12. PARAGUAY

- a. *Remedy of unconstitutionality submitted by Modesto Napoleón Ortigoza — Acción de inconstitucionalidad en el juicio: Modesto Napoleón Ortigoza s/ supuesto homicidio del Cadete Alberto Anastasio Benítez*, Acuerdo y Sentencia 585, Acción de inconstitucionalidad en el juicio, Suprema Corte de Justicia, 31 de diciembre de 1996.

Constitutional remedy brought by the defense of Modesto Napoleón Ortigoza requesting nullification of the criminal proceedings in the death of Anastasio Alberto Benítez. The defense alleged that the accused was tortured into confessing and that this confession became the basis for the process. Furthermore, the petition states that the State has the obligation to investigate the alleged torture as a crime against humanity that is not subject to statute of limitations. The

alleged murder and torture were perpetrated in the early 1960s, during the regime of Alfredo Stroessner. Modesto Napoleón Ortigoza has been considered a political prisoner and it has been argued that the charges against him were part of the system of persecution against dissidents opposed to the military regime.

### 13. PERU<sup>5</sup>

- a. *Habeas corpus submitted by Alfredo Crespo Bragayrac* — Expediente 0217-2002-HC/TC, Recurso extraordinario, Tribunal Constitucional, 17 de abril de 2002.

Extraordinary remedy filed by Alfredo Crespo Bragayrac against the decision issued by the Criminal Chamber I of the High Court of Justice of Ica, which declared inadmissible *habeas corpus* action against the military courts and the Peruvian government. The petitioner alleged the violation of his right to individual freedom. He requested that the court declare void the military criminal proceedings brought against him for the crime of treason and order his immediate release and/or prosecution in civilian courts. Alfredo Crespo Bragayrac was arrested by members of the Counter-Terrorist Directorate (Dirección Contra el Terrorismo, DINCO-TE), prosecuted, and sentenced for the crime of treason in military courts. He argued that this trial violated his constitutional rights to a natural judge and to a defense, as well as the principle of legality.

5 The decisions of the Peruvian courts and tribunals make frequent reference to the Colina Group. According to the final report of the Truth and Reconciliation Commission, the Colina Group “was an organic and functional task force located, during [the] government [Alberto Fujimori], within the structure of the Army to the extent that [the Colina Group] used human and logistical resources of the Army Directorate of Intelligence [Dirección de Inteligencia del Ejército, DINTE] of the Army Intelligence Service [Servicio de Inteligencia del Ejército, SIE] and the National Intelligence Service [Servicio de Inteligencia Nacional, SIN]. Therefore, for its establishment and operation it must have had secret funds to cover the needs of a military contingent devoted exclusively to illegal activities involving serious human rights violations” [unofficial translation]. See *Final Report of the Truth and Reconciliation Commission*, vol. 3, chap. 2 (Lima, 2003), at 130. On the same subject, the Inter-American Court of Human Rights stressed that the Colina Group “was a group related to the Servicio de Inteligencia Nacional (National Intelligence Service) whose operations were known by the President of the Republic and the Commander General of the Army. It had a hierarchical structure and its personnel received, besides their compensations as officials and sub-officials of the Army, money to cover their operative expenses and personal pecuniary compensations [in] the form of bonuses. The Colina Group carried out a State policy consisting [of] the identification, control and elimination of those persons suspected of belonging to insurgent groups or who opposed ... the government of former President Alberto Fujimori. It operated through the implementation of systematic indiscriminate extralegal executions, selective killings, forced disappearances and tortures.” IACourtHR, *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of November 29, 2006, Series C, No. 162, para. 80(18). The same text has been cited by the Constitutional Court of Peru. In addition, several of the textual paragraphs included in this digest make reference to two particular cases known as “La Cantuta” and “Barrios Altos.” The first relates to the extrajudicial execution of nine students and a professor at the National University of Education “Enrique Guzmán y Valle” (also known as La Cantuta) in Lima. The second concerns the extrajudicial execution of 15 people, as well as serious injuries suffered by four others; these crimes were committed as part of a plan called “Ambulante,” which aimed at monitoring possible sympathizers of subversive groups within the area of Barrios Altos, in downtown Lima. See *Final Report of the Truth and Reconciliation Commission*, cited above.

- b. *Habeas corpus submitted by María Emilia Villegas Namuche* — Expediente 2488-2002-HC/TC, Recurso extraordinario, Tribunal Constitucional, 18 de marzo de 2004.

Extraordinary appeal filed by María Emilia Villegas Namuche against the decision of Criminal Chamber I of Piura, which partially upheld the writ of *habeas corpus* filed on behalf of her brother, Genaro Namuche Villegas. He was a student at the School of Engineering in the National University of Piura, who on October 2, 1992, went to work and was never seen again. The petitioner argues that the Peruvian State is obliged to return her brother alive or to give information on the whereabouts of his remains, as well as to declare void the criminal proceedings before military courts in which he was sentenced in absentia to life imprisonment for the crime of treason. The Criminal Chamber had declared partially inadmissible the writ of *habeas corpus* on the ground that the petitioner had not conclusively proven the disappearance or absence of her brother in accordance with applicable national laws.

- c. *Habeas corpus submitted by Gabriel Orlando Vera Navarrete* — Expediente 2798-04-HC/TC, Recurso extraordinario, Tribunal Constitucional, 9 de diciembre de 2004.

Extraordinary appeal filed by Gabriel Orlando Vera Navarrete against the order of the Second Specialized Criminal Chamber of the High Court of Justice of Lima, which declared inadmissible the writ of *habeas corpus* through which Vera Navarrete argues that he was arbitrarily arrested. The petitioner claims that after more than 36 months in detention he has not been convicted in any of the criminal processes against him. Vera Navarrete, a member of the Colina Group, was indicted for his participation in the massacres perpetrated at the National University of Education “Enrique Guzmán y Valle” (La Cantuta) and in the Barrios Altos massacre, among others. In 2008 the Supreme Court of Lima found Gabriel Orlando Vera Navarrete criminally responsible as a direct co-perpetrator of the crimes of homicide and forced disappearance in the La Cantuta case.

- d. *Habeas corpus submitted by Máximo Humberto Cáceda Pedemonte* — Expediente 1805-2005-HC/TC, Recurso de agravio constitucional, Tribunal Constitucional, 29 de abril de 2005.

Constitutional remedy filed on behalf of Máximo Cáceda Pedemonte against the decision of the Second Chamber of Criminal Processes for Detained Inmates of the High Court of Lima, which declared unfounded a writ of *habeas corpus* and requested his immediate release. The purpose of the constitutional procedure is to have the Court declare in favor of the application of the statute of limitations in the case against Cáceda Pedemonte. He was charged with having been a member of an illicit association, as he contributed to the reaching of an agreement between some high-ranking officers of the Peruvian Army and members of the Colina Group. As a major in the Peruvian Army and chief of finances in the Army Directorate of Intelligence (Dirección de Inteligencia del Ejército, DINTE), Cáceda Pedemonte would have authorized economic benefits and paid operating expenses for the members of the Colina Group. He would also have approved funds for “other strategies” developed by the group itself, including monitoring detention, interrogation under torture, annihilation, and physical disappearance of suspects.

- e. *Habeas corpus submitted by Juan Nolberto Rivero Lazo* — Expediente 4677-2005-PHC/TC, Recurso de agravio constitucional, Tribunal Constitucional, 12 de agosto de 2005.

Constitutional remedy filed on behalf of Juan Nolberto Rivero Lazo against the decision of the First Chamber of Criminal Processes for Detained Inmates of the High Court of Lima, which declared unfounded a writ of *habeas corpus*, arguing that the maximum period for his detention has been exceeded. Juan Nolberto Rivero Lazo, a general in the Peruvian Army, was the chief of the Army Directorate of Intelligence (Dirección de Inteligencia del Ejército, DINTE) and a member of the Colina Group. At the time this constitutional remedy was filed, Rivero Lazo was on trial for his involvement in the crimes perpetrated at the National University of Education “Enrique Guzmán y Valle” (La Cantuta) and the Barrios Altos massacre, among others.

- f. *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.)* — Expediente 560-03, Sala Penal Nacional, 13 de octubre de 2006.

Judgment on the individual criminal responsibility of Manuel Rubén Abimael Guzmán Reynoso and 22 other people identified as members of the Central Committee, the Politburo, and/or the Permanent Committee, the highest bodies within the hierarchy of the illegal organization known as the Communist Party of Peru–Shining Path. They are accused of the crimes of terrorism, aggravated terrorism, and membership in a terrorist group. The process was based on the theory of perpetration-by-means through an organized apparatus of power.

- g. *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas* — Expediente 679-2005-PA/TC, Tribunal Constitucional, 2 de marzo de 2007.

Constitutional remedy filed on behalf of Santiago Enrique Martín Rivas against the decision of the Constitutional and Social Law Chamber of the Supreme Court of Justice of the Republic, which declared inadmissible the writ of *amparo* against the Supreme Council of Military Justice. Martín Rivas alleges infringement of his rights to due process, *ne bis in idem*, the right to be benefited by the amnesty law, and the principle of legality. On October 17, 2001, the aforementioned Council reopened the case known as La Cantuta by overruling a previous decision that had declared the case definitively closed based on the application of the amnesty laws (Laws 26479 and 26492). Martín Rivas was major in the Peruvian Army and was one of the leaders of the Colina Group.

- h. *Constitutional remedy (amparo) submitted by Julio Rolando Salazar Monroe* — Expediente 03938-2007-PA/TC, Recurso de agravio constitucional, Tribunal Constitucional, 15 de noviembre de 2007.

Constitutional remedy filed by Julio Rolando Salazar Monroe against the decision of the Constitutional and Social Law Chamber of the Supreme Court of Justice of the Republic, which declared inadmissible the writ of *amparo* against the Supreme Council of Military Justice. Salazar Monroe requests the overturning of the decisions that annulled the ruling on definitive dismissal of the criminal investigation into the massacre of Barrios Altos.

He argues that those decisions violate his right to due process and the principle of *ne bis in idem*. According to the appellant, the ruling for definitive dismissal was not based on application of the amnesty laws but on considerations of insufficient evidence and, therefore, it cannot be annulled as a consequence of the judgment of the Inter-American Court of Human Rights in the Barrios Altos case. Julio Rolando Salazar Monroe was head of the National Intelligence Service (Servicio de Inteligencia del Ejército, SIE) and member of the Colina Group.

- i. *Motion for annulment and consults (Case Leaders of the Shining Path)* — R.N. no. 5385-2006, Segunda Sala Penal Transitoria, Suprema Corte de Justicia, 14 de diciembre de 2007.

Appeal motion (annulment and consultation) in the case against Manuel Rubén Abimael Guzmán Reynoso and 22 other people identified as members of the Central Committee, the Politburo, and/or the Permanent Committee, the highest bodies within the hierarchy of the illegal organization known as the Communist Party of Peru–Shining Path. The Supreme Court of Justice ruled against the appellants and confirmed the trial judgment.

- j. *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* — Expediente A.V. 19-2001, Sala Penal Especial, Corte Superior de Justicia de Lima, 7 de abril de 2009.

Judgment on the individual criminal responsibility of Alberto Fujimori Fujimori, who was president of the Republic of Peru from July 28, 1990, to November 17, 2000. The Special Chamber of the Supreme Court of the Republic found Fujimori guilty of the crimes of homicide, serious bodily harm, and kidnapping, committed in Barrios Altos and the National University of Education “Enrique Guzmán y Valle” (La Cantuta). According to the Chamber, based on their characteristics, these crimes amounted to crimes against humanity. The process was based on the theory of perpetration-by-means through an organized apparatus of power.

## 14. URUGUAY

- a. *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.)* — Sentencia 036, Ficha 98-247/2006, Juez Penal 19° Turno, 26 de marzo de 2009.

Judgment on the individual criminal responsibility of José Nino Gavazzo Pereira and José Ricardo Arab Fernández as co-perpetrators of the crime of aggravated homicide against Adalberto Waldemar Soba Fernández, Gerardo Francisco Gatti Antuña, León Gualberto Duarte Luján, Alberto Cecilio Mechoso Méndez, Ary Cabrera Prates, Cecilia Susana Trias Hernández, and 22 other people. All the crimes were committed during the time of the civil-military dictatorship in Uruguay, between 1973 and 1985, and were part of a regional agreement that became known as the Condor Plan. Through this scheme, the dictatorial regimes in Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay sought to coordinate their actions, which allowed them to follow, survey, detain, interrogate, transfer between countries, and disappear or kill people whom they considered to be subversive. In short, any person who openly opposed or refused to

support the policy or political ideology of these regimes would be considered as subversive and, therefore, as an enemy. José Nino Gavazzo Pereira, lieutenant colonel in the Uruguayan Armed Forces, was chief operating officer of the Information Service of the Ministry of Defense and head of the clandestine detention center known as Automotive Orletti. José Ricardo Arab Fernández, a captain in the Uruguayan Armed Forces, was also a member of the Information Service of the Ministry of Defense.

## 15. VENEZUELA

- a. *Decision on the extradition of José María Ballestas Tirado* — Sentencia 869, Expediente 01-847, MP. Alejandro Angulo Fontiveros, Tribunal Supremo de Justicia, Fallo del 10 de diciembre de 2001.

Decision on request presented by the Colombian government for the extradition of José María Ballestas Tirado, a Colombian citizen, for the crimes of rebellion, kidnapping, wrongful death, seizure, and diversion of aircraft. According to the decision on April 12, 1999, an Avianca aircraft, which covered the route between Bucaramanga and Bogota, was hijacked along with its entire crew and diverted to San Pablo Bolívar. The facts were publicly known and attributed to the Marxist guerrilla group called the National Liberation Army (Ejército de Liberación Nacional, ELN).

- b. *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez)* — Sentencia 1747, Expediente 06-1656, MP. Carmen Zuleta de Merchán, Tribunal Supremo de Justicia, 10 de agosto de 2007.

Appeal brought by the Office of Public Prosecutions against decision of the Criminal Cassation Chamber of the Supreme Court of Justice. The latter decided that Casimiro José Yáñez could not be tried for the disappearance of Marco Antonio Monasterios Pérez, since, at the time of the facts, the Venezuelan criminal code did not contain the relevant criminal definition. Casimiro José Yáñez served as an official of the Directorate of Intelligence and Prevention Services of the Ministry of Interior and Justice.

## ABBREVIATIONS

AUC	Autodefensas Unidas de Colombia (United Self-Defense Forces of Colombia)
DINA	Dirección de Inteligencia Nacional (National Intelligence Directorate, Chile)
DINTE	Dirección de Inteligencia del Ejército (Army Directorate of Intelligence, Peru)
DPLF	Due Process of Law Foundation
ECourtHR	European Court of Human Rights
FMLN	Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front, El Salvador)
IACHR	Inter-American Commission on Human Rights
IACourtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda*
ICTY	International Criminal Tribunal for the former Yugoslavia**
IHL	International Humanitarian Law
ILC	International Law Commission of the United Nations
JCE	Joint Criminal Enterprise
MIR	Movimiento de la Izquierda Revolucionaria (Left Revolutionary Movement, Bolivia)
MP	Magistrado Ponente (reporting judge)
RS	Rome Statute (of the International Criminal Court)***
SCSL	Special Court for Sierra Leone
SIE	Servicio de Inteligencia del Ejército (Army Intelligence Service, Peru)
SIN	Servicio de Inteligencia Nacional (National Intelligence Service, Peru)
UN	United Nations

\* The official name is International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.

\*\* The official name is International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

\*\*\* Each time the term “Rome Statute” appears in either the footnotes or the main text, it refers to the Rome Statute of the International Criminal Court approved on July 17, 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Statute entered into force on July 1, 2002.





## CHAPTER I

# CRIMES UNDER INTERNATIONAL LAW

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International recognition of certain common values and interests that must be protected in order to ensure the dignity of the human being, as well as international peace and security, led to the establishment of rules proscribing certain conducts, which are known as “crimes under international law” or as “international crimes.” In one of his studies in the field, M. Cherif Bassiouni refers to “the criminal aspect of international law [which] consists of a body of international proscriptions containing characteristics evidencing the criminalization of certain types of conducts, irrespective of particular enforcement modalities and mechanisms.”<sup>1</sup>

In recent years, important academic studies have identified a broad set of international rules defining crimes of this nature,<sup>2</sup> some of which merit particular condemnation and censure.<sup>3</sup> These rules include prohibitions against genocide, crimes against humanity, war crimes, and crimes of aggression. According to jurisprudence and doctrine, these crimes are defined by the importance of the legal values they infringe, the harm they cause, and their inherent gravity.<sup>4</sup> They are, therefore, regarded as core crimes under international law.<sup>5</sup>

Expanding on this reflection, William A. Schabas has observed that the international nature of these crimes derives from the practical and political exigencies by which States, individually or collectively, acquire the right and the duty to investigate and prosecute such crimes when the State in which they were committed is unwilling or unable to do so.<sup>6</sup> Other academic stu-

- 1 M. Cherif Bassiouni, “The Sources and Content of International Criminal Law: A Theoretical Framework,” in *International Criminal Law*, vol. 1, *Crimes*, ed. M. Cherif Bassiouni, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999), at 31.
- 2 These include studies by Bassiouni and by William A. Schabas, both of whom identify the following as among international criminal proscriptions: piracy, slavery, trafficking in slaves and in persons, hijacking of aircraft, theft of nuclear materials, funding of terrorist activities and unlawful acts against the security of maritime travel and platforms on the high seas. M. Cherif Bassiouni, “The Sources and Content of International Criminal Law,” *supra* note 1, and William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (New York: Cambridge University Press, 2007), at 82.
- 3 Reaffirming the unanimous condemnation of the international community, the preamble to the Rome Statute of the International Criminal Court states that crimes of aggression and genocide, crimes against humanity, and war crimes are “the most serious crimes of concern to the international community.”
- 4 In his analysis of the international nature of these crimes, Schabas observed that “their heinous nature elevates them to a level where they are of ‘concern’ to the international community. They dictate prosecution because humanity as a whole is the victim.” William A. Schabas, *An Introduction to the International Criminal Court*, *supra* note 2, at 83.
- 5 Ciara Damgaard is among those who have proposed that crimes of aggression and genocide, crimes against humanity, and war crimes be characterized as “core international crimes.” Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008). See also, for instance, Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006).
- 6 Interestingly, in Schabas’s view, the political argument for the international prosecution of crimes of aggression and genocide, crimes against humanity, and war crimes is critical in distinguishing them from

dies, including those by Antonio Cassese, have asserted that the presence of “international elements” or a “context of organized violence” is critical to characterizing an act as a crime against international law.<sup>7</sup> According to Cassese, these elements are as follows: (i) for genocide, specific intent or genocidal intent; (ii) for crimes against humanity, the systematic or widespread nature of the attack against the civilian population; and (iii) for war crimes, a context of armed conflict and its direct relationship to the conduct.<sup>8</sup> Once the relevant element is determined to be present, then an act that is abominable in and of itself, such as taking a life or torturing someone, amounts to an international crime.

In light of these characteristics, a brief reflection is warranted on the commonalities and differences between crimes and human rights violations. Clearly, both categories are legal means by which the international community seeks to protect values considered essential to human existence, i.e., the individual and collective rights of persons and groups. In some instances, such as the prohibition on torture and on torture as a crime against humanity, the protected value is one and the same. Similarly, any breach of these international norms gives rise to the responsibility of those subjects who have the obligation to act according to the applicable norm or prohibition. This can refer to the perpetrator of the conduct in his/her individual capacity (in the case of felonies under national law or international crimes), or it can refer to the State to which the conduct is attributed (in cases of human rights violations or international crimes).

Despite these similarities, crimes under international law and serious human rights violations cannot and should not be confused. In the absence of the contextual elements described above, a conduct, however abominable, cannot be characterized as an international crime, though it may indeed be a serious human rights violation. For example, the massacre of a group by state actors in violation of an obligation set out in an international human rights treaty will, as a general rule, constitute a serious human rights violation. However, if there is not genocidal intent, and the crime is not part of a widespread or systematic attack against the civilian population, nor directly related to a context of armed conflict, the massacre cannot be legally characterized as an international crime.

Hence, although international crimes and human rights violations are intimately related, a precise legal characterization of an act is critical for, inter alia, (i) accurately evaluating the acts and determining all of the elements involved; (ii) clearly defining the parameters of the obligation set out in the relevant norms in order to establish the corresponding responsibilities for its breach, and their consequences; (iii) determining the appropriate domestic or international

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other crimes regulated under international law that seriously affect the values recognized and shared by all States, including piracy, slavery, the seizure of aircraft, and so forth. From Schabas’s perspective, the rationale for international criminal prosecution of the latter set of crimes—which he refers to as “transnational,” according to the categories developed by Bassiouni—derives from technical rather than political considerations. Such crimes are often perpetrated in spaces over which no country has jurisdiction, or several countries do, pursuant to the rules of territoriality set forth in criminal laws; for this reason, mechanisms for close international cooperation or other types of international mechanisms are required in order to prosecute such crimes. In contrast, as practice has shown, deficiencies in or absolute absence of investigation, prosecution, and punishment of genocide, crimes against humanity, and war crimes are due to the lack of will or capacity on the part of the State in which the crimes were committed to fulfill its obligations. William A. Schabas, *An Introduction to the International Criminal Court*, *supra* note 2, at 82–83.

7 Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), at 54.

8 *Ibid.*

legal mechanisms to establish such responsibilities; and (iv) correctly applying the pertinent legal regime for each category.<sup>9</sup>

Mass atrocities have tragically marked the history of our region. Based on this brief introduction, this chapter examines the way in which Latin American courts and tribunals have interpreted three categories of crimes under international law: genocides, crimes against humanity, and war crimes.

In order to further our understanding of this issue, the decisions selected identify and analyze the various objective and subjective elements of the crimes. The chapter is organized to follow international jurisprudence on the subject, and therefore particular effort has been made to specifically include each of the elements identified by international courts as constitutive of international crimes. Complementing this, the chapter touches on other topics that Latin American courts have addressed in *obiter dicta* of their decisions. While such *dicta* do not establish legal rules, they point to the ways in which international law categories have been accepted in domestic law. As an example, the reader will find a narrative of the historical evolution of the legal definitions of the crimes examined herein.

## 1. OVERVIEW

Various Latin American courts have included in their rulings a general examination of the concept and evolution of international crimes, framed in the theory of crimes under international law as it has evolved in international jurisprudence and doctrine. In this regard, it is important to draw attention to three specific points from the jurisprudence that follows.

First, the judgments recognize the different bodies of law involved in developing the conventional and customary definitions of these crimes, in particular, international human rights law and international humanitarian law. At the same time, the decisions presented have the required specificity and technical development to distinguish such crimes from human rights violations, despite the emphasis on their interconnectedness. Finally, it is significant that some of the decisions recognize the *jus cogens* nature of many of these offenses, such as, for example, the prohibition on committing genocide.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.2:

[A] key aspect of building an international consensus for the protection of the values of human dignity and the rejection of barbarity is the recognition of certain serious violations of human rights and international humanitarian law as international cri-

9 This study contains some discussion of the way Latin American courts have interpreted the legal regime applicable to crimes against international law, although it will not be examined in depth in this chapter. However, it is worth briefly noting some of the international rules and principles that inform that legal regime. For example, such crimes cannot be subject to statutory limitations, amnesty laws, or pardons. Additionally, States may exercise jurisdiction over such crimes pursuant to a specific regulation, based on the principle of universal jurisdiction. At the same time, the perpetration of such crimes gives rise to the individual criminal responsibility of the perpetrator, which may be determined by an international tribunal in accordance with its own rules of competence and admissibility.

mes, the punishment of which is of interest to the entire community of nations insofar as these crimes constitute a core *delicta juris gentium*, that is, the fundamental body of “serious crimes whose commission affects humanity as a whole and offends the conscience and the law of all nations” [footnote omitted].

Parallel to the evolution of the laws of war, international humanitarian law, and international human rights law, and the establishment of international tribunals to try those responsible for atrocious crimes, the international community gradually reached consensus around the need to proscribe, under international law, the most atrocious crimes whose severity could be assessed based on their dimensions, their profound impact on human dignity, or their devastating impact on peace, security, and the coexistence of the community of nations. While this consensus had been emerging over several centuries [footnote omitted], it developed even more quickly and concertedly in the aftermath of World War II.

The most significant progress [...] in defining international crimes whose punishment was in the interest of the international community as a whole took place beginning in 1946, with the establishment of the Nuremberg Military Tribunal and the other postwar military tribunals. At that time, the United Nations also decided to establish an International Law Commission to develop a code of crimes against the peace and security of humankind based on the principles developed by the Nuremberg Tribunal, which began to produce results by 1950 [footnote omitted]. The failure to reach consensus on a definition of the crime of aggression [footnote omitted], however, led to the decision to develop separate international instruments, in lieu of a code, for the punishment of different types of conduct which, due to their severity, qualified as international crimes [footnote omitted].

CHILE, *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.) (List of Judgments 3.b)*, Whereas 6 and 7:

[A] historical analysis of our hemisphere reveals that in [1863], U.S. President Abraham Lincoln issued the Lieber Code or General Order No. [100] to confer legal legitimacy on the Union’s struggle that would distinguish it from the secessionist war waged by the Confederacy in the South.

This analysis made the point that “the [157] article[s] of this executive order are essentially an affirmation of the human condition of those fighting on the battlefield and, consequently, of the imperative to recognize it in all circumstances in the treatment afforded to those who have surrendered or are not in a position to defend themselves, including the civilian population not taking part in military activities” [footnote omitted].

It also noted that the terms “humanity,” “laws of humanity,” and “dictates of humanity” [*sic*] were first used in the preamble to the Hague Convention IV of October 18, 1907, with respect to the laws and customs of war on land.

The second paragraph of the preamble observes that contracting States are “[a]nimated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization.” Meanwhile, paragraph 8 of the pream-

ble, known as the Martens clause, provides that “... the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience” [*footnote omitted*].

[B]eginning with that historical benchmark, then, and in response to the demands imposed on the international legal conscience by the Jewish Holocaust, *international criminal law has developed specific definitions of crimes against humanity in Article 6(c) of the Statute of the Nuremberg Military Tribunal [...]*. [*Emphasis added*]

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 11–13:

[T]he United Nations Charter marked the emergence of a new regime of international law and the end of the old paradigm of the Westphalia model, which dated back three centuries to the close of the Thirty Years’ War in Europe. International law was structurally transformed from a pragmatic system of bilateral treaties *inter pares* to an authentic supra-State legal system: it was no longer just a *pactum associationis*, but also a *pactum subjectionis*. In the new system, States, individuals, and peoples became subjects of international law [*footnote omitted*].

[The Universal Declaration of Human Rights and the United Nations Charter] amounted to a recognition of the preexisting right of persons not to be subject to State persecution. This necessary human rights safeguard, which the States of the world community have undertaken to uphold, is not based on any one legal theory exclusively. Indeed, according to its tenets, the fairness of social institutions and the parameters of personal virtue are determined based on certain principles that are universally valid, regardless of their effective recognition by a particular body or individual, which is not to imply a preference for exclusive jusnaturalist or positivist visions. The universality of such rights is therefore not contingent on a positive system or natural law, outside the realm of positive law [*footnote omitted*].

This conception of international law is meant to exclude certain criminal acts from the legitimate discharge of the duties of the State [*footnote omitted*] [...] and it is premised mainly on the imperative to protect human dignity, which is recognized in the aforementioned declaration, rather than exclusively on the codification of a positive law system established in the international sphere.

[F]rom the outset, acceptance of the existence of crimes relating to the rights of persons was seen as contingent upon consensus among civilized nations, without detriment, clearly, to the power of nation-states to establish and define the crimes that would be penalized under that body of law [*footnote omitted*]. Moreover, the positivization of human rights in international law, as a reinforcement of their positivization at the domestic level, is what ultimately caused the classical debate between positivism and jusnaturalism to lose much of its practical meaning [*footnote omitted*].

[T]he positive incorporation of the rights of persons in the National Constitution makes it possible to argue that a system for the protection of rights exists and is obligatory, regardless of the express consent of the nations bound by it, which is currently referred to in this evolutionary process as *jus cogens*. This is the single most authoritative source of international law to which States are subject, and it prohibits the commission of crimes against humanity, even in times of war. It may not be derogated by treaties with conflicting content and it must be applied by the domestic courts of countries, whether or not the latter have expressly accepted it [*footnote omitted*].

[O]n the date the aforementioned acts were committed, a legal system was in place consisting of those conventions and international customary practice, pursuant to which the commission of crimes against humanity by State officials was considered inadmissible and such acts subject to punishment under an enforcement system that did not necessarily adhere to the traditional principles of national states, so as to prevent a recurrence of these aberrant crimes [*footnote omitted*].

See also PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 228:

No armed conflict or political objective justifies or excuses the use of extreme violence, terror, or barbarity. It is for this reason that war crimes, crimes of aggression, and crimes against humanity, inter alia, exist even in situations of armed conflict between two or more States. Not even the passage of time can justify impunity or pardon. Proof of this is that on July 2 of this year, nearly 30 years after the crimes in question were committed, an international criminal tribunal has been established in Cambodia to try Communist Party leaders of the so-called Democratic Kampuchea—the Khmer Rouge, led by the now deceased Pol Pot—for their alleged responsibility in the deaths of nearly 2 million people between 1975 and 1979. This tribunal joins the international criminal tribunals established for Rwanda and for the former Yugoslavia.

As complement to the previous decisions, see EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascoechea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

Beginning in 1946, the year in which the Statute of the Nuremberg Tribunal was drafted, a series of international norms have been developed to create a category of crimes against humanity and to ensure that the perpetrators of such acts are prosecuted. To this end, the United Nations has systematized these norms and has adapted them into a series of international legal instruments.

These international instruments include the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 [...] and the four *Geneva Conventions of August 12, 1949* and their Additional Protocols 1 and 2 [...]. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* should also be mentioned here [...].

This series of legal instruments, then, [...] composes a legal corpus through which the [i]nternational community protects the individual as a subject of international law. They are the legal norms that define a series of conducts as crimes [...].

In light of the foregoing, signatory countries [...] are bound to prosecute and punish the crimes defined therein, specifically because they constitute violations of human rights and, ultimately, of the highest legally protected values, the impairment of which must not be subject to any statute of limitations. *This series of instruments composes a doctrine that is distinct from classical international law and is intended to protect individuals, social groups, and populations. The norms contained therein take precedence over any domestic norms that might preclude their application. [Emphasis added]*

For a specific analysis of the recognition and evolution within international law of the crime of genocide and crimes against humanity, see “*Evolution and recognition of the crime of genocide as a crime under international law*” and “*Evolution and recognition of crimes against humanity as crimes under international law*,” sections I.2.A and I.3.A, respectively, in this digest.

## A. Contextual elements of crimes under international law

As noted in the introduction to this chapter, according to Antonio Cassese and other authors, crimes under international law are distinguished by what Cassese refers to as “contextual elements” (a context of organized violence) or “international elements.” The excerpts from the two rulings presented below do not address the interpretation of each of those specific elements by Latin American courts; these will be examined in the relevant section for each crime. Rather, they illustrate the kinds of historical conditions, criminal acts, or institutional structures that Latin American courts have taken into account in presenting the objective context for the legal analysis of those elements.

PANAMA, *Appeal motion (Case Cruz Mojica Flores) (List of Judgments 11.c)*, Whereas:

We find ourselves, then, at that historic juncture in time when this nation was under [an eminently military regime] that perpetrated flagrant human rights violations. Both the criminal component and the special characteristics of the parties involved make a diametrical difference in the judicial sphere. Such a breach involves the realm of international human rights, which has been incorporated into our law through the signing of instruments that have been adopted under the laws of the Republic in accordance with the constitutional principle set out in Article 4.

From this standpoint, international doctrine and jurisprudence regard aggressions of this nature as crimes against humanity, which have significant connotations that give rise to protections under international criminal law. This concept is reiterated immutably in various human rights instruments, among them the Nuremberg Statute, the Declaration of the Rights of Man, the United Nations Charter, the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and the Rome Statute.

Additionally, regarding specific characteristics identified in national jurisprudence and doctrine on state criminality and its context, see PERU, *Cases of Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 625, 735, and 747:

[T]he common characteristic of a State crime is the existence of a plan or design that, depending on the case, involves the security forces [*fuerzas de orden*] and usually high-level government authorities as well. The criminal plan not only includes the commission of the crimes set forth therein, but also contemplates the measures necessary to avoid leaving behind any physical traces or trail and to erase any direct evidence. Should any signs be discovered pointing to the participation of government agents, the State apparatus stands ready to use all means available to it to obstruct the investigation: to deny it ever happened, refuse to make information public, allude to the classified nature of official information, etc. Should the State be unsuccessful in paralyzing the investigation, it will interfere with the punishments, either by resorting to token punishments or by enacting an amnesty.

In this regard, [German professor Claus] ROXIN regards the criminality of the organized power apparatuses of the State as the “*prototype of organized criminality*” [*footnote omitted*]. Furthermore, as [Raúl] ZAFFARONI points out [*footnote omitted*], criminology and criminalistics show that “[*s*]tate crime is a highly organized and hierarchical crime, perhaps the example par excellence of truly organized criminality.”

It should be noted that this type of criminal behavior is set apart in particular by the State’s superior strategic position, meaning that the central authority, in discharging its duty, uses the structures of the State apparatus for the systematic commission of crimes that acquire international relevance due to their gravity and the risk of impunity [*footnote omitted*]. This type of criminality undermines the legal order by circumventing the law at the national and international levels. A State that uses its superior strategic position to order the commission of these types of serious crimes cannot be considered to be governed by the Rule of Law. Indeed, it is totally alienated from it.

*Disengagement from the legal order* in situations of State crime can occur in two ways. The first is when the highest strategic level of the State opts to deviate completely from the rule of law and create a *totally separate legal system* that is not recognized or accepted under international law insofar as it is an expression of, or a cover for, the commission of serious crimes. The second scenario occurs when the highest strategic level of the State gradually distances itself from the law. While at first this may be the case only for the perpetration of certain crimes, increasingly frequent and systematic acts follow, accompanied by measures to annul, deform, or distort the spheres and jurisdictions that constitute the State’s official, judicial, and enforcement machinery. The second scenario is the most serious in that there remains a veneer of legitimacy that belies the intent to surreptitiously create an *alternative legal system* alongside the legally established one by taking advantage of the latter’s forms and structures for the commission of serious crimes.

It is clear that democratic systems cannot tolerate either situation, whether an outright deviation from the law or the coexistence of two parallel or alternative legal



systems promoted from within the State and by its highest authority. Sooner or later, therefore, this anomalous situation will provoke a reaction from, and the intervention of, international organs to which the State infractor is party in order to safeguard or restore the legal order recognized and legitimized by the international community.

[In this context, it should be emphasized that] *de facto* governments are established through “...*circumstances contrary to the constitutional and legal norms that serve as the basis for establishing a government or for the exercise of political power.*” In such cases [...] the governing authority of such regimes is tarnished by the “*judicial irregularity syndrome,*” leading to “*the total or partial breakdown of the established constitutional order through a sudden and violent action*” [footnote omitted]. The Latin American experience serves as a condemnation of the tendency of such *de facto* regimes, particularly those installed through coups d’état, to gradually deviate from the law and preside over a parallel legal system in which State criminality is always a latent or visible consequence, as has been observed in several countries in the region over the past three decades [footnote omitted].

For [all of] these reasons, criminal liability is imputed [to persons who commit such crimes] under domestic as well as international criminal law. Here, according to [Patricia] FARALDO CABANA, “...*these actions by State organs that involve the perverse use of the State apparatus by placing it at the service of systematic and organized human rights abuses are also subject to international law and international criminal law if they fit the definition of crimes against humanity. This occurs in the moment that the commission of crimes against basic individual legally protected values such as life, liberty, and the dignity or physical integrity of persons is aggravated by the objective of destroying, in an organized and systematic way, an identifiable population group, with the tolerance or participation of the de jure or de facto political authority*” [footnote omitted].

For additional references on the international elements of each of the crimes, see “*Specific intent: Intention to destroy, in whole or in part, a specific group as such,*” “*Widespread or systematic attack against the civilian population,*” “*Existence of an armed conflict,*” and “*Nexus between conduct and armed conflict,*” sections I.2.B.i, I.3.B.i, I.4.A.i, and I.4.A.ii, respectively, in this digest. Also, regarding the determination of crimes which, by their nature, could be subsumed under international law, as well as the legal implications of doing so, see “*Subsumption of conduct under international law*” and “*Legal consequences of the subsumption of national crimes under international law,*” sections IV.3.A and IV.3.B, respectively, in this digest.

In addition, for a discussion of jurisprudential criteria proposed by Latin American courts and tribunals on the responsibility of non-State actors for the commission of crimes under international law, see, under the subhead “*War crimes,*” “*Perpetrator of the crime: State and non-State actors,*” section I.4.A.iii, as well as, under the subhead “*Perpetration-by-means,*” “*Existence of an organized apparatus of power*” and “*Peruvian case: Shining Path (non-State actors),*” sections II.3.C.i and II.3.D.iii, respectively, in this digest.

## B. Crimes under international law cannot be considered as political crimes

An in-depth discussion of what constitutes a political crime is beyond the scope of this digest. However, in general terms, political crimes are understood as those crimes that harm specific legal values such as the integrity of the State and its institutions, and/or as those crimes in which the motive of the perpetrator is to undermine “[...] the legal integrity of the State or to control the functioning of its institutions and/or its assets.”<sup>10</sup>

Leaving aside the problems associated with the definition of political crimes, one of their most important characteristics, for the purposes of this study, has to do with the limitations that various domestic and international rules have imposed with respect to granting the extradition of persons accused or convicted of such crimes.<sup>11</sup>

Contemporary research indicates clearly that the impossibility of extradition would be incompatible with the inherent nature of international crimes, which the international community has the right and the duty to criminally prosecute, including by means of extradition of the perpetrators. In this regard, various international instruments explicitly state that crimes under international law may not be characterized as political offenses for the purpose of denying extradition.

Latin American jurisprudence upholds this principle in its own analytical process and, at the same time, establishes a difference between the two categories, i.e., international crimes and political crimes. Based on an examination of the legally protected values each one is meant to protect, the courts conclude that political crimes are established by law in order to protect the integrity of the State, while crimes under international law are intended to protect the existence of groups and the life, integrity, and security of persons, whether in times of peace or of armed conflict.

VENEZUELA, *Decision on the extradition of José María Ballestas Tirado (List of Judgments 15.a)*,  
Whereas:

[It is important] to refer to the two categories of political crimes: pure political crimes and relative political crimes.

Pure political crimes are politically motivated and only violate the right of the State.

Relative political crimes are politically motivated and violate the right of the State as well as private rights or the rights of individual persons.

10 Santiago Oñate Laborde, “Delito Político,” in *Diccionario Jurídico Mexicano*, vol. 3 (Mexico City: Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 1983), at 81.

11 According to one study, “There are two bases for non-extradition for political crimes: (a) non-interference in the internal political conflicts of other countries; and (b) the fact that in many cases, acts that ‘totalitarian’ States regard as political crimes are, in some circumstances, viewed by ‘democratic’ States as the legitimate exercise of human rights.” Héctor Daniel Jiménez Becerra, “El Procedimiento de Extradición,” in *Anales de Jurisprudencia* (Instituto de Investigaciones Jurídicas, UNAM), Sexta Época, Segunda Etapa, No. 252 (July–August 2001), at 333–34. [*Unofficial translation*]

This distinction between pure and relative political crimes gives rise to another, more profound, distinction between political crimes and social crimes.

Political crimes are those that affect the organization and interests of a State. Social crimes are those that affect social peace, human coexistence, and basic social institutions. For this reason, they are contrary to humanity and, therefore, contrary to all States.

These distinctions are exceedingly important when addressing the issue of whether all crimes for which a political motive is alleged, whether genuine or fictitious, shall merit [...] benefits [such as the impossibility of granting extradition].

Attacks on innocent people who have no relationship to the interests at stake or to the problem, and who have given no provocation in word or deed, are not justified even in a military war. Such war is governed by laws that prohibit attacks on civilians or persons uninvolved in the conflict and on nonmilitary targets, and that limit any attack to specific belligerents or military targets. In wartime, distinctions must be made between combatants and noncombatants. In order to avoid harming the latter, specific zones are drawn and some are declared off-limits as demilitarized, denuclearized, safe, or neutralized zones. To conclude, in view of the foregoing, aggression is selective even in conventional warfare between military powers, so as not to harm the innocent.

It is a firm and incontrovertible fact that a political armed struggle must be governed by the laws of war. Attacks against innocent people, or against private rights or the rights of individuals, is absolutely unjustified, even where a political motive is claimed.

*MEXICO, Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a), Whereas Eleven:*

[The complainant argues that] [...] political crimes are not confined to rebellion, sedition, mutiny, and illicit association, but also encompass all of the other crimes that serve as instruments for their commission, by virtue of the compellingly political nature of any act carried out in the commission of a manifestly political crime[.] An example of the foregoing is amnesty laws, which have included under political crimes—in addition to attacks on the internal or external security of nations for the purpose of replacing or overthrowing their governments—those common crimes whose motive or consequence was the commission of the crimes characterized as political in nature[.] [Among those are the crimes] that have been improperly and arbitrarily attributed to [the complainant], specifically, the crimes of genocide, terrorism, and torture, since they were the political means or consequence associated with replacing the government institutions and the system of government in Argentina and overthrowing the individuals running that government. To take the other view—that political crimes are confined to those whose intent or consequence is to replace government institutions and the system of government, or to overthrow the latter, and do not include crimes perpetrated for that purpose or as a consequence of it—would be tantamount to arguing that it is possible to overthrow or replace a

system of government by means of peace, tranquility, legal security, and social contentment, in other words, without committing any crimes, which is unprecedented as well as impossible.

[In this regard, this High Court asserts that] the Convention on the Prevention and Punishment of the Crime of Genocide cited herein does not contravene Article 15 of the Federal Constitution, since, in fact, *the crime of genocide is not of a political nature.* [*Emphasis added*]

In this regard, it should be noted that this High Court has maintained that, given the meaning of the term “political” in common and technical usage, a political crime must be understood as one that is committed against the State.

For its part, the Mexican Legal Dictionary of the Legal Investigations Institute of the Autonomous National University of Mexico, 7th edition, page 888, defines political crimes as “... **those whose ‘legally protected value’ is the legal integrity of the State and the ‘normal functioning of institutions.’ In this sense, political crimes are the ultimate safeguard of the basic political decisions enshrined in the Constitution (...).**”

Conversely, doctrinarians espouse three different theories for the classification of political crimes: objective, subjective, and combined. The argument in the first instance is that the political character of such crimes must be clearly related to the nature of the legally protected or legitimate value that the criminal definition is designed to protect. The subjective theory is based on the notion that political crimes are those in which the perpetrator, regardless of the legally protected value that has been impaired or imperiled, has perpetrated the criminal act with the intention of undermining the legal integrity of the State or gaining control over the functioning of its institutions. Lastly, in the combined theory, in order to qualify as a political crime, both the subjective elements (the explicit intention to undermine the integrity of the State) and the subjective elements [*sic*] (harm to a legally protected value and political nature) must be present.

## 2. GENOCIDE

While it is not appropriate to create a hierarchy of crimes under international law, various scholars and even some legal rulings have labeled genocide the “crime of crimes” in recognition of the atrocious nature and brutal consequences of the attacks that have been perpetrated in every region of the world in recent decades with the intent to destroy specific groups.<sup>12</sup> This qualification of genocide may never be used, however, to argue against the unequivocally egregious nature and utter condemnation of crimes against humanity and war crimes.

The following excerpts from Latin American jurisprudence review the process by which genocide was recognized as an international crime whose commission gives rise to individual responsibility. Just as other courts have done in addressing international crimes in general, these

12 See, for example, William A. Schabas, “The Crime of Genocide,” in *The New International Criminal Law*, ed. Kalliopi Koufa, Thesaurus Acroasium series, vol. 32, 29th annual session of the Institute of International Public Law and International Relations of Thessolniki (Athens: Sakkoulas, 2003), at 467–503.

rulings depict the different bodies of law that have been interwoven in the process of establishing an international definition of genocide. The jurisprudence also illustrates the process of examining and negotiating this definition in different forums, underscoring the broad international consensus upon which it was based. As a final relevant note, the rulings also underscore the nature of the prohibition on genocide as a rule of *jus cogens*.

## A. Evolution and recognition of the crime of genocide as a crime under international law

COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 3:

Genocide is considered by the world community to be a crime under international law, contrary to the spirit and aims of the United Nations and universally condemned by the civilized world.

In 1944, jurist Raphael Lemkin coined the term “genocide” by combining the Greek word *genos* (race) with the Latin suffix *cide* (to kill).

That expression, and memories of Nazism, guided the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 of the United Nations General Assembly on December 9, 1948 [...], which entered into force on January 12, 1951 [...].

In this regard, it should be noted that [the] *juris corpus*, which frames the prohibition against genocide, is constituted by international human rights law, which in turn encompasses all of the international conventional norms whose objective and purpose is “the protection of the fundamental rights of human beings, regardless of their nationality, whether in relation to their own State or in relation to other States Parties” [*footnote omitted*].

It is, therefore, pertinent to recall that this system of normative protection is contained in the international instruments, whether universal or regional in scope, that have been signed to confer indisputable binding force on the rights recognized and set out in the Universal Declaration of Human Rights of 1948, and on the precepts and principles of “*jus cogens*” [...].

[T]he criminal definition of genocide embodied in Article 322<sup>a</sup> of Law 589 of 2000 must be interpreted in light of the international human rights covenants and agreements ratified by Colombia, in accordance with Article 93 of the Constitution and in keeping with the principles and precepts of international humanitarian law and international human rights law that form part of “*jus cogens*.”

[I]t is important to take into account, in particular, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948 [...].

MÉXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Eleven:

The United Nations General Assembly, at its session of November 9, 1946, submitted a draft resolution to its Legal Committee inviting the Economic and Social Council to study the issue of the crime of genocide and to report on the possibility of declaring it an international crime.

The Legal Committee (Sixth Committee) submitted its recommendation to the General Assembly, and finally, on December 11, 1946, the latter adopted Resolution 96(I) affirming that *genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices are punishable*, and requesting that the necessary studies be undertaken for the purpose of drawing up a draft convention on the crime of genocide. [*Emphasis added*]

Following various efforts in this regard on the part of the Economic and Social Council, the Secretary General of the United Nations, and the Committee specifically formed to draft the convention, the latter produced a final draft of the Convention on the Prevention and Punishment of the Crime of Genocide, which declared genocide an international crime, whether committed in time of peace or in time of war, and defined the crime of physical and cultural genocide. It further established that punishable acts must include conspiracy, incitement, complicity, and attempt to commit genocide; that any person who commits this crime shall be punished regardless of his character as chief of State, public official, or private individual; and that the trial should take place in the country where the crime was committed or before a competent international tribunal.

During the plenary sessions of the Economic and Social Council that examined the draft, the discussions revolved around the punishment of incitement to commit genocide, whether or not it was appropriate to include cultural genocide, the advisability of protection for political groups as such, and the establishment of an international tribunal.

The final draft included the following points: the preference for a specific list of acts constituting genocide rather than the adoption of a generic definition; the exclusion of political groups; the exclusion of motives for the attack; the inclusion of mental harm and the forcible transfer of children from one group to another; the inclusion of cultural genocide; the exclusion of ineffectual “incitement” and that effected privately; the non-inclusion of a provision on due obedience; the substitution of the responsibility of chiefs of State for that of constitutionally responsible rulers; and the retention of the reference to an international criminal court, albeit one whose jurisdiction is limited by the requirement that it be accepted by the contracting parties.

For an in-depth discussion of the crime of genocide, its international recognition, and the norms of jus cogens, see COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas Third. See also COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas

2.1., and COLOMBIA, *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b)*, Whereas 3.3.1.

## B. Elements of the crime of genocide

### i. Specific intent: Intention to destroy, in whole or in part, a specific group as such

The first element of the crime of genocide—referred to as specific intent (*dolo specialis*) or genocidal intent—consists of the intention to destroy, in whole or in part, a specific group as such. Domestic and international jurisprudence and doctrine identify this as the element that determines the international, and extremely special, nature of this crime.

Significantly, Latin American jurisprudence has addressed some of the key factors in determining the presence of the specific intent required for the crime of genocide. First, as underscored in the paragraphs transcribed below, the perpetrator not only must carry out the act in an intentional manner, for example, by seeking the death of one or more persons. He must also have the specific intent to commit the act for the purpose of seeking the whole or partial destruction of one or more of the groups indicated in the definition of the crime. Moreover, a clear distinction must be drawn between intent and motive, as the Supreme Court of Justice in Mexico has done.<sup>13</sup>

Despite the precision of Latin American jurisprudence, international jurisprudence further indicates that the following elements also must be proved in order to establish genocidal intent: (i) intent to commit the act; (ii) intent to destroy the group that is the specific target of the attack;<sup>14</sup> and (iii) intent of the accused to participate in the attack designed for this specific purpose.<sup>15</sup> Also according to international jurisprudence, a protracted period of premeditation is

13 In this regard, international jurisprudence has also established “the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.” International Criminal Tribunal for the former Yugoslavia (hereafter, ICTY), *Prosecutor v. Goran Jelusic*, Case No. IT-95-10-A, Appeals Chamber, Judgment, July 5, 2001, para. 49. See also: “*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law, but it ‘becomes relevant at the sentencing stage in mitigation or aggravation of the sentence.’” ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, July 29, 2004, para. 694.

14 In this context, the concept of “attack” should be understood in its broadest sense. In other words, any line of conduct perpetrated against the specific group, with or without the use of armed force or even physical violence, should be considered as an “attack” for this purpose.

15 See, for instance, ICTY, *Prosecutor v. Goran Jelusic*, *supra* note 13, para. 78. In application of this criterion, see ICTY, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Appeals Chamber, Judgment, April 19, 2004, paras. 134 and 144. In this case, the tribunal held that “all the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of some members of the VRS [Vojska Republike Srpske or Army of the Republic of Srpska] Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his

not required for the crime of genocide. This means that the genocidal intent can develop during the course of an attack, even if this was not the specific objective during the planning period.<sup>16</sup> International criminal tribunals have also established certain criteria pursuant to which genocidal intent may be inferred.<sup>17</sup>

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 3.1.1:

In accordance with the Rome Statute and the Convention against Genocide, this crime requires a particular intentionality [*mens rea*] that distinguishes it from other crimes against humanity. The person must be shown to have acted with the intention to destroy a group “in whole or in part,” which means, for example, that an isolated act of racist violence does not constitute genocide, as it lacks the aspect of particular intentionality. Moreover, the complete destruction of the group need not have been achieved, as the relevant aspect is the intention to achieve such an outcome. By the same token, the actions need not have been carried out systematically.

Although the Statute does not resolve the doctrinal debate over the number of deaths necessary to fit the criminal definition of genocide, it is important to bear in mind that the quantitative factor is related in reality to the *dolus specialis* of the genocide, rather than to its outcome [*footnote omitted*].

MÉXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Eleven:

[The] individual acts [set forth in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide], which are only the means through which

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part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent.” Based on these arguments, the Appeals Chamber overturned the finding of guilt as perpetrator of the crime of genocide handed down by the Trial Chamber. Krsti was found responsible for aiding and abetting the commission of the crime of genocide.

- 16 ICTY, *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Trial Chamber, Judgment, August 2, 2001, para. 572. Notwithstanding this interpretation, the ICTY seems to assert a stricter interpretation in this regard: “The *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent.” International Criminal Tribunal for Rwanda (hereafter, ICTR), *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment, May 21, 1999, para. 91.
- 17 Among the factors cited by the tribunals in inferring genocidal intent are “(a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.” ICTR, *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-I, Trial Chamber, Judgment, December 13, 2006, para. 320.



the perpetrator pursues the destruction of the group [...], must be committed with the intent to destroy, in whole or in part, a national, racial, ethnic, or religious group. It should be noted that this intent to destroy a group does not refer to the motive of the crime, but rather to the subjective element of the wrongdoing. This is to say that the motive for the actions themselves is irrelevant to the existence of the crime, since it is possible to act with the purpose of destroying the group for political or economic reasons, revenge, or other motives. In other words, in order to determine the crime of genocide, it is not necessary to know the reasons or motives behind the intention to destroy the group.

The foregoing conclusion is based on the fact that the proposal to define the crime of genocide as deliberate acts committed with the intent to destroy a national, racial, religious, or political group *because of* the national or racial origin, religious beliefs, or political opinions of its members *was not approved*. In opposing this definition, the British Delegation argued that the essential issue was the intention to commit the crime, regardless of the perpetrator's motives, and that, given their restrictive character, the unnecessary inclusion of motives could be used to circumvent an accusation of genocide by arguing different motives. [*Emphasis added*]

See also MÉXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c), Dissenting vote of Justice Juan N. Silva Meza* (identical).

## ii. Victim of the crime of genocide: National, ethnic, racial, or religious group

So far, Latin American jurisprudence has only marginally addressed the second element of the crime of genocide, namely a specific group as the victim or target (*sujeto pasivo*) of the crime. As a result, national courts in Latin America have shed little light on the complex legal questions that have, in fact, been examined in international jurisprudence.

International criminal tribunals have established three particularly relevant points in regard to the determination of the “group”: (i) as far as the definition and international jurisdiction are concerned, the “group” is limited to those specified by the international norm, and the definition therefore excludes social and political groups; (ii) the group is determined based on subjective criteria, although objective criteria should also be considered;<sup>18</sup> and (iii) while general guidelines may be established in regard to the definition of each group, the definitive determination must be made on a case-by-case basis, bearing in mind cultural and social factors and taking into account that the norm is intended to protect stable groups.<sup>19</sup>

18 According to the jurisprudence of the *ad hoc* tribunals, “Membership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, [...] but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria [...]” ICTR, *Prosecutor v. Sylvestre Gacumbtsi*, Case No. ICTR-2001-64-T, Trial Chamber, Judgment, June 17, 2004, para. 254. See also, among others, ICTR, *Prosecutor v. Athanase Seromba*, *supra* note 17; ICTY, *Prosecutor v. Vidoje Blagojevi and Dragan Joki*, Case No. IT-02-60-T, Trial Chamber, Judgment, January 17, 2005, para. 667.

19 See, for instance, ICTY, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, September 2, 1998, and ICTY, *Prosecutor v. George Rutaganda*, Case No. ICTR-96-03, Trial Cham-

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.3.2:

[T]he victim [of the crime of genocide] must be a national, ethnic, [racial], or religious group [as such]. Moreover, there is an essential subjective element to this crime, which is the aim of destroying those groups, in whole or in part.

### *a. Genocide and political groups*

As already noted, based on the interpretation of the relevant instruments provided by the international tribunals, political and social groups are explicitly excluded as victims or targets (*sujeto pasivo*) of the crime of genocide, at least at the level of international jurisdiction. This position, however, does not necessarily entail a limitation on national systems, which may broaden the international definition to incorporate other groups as potential victims under domestic law, in accordance with their political agreements and legislative processes.<sup>20</sup>

The two excerpts from jurisprudence transcribed below specifically examine the issue of political groups and the crime of genocide. The Supreme Court of Justice of the Argentine Nation emphasizes the history of the international definition of genocide, particularly the discussions and evolution of the definition in regard to the inclusion of political groups as victims or targets of this crime. The Court observed in its analysis that these groups ultimately were excluded from the definition because of political concessions and compromises within the international community, rather than for legal-technical reasons. As the second decision points out, this supports the conclusion that, should a country achieve the political consensus required to broaden the protection to include other groups, it is perfectly able to do so. This would not result in a negation of the values that the international norm is meant to protect or of the international obligations derived from this definition as *jus cogens*, nor are there any other obstacles derived from the nature of the crime.

ARGENTINA, *Case “Circuito Camps” and others (Miguel Osvaldo Etchecolatz) (List of Judgments 1.d)*, Whereas IV.b:<sup>21</sup>

[F]ollowing World War II, an international discussion began as to the most appropriate definition of the concept of genocide. A milestone in that discussion, which continues today, was the Convention on the Prevention and Punishment of the [C]rime of [G]enocide, approved by the United Nations in December 1948.

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ber, Judgment, December 6, 1999. See also ICTY, *Prosecutor v. Radislav Krstic*, *supra* note 16, paras. 555–57.

20 With respect to the criteria established by Latin American courts for modifying the definition of the crime of genocide, crimes against humanity, or war crimes in domestic law, see “*Minimums of protection set forth by international treaties may be broadened by national legislation*,” section IV.2.D of this digest.

21 The ruling handed down by the Oral Tribunal of the National Federal Court of La Plata in Case No. 2251/06 was upheld by the Supreme Court of Justice of the Argentine Nation in its ruling “*Etchecolatz, Miguel Osvaldo r/extraordinary remedy*,” E. 191. XLIII, February 17, 2009.

There is also an antecedent to the Convention that must not be overlooked given its implications for the conclusions of this Court in today's ruling.

As a result of the experiences occasioned by Nazism, the United Nations, in its **Resolution 96(I) of December 11, 1946**, invited Member States to enact the necessary legislation for the prevention and punishment of genocide.

The resolution states: "*Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.*" It goes on to say: "*The General Assembly, therefore, [...] Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable.*"

It is clear from this transcription—and extremely relevant to this point—that in the resolution cited, the international community, horrified by the knowledge of the crimes committed by the Nazis during World War II, did not hesitate to include "**political and other groups**" in the definition of genocide in the first paragraph transcribed, while the second paragraph refers to "**political ...or any other grounds.**"

Moreover, Article 2 of the first *[sic]* draft of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide stated as follows: "In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or **political** group, on grounds of the national or racial origin, religious belief, or **political opinion** of its members: (1) Killing members of the group; (2) Impairing the physical integrity of members of the group; (3) Inflicting on members of the group measures or conditions of life aimed at causing their deaths; Imposing measures intended to prevent births within the group."

As can be observed, this draft referred to political groups as well as to the political opinions of a group's members.

Due to the prevailing political situation in some States, however, the Convention approved in 1948 defined the crime [...] [in such a way] as to exclude political groups and political motives from the new definition.

See also COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code)* (*List of Judgments 4.c*), Whereas 4:

[T]he criminalization of the systematic annihilation of a political group through the extermination of its members, far from raising issues of constitutionality, is fully supported in the values and principles that inform the 1991 [Colombian] Political Constitution, including social harmony, peace, and unrestricted respect for life and for the existence of human groups, which are considered as such regardless of their ethnicity, nationality, or political, philosophical, or religious beliefs. Let us not forget

that the specific intent of the Constituent Assembly's work was to institutionalize constructive strategies for political coexistence in response to prevailing violence and armed conflict, and therefore, many of the provisions of the Constitution stem from the desire to consolidate peace among Colombians and seek to fulfill that purpose.

### iii. Perpetrator of the crime of genocide: State and non-State actors

Based on the elements of the international definitions, genocide, crimes against humanity, and war crimes may be perpetrated by any individual, and there is no requirement that he/she be acting in an official capacity or that the conduct be fostered, sponsored, or tolerated by a State. Similarly, an omission on the part of a government authority is not required in order for the act to be attributed to the State. Nonetheless, in the view of authors such as Bassiouni, international crimes in practice are typically committed by State actors or by people benefiting from some type of State policy. Similarly, Cassese has asserted that while these crimes are committed by individuals, these persons will always be acting within the framework of a State policy, and they will benefit from that policy, or they will be part of a highly organized non-State criminal enterprise.<sup>22</sup>

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.3.2:

The perpetrator of this crime, genocide, is indeterminate, which is to say that it may be any person [whether a State or non-State actor].

### iv. Underlying conducts of the crime of genocide

In accordance with the relevant international instruments, the crime of genocide has five constitutive acts: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; and (v) forcibly transferring children of the group to another group. These same acts have been included in the national definitions of many countries of the region.

In general terms, Latin American jurisprudence has not engaged in an exhaustive analysis of each of these conducts. At most, certain rulings merely allude to them in relation to the international definition of the crime. The following decision by the Colombian Constitutional Court is noteworthy, however, in that it addresses a critical aspect that has also been taken up in international jurisprudence. Given the specific nature of the subjective element and of the victim of the crime of genocide, in order to establish the responsibility of the perpetrator it is not necessary to prove that the destruction, in whole or in part, of the group under attack was actually accomplished. What will be relevant, then, is to prove that the acts committed potentially would have been of sufficient severity and gravity so that, had they continued on that course,

<sup>22</sup> See M. Cherif Bassiouni, "The Sources and Content of International Criminal Law," *supra* note 1; Antonio Cassese, *International Criminal Law*, *supra* note 7.

they could effectively have led to the physical or biological destruction of the group.<sup>23</sup> Another relevant principle within international jurisprudence holds that once genocidal intent has been established, it is not necessary to determine that the perpetrators chose the most suitable or effective means of achieving their aim.<sup>24</sup>

COLOMBIA, *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b)*, Whereas 4.1:

[In view of the] specific legal value [protected by the definition of the crime of genocide] and [the] equally specific aspect of intentionality, not every violation of the physical or mental integrity of the members of the group can be qualified as genocide, just as not every act of racist aggression can be regarded as such [*footnote omitted*].

Along these same lines, the Prosecutor is correct in observing that it is the serious injuries, as opposed to the minor ones, that effectively harm or imperil the legal values protected under the statutory definition of the crime of genocide, and it would not be reasonable for the legislature to include within the crime of genocide acts that diverge from its essence, which is none other than the deliberate destruction of a human group with a defined identity [*footnote omitted*].

In this sense, the mere presence of the subjective element of the statutory definition of the crime of genocide—when the conduct is inconsistent with the element of intentionality in view of its inherent ineffectiveness in obtaining such an outcome—cannot lead to the conclusion that the legislature must necessarily define as one of the forms of genocide any harm to the physical or mental integrity of the members of the group, whether national, ethnic, religious, or political.

While the Court pointed out [previously] that the desired outcome of the genocide—total destruction of the group—need not have occurred in order for specific conducts to be characterized as genocide, it is clear that in order for the law to penalize a particular act under this definition, the behaviors to be punished must have been capable of producing the desired result and must have had the real potential to threaten the legally protected value at stake.

Regarding the enumeration of the underlying conducts of the crime of genocide, see, for example, COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*; COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*; MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*; COLOMBIA, *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b)*.

23 See, for instance, ICTY, *Prosecutor v. Radislav Krstic*, *supra* note 15, para. 25; and ICTY, *Prosecutor v. Rodoljub Brđjanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, September 1, 2004, para. 694.

24 ICTY, *Prosecutor v. Radislav Krstic*, *supra* note 15, para. 32.

## C. Legally protected value in the crime of genocide

COLOMBIA, *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b)*, Whereas 4.1:

[T]he legal value that is to be protected by the criminalization of genocide is not limited to life and integrity, but extends to the very right to existence of human groups, regardless of nationality, race, or religious or political creed [*footnote omitted*].

MÉXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Eleven:

[T]he criminalization of genocide is intended to safeguard the existence of certain human groups that are considered stable, and that form the environment in which the individual develops in virtually all the social and cultural facets of his existence, as well as the foundation of the international community, and the importance of which, in terms of their role for the individual, is almost comparable to that of the States themselves.

See also MEXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c)*, Dissenting vote of Justice Juan N. Silva Meza (*Identical, but which adds*):

It must therefore be concluded that the criminal definition of genocide protects the existence of certain human groups. It is, in other words, a legally protected value of a supra-individual nature conferred not on a physical person but rather on the group as a whole.

## D. Application: Genocide

### i. Guatemalan case: Classifying facts as genocide

GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*, Whereas I and II:

In its examination of the extent and intensity of the damage, [the first trial court] took into account the loss of life of the victims but noted that the harm was not limited to that loss, which is incalculable in and of itself. It was even more profound since, as the witnesses reiterated, *the events signified the complete disappearance of the Río Negro community*[.] The few survivors were forced to take refuge in the mountains for a prolonged period of time, or in other communities [...]. There were also instances of forcible transfer of surviving children [...]. The latter were made to live with some of their victimizers [...], who subjected them to conditions of servitude and degrading treatment, uprooting them completely from their families—most of which had been

murdered—and from their social context, and distancing them from the ethical and moral values of their community.

In accordance with Article 421 of the Criminal Procedures Code, this Court must confine itself to the arguments cited and may not officially take up other aspects. It is important to bear in mind, however, that the event in the instant case constitutes the massacre of a group, that severe bodily and mental harm was inflicted on members of the group, that the group was intentionally subjected to living conditions calculated to bring about its physical destruction, and that there was a forcible transfer of the children of one group to another group. Therefore, in accordance with an international normative process that began with the London Agreement of August 8, 1945 and was further developed by the Nuremberg Tribunal, which was established to try serious crimes committed in any place, this Court takes the view that the appropriate classification for the Río Negro massacres was that of GENOCIDE [...]. [*Capital letters in original*]

## ii. Argentine case: Determination of the group

ARGENTINA, *Case “Circuito Camps” and others (Miguel Osvaldo Etchecolatz) (List of Judgments 1.d)*, Whereas IV.b:<sup>25</sup>

[The adoption of the conventional definition of the crime of genocide] [p]osed, particularly with respect to the events that transpired in our country during the military dictatorship that began in 1976, the interesting question of whether or not the tens of thousands of victims of that State terrorism constitute a “national group” as set out by the Convention.

I posit that an affirmative response is required[.] [...] [This] assertion [...] is based on the following analysis and relies on the most elemental logic.

In the historic ruling in Case 13 [the trials of the military junta leaders], the mechanics of the mass destruction implemented by those self-identified as the “National Reorganization Process” was considered to have been proven.

According to Case 13/84, in which former members of the military juntas were convicted: *“The system implemented—kidnapping, interrogation under torture, clandestine and illegitimate deprivation of liberty, and, in many cases, the elimination of the victims—was substantively the same throughout the territory of the Nation and was prolonged over time.”*

[Here] it is useful to recall certain concepts from the Spanish justice system on this matter.

In regard to the issue under study, upon taking up the case that ultimately led to the conviction of Adolfo Francisco Scilingo, the National Criminal Court of Spain en banc, in its ruling of November 4, 1998, [...] concluded that the events that had transpired in Argentina constituted genocide, even though the existing Spanish Criminal Code does not recognize political groups as victims.

25 See *supra* note 21.

It is useful to transcribe the main arguments developed by the Spanish magistrates on that occasion[.] The judges asserted: **“The plural and pluripersonal action alleged, in the terms in which it is set out in the pretrial proceedings [sumario], targets a distinguishable group of Argentines or residents of Argentina who were clearly singled out by the masterminds for persecution and harassment. Moreover, the acts of persecution and harassment consisted of deaths and prolonged illegal detentions—in which cases it has frequently been impossible to establish the fate of the detainees, who were abruptly removed from their homes and dispatched from society forever, thereby giving rise to the uncertain concept of ‘the disappeared’—torture; confinement in clandestine detention centers, with no respect whatsoever for the rights afforded detainees under any law; imprisonment or punishment in penitentiaries, while the families of the detainees had no knowledge of their whereabouts; and removal of the children of the detained to give them to other families—i.e., the forcible transfer of children from one group to another. The allegations aired in the pretrial proceedings describe in no uncertain terms the idea of exterminating a group within the Argentine population, without sparing anyone identified with that group. This act of extermination was not carried out randomly or indiscriminately, but rather with the intention of destroying a certain sector of the population: a very heterogeneous, yet discrete group. The group subject to persecution and harassment included citizens who did not fit the preconceived prototype that the sponsors of the repression regarded as part of the new order to be established in the country. It comprised citizens who opposed the regime, but also citizens who were indifferent to the regime. The repression was not intended to change the group’s attitude toward the new political system, but rather to destroy the group through detentions, deaths, disappearances, removal of children from their families, and the intimidation of group members. These imputed actions constitute the crime of genocide.”**

The [Spanish] magistrates [continue] as follows: “In keeping with the sense of the countries party to the 1948 Convention about the pressing need to criminally prosecute genocide and to prevent impunity for what they considered an atrocious crime under international law, the term ‘national group’ should not be interpreted to mean ‘a group of persons belonging to the same nation,’ but rather, simply, a national human group, a distinguishable human group, characterized by some aspect, and incorporated into a broader collective... This social conception of genocide—felt and understood in this way by the community, and providing the basis for its repugnance and horror at the crime—would not countenance exclusions such as those indicated [with respect to political groups]” [*footnote omitted*].

Spanish National Court judge Baltasar Garzón’s statements on this subject are equally relevant. In a November 2, 1999, decision, he asserted: “With the coup d’état in Argentina, the military juntas imposed a reign of terror based on the State’s calculated and systematic elimination of thousands of people through violent means, in the guise of a so-called war against subversion. The aim of this systematic action was to establish a new order, just as Hitler intended to do in Germany, in which there was no room for certain categories of persons who did not fit the stereotype of nationality,



Western civilization, and Western Christian morality. In other words, all of those who, according to the ruling hierarchy, did not espouse a fascist-style ultranationalist concept of society and adhered instead to ‘international slogans such as Marxism and atheism.’ In keeping with this rationale, an entire plan was developed for ‘selective elimination,’ or the elimination of certain sectors of the Argentine population. One can argue, therefore, that the selection was not so much of specific individuals—since thousands of the people who were killed or disappeared did not espouse any particular political or ideological position—but rather was based on membership in certain collectives, sectors, or groups of the Argentine nation (national group), which, in their inconceivable criminal calculation, [the authorities] considered to be against the Process. [...] The objective of this selection process, while arbitrary with respect to individuals, was perfectly calculated when weighed against the objectives of the so-called ‘National Reorganization Process,’ which was premised on the ‘necessary’ disappearance of a certain ‘quantity’ of people situated in sectors that impeded the ideal configuration of the new Argentine Nation[.] They were ‘the enemies of the Argentine soul,’ according to General Luciano Benjamín Menéndez, a defendant in the instant case; they upset the equilibrium and therefore **‘had to be eliminated.’**”

An Argentine sociologist, a prominent expert on the subject, offered the following observation about the division of the Argentine territory into zones and sub-zones of operation, with hundreds of clandestine detention centers: “One of the striking aspects of these events is the exhaustive previous planning ... The extermination was carried out with a speed and precision that reflected years of prior conceptual development and learning. The perpetrators did not hesitate to apply every one of the mechanisms for the destruction of subjectivity gleaned from previous experiences of genocide or repression. The Argentine concentration camps combined the worst of the experiences from the Nazi concentration camps, the French internment camps in Algeria, and the United States counterintelligence practices in Vietnam. Such practices included torture using the ‘electric cattle prod,’ the ‘submarine’ (submerging the victim’s head in a bucket of water to the point of near asphyxiation), the introduction of rodents into human bodies, the daily humiliation and denigration of prisoners, mistreatment, beatings, overcrowding, and starvation. Other methods were specific to the Argentine experience, including the torture of prisoners in front of their children, the torture of the children or spouses of prisoners in their presence, and the illegal appropriation of many children of the ‘disappeared’ (who were then given to military families)... With what expertise in horror the Argentine perpetrators of genocide evaluated and used the most degrading elements of each previous experience of genocide, demonstrating a level of sophistication that removes any question of improvisation or of the surfacing of some spontaneous hatred...” [*footnote omitted*].

With regard to whether what happened in our country should be understood within the concept of “national group,” [...] it is illustrative to look at the reflections of this same author on the subject: “...The characterization as a ‘national group’ is absolutely valid for examining the events that took place in Argentina, since the perpetrators intended to destroy a particular web of social relations in a State in order to bring about a change substantial enough to alter the life of the whole. Given that the

definition set out in the 1948 Convention includes the phrase ‘in whole or in part,’ it is obvious that the Argentine national group was annihilated ‘in part’—a part that was substantial enough to alter the social relations of the nation... The annihilation that occurred in Argentina was not spontaneous, it was not happenstance, and it was not irrational: it was the systematic destruction of a ‘substantial part’ of the Argentine national group in order to transform it as such, to redefine its way of being, its social relations, its destiny, its future” [footnote omitted].

In light of the foregoing, my understanding is that, predictably, we are clearly dealing not with a mere succession of crimes, but rather with something significantly bigger that is appropriately termed “genocide.” But it is important to clarify that this cannot and should not be interpreted as a disregard for the important distinctions between what happened in Argentina and the exterminations that claimed more than a million Armenian victims (in the first genocide of the twentieth century, which began in 1915), or millions of victims of Nazism during World War II, or the massacre of a million people in Rwanda in 1994, to cite a few notorious examples.

It is not a competition over which nation has suffered more or which community boasts the greatest number of victims. It is, rather, a matter of correctly identifying phenomena that, despite contextual differences and variations in time and space, have a commonality that must be acknowledged. Indeed, as [Daniel] Feierstein points out in his discussion of the reasons why distinct historical processes can be identified in the same terms, “Using the same concept does imply arguing the existence of a common thread that refers to a technology of power in which the ‘negation of the other’ is taken to the extreme: their physical disappearance (of the bodies) and their symbolic disappearance (the memory of their existence)” [footnote omitted].

### 3. CRIMES AGAINST HUMANITY

As Caroline Fournet observed in her study of international crimes, crimes against humanity are as old as humanity itself. Nonetheless, they did not emerge as a legal category until the early twentieth century, when the Allied Powers referred to the massacre of the Armenian people as “crimes against humanity and civilization.”<sup>26</sup> Since that time, and up to the present, the international definition of such crimes has undergone substantial changes in the tug of war between these crimes’ unquestionable brutality, on the one hand, and the political concerns of different States, on the other.<sup>27</sup>

Despite their roots in international humanitarian law, crimes against humanity today are intrinsically linked to international human rights law, perhaps more than any other crime under international law.<sup>28</sup> It has been pointed out in Latin American jurisprudence, in accordance

26 Caroline Fournet, *International Crimes: Theories, Practice and Evolution* (London: Cameron May, 2006).

27 M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague: Kluwer Law International), 1999.

28 As Bassiouni has pointed out, during the process of drafting the basic documents for the legal proceedings in the aftermath of World War II, which for the first time included the legal definition of crimes against humanity, “[t]he drafters may have been concerned with the legal nature of ‘crimes against humanity,’ and the problems posed by this category of crimes in respect of the ‘principles of legality,’ [footnote omitted]

with the relevant international judgments, that crimes against humanity hone in directly on the protection of basic rights such as, inter alia, life, liberty, physical integrity, and psycho-sexual freedom. These judgments also describe some of the other characteristics of this category of crimes, such as the severity of the harm inflicted and the atrocious consequences for the victims, their relatives, and society. Moreover, Latin American courts have been emphatic in asserting that crimes against humanity must be extensive in nature, meaning that they must be perpetrated in a systematic or widespread manner. This is precisely the contextual element that distinguishes crimes against humanity from gross human rights violations.

Latin American jurisprudence has gone into particular detail about the trajectory of the recognition and evolution of the international definition of crimes against humanity, noting all the relevant historical-legal benchmarks. Here, it need only be added that in the wake of the brutality experienced during World War II, crimes against humanity were conceived in response to the atrocities perpetrated against people who were not protected under the laws of war, bearing in mind in particular the crimes perpetrated by the State against its own population or other individuals under its jurisdiction.<sup>29</sup> This ultimately was a critical factor in the complete “emancipation” of such crimes from crimes of war and aggression and in the affirmation of their inherent nature as brutal crimes that may be committed in times of peace and of war, and against any civilian population, as long as they are committed in a systematic or widespread manner.

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 16:

[C]rimes such as genocide, torture, forced disappearance of persons, [intentional] murder, and any other acts designed to persecute and exterminate political adversaries—among which we must include belonging to a group whose purpose is to carry out this persecution—may be considered crimes against humanity, *because they violate jus gentium norms*, as set forth in Article 118 of the National Constitution. [*Emphasis added*]

CHILE, *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.) (List of Judgments 3.b)*, Whereas 4:

[T]his Court shares the opinion that a crime against humanity is one that offends general principles of law and becomes a matter of concern to the international community.

Hence, under the law, these conducts must be carried out—in accordance with the Constitution of the Republic, which has internationalized criminal law based on

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[...]. [They concluded] that ‘crimes against humanity’ are simply an extension of war crimes because the category of protected persons is the same in the two crimes, the difference being whether the violators were of the same or another nationality. Thus, the historical-legal foundation of ‘crimes against humanity’ is found in international humanitarian law and in the normative aspect of the international regulation of armed conflicts.” *Ibid.*, at 10.

29 M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, *supra* note 27; Antonio Cassese, *International Criminal Law*, *supra* note 7.

*jus cogens*—bearing in mind that they are the product of the massive violation of the fundamental rights of the victims in a context of the persecution, kidnapping, and forced disappearance of the latter.

ARGENTINA, *Case “Circuito Camps” and others (Miguel Osvaldo Etchecolatz) (List of Judgments 1.d)*, Whereas IV.a:<sup>30</sup>

[I]n respect [to the nature of crimes against humanity], it is worth recalling the words of the International Tribunal for the former Yugoslavia in the Erdemovi case: “Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity” [*footnote omitted*].

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 23:

[I]n the “Almonacid” case [against Chile], the Inter-American Court stated that crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 5:

The crimes, each comprising multiple human rights violations, committed during the *de facto* government, in the context of State terrorism, and conducted in a systematic, massive, and planned manner—which included forced disappearances, murders, torture, prohibitions against political, social, and labor rights and freedom of expression, violations of freedom of movement, etc.—amount to practices that international law considers “crimes against humanity.” Such crimes are not subject to any statute of limitations and it is incumbent on all States to prosecute them.

Rather than remaining frozen in the Nuremberg Statute, the concept of a “crime against humanity” continued to evolve, improve, and gain autonomy. Its essential characteristics were defined (non-applicability of the statute of limitations, inadmissibility of amnesty, pardon, indulgence, political asylum, and refuge). It was solidified

30 See *supra* note 21.

as a general principle of international law with the rank of “jus cogens,” making the punishment of the perpetrators of crimes against humanity a universal imperative.

The norms prohibiting crimes against humanity have the rank of “jus cogens”; they are subject to general observance and constitute universal criminal laws that give rise to individual criminal liability.

The existence of the rule of “jus cogens” stipulating the punishment of crimes against humanity has a dual conventional and customary nature (domestic practice and “*opinio juris*” of States).

## A. Evolution and recognition of crimes against humanity as crimes under international law

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.2:

The concept of crimes against humanity has evolved to cover a series of atrocious acts committed in a massive or systematic manner; they are primarily customary in their origins and have been proscribed under international law for several centuries. Although a nexus with war crimes or crimes against peace was required at first, this condition is gradually disappearing.

The first attempt in modern times to assign individual criminal liability occurred during World War I. At the 1919 Peace Conference, the Allied Powers found that the massacre of Armenians by the Turks and other acts of comparable gravity were “violatory of the laws and customs of war and the elemental laws of humanity.” Nonetheless, the Treaty of Versailles did not mandate trials to determine the criminal liability of the perpetrators, on the premise that the concept of laws of humanity posed a moral question in respect to which no standard existed that would make prosecution by a court possible [*footnote omitted*].

The contemporary notion of crimes against humanity appears in Article 6(c) of the Statute of the Nuremberg Tribunal [...]. Although most of the violations attributed to Nazi criminals were war crimes under the Law of The Hague, the new category of crimes against humanity was necessary in order to extend criminal liability to high-level Nazi officials for acts committed against the civilian population. The problem posed by this new category was that the Allies could be accused of *ex post facto* judgments based on a strict interpretation of the principle of legality. The nexus to war crimes and crimes against peace was created precisely to circumvent such a charge. The extension of criminal liability was based on the recognition that certain provisions pertaining to war crimes were applicable to civilians and other protected persons and, therefore, their punishment was justified if there was a nexus to a war crime or a crime against peace within the jurisdiction of the Nuremberg Tribunal [*footnote omitted*]. [...] Under Law No. 10 of the Allied Control Council, the Allies tried German officers and soldiers in their respective areas of occupation for crimes against humanity, but they did not require the nexus between crimes against huma-

nity and the initiation of the war or war crimes [...] *[footnote omitted]*. Because many Nazi criminals went into hiding to avoid trial, several States kept the criminal cases initiated in the 1950s open for years. In the 1980s and early 1990s, for example, France tried Klaus Barbie and Paul Touvier for crimes against humanity *[footnote omitted]*.

Outside the context of World War II, other States have prosecuted atrocious crimes against humanity. Latvia and Estonia, for example, tried police officers for murder, torture, and forced deportation, while leaders of the Dergue regime in Ethiopia were made to stand trial for atrocious crimes against humanity *[footnote omitted]*.

A proposal to eliminate the requirement of a nexus between crimes against humanity and war crimes was introduced into the discussion of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity *[footnote omitted]*. It was ultimately agreed that such crimes could be committed “in time of war or time of peace” *[footnote omitted]*, a definition which, despite all efforts, did not totally eliminate the nexus with war. This nexus was also preserved in the Statute of the [International Criminal] Tribunal for the former Yugoslavia, although not for the Rwanda tribunal *[footnote omitted]*. In the Rome Statute, such crimes are delinked from the existence of an armed conflict.

As international humanitarian law was being developed and consolidated, the United Nations General Assembly adopted several declarations on the protection of human rights that gradually solidified the international consensus repudiating [certain] acts [...].

An example of this is the general prohibition against racial discrimination embodied in binding instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 *[footnote omitted]*. The convention served as a springboard for the subsequent recognition of *apartheid* as an international crime *[footnote omitted]*. The United Nations General Assembly approved the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973, which characterized as crimes against humanity policies and practices of segregation and racial discrimination implemented for the purpose of maintaining domination by one racial group over another *[footnote omitted]*. This offense was expressly included in the Rome Statute, Article 7(j), as one of the acts considered to be a crime against humanity.

Something similar occurred in the case of torture, which is prohibited under a wide range of human rights treaties *[footnote omitted]*. It has been defined as an international crime in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [...] *[footnote omitted]* and in the Inter-American Convention to Prevent and Punish Torture [...] *[footnote omitted]*.

The list of conducts considered to be crimes [against humanity], the punishment of which is of interest to the international community, has since been expanded to include forced disappearance *[footnote omitted]* and summary execution [...] *[footnote omitted]*.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 710:

The elements of [crimes against humanity] have evolved over time [by means of various international instruments], mainly: (i) the Declaration of the governments of France, Great Britain, and Russia of May 28, 1915; (ii) the Preliminary Peace Conference of January 1919; (iii) Article 6(c) of the Charter of the Nuremberg International Military Tribunal of August 8, 1945, which explicitly envisaged the notion of “crime against humanity” for the first time; (iv) Article 5(c) of the Charter of the International Military Tribunal for the Far East [*footnote omitted*]; (v) Law No. 10 of the Allied Control Council of December 20, 1945; (vi) Article 5 of the Statute of the International Tribunal for the former Yugoslavia [...]; (vii) Article 3 of the Statute of the International Criminal Tribunal for Rwanda [...] (both Statutes helped reinforce the punishability of crimes against humanity in customary law [*footnote omitted*]); and (viii) Article 7 of the Statute of the International Criminal Court of July 17, 1998, which entered into force on July 1, 2002, and which set out a more precise definition of such crimes, based primarily on the charters of the international tribunals for Nuremberg and the Far East, as well as the international criminal tribunals for the former Yugoslavia and Rwanda [*footnote omitted*].

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.)* (*List of Judgments 14.a*), Whereas 5:

As the concept of “crime against humanity” has evolved, certain essential legal principles for prosecution have been consolidated: the perpetrators are not eligible for refuge or asylum; these crimes are not subject to any statute of limitations; and States are barred from adopting measures that would prevent their prosecution.

[The existence of crimes against humanity] has been confirmed by the jurisprudential and normative evolution of recent decades. It is important to bear in mind that well before World War II, the international community had repudiated the excesses committed during military conflicts and had expressed its intention to prosecute the perpetrators of such crimes by establishing the values that gradually became the pillars of international criminal law and, fundamentally, of crimes against the law of nations and against humanity. Important examples of this include the “Martens clause” of Hague Convention II of 1899, which introduced the protection of the principles of the law of nations; Hague Convention IV of 1907, which reaffirms this protection; and the four Geneva Conventions of 1949, stipulating that its denunciation “shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience” (Articles 63, 62, 142, and 158 of Conventions I to IV). Later, when the barbarity of the acts committed during World War II moved the international public conscience, [...] the Charter of the Nuremberg Tribunal

established three categories of crimes: crimes against peace, war crimes, and crimes against humanity.

In the context of this evolution, the systematic practice of torture, forced disappearance, and murder, ideologically driven by the national security doctrine, constitutes a “crime against humanity.” This correlation derives from the peremptory norm of “*jus cogens*,” which has gradually been taking shape in the international public conscience. Its outward expressions are found in conventions, declarations, and international jurisprudence reflecting the will to suppress violations of the values inherent to humanity, taken as a whole. Here it is relevant to cite a passage from Whereas III of the March 6, 2001, ruling handed down in Buenos Aires by Federal Judge Dr. Gabriel R. Cavallo, declaring the “FULL STOP” and “DUE OBEEDIENCE” laws to be invalid, unconstitutional, and null and void: “(...) *the acts (...) were committed in the framework of a plan of systematic repression implemented by the de facto government (1976–1983). We shall see below how these acts, due to the context in which they occurred, must be, and are, considered crimes against humanity under the law of nations. This entails an acknowledgment that the magnitude and extreme gravity of the events that occurred in our country during the period cited offended legal norms that reflect the most basic values recognized by humankind as inherent to each of its members as human persons. In other words, the events described have the sad privilege of constituting the set of behaviors considered criminal under the law of nations, regardless of the place where they occurred and the nationality of the victims and perpetrators.*”

## B. Elements of crimes against humanity

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 712 and 714:

That being the case, based on the development or evolution of the international criminal [definition], according to [Spanish professor Alicia] GIL GIL, crime against humanity may be defined, in a general sense, as any violation of basic individual rights (life, physical integrity and health, freedom...) committed, in a time of peace or of war, as part of a widespread or systematic attack perpetrated with the participation or tolerance of the *de jure* or *de facto* political authority.

If, according to international jurisprudence, a crime against humanity is understood to have a special nature and a greater degree of immorality associated with its commission relative to common crimes [*footnote omitted*], then the following must be verified:

1. From the objective or material standpoint, the presence of certain normative hypotheses that have been developed and recognized under positive or customary law for the protection of human rights. Specifically, the requirements set out in international instruments and tribunals have consistently included (i) the status of the perpetrator (an organ of State power or a criminal organization that has assumed *de facto* control over a territory [*footnote omitted*]), (ii) the nature of the infraction (organized



and generalized or systematic acts—the term “generalized,” which is quantitative, alludes to the number of victims, while the adjective “systematic” connotes a methodical plan [*footnote omitted*]), (iii) the context for the commission of the crime (situation of internal or external conflict) [*footnote omitted*], and (iv) the characteristics and status of the victims (civilian population and defenselessness) [*footnote omitted*].

From a subjective standpoint, the agent or perpetrator must be cognizant of the broader, general context in which the act occurs and aware that the act is, or will be, part of a widespread or systematic attack—organized violence—against the civilian population, according to a plan or policy [*footnote omitted*]. It is clear that customary international law has never recognized the commission of an isolated inhuman act as a crime against humanity; instead, the act must form part of a broader campaign of atrocities committed against civilians.

### **i. Widespread or systematic attack against the civilian population**

Latin American jurisprudence is consistent in affirming that crimes against humanity must be committed as part of a systematic or widespread attack against the civilian population. Today, this constitutes what we have described as the “international element” or “contextual element” that distinguishes such crimes from ordinary crimes and even from gross violations of human rights. Under international law in its present form, “attack” must be understood as “a course of conduct involving the multiple commission of [specific criminal acts] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>31</sup>

Among the decisions transcribed below, the Panamanian jurisprudence stands out in particular for its precise definition of the concepts “systematic” and “widespread.” For its part, the Peruvian jurisprudence clearly distinguishes individual acts that, although committed on a wide scale, are not supported, coordinated, or even tolerated by a State policy or plan or by a highly organized power structure that exercises some form of *de facto* control. This criterion aims at excluding isolated or random acts from this category of crimes, even if they are perpetrated on what in other situations would be considered a large scale. The Peruvian decision also reiterates the principle established by the *ad hoc* tribunals to the effect that “systematic or widespread nature” refers to the attack as a whole and not to each of the acts perpetrated by the accused. In other words, “[p]rovided that the acts of the individual are sufficiently linked to the widespread or systematic attack, and are not found to be random or isolated, it is possible that a single act could be found to be a crime against humanity.”<sup>32</sup>

31 This is, textually, the definition of an “attack directed against any civilian population” established in the Rome Statute of the International Criminal Court. Its relevance, however, extends beyond that instrument or the jurisdiction of the Court, insofar as it is the result of a broad process of negotiation and consensus building among the international community and a reflection of judicial interpretation and doctrinal development in the international sphere. In this regard, see, for example, Darryl Robinson, “The Elements of Crimes against Humanity,” in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy S. Lee (Ardsley, NY: Transnational Publishers, 2001).

32 ICTY, *Prosecutor v. Blagoje Simić, et al.*, Case No. IT-95-9-T, Trial Chamber, Judgment, October 17, 2003, para. 43.

CHILE, *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.) (List of Judgments 3.b)*, Whereas 22–24:

[A]t this time, in terms of a legal characterization, the crime provisionally appears to have been committed [...] in the context or implementation of a plan or policy, based on a planned way of proceeding.

[I]n effect, this is a second element that is required in order to characterize the act as a crime against humanity, namely that it must be “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

PANAMA, *Appeal motion (Case Cruz Mojica Flores) (List of Judgments 11.c)*, Whereas:

Important characteristics that inform [the] definition [of a crime against humanity] refer to acts committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack; these acts include murder and forced disappearance of persons. In this context, [an attack] is defined as a pattern of behavior that leads to the repeated commission of such acts against the civilian population in accordance with a State policy, with the organization that commits such acts to further that policy, or with the group holding *de facto* political power. The systematic or generalized element means that many individuals are affected by a multiplicity of acts. In the political sense, the State must promote or encourage such acts, or deliberately refrain from acting to prevent them.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 715 and 716:

From the normative standpoint, the doctrine has emphasized the degree to which acts of aggression that constitute crimes against humanity are structured, political, and systematic. Here, according to [Professor Kai] AMBOS: “*The common denominator in a systematic attack is that it is carried out pursuant to a preconceived policy or plan, with emphasis on the organized nature of the attack. An attack is systematic if it is based on a policy or plan that provides a blueprint for individual perpetrators with regard to the target of the attack, i.e., the specific victims... This is, in reality, the international element of crimes against humanity, based on which acts that might otherwise be considered common crimes acquire the character of crimes against humanity. In essence, the political factor requires only that the random acts of individuals acting on their own, in isolation, and with no one coordinating them, be excluded... Such common crimes, even when committed on a generalized scale, do not constitute crimes against humanity, unless they are at least connected in one way or another to a particular State or organizational authority: they must at least be tolerated by the latter.*”

For its part, in the matter of PROSECUTOR V. BLASKIC, the International Criminal Tribunal for the former Yugoslavia recognized the systematic character of an attack based on the following indicators, which are always inferred from the context: “(a) the existence of a political objective, a plan of attack or an ideology, in

the broad sense of the word, to destroy, persecute or weaken a community; (b) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhuman acts linked to one another; (c) the preparation and use of significant public or private resources, whether military or other; (d) the implication of high-level political and/or military authorities in the conception and production of the methodical plan” [*footnote omitted*].

As indicated in the AMICUS CURIAE from the University of Texas at Austin, citing the judgment on appeal in PROSECUTOR V. BLASKIC [...] only the attack—not the specific acts with which the accused is charged—must be widespread or systematic; furthermore, citing the Inter-American Court of Human Rights, ALMONACID ARELLANO V. CHILE, of September 26, 2006, paragraph 96, even a single act, committed in the context of a generalized or systematic attack, suffices to produce a crime against humanity.

### *a. Civilian population*

As can be inferred from the international definition, the attack must be directed against “*any civilian population*.”<sup>33</sup> While this could be perceived as an element that determines the specific nature of the victim (*sujeto pasivo*) of the crime, it is important to engage in a more thorough reading of Latin American and international jurisprudence on this point.

The International Criminal Tribunal for the former Yugoslavia has concluded that the term “civilian population”<sup>34</sup> refers to the nature of the attack in which the specific crimes are inserted, rather than to the nature of the individual victims. As a result, while there is no need to establish the civilian status of each and every individual victim, it is necessary to establish that the crimes were part of a systematic or widespread attack directed against the civilian population.<sup>35</sup> Following the arguments of this tribunal, therefore, military personnel, militia members,

33 As far as their normative origins, crimes against humanity were conceived in the aftermath of World War II in order to criminally prosecute the atrocities committed by a State against its own civilians, acts that were not considered to fall under the category of war crimes. Specifically, Cassese has noted that “[a]s for the word ‘any’, it is apparent, both from the text of the provision and from the legislative history of Article 6(c), that it was intended to cover civilians other than those associated with the enemy, who were already protected by the traditional rules of the law of warfare. In other words, by using ‘any’, the draftsmen intended to protect the civilian population of the state committing the crimes [...], as well as civilians of its allied countries or of countries under its control [...].” Antonio Cassese, *International Criminal Law*, *supra* note 7, at 118. See also M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, *supra* note 27.

34 As established in the relevant norms, jurisprudence, and doctrine, “Civilian population comprises all persons who are civilians,” and “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.” See Article 50 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977.

35 In an interpretation of the relevant norms, the International Criminal Tribunal for the former Yugoslavia has determined that members of the armed forces, militias, voluntary corps, or organized resistance groups placed *hors de combat* are not considered “civilians” on an individual basis. See, for example, ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Appeals Chamber, Judgment, October 8, 2008, and ICTY, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, May 5, 2008.

and members of volunteer or organized resistance groups who have been placed *hors de combat* may be victims of crimes against humanity, even though they do not have civilian status. This international jurisprudence calls for a careful reading of Latin American jurisprudence, which appears to opt for a different interpretation by including among the civilian population even those who “allegedly were engaged in an act of armed resistance.”

CHILE, *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.) (List of Judgments 3.b)*, Whereas 25–26:

[The characteristics of being widespread or systematic] must be conclusive elements in establishing any of the crimes against humanity. In other words, it is an attack by State agents *and that attack must be directed against any civilian population*. The latter term is used and taken normatively from international criminal law pursuant to Law No. 10 of the Allied Control Council [and] Article 6(c) of the Nuremberg Charter. [*Emphasis added*]

[T]he latter element presents more than one difficulty in interpretation, inasmuch as it deals with the victim, or “the status that might be attributed to the victim [...], which must be clarified or interpreted in keeping with the purpose of covering to the maximum extent ‘any category of individual persons.’ Therefore, even when it is a matter of a number of people, some of whom might have been engaging in an act of armed resistance, it must be understood that they formed part of ‘any civilian population.’”

For further analysis of the interpretation by Latin American courts and tribunals of the terms “civilian person” and “civilian population,” see “*Victims: War crimes against persons protected under international humanitarian law*,” section I.4.A.iv in this digest.

## ii. Knowledge of the attack

Consistent with international jurisprudence, Latin American jurisprudence has defined the second element of these crimes as the perpetrator’s knowledge of the systematic or widespread attack directed against the civilian population. This is precisely the subjective element of crimes against humanity. According to the international criminal tribunals, it is necessary to prove that the accused (i) had the intention to commit the act of which he/she is accused; (ii) knew about the systematic or widespread attack, although he/she need not have known all of the details;<sup>36</sup> and (iii) was aware that his/her conduct was part of that attack.<sup>37</sup>

36 ICTY, *Prosecutor v. Fatmir Limaj, et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, November 30, 2005, para. 190; ICTY, *Prosecutor v. Blagoje Simic, et al.*, *supra* note 32, para. 45; ICTY, *Prosecutor v. Dragoljub Kunarac, et al.*, Cases No. IT-96-23 and IT-96-23/1-A, Appeals Chamber, Judgment, June 12, 2002, para. 102.

37 *Ibid.* In addition to the aforementioned judgments, see ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, December 17, 2004, para. 100.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 713:

[I]n recognition of the principle of individual culpability, the act must be intentional or with knowledge (*dolo de cualquier clase*), whether by commission or omission, and such intentionality or knowledge must extend to all elements of the crime; basically the act must be known to have been part of a widespread or systematic attack against the civilian population.

See also Whereas 714 of this same judgment, included in “*Elements of crimes against humanity*,” section I.3.B in this digest. The Supreme Court emphasizes that the *mens rea* of crimes against humanity requires knowledge of the broad general context within which the act occurs, and also requires that the conduct be part of the widespread or systematic attack.

## C. Application: Plan or policy

### i. Panamanian case

PANAMA, *Appeal motion (Case Cruz Mojica Flores)* (*List of Judgments 11.c*), Whereas:

From our national perspective [...] it is indisputable that from 1968 to 1989, the State apparatus was used, inter alia, for criminal ends in a systematic policy to persecute citizens whose ideology diverged from the positions of the authorities. In view of this situation, and in light of the facts surrounding the death of Mr. Gilberto Aizprua Colindes, the Court takes the view that we are dealing with a crime against humanity.

### ii. Argentine case

ARGENTINA, *Case “Circuito Camps” and others (Miguel Osvaldo Etchecolatz)* (*List of Judgments 1.d*), Whereas I:<sup>38</sup>

Hence, in the ruling in Case 13/84 handed down by the Federal Criminal and Correctional Court of the Federal Capital in the trial of former members of the Military Juntas, it was established, inter alia, that during the period in which the events on trial here today transpired, “...lower-ranking personnel were granted broad discretion to deprive of their liberty people who, according to their intelligence, were linked to subversion. The directive was that they should interrogate them under torture and subject them to inhumane living conditions while holding them captive in clandestine locations. They had great freedom to determine the ultimate fate of each victim, which could entail the victim’s entry into the legal system (being placed at the dispo-

38 See *supra* note 21.

sition of the national executive branch or civilian or military justice), his freedom, or simply his physical elimination.”

The system implemented—kidnapping, interrogation under torture, clandestine and illegitimate deprivation of liberty, and, in many cases, the elimination of the victims—was substantially the same throughout the territory of the nation and was prolonged over time [*footnote omitted*].

These statements are categorical, because of their clarity and because they constitute an incontrovertible legal truth, which is critical to explaining the aforementioned context of the events for which Etchecolatz was tried and convicted today.

### iii. Bolivian case

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)*, Section VII, Whereas:

Upon evaluation of the evidence [submitted at trial] it is concluded that the July 17, 1980, coup d'état against the State had specific objectives such as the capture and detention of the President of the Republic and his ministers in order to secure, through coercive tactics applied by members of the Armed Forces, “resignations” or “relinquishments of command”; the capture, detention, and murder of the main political and trade union leaders; the silencing and control of all of the communications media and the total restriction of all of the freedoms recognized by the C.P.E. [Political Constitution of the State] [...].

[S]ome 30 religious dwellings were raided, many of which were looted, and a good number of priests were forced into hiding due to threats against them. Some of the Church media were silenced or intimidated by threats from the military authorities. The admonitions received by some high-level officials were met with censure. Several journalists were detained and some were tortured. The enforcement of a “military zone” throughout the country plunged the population into a state of constant tension and intimidation due to the lack of guarantees. Incomplete lists of detainees, displaced persons, or asylees left their relatives in a state of anxiety and apprehension. The use of irregular armed groups not subject to any legal controls marked this period of our history as a time of distrust and fear due to the prevailing reign of terror. These and other events that we are not able to describe herein are, in and of themselves, deserving of censure.

### iv. Chilean case

CHILE, *Application for revocation of immunity of Augusto Pinochet Ugarte (Clandestine Detention Centers of DINA) (List of Judgments 3.c)*, Whereas 3:

The commanders in chief of the Armed Forces and the director general of the Carabineros [Federal Police] proceeded, on September 11, 1973, to overthrow the government. They took over Power and Supreme Rule of the Nation, for the reasons set

out in Edict No. 5 and Decree Law No. 1, established a government junta, and closed down the National Congress, the Constitutional Court, and other institutions so as to exercise constituent, executive, and legislative authority pursuant to norms issued by them, as evident in the provisions of decree laws nos. 1, 12, 25, 27, 77, 78, 119, 127, 130, 133, 198, 527, 778, and 991. In this way, they took over internal control of the country, maintaining a monopoly over the exercise of political power. Consistent with the nature of the regime, various intelligence bodies were created in response to the Supreme Government's need for the immediate and constant collaboration of a specialized institution charged with providing it with the systematic and duly processed information it required to adapt its resolutions in the area of Security and National Development. These included the National Intelligence Directorate [Dirección de Inteligencia Nacional, DINA], which was defined as a military body of a technical and professional nature, operating directly under the government junta. Its purpose was to gather all information at the national level from the various spheres of activity in order to produce intelligence as required for policy-making, planning, and the adoption of measures to ensure national security and the development of the country, in accordance with Article 1 of Decree Law No. 521. The aim of the DINA was to detect and divulge to the relevant authorities any activities or actions that could affect the government in power and the interests it deemed relevant. In this way, the latter could adopt resolutions to keep such activities from being carried out, particularly if they were considered potentially destabilizing. The aim was to know and be intimately familiar with all national and international activities involving Chile, especially those of people holding ideas contrary to the government's interests who might be planning or pursuing such activities. Hence, intelligence work was intrinsic to the government in power at the time and was considered a priority of the Head of State. It provided them with useful knowledge from different spheres of activity, whether internal or external, economic, diplomatic, or military, or information with repercussions for industrial and commercial development. All of the information about a particular matter was processed, with non-conventional support, which might be useful to the political and military ruler of the country—embodied in a single person—for making appropriate and timely decisions in an atmosphere of security and trust.<sup>39</sup>

39 Note added to the original: The Whereas clauses transcribed here are part of a decision on the “merits of the request to take away the immunity of Augusto Pinochet Ugarte, for the purpose of investigating his possible responsibility in the planning, implementation, and cover up of the deprivation of liberty [of the victims identified herein].” It clearly was not a decision concerning his individual criminal liability for the acts set out in the indictment. It should also be noted that this decision did not characterize the acts to be investigated, i.e., the deprivation of liberty of the individual victims, as “crimes against humanity.” Therefore, it does not correspond to the court's conclusion that the arrangement was part of a plan or policy as elements of a crime against humanity, even though it does refer to the acts of illegal deprivation of liberty as “forced disappearances.” In the view of the authors, however, the transcribed text is interesting as an illustration of the different elements that might be taken into account in a possible legal decision concerning such a plan or policy, in the context of a criminal proceeding for crimes against humanity, or that might be subsumed in the latter due to their context.

## v. Peruvian case

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 717:

[I]t is evident from the foregoing that the acts of murder and severe bodily harm on trial transcend the strictly individual or common dimension inasmuch as they are fully consistent with the elements that define crimes against humanity. The murders and severe bodily harm inflicted in Barrios Altos and La Cantuta also constitute crimes against humanity, *fundamentally because they were committed within the framework of a State policy for the selective but systematic elimination of alleged members of subversive groups*. This policy was designed, planned, and controlled at the highest levels of State power and implemented by government agents—military intelligence personnel—using the military apparatus. Moreover, consistent with its objectives, it affected a significant number of defenseless civilians. [*Emphasis added*]

This conclusion is completely compatible with the information set out in Part II of the instant ruling. It has been demonstrated that it was a State decision, ordered and approved by the Chief of State and carried out by military intelligence bodies—the Colina Special Intelligence Detachment and DINTE [Army Directorate of Intelligence]—ultimately directed by the SIN [National Intelligence Service], with every conceivable form of official support, whose ultimate objective was the forced disappearance and/or arbitrary or extrajudicial murder of alleged subversives. In this context, Barrios Altos and La Cantuta were two, though not the only, significant events.

Therefore, based on the store of evidence already examined, there is no other choice but to concur with the decisions of the IACHR [Inter-American Commission on Human Rights] and the Constitutional Court, which also have characterized these acts as crimes against humanity under international criminal law [*footnote omitted*].

## D. Evidence of the existence of a plan or policy

ARGENTINA, *Motion submitted by the defense of Jorge Rafael Videla (List of Judgments 1.a)*, Whereas 13:

Given the lack of documentary proof in the record of secret and illegal orders [...], it was necessary to find another way to conclude that there was a plan. This in turn was a prerequisite for punishing those who planned the crimes as indirect authors of each of the crimes of kidnapping of minors with which they are charged. In effect, “the existence of these secret orders, which validated the commission of crimes by the subordinates, was proved by the methodology employed and the repeated commission of the crimes by the direct authors” [*footnote omitted*].



## E. Forced disappearance as a crime against humanity

Forced disappearance of persons is a crime and a human rights violation that has profoundly and tragically marked the history of our region. In reaction to this brutal practice, the international community in recent decades has reaffirmed its utter repudiation of any act of forced disappearance. This subject has been given particular attention in the decisions and jurisprudence of the inter-American system for the protection of human rights.

The following sections present some of the most important criteria emanating from Latin American jurisprudence on forced disappearance as a crime against humanity. The first section presents excerpts from decisions that examine the nature and characteristics of forced disappearance in general. These judgments clearly reflect the influence of the jurisprudence of the Inter-American Court of Human Rights on Latin American domestic jurisprudence. With this as the basis, the second section identifies a clear and consistent criterion established by the courts of the region: the distinction between an isolated act of forced disappearance (a serious human rights violation in and of itself) and the same act committed as part of a systematic or widespread attack against the civilian population. The latter would, of course, amount to a crime against humanity. The final section discusses one of the most important legal rules concerning forced disappearance, which has been consistently upheld by Latin American courts: its nature as a permanent or continuous crime. This has clear implications, for example, for the principle of legality in criminal law and the principle of nonretroactivity of the law, as well as the non-application of statutory limitations to the crime, as will be examined in subsequent chapters of this digest.

### i. Overview

EL SALVADOR, *Habeas corpus submitted by Reyna Dionila Portillo (List of Judgments 7.b)*, Whereas 3:

[Forced disappearance] is the arbitrary deprivation of freedom, regardless of its form (it is generally carried out without any warrant, whether legal, administrative, etc.) or motivation, perpetrated by agents of the State or by persons or groups of persons acting with State approval. This deprivation of freedom is followed by misinformation or a refusal to provide information, on the part of those identified as responsible or those who should provide such information, that would allow the individual who has been deprived of his freedom to be found. This is done in order to cover up the whereabouts of the affected individual and to keep the perpetrators from being brought before the authorities responsible for punishing the acts for which they are liable.

The United Nations General Assembly has pronounced on the issue under study in its *Declaration on the Protection of All Persons from Enforced Disappearances* [...]. [Forced disappearance is also defined in] the Inter-American Convention on Forced Disappearance of Persons [...].

It can be concluded, therefore, that the forced disappearance of persons is characterized by the arbitrary and irregular nature of the deprivation of freedom; by the clandestine and secret—although not generalized—nature of the operations carried out by the military or paramilitary groups, police forces, and even civilian organi-

zations responsible for illegal deprivation of liberty; by the transfer of the person to unknown destinations, thereby ushering him into a system where he is subjected to cruel and inhuman treatment that usually culminates in death, in circumstances that ensure the impunity of the perpetrators; and, finally, by the refusal of the groups responsible for the detention to provide information that might shed light on the victim's whereabouts, leaving his relatives in a state of complete ignorance about the fate of the person who has been subjected to such restriction.

PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Whereas 2 and 3:

According to doctrine, the acts reported by the appellant constitute the crime known as forced disappearance. According to the Inter-American Convention on Forced Disappearance of Persons, the latter consists of “depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

The practice of forced disappearance violates several basic rights. Besides violating freedom of movement, it blocks recourse to the legal remedies available to protect the rights that have been violated, impairing the right to access a court so that it may rule promptly on the legality of the detention [...]. Moreover, forced disappearance usually involves acts of torture and inhuman and degrading treatment and therefore constitutes a breach of the right to personal integrity. This criminal practice also frequently involves the extrajudicial murder of the detainees, followed by the concealment of their bodies. The former violates the right to life, while the aim of the latter is to ensure impunity for the act.

VENEZUELA, *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b)*, Whereas IV.1:

Forced disappearance of persons is considered, then, to be the arrest, detention, or involuntary transfer of persons, or the deprivation of their freedom in some form, by government agents from any sector or level, organized groups, or private individuals acting on behalf of the government or with its direct or indirect support, or its authorization or acquiescence. This is followed by the refusal to disclose the fate or whereabouts of those persons or to acknowledge that they have been deprived of their freedom, thereby placing them outside the protection of the law. This is a multiple offense inasmuch as it infringes on several fundamental legally protected values, including personal liberty, security of persons, and human dignity, and constitutes a grave threat to the right to life, as set out textually in Article 2 of the Declaration on the Protection of All Persons from Enforced Disappearances issued by the General Assembly of the United Nations, which states that acts of enforced disappearance

place persons outside the protection of the law and inflict severe suffering on them and on their families.

PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, *Whereas 23–24*:

Forced disappearance of persons is a multiple offense inasmuch as it affects physical liberty, due process, the right to personal integrity, recognition of legal personality, and, as already pointed out, the right to effective judicial protection. These rights are absolute, and their protection therefore is regulated by international human rights law and international humanitarian law.

In effect, the forced disappearance of persons is meant to produce a cruel sense of uncertainty for the disappeared person and for his/her relatives, who become direct victims of this grave act. International law, therefore, recognizes forced disappearance as one of the most egregious forms of human rights violations.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, *Whereas 7*:

The [Inter-American] Court [for Human Rights], in the aforementioned cases, characterized forced disappearance as a crime against humanity, as an affront to the conscience of the hemisphere, and as a practice that “is cruel and inhuman, mocks the rule of law, and undermines those norms that guarantee protection against arbitrary detention and the right to personal security and safety.” Moreover, the Court has pointed out that the practice of disappearances “constitutes a radical breach of the [American Convention on Human Rights] in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention.” Similarly, the Inter-American Convention on Forced Disappearance of Persons would later state in its preamble that it is “an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States.”

[F]orced disappearance is characterized by, *inter alia*, creation of a state of overwhelming uncertainty over whether the victim is alive or dead. This situation arises from the fact that the perpetrators of the disappearance not only cut off all communication between the disappeared person and his/her social milieu, but also eliminate any trace or information that would point to the survival or death of the person in question [...].

See also COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.A:

[F]orced disappearance, also referred to as enforced or involuntary [disappearance] in other international instruments and documents, constitutes a serious offense against the intrinsic dignity of the human person and violates the principles and purposes of the Charter of the Organization of American States.

## ii. Forced disappearance as a crime against humanity

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)* Section VI, Whereas:

[I]n a March 2, 1993, resolution of the Economic and Social Council concerning the protection of freedom, security, and recognition of the legal personality of human rights, the United Nations stated, “No State shall practice, permit or tolerate enforced disappearances,” and it condemned such crimes against humanity as breaches of International Law and a negation of the objectives of the 1948 Charter.

COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.A:

[I]t is important to understand that *the systematic practice of forced disappearance of persons constitutes a crime against humanity*, because of the means and methods used to perpetrate it, which are usually shrouded in complex power mechanisms. From the foregoing, it is also possible to infer its patent incompatibility with the constitutional and democratic rule of law, which promotes the consolidation of freedom, dignified treatment, and the full development of persons. [*Emphasis added*]

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 13:

Similarly, it has been said that “the forced disappearance of human beings is a multiple and continuing violation of many rights under the [American] Convention [on Human Rights] that the States Parties are obligated to respect and guarantee,” this notwithstanding the positive law of the State involved, since “*international practice and doctrine have often categorized disappearances as a crime against humanity*, even though, at the time of the events, there was no treaty in force that was applicable to the States Parties to the Convention and that used this terminology” [*footnote omitted; emphasis added*].

PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, Whereas 25–27:

Now then, *when this act is committed as part of a general strategy or constitutes just one example in a series of similar unlawful acts, we are then faced with a pattern of violations that amounts to a crime against humanity [...]. [Emphasis added]*

The crime of forced disappearance has always been considered a crime against humanity. This has been corroborated by Article 7 of the Statute of the International Criminal Court, which defines it as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

It is unquestionably a crime against humanity and, in light of its extreme gravity, the social imperative of clarifying and investigating it cannot be compared to that of a mere common crime. In this sense, General Assembly Resolution No. 666 (XIII-083) of the Organization of American States stated, in Article 4, that “the practice of the forced disappearance of persons is an affront to the conscience of the Hemisphere and constitutes a crime against humanity.” The Inter-American Convention on Forced Disappearance of Persons reaffirmed, in its preamble, that *the systematic practice of forced disappearances constitutes a crime against humanity*. The social imperative of their clarification and investigation cannot be equated with that of a mere common crime.

See also PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 29 and 30 (identical).

### ***a. Chilean case***

CHILE, *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.) (List of Judgments 3.b)*, Whereas 1, 2, and 3:

[The] act of removing [the bodies] was the final link in a chain that began, in this particular case, with the detention of a group of people in La Moneda palace. The part of the group made up of members of the Presidential Security Guard and Aides was taken to the Tacna Regiment. Later, their hands and feet bound, they were loaded onto a military truck, covered with a tarp, and taken to a site assigned to that unit in Peldehue. They were then presumably shot by members of the escort made up of officers from the permanent cadre. Finally, they were buried in a dry well, into which they either were tossed or fell as they were executed.

The removal undertaken more than five years after those abductions and presumed executions was the final phase of an effort to cover up the aforementioned events [...].

[It] can be deduced unequivocally from these circumstances that the substantive aspect of the behavior described in the charges herein refers to a link in the chain that

formed part of a widespread and systematic attack against members of the civilian population. It was carried out pursuant to an action implemented and executed under the direct control of the military authority in power in the country and was also part of a policy designed to instill fear through the detention or abduction of the victims by State agents, followed by the absolute refusal to give information regarding their fate.

[I]n consequence, the crime, which began with the abduction of people who remain disappeared to this day and came full circle with the behavior described in the instant case, is complex in nature. This means that *the accusation describes a crime of a special nature, which involves a higher degree of immorality in its commission and is thus distinguished from a common crime. Moreover, since it is also related to a widespread and systematic attack against part of the civilian population, it should be criminally prosecuted as a crime against humanity.* [*Emphasis added*]

### iii. Forced disappearance is a permanent crime

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 36:

[T]his Court [...] deems it necessary to point out that, while the notion of a permanent crime comes from the doctrine, inasmuch as it is not explicitly set out in any precept of our positive law, it is also true that in the classification of offenses only certain exceptional cases [...] are described specifically in the law. The vast majority of crimes are based instead on the various rules derived from the Criminal Code itself, such as a legally protected value or the structure of the criminal definitions set out in the special part. Hence, the distinction between instantaneous and permanent offenses lies in the fact that the legally protected value in the latter case can be harmed over a prolonged period and the actions described in the criminal definition are specifically intended to produce that progressive breakdown. If the crime is consummated in a single instant—that is, if the process of commission, which culminates in the completion of all of the defining components of the crime, is over within a single, defined moment—then we would be dealing with an instantaneous crime. [...] Conversely, in permanent crimes the moment of consummation is prolonged over time. In such cases, there is still a particular moment in which the criminal behavior is completed, but the latter gives rise to a status or situation that may become prolonged over time, which renders the behavior continuous. Such is the case with kidnapping: the agent confines his victim, thereby completing the criminal act, but that is only the beginning of a continuous confinement, which may last for a longer or shorter period at the will of the perpetrator.

VENEZUELA, *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b)*, Whereas IV.1:

Now then, although the aforementioned Article 181(a) establishes that the crime of forced disappearance of persons is a continuing crime,<sup>40</sup> Article 17 of the Declaration on the Protection of All Persons from Enforced Disappearances stipulates that **any act constituting enforced disappearance shall be considered a permanent or continuous offense** as long as the perpetrators continue to conceal the fate and the whereabouts of the persons who have disappeared and these facts have not been clarified. In view of this normative distinction, it is incumbent upon this Court to specify the nature of the offense, that is, whether it really is continuing or, on the other hand, permanent, inasmuch as both the Declaration on the Protection of All Persons from Enforced Disappearances issued by the United Nations General Assembly and the Inter-American Convention on Forced Disappearance of Persons form part of the bloc of constitutionality [...].

Thus, according to criminal doctrine, permanent or continuous crimes “are those in which the perpetrator’s actions are prolonged over time, so that the consummative process persists until such time as it is ended either by the decision of the agent, or as a result of actions taken by the victim, or due to circumstances beyond the control of the protagonists of the action” [footnote omitted].

Permanent or continuous crimes “entail the prolongation of an antijudicial situation for a specific period of time at the will of the perpetrator (...); this prolongation perpetuates the crime, which continues to be consummated until the perpetrator desists from the antijudicial situation” [footnote omitted].

Permanent or continuous crimes include kidnapping, abduction, and forced disappearance of persons, inter alia, inasmuch as in all of these cases the consummative process is prolonged over the time period in which the victim remains deprived of his freedom. [There is a separate category of offenses also known as continuing crimes.]<sup>41</sup> [A]s the Criminal Cassation Chamber has pointed out, the latter occur when the agent, with a single purpose and violating a single right, perpetrates different actions at different times, each of which, while involving a criminal act, represents only the partial perpetration of a single crime. An example of the latter would

40 Footnote added to the original: For the purpose of this study, the term “continuing” must be understood as referring to a third category of crimes, differentiated from a permanent or continuous offense and, of course, from an instantaneous offense. According to the prevailing legal doctrine in many countries in Latin America, a continuing crime (*crimen continuado*) is constituted by individual conducts or single acts that are understood as a single legal entity, since all of them are perpetrated with the same single purpose and violate the same right. In this regard, it should be noted that such use of the terms, that is, “continuing” as a separate category differentiated from “permanent” and “continuous,” is not clearly reflected in the English versions of some relevant international instruments, including the Declaration on the Protection of All Persons from Enforced Disappearances, even though the Spanish versions of the same instruments clearly refer to forced disappearance as a “*delito permanente o continuo*.” This distinction is fundamental to the Latin American jurisprudence, since the application of many rules in criminal law (including statutes of limitations) will depend on how the crime is categorized, that is, whether the court deems the crime to be instantaneous, permanent or continuous (*permanente o continuo*), or continuing (*continuado*).

41 See *supra* note 40.

be fraud committed by a person against several people on different occasions, but by means of a single perpetrating act or “*modus operandi*.”

See also MEXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) (List of Judgments 10.b)*, Whereas Eight:

Still taking into account the form of consummation, a distinction is made between instantaneous crimes, which are consummated in a single instant, such as the actual death in a homicide, and permanent crimes, which the Criminal Code refers to as continuous crimes and describes as those “in which the constituting act or omission persists uninterrupted for a certain amount of time.”

A permanent (or continuous) crime [*delito permanente (o continuo)*] must not be confused with a continuing crime [*delito continuado*], [a different type of crime] in which a series of actions constitutes a single act of commission.<sup>42</sup>

It is understood that deprivation of freedom means eliminating ambulatory freedom or restricting the subject’s freedom of movement, removing the victim from his location at the moment the criminal act is perpetrated—whether a setting where he could usually be found or a place where he was only present temporarily—or preventing him from leaving the place where he was found, in order to perpetrate any of the acts set out in the subparagraphs contained in this legal provision.

Now, the crime under study has a substantive and permanent result, as it is consummated in the moment the victim is illegally detained for the purpose of perpetrating any of the acts, or through any of the conducts, set out in the three subparagraphs of the article in question.

It is also extremely relevant to underscore that *it lasts for as long as the situation persists, in other words, the act of consummation begins the moment a physical impediment is imposed on the victim’s freedom of movement and he is detained or confined in a certain location, and it continues throughout the period of deprivation of freedom. [Emphasis added]*

The latter hypothesis is extremely germane to this matter in that, while it is true that the crime is consummated by depriving the victim of his freedom, it is also true that the crime is permanent or continuous in nature since it is prolonged over time until that deprivation has ceased.

According to doctrine, permanent or continuous crimes are those in which consummation is prolonged over time, and, more specifically, they are crimes in which the agent of the act itself creates an antijudicial state that is prolonged over time through the agent’s subsequent actions.

This gives rise to the two necessary prerequisites to constitute a permanent or continuous crime:

- (a) Consummation is prolonged over time, and
- (b) Consummation is contingent upon the will of the perpetrator of the act.

42 See *supra* note 40.



The foregoing cannot be understood without a grasp of the nature of the legally protected value affected by the criminal behavior, since some such values would be inconsistent with the phenomenon of continuous consummation.

Hence, a legally protected value such as “freedom” never expires and, by its very nature, continues to exist throughout the prolonged period of consummation of the crime; crimes such as illegal deprivation of freedom, therefore, are inherently permanent or continuous crimes.

A permanent or continuous crime, then, occurs when, given the characteristics of the legally protected value that has been impaired, its consummation may be prolonged over time.

From the foregoing analysis, it can be concluded that a permanent or continuous crime occurs when the legal rule has been breached for a prolonged period of time without any solution or autonomous formula that would put an end to its continuity within a certain period of time, since it is contingent upon the uninterrupted behavior of the agent. During this period, the legally protected value is impaired, although not actually destroyed, through the restriction placed on its full enjoyment in the legal framework, as a result of the perpetrator’s illicit actions.

## **F. Torture and other cruel, inhumane, and degrading treatments**

Just as with the forced disappearance of persons, the history of Latin America has been marred by torture and other cruel, inhuman, and degrading treatment. Nonetheless, none of the decisions reviewed for this study approached the issue of torture as a crime against humanity with the same level of detail that they applied to the issue of forced disappearance. This is not to say, however, that Latin American jurisprudence does not provide relevant legal criteria on the matter.

Some of the decisions transcribed below trace the process of interpreting and integrating into domestic law the various international definitions of torture and cruel, inhuman, and degrading treatment. The same decisions have emphasized the challenges this has entailed, given the number of international definitions and the substantive differences between them. The second section presents a series of decisions centered on the factual determination of acts of torture and cruel, inhuman, and degrading treatment in situations of detention-disappearance, which, unfortunately, have been a recurrent practice in the history of our region.

### **i. Overview**

COLOMBIA, *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b)*, Whereas 3.3.2 and 4.2:

The Court has recalled that the aim of preventing and punishing torture is an ethical and legal imperative for States and societies inasmuch as this practice contradicts the essential condition of dignity of the human being, his very nature, and the funda-

mental rights held to be inherent to him, for which reason it is expressly proscribed under international law [*footnote omitted*].

This is clearly inferred from, inter alia, (i) Article 5 of the Universal Declaration of Human Rights [*footnote omitted*], (ii) Article 7 of the International Covenant on Civil and Political Rights [*footnote omitted*], (iii) Article 5(2) of the American Convention on Human Rights [*footnote omitted*], (iv) Article I of the American Declaration of the Rights and Duties of Man [*footnote omitted*], and (v) Common Article 3 of the Geneva Conventions, on the protection against torture of people protected by international law in case of armed conflict [*footnote omitted*].

Torture has [also] been the subject of several [specific or specialized] international instruments intended to prevent and punish it, in particular (i) the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [*footnote omitted*]; (ii) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [*footnote omitted*]; (iii) the Inter-American Convention to Prevent and Punish Torture [*footnote omitted*]; [and] (iv) the Statute of the International Criminal Court [*footnote omitted*].

It should be noted that the aforementioned international instruments have not adopted a single consistent definition of the crime of torture.

[I]n this regard, in addition to the fact that [the Inter-American] Convention [to Prevent and Punish Torture] offers the broadest protection [by not requiring, for example, that the physical or mental suffering be “severe”], the other international instruments mentioned clearly stipulate the applicability of the Inter-American Convention [in specific clauses stating that the content of those instruments “is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”].

In effect, not only does the aforementioned international instrument [...] omit the expression “severe” for the purposes of defining what is understood to be torture, it also provides explicitly that torture shall be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities even if these methods do not cause physical pain or mental anguish. In other words, according to the Inter-American Convention, any act which, in the terms and for the purposes set out therein, endangers personal autonomy, shall constitute the crime of torture, even if it does not cause suffering or pain.

*PERU, Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j), Whereas 694:*

Cruel treatment, as it has been previously described, encompasses not only an attack on the physical integrity of the person but also the impairment of his mental or moral integrity, which is understood as freedom to exercise self-determination and to act based on the decisions made, which disallows any act that involves a sense of debasement or humiliation, ill-treatment, or indignity. In our criminal law, cruel treatment is a specific aggravating circumstance and must be taken into account as such in any

act involving the illegal deprivation of a person's liberty or of his potential individual freedom of movement.

International human rights law prohibits torture and other cruel, inhuman, and degrading treatment or punishments [*footnote omitted*]. Leaving aside torture, which is considered an aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment (United Nations Convention against Torture of 1975), and given that these are not finite behaviors separated by a clearly drawn dividing line, [*footnote omitted*], it is clear that *cruel treatment, when it is inflicted by a public official or another person in the discharge of public duties, or at the incitement or with the consent or acquiescence of such a person, i.e., a perpetrator with special characteristics, can be defined as any act that deliberately causes pain and suffering but that is not of a sufficient intensity to be characterized as torture or injury.* [*Emphasis added*]

## ii. Torture and other cruel, inhumane, and degrading treatments during detention

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)* Section VII, Whereas:

In his testimony, witness Luis Alvaro Puente [states,] [...] “[...] [I] was detained and taken to a Toyota pick-up truck parked at the entrance to the school. I was not allowed to speak. They took me by way of El Prado; we passed the University and then turned toward the Miraflores Army headquarters. I was taken out of the pick-up truck and I saw other people being taken out too. They put us in a sort of entrance hall, our faces to the wall, our hands on our necks, our feet spread. [...] I estimate that it was a little after five o'clock in the afternoon. I was called and taken to a large room. Col. Luis Arce Gómez was there. I was insulted in very vulgar terms, greeting with yelling. The insults were directed against me personally and against the Church, the priests, and the work we were doing: whether it was the destruction of the Fatherland, whether it was communism. I was threatened with death. I was told they were going to kill me. Col. Arce Gómez exploded in anger: ‘Call my men. They’re going to kill you. They know how it’s done.’ And several individuals in civilian dress came up. The first one had long sideburns and was fat, powerfully built, and carried a rifle. They arrived, and right then and there, Col. Arce Gómez ordered them to beat me at the far end of the room where there were electrical instruments that seemed to be the kind used for torture. That was when the torture began, without any caution whatsoever: blows, kicks. We kept falling to the floor. There were blows to the ribs, the stomach, and the genital area that we found unbearable. There was no interrogation, just blows. At one point, Col. Arce called out from the other end of the room: ‘Bring them.’ And he personally interrogated us. That is how it happened. I estimate that the beating lasted for about one to two hours. Then Col. Arce gave the order, saying: ‘Kill this one for me and dump him at the door of San Calixto.’ A weapon was placed against my forehead. I could feel it there, and the silence. The weapon was loaded and I remained like that, I guess for a second, I don’t know. And after a

certain period of time, the person who was escorting me said, ‘It would be better to wait until three in the morning.’”

ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*, Whereas:

CONADEP’s [National Commission on the Disappearance of Persons] general description of the clandestine detention centers places particular emphasis on their nature: they were kept secret from the public, but not from military commanders. The report specifically pointed out the practices of members of the operational groups serving in those centers related to the depersonalization of detainees entering the system. In this regard, it stated, “*The structural characteristics of the buildings, and daily life inside them, clearly were designed not so much with the mere physical restraint of the victims in mind, but rather to strip the latter meticulously and deliberately of the qualities inherent to every human being. Because to enter one of those centers meant, in every case, TO CEASE TO EXIST. The aim, therefore, was to deconstruct the identity of the captives, alter their temporal references, and torment their bodies and their spirits beyond all imagining.*”

The torture merits a separate analysis and its objective was twofold. The detainees were subjected to torture from the moment they arrived at the detention centers, primarily to extract information from them concerning the people with whom they shared political activities, residences, contacts, appointments, etc. In other words, its objective was to gather intelligence. The system of repression was able to remain current and expand through the information gleaned from each of the detainees. The second purpose of torture was to subdue the detainees, to strip them of their will and break their spirits in order to facilitate their management until such time as a decision was made to release or “transfer” them.

When we speak of torture, we must first recall that the deprivation of freedom of movement meant, for those who experienced it, the total loss of spatial and temporal reference points, in conditions of extreme physical and psychological abuse. The victims lost all of their rights. Compounding this, they were assigned an alphanumeric code instead of their name, which was never used, as a way of suppressing their identity and individuality, their past, and their sense of belonging to a basic family and social unit. This form of identification was always used, whether in taking them to the bathroom or to be tortured or “transferred.”

Life itself inside the center was fraught with suffering, since after their arrival and the initial interrogation under physical torture, the detainees were taken to the “tubes” (tiny cells), where they were forced to wait hooded, bound, and gagged [*tabicados*] for the next torment or to anticipate their uncertain fate. The kidnapped individuals spent their days in subhuman conditions, deprived of the basic necessities for their subsistence, such as personal hygiene and appropriate and sufficient food.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (List of Judgments 13.j), Whereas 694:

In this case, it should be recalled that those who deprived the aggrieved parties of their liberty and maintained them in that state were public agents acting under superior orders—patently illegal, of course. The victims were taken to illegal detention centers; these were not legally authorized centers, but rather belonged to a government institution, specifically to the State secret services, the SIE [Army Intelligence Service]. Of course, no regular, lawful procedure was followed—in particular, [there was no] notification of the charges or any official, public information concerning the victims' whereabouts and legal status—and these measures were taken in a context of an alteration of the constitutional order, or the exercise of power by an authoritarian government [*footnote omitted*]. A more detailed description of what happened to each of the victims has already been provided, and this, given its rationality and internal coherence, leaves no room for reservations or doubt.

The public agents involved acted with manifest illegality and arrogance. They used their authority against what they, by virtue of their positions, were supposed to respect. The brazen kidnapping of Gorriti Ellenbogen is particularly telling, inasmuch as it occurred in the context of an authoritarian regime from which the victims could expect no treatment that was predictable or formally consistent with preexisting laws, even more so if they were taken to, and held in, an irregular institution belonging to the State secret services, which in and of itself would be deeply intimidating and would cause them to fear what might become of them. It is obvious, as the IACHR has observed, that the victims' fright, their fear about what was going to happen to them, was exacerbated not only by the illegality of the deprivation of liberty or kidnapping—which only deepened the innate sense of vulnerability—but also by the circumstances, such as the place of detention, the individuals who were guarding them, and the characteristics of the political regime that was sponsoring such acts.

The cruel behavior of those who ordered and carried out the kidnapping and of the guards and officials who perpetuated it—the aggravated and aggressive behavior that was well known to the perpetrators and experienced by the victims, the intensity and severity of the harm, and the multiplicity of participants in the commission of the acts—was manifest (i) in the way the public agents carried out the detention—its brazenness in the first case and the absence of reasonable, well-founded explanations in both cases; (ii) in the circumstances of the victims' transfer to the SIE, that is, removal of identifying marks from the weapons, concealment of the identity of the apprehenders, efforts to keep other military personnel from recognizing the detainee; and (iii) in the descriptions used, the initial isolation, and the assurances of the severe consequences of the acts attributed to the victims and the refusal to define their legal status, even though, as was made clear, it was an operation carried out by public agents, ultimately with an abusive or arbitrary element that underscored for the victims their lack of legal protection and security and personal tranquility.

From a subjective standpoint, all of the factual elements listed demonstrate that the agents who physically perpetrated the kidnapping, and those who ordered it, ac-

ted without even the most elemental sense of humanity or respect for the human person. They deliberately set out to intensify the suffering of the kidnapped individual unnecessarily—the means, the context, and the objectives were designed to intensify the suffering of the victim beyond what is typical of a common kidnapping. They did so by keeping the victim in suspense as to what was going to happen to him and removing him from his daily activities, which had been taken into account in order to perpetrate the kidnapping, in order to separate him temporarily from his social role for the political benefit of the regime in power.

#### 4. WAR CRIMES

The need to set limits on the use of force in the framework of armed conflicts so as to minimize the human suffering they cause has been evident throughout history. As international law evolved, this common understanding was eventually articulated in a set of norms meant to protect the basic values and interests of the international community in times of war. Today this is known as *international humanitarian law* or the *law of armed conflicts*.

Within this branch of international law, war crimes have emerged as a legal category intended to establish the individual responsibility of people who commit serious violations of the conventional or customary norms that establish limits in times of war and who impair a fundamental value, causing grave harm to the victim of the crime.<sup>43</sup>

There can be no doubt that armed conflict represents one of the most chaotic contexts for human action, and hence its regulation represents a genuine challenge to the law. However, therein lies the importance of ensuring that war crimes are suppressed by judicial means. From the standpoint of the International Committee of the Red Cross (ICRC), “There is a significant mismatch between the knowledge combatants have of humanitarian norms and their limited inclination to respect them in the event of hostilities.... The gulf observed between the acknowledgment and application of humanitarian norms derives from a series of mechanisms leading to the moral disengagement of the combatant and to the perpetration of violations of [international humanitarian law].”<sup>44</sup> Citing this passage, Alejandro Valencia echoes the ICRC’s categorical conclusion: “[...] Given the gulf between what is preached and what is practiced

43 See ICTY, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-1-T, Appeals Chamber, October 2, 1995, para. 94. There are four criteria for determining the application of Article 3 of the Statute of the ICTY, which have been understood by the doctrine as the basis for individual responsibility for war crimes in general: “(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, [...] [belong] to treaty law; (iii) the violation must be “serious,” that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.” The tribunal itself has upheld these criteria in numerous decisions, including ICTY, *Prosecutor v. Dragoljub Kunarac, et al.*, *supra* note 36, para. 66; ICTY, *Prosecutor v. Fatmir Limaj, et al.*, *supra* note 36, para. 175; ICTY, *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-A, Trial Chamber, Judgment, November 16, 2005, para. 30; ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Trial Chamber, Judgment, January 31, 2005, para. 218, among other judgments.

44 Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations* (Geneva: ICRC, 2004), at 8–10.

in humanitarian law [...] sanctions for violations are one of the most effective means to obtain greater respect for humanitarian law.”<sup>45</sup>

## A. Elements of war crimes

### i. Existence of an armed conflict

Just as the term indicates, war crimes can only be committed in the context of an armed conflict, whether of an international or a non-international character. War crimes differ in this regard from genocide and crimes against humanity, which can be perpetrated in times of peace as well as war. Clearly, then, the existence of an armed conflict is the first defining element of war crimes.

Despite its obvious importance, the concept of “armed conflict” has never been defined in any international instrument. Therefore, its interpretation by domestic and international courts is all the more relevant. From the outset, Latin American jurisprudence, and particularly that of Colombia, has used the same legal definition proposed many years ago by the International Criminal Tribunal for the former Yugoslavia. Even more importantly, Latin American jurisprudence has further developed the concept of an armed conflict of non-international character. In particular, these decisions have identified the core characteristics of such armed conflicts, i.e., the level of intensity of the violence and the degree of organization of the parties. Likewise, the same decisions have developed in more detail the different subcategories, within this kind of armed conflict, that may be inferred from international treaties (armed conflicts of the type of Common Article 3, and of the type of Additional Protocol II of the Geneva Conventions of 1949).

*COLOMBIA, Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i), Whereas D, 1.1:*

The prerequisite for the application of international humanitarian law [IHL] is the existence of an armed conflict. It is therefore necessary to determine the conditions that give rise to the application of international humanitarian law in order to establish the sphere of applicability of the criminal definitions relating to [...] violations of IHL [...].

Due to the volatile nature of today’s armed conflicts, international jurisprudence has come to define them as “a resort to armed force between States, or protracted armed violence between governmental authorities and organized armed groups, or between such groups.”

45 Alejandro Valencia, *Derecho internacional humanitario: Conceptos básicos: Infracciones en el conflicto armado colombiano* (Bogotá: OACNUDH, 2007), at 241. [Unofficial translation]

***a. Armed conflict of a non-international character***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 1.1:

In the case of internal armed conflicts, the adjective “protracted” is intended to exclude from the definition cases of mere civil disturbances, sporadic upheavals, or isolated acts of terrorism. This definition is reflected in the provisions of Article I of Additional Protocol II concerning its “material field of application.”

The Rome Statute of the International Criminal Court provides a similar test to determine the existence of an armed conflict, which is not international in nature, so as to establish whether war crimes have occurred. According to Article 8(2)(f) of that treaty, “Paragraph 2(e) (which defines as war crimes, serious violations of the laws and customs applicable in armed conflicts not of an international character) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

The Inter-American Commission on Human Rights has explained that for the purposes of applying International Humanitarian Law, and specifically the protections set out in Common Article 3, the situation must have transcended the magnitude of a mere internal disturbance or tension, in order to constitute an armed conflict of a non-international character:

“In contrast to these situations of domestic violence, the concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other. In this regard, Common Article 3 simply refers to, but does not actually define ‘an armed conflict of a non-international character.’ However, Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. Thus, Common Article 3 does not apply to riots, mere acts of banditry or an unorganized and short-lived rebellion. Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory. The Commission notes that the ICRC’s [International Committee of the Red Cross] authoritative Commentary on the 1949 Geneva Conventions indicates that, despite the ambiguity in its threshold of appli-



cation, Common Article 3 should be applied as widely as possible. The most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the ‘lowest’ level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.”

As a result, the existence of an armed conflict must be determined not in the abstract, but rather in light of the characteristics of each particular case. International jurisprudence has examined two main factors in establishing whether, in specific cases, a conflict has reached the threshold of severity necessary to be classified as an armed conflict: (i) the intensity of the conflict, and (ii) the organization of the parties. In evaluating the intensity of a particular conflict, international courts have taken into account, for example, factors such as the severity of the attacks and whether there has been an increase in armed clashes, the extent of the hostilities across territory and over time, increases in the size and mobilization of government armed forces, and the mobility and distribution of weapons in the hands of the parties to the conflict. In terms of the organization of the groups in conflict, international courts have looked at factors such as the presence of military detachments, designated zones of operation, and the capacity to procure, transport, and distribute weapons.

It is clear, finally, that for purposes of the applicability of International Humanitarian Law, the existence of an armed conflict is determined by law based on objective factors, regardless of the characterization or category assigned to it by the States, governments, or armed groups involved. It should also be underscored that the existence of an armed conflict “shall not affect the legal status” of the armed groups (Common Article 3).

PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 464:

Contexts involving the use of violence by the armed forces of a State and by organized armed groups within the territory of that State are legally regulated in the framework of International Humanitarian Law, and such a context is defined as an armed conflict not of an international character.

For a discussion of the difference between an armed conflict not of an international character pursuant to Common Article 3 of the Geneva Conventions and an internal armed conflict under Protocol II additional to those Conventions, see PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 470:

Based on the conclusions of the [Truth and Reconciliation Commission], Protocol II Additional to the Geneva Conventions would not be applicable to the type of armed conflict that occurred in the country, since not all of the applicable normative hypo-

theses are present. These include the existence of a responsible command in Shining Path capable of enforcing compliance with International Humanitarian Law. To the contrary, the members of its high command adopted a strategy of not abiding by IHL and of systematically violating Common Article 3. There is a possibility of applying certain provisions of the protocol that have achieved the status of customary law or that reflect universal principles, which must be applied to any situation of armed conflict regardless of the way in which it is legally defined.

See also COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 3.1.3:

[An] important aspect of the Rome Statute relating to armed conflicts that are not of an international character is that it does not include the requirements of territorial control and responsible command set out in Protocol II, and this broadens the scope of internal conflicts that may give rise to [war] crimes.

As complement to the previous decisions, see EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascochea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

[A] *non-international armed conflict* is distinguished from an international armed conflict by the legal status of the parties to the conflict: the parties in conflict are not sovereign States, but rather the government of a single State that is combating one or more armed groups within its territory. The expression “*armed conflict*” establishes a substantive criterion: the existence of open hostilities between armed forces *having a certain degree of organization*, meaning that internal disturbances and tensions featuring isolated or sporadic acts of violence do not constitute armed conflicts from the legal standpoint, even when the government has had to resort to the police forces or even a military detachment to restore order. A non-international armed conflict is a situation involving evident hostilities between armed forces or organized armed groups within the territory of a State.

The foregoing is important because in the classical approach, States were the only sovereign entities considered subject to the laws of war; in other words, the laws governing armed conflicts *were not applicable to internal armed conflicts*.

Indeed, in a non-international armed conflict, the legal status of the parties in conflict is fundamentally unequal: some are fighting against government institutions acting pursuant to the established public authority. For this reason, the efficacy of Common Article 3 of the Geneva Conventions must be understood in light of the following normative hypotheses: first, when government armed forces are battling dissident armed forces, in other words, when one segment of the government army rebels; and second, when government forces are battling organized armed groups. The latter, which is the more common scenario, is not a matter of isolated, uncoordinated individuals or mere crime. Rather, there must be a responsible command that imposes a certain degree of organization in the group. There must be sufficient or-

ganization, on the one hand, to conceive and carry out sustained, concerted military operations and, on the other, to impose discipline on behalf of a *de facto* authority.

## ii. Nexus between conduct and armed conflict

As a second element of war crimes, a nexus, a sufficient relation, must be established between the conduct and the armed conflict. Latin American jurisprudence, again mainly Colombia's, has reiterated and further developed the standards and criteria articulated by the international criminal tribunals, which have pointed out that "[t]he nexus requirement serves to distinguish war crimes from purely domestic crimes and also prevents purely random or isolated criminal occurrences from being characterized as war crimes."<sup>46</sup>

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 1.2:

[International humanitarian law] is automatically applicable when the temporal, spatial, and material conditions have been met: this means that the "temporal and geographical scope of both internal and international armed conflicts extend beyond the exact time and place of hostilities"; that "a violation of the laws and customs of war [could], therefore, occur at a time and place where actual combat is not taking place as such"; (...) that "the requirement that *the acts of the accused must be closely related to the armed conflict* is not ruled out when the crimes are temporally and geographically remote from the conflict per se"; and that "the laws of war [may] frequently encompass acts which, while they may not have been committed in the theater of the conflict, *are substantially related to it.*"

Substantively speaking, for a particular act or situation that has occurred in an area where there has been no armed combat to be covered within the scope of International Humanitarian Law, that act or situation must have a close or sufficient nexus to the conflict. Hence, not all illegal acts that take place during an armed conflict are subject to international humanitarian law: "Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law. (...) It is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue." International jurisprudence has established several criteria to determine the existence of a close nexus between a particular act or situation and the international or internal armed conflict during which it occurred; it points out that the close relationship exists "insofar as the crime is shaped by or dependent on the environment—the armed conflict—in which it was committed." In determining whether this connection is present, international courts have taken into account factors such as whether the perpetrator is a combatant, whether the victim is a noncombatant, whether the victim is a member of the opposing party, whether the act may be said to serve the ultimate goal of a military campaign, or whether the crime is committed

46 ICTY, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Trial Chamber, Judgment, September 27, 2007, para. 423.

as part of or in the context of the perpetrator's official duties. The jurisprudence also specifies, *in cases where war crimes have been committed, that it is sufficient to establish that "the perpetrator acted in furtherance of or under the guise of the armed conflict" and that "the conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at minimum, have played a substantial role in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed."* [Emphasis added]

### ***a. Geographic nexus***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 1.2:

In geographic terms, International Humanitarian Law is applicable in the areas where armed combat or hostilities are actually taking place, as well as throughout the territory controlled by the State and the armed groups in conflict and other places where, while an armed confrontation may not have actually occurred there, events have taken place that are closely related to the armed conflict. It has been explained in this way by the International Criminal Tribunal for the former Yugoslavia, which pointed out that "there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war." International jurisprudence has accepted that for International Humanitarian Law to be applicable, "it is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part"; that "it is not necessary that a particular municipality be fraught with armed confrontation for International Humanitarian Law standards to be applied there" [...] [;] and also, that in the specific case of internal armed conflicts, International Humanitarian Law applies from the initiation of such armed conflicts until a peaceful settlement is achieved in the "whole territory under the control of a party, whether or not actual combat takes place there." Hence, in order for International Humanitarian Law to be applicable to events or situations that occur in areas where actual combat is not taking place, "it would be enough (...) that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."

### **iii. Perpetrator of the crime: State and non-State actors**

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 3.1.3:

[I]t should be noted that the definitions used [in the Rome Statute, with respect to war crimes] cover non-State armed organizations in accordance with the evolution of international humanitarian law. In other words, members of irregular armed groups, like members of the regular public force, may be perpetrators of such crimes.

PERU, *Case against the Leaders of the Shining Path* (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f), Whereas 465:

The Constitutional Court [...] has held that the norms of International Humanitarian Law are applicable to an internal conflict between State forces and private armed groups. The preemptory norms derived from this body of law are not binding solely on States, but also give rise to direct individual liability. In this regard, it must be born in mind that International Humanitarian Law norms absolutely prohibit attacks against the life of civilians and unarmed persons at all times and in all places.

[In particular, Common Article 3 of the Geneva Conventions] is binding not only on State signatories to the Convention but also on all persons residing in their territory and, in particular, on non-State groups taking part in the hostilities.

#### **iv. Victims: War crimes against persons protected under international humanitarian law**

Although the concept of “war crimes” is currently accepted, in a generic sense, in reference to violations of rules of international humanitarian law that may give rise to individual criminal responsibility, at least two subcategories are particularly relevant as far as the victims of these crimes: grave breaches of the Geneva Conventions of 1949 and Common Article 3 to those Conventions, and violations of the laws and customs—or the laws and uses—of war.

According to international jurisprudence, while the latter subcategory encompasses a broader array of offenses committed in violation of the norms establishing prohibitions on the means and methods of war, the former refers to acts perpetrated against persons specifically protected under international humanitarian law. A special character has been assigned to victims of crime in this subcategory, who are known generically as “protected persons.”

In the following paragraphs, Colombian jurisprudence offers a painstaking examination of the latter concept. Without undervaluing the importance of its analysis, it should be noted that the international jurisprudence to date draws a clear distinction between a “civilian person” and a “protected person.” According to the international tribunals, while all civilians qualify as protected persons, not all protected persons can be characterized as civilians in the framework of either an international or a non-international armed conflict.<sup>47</sup>

COLOMBIA, *Remedy of unconstitutionality* (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b), Whereas 3.3.2:

Persons protected under international humanitarian law are defined, pursuant to Article 135 of Law 599 of 2000, as: (i) members of the civilian population; (ii) persons not participating in the hostilities and civilians in the power of the enemy; (iii) the wounded, sick, or shipwrecked, who have been placed *hors de combat*; (iv) health and religious personnel; (v) journalists on mission or accredited war correspondents; (vi) combatants who have laid down their arms through capture or surrender or for

<sup>47</sup> See, for instance, ICTY, *Prosecutor v. Milan Martić*, *supra* note 35, and ICTY, *Prosecutor v. Mile Mrkšić and Veselin Šljivčanin*, *supra* note 35.

another analogous reason; (vii) those who prior to the hostilities were considered stateless persons or refugees; (viii) any other person who enjoys [protected] status by virtue of Geneva Conventions I, II, III, and IV of 1949 and Additional Protocols I and II of 1977 and others that may be ratified in the future.

### *a. Civilian person*

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 3.3:

A civilian [...] is someone who satisfies the two conditions of not being a member of the Armed Forces or the irregular armed groups in conflict and not taking an active part in the hostilities.

The first requirement—that of not being a member of the Armed Forces or an irregular armed group—appears in the ICRC Study as a definition of the notion of “civilian” under customary law. The Criminal Tribunal for the former Yugoslavia, for its part, stated that *for the purposes of the application of the protections set forth in the norms penalizing war crimes*, civilians are “all persons who are not, or are no longer, members of the armed forces,” which is understood to include official government armed forces as well as irregular armed groups. [*Emphasis added*]

Many international entities have addressed the second requirement—that of not taking part in the hostilities. As the Inter-American Commission on Human Rights has stated, the minimum guarantees set forth in Common Article 3 apply, in the context of armed conflicts, to those who take no direct or active part in the hostilities, including the civilian population and those placed *hors de combat* due to surrender, capture, or other reasons. The Criminal Tribunal for the former Yugoslavia has declared that for the purposes of determining the civilian nature of persons covered under the guarantees envisaged, *inter alia*, in Common Article 3, applicable to internal armed conflicts, “it is necessary to demonstrate that the violations were committed against persons who were not directly involved in the hostilities,” for which the Tadic criterion must be applied: “whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.” The civilian character of a person or a population, therefore, is determined by examining the specific facts based on which that status is being claimed, rather than by the mere invocation of his or their legal status in the abstract. It also takes into account, as stated earlier, that the notion of “hostilities,” like that of “armed conflict,” transcends the specific time and place where the fighting is taking place and is to be applied based on the geographic and temporal criteria that serve as the parameters for the application of International Humanitarian Law.

See also PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 461:

[I]t is not an admissible justification or excuse in criminal law to identify as a target of military action a person who is not participating in the hostilities, but who the leadership or commanders of the armed organization have decided, for ideological or political reason, is not innocent. No person or group of people may claim the power to decide who should or should not be eliminated, and whoever does so will be subject to punishment. The subject exercises his freedom but is liable for such exercise.

### ***b. Civilian population***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 3.3:

A population is considered to be a “civilian population” if it is predominantly civilian in nature. The notion of “civilian population” extends to all civilian persons taken individually. The presence among the civilian population of members of the armed forces or irregular armed groups, persons placed *hors de combat*, persons actively engaged in the conflict, or any other person not covered by the definition of “civilian,” does not alter the civilian nature of that population. “It is not required that every single member of that population be a civilian—it is enough if it is predominantly civilian in nature, and may include, for example, individuals placed *hors de combat*.”

### ***c. “Persons hors de combat” under Common Article 3 of the Geneva Conventions***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 3.3:

The protection established under the principle of distinction covers not only civilians but also, within the broader category of “noncombatants,” those who have participated in the hostilities but have been placed *hors de combat* because (i) they have been taken prisoner by another armed party to the conflict, (ii) they are unconscious, wounded, sick, or have been shipwrecked, or (iii) they have clearly expressed their intention to surrender and to refrain from hostile acts and attempts to escape. The protection of persons placed *hors de combat* is set out in Common Article 3 of the Geneva Conventions and in Article 7 of Additional Protocol II. It is also a rule of international customary law and has been interpreted as such by the criminal tribunals for Rwanda and Yugoslavia, which have explained that in the context of internal armed conflicts, the protection envisaged in Common Article 3 of the Geneva Conventions (which has the status of customary law) protects, in general, persons who for whatever reason, including those listed hereinabove, are no longer directly involved in the fighting.

As in the case of “civilians,” when persons placed *hors de combat* take a direct role in the hostilities, they forfeit the guarantees available to them under the principle of distinction, only for the time period in which their participation in the conflict lasts.

Additionally, see EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascoechea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

[T]he normative content of Common Article 3 of the Geneva Conventions and Additional Protocol II, both of which are in force for El Salvador, is applicable to persons who do not take part—or are no longer taking part—in the hostilities in an armed conflict. Such persons, therefore, must be considered to enjoy the norms of protection specifically set out for them in the Protocol.

## **B. Determination of a non-international armed conflict by national courts**

The following paragraphs transcribe several Latin American court judgments that evaluate the factual situations that constitute grounds for determining the existence of an armed conflict, its nature, and, in some cases, the basic body of law applicable to it.

It is critical to study these kinds of evaluations, as well as those undertaken by international tribunals, in order to identify the situations of fact that, in the view of the different courts, distinguish an armed conflict—particularly one that is non-international in nature—from internal disturbances and tensions, for the purposes of determining the applicable law. According to the Criminal Tribunal for Rwanda, for example, “the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. [...] [O]n the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria.”<sup>48</sup> In the framework of processes to determine individual criminal responsibility, the courts will be charged with determining the nature of the conflict using objective criteria to evaluate the available facts.

### **i. Chilean case**

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 34:

[A]fter September 11, 1973, when the Armed Forces overthrew the government and took power, the Government Junta, in the exercise of its constituent, legislative, and executive powers, issued Decree Law No. 5, dated the September 12 of that year. The first article of that law, interpreting Article 418 of the Code of Military Justice

48 ICTR, *Prosecutor v. Jean-Paul Akayesu*, *supra* note 19, para. 603.



(which was in force on July 19, 1974), stipulated that the state of siege imposed due to the internal upheaval must be understood as “a state or time of war” for the purposes of applying the penalties in force for that period set out in the aforementioned Code and in other criminal laws, and for all of the effects and purposes of that decree law. This situation was extended until September 11, 1974, when Decree Law No. 641 was issued, declaring our nation in a State of Siege, in the degree of Internal Defense, in accordance with Decree Law No. 640 of the previous day, since the conditions in the country at that time constituted a case of internal upheaval caused by rebel or seditious forces that were organized or on the verge of organizing, whether openly or underground, [...] which led to the activation of the Military Courts in wartime [...] and to the penalties specially stipulated for wartime. This situation lasted for six months following the publication of the aforementioned Decree Law No. 641, in other words, until March 11, 1975 [...]. At the time of the events under study, the Geneva Conventions of 1949 were unquestionably in force—as they are today—and were ratified by Chile and published in the Official Gazette [*Diario Oficial*] from April 17 to April 20, 1951. According to Article 3 (of the Geneva Convention relative to the Protection of Civilian Persons in Time of War), in case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties—which is precisely Chile’s situation during the period from September 12, 1973 to March 11, 1975—each party to the conflict shall be bound to provide humanitarian treatment, even to combatants who have laid down their arms, without any adverse distinction. The following acts, among other things, are prohibited at any time and in any place: (a) violence to life and person, and (b) outrages upon personal dignity.

## ii. Guatemalan case

*GUATEMALA, Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al. (List of Judgments 8.a), Whereas VI:*

On August 7, 1987, in Guatemala City, the Esquipulas II Agreement was signed by the Presidents of the Republics of Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica.

The Central American Agreement, Esquipulas II, [...] clearly arose out of the ongoing armed confrontations taking place inside several countries and the clear threat that they could lead to clashes between States. It has been said that the armed political crisis in the region was the result of intrinsic circumstances in which disagreement over political models to achieve social and economic development goals necessitated retaining or taking State power—even if that meant holding on to it or acquiring it through the use of armed force—and also a result of exogenous factors that reflected the interference of foreign actors in support (political, military, or diplomatic) of one or the other of the belligerent sectors. Recognition of this circumstance does not entail a value judgment with respect to any of the sectors involved. It is merely a reflection of the circumstances underlying the confrontations

that eventually reached the extreme of armed conflict between citizens of the same nationality and even between the same ethnic groups or indigenous peoples. This tragedy has frequently given rise to debate over the rationality of war or the need to achieve peace.

That confrontation, which Rodrigo Borja defines as “a violent action designed to force the adversary or enemy to submit to the will of another,” [*footnote omitted*] persisted for more than three decades in Guatemala and resulted in the death, and harm to the physical and moral integrity, of thousands of people and the destruction of public and private property, and it had serious repercussions for national solidarity.

### iii. Salvadoran case

*EL SALVADOR, Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascochea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c),* Whereas III:

In the Salvadoran case, based on the parties to the conflict—the Frente Farabundo Martí para la Liberación Nacional (FMLN) and the Government of the Republic—as well as on the legal nature of the conflict itself and the territorial space in which it occurred, it is clear that it was national in character, in other words, an armed conflict not of an international character. It was a conflict in which the FMLN was recognized, pursuant to the Franco-Mexican Declaration, as a belligerent group in the terms of Protocol II of the Geneva Conventions, which I have already mentioned.

In this regard, from my perspective, I understand that *legally, the parties to the conflict, and civilians in general, were subject to the Geneva Conventions and its Protocols, which, as I have stated earlier and based on the executive and legislative decrees I have cited, were already legally binding on El Salvador. It follows then that the State must assume its responsibility under the aforementioned body of law.*

## C. War crimes in armed conflicts of a non-international character

### i. Violations of Common Article 3 constitute war crimes

The possibility of establishing individual criminal responsibility for war crimes committed in the context of non-international armed conflicts is clearly accepted today at the national and international levels. Nonetheless, this was not always the case. As Theodor Meron has pointed out, “[t]he sovereignty of states and their insistence on maintaining maximum discretion in dealing with those who threaten their ‘sovereign authority’ have combined to limit the reach of international humanitarian law applicable to non-international armed conflicts.”<sup>49</sup> This artificial limitation was also extended to norms governing individual responsibility for serious violations of the limitations on the use of violence in this type of armed conflict. As a result,

<sup>49</sup> Theodor Meron, “International Criminalization of Internal Atrocities,” in *89 American Journal of International Law* 554, at 554 (1995).

individual responsibility for war crimes used to be confined to those perpetrated in the context of international armed conflicts.

Nonetheless, as international criminal law has steadily evolved through the establishment of the *ad hoc* criminal tribunals<sup>50</sup> and the International Criminal Court, the principle of individual criminal responsibility for serious violations of Common Article 3 to the Geneva Conventions and other laws and uses applicable to non-international armed conflicts<sup>51</sup> has been consolidated as a conventional<sup>52</sup> and customary<sup>53</sup> rule. The sections that follow present the jurisprudence developed by Latin American courts in relation to the individual criminal responsibility that may arise from breaches of the prohibitions contained in Common Article 3 to the Geneva Conventions of 1949, as well as Protocol II Additional to those conventions.

PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, Whereas 17:

[C]ommon Article 3 of the four Geneva Conventions and Protocol II Additional to the Conventions [...] apply when an internal armed conflict exists between government forces and private armed groups. International jurisprudence has indicated that the minimum standards of International Humanitarian Law were not established solely for purposes of mere recognition. Rather, *their violation constitutes a grave breach of humanitarian law and ultimately a war crime* (International Court of Justice, judgment on the merits in the case of the Corfu Channel—1949, and the judgment on military and paramilitary activities in and against Nicaragua—1986). The peremptory norms derived from this body of law are not only binding on States, but also give rise to direct individual responsibility. In this sense, it should be recalled that norms of International Humanitarian Law absolutely prohibit violence against the life of unarmed civilian persons at any time and in any place.

See also PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 19 (identical).

50 As Meron points out, “the Security Council’s Statutes for the Criminal Tribunals for the former Yugoslavia and Rwanda have contributed significantly to the development of international humanitarian law and its extension to non-international armed conflicts [*footnote omitted*]. This advance can be explained by the pressure, in the face of atrocities, for a rapid adjustment of law, process and institutions [*footnote omitted*]. No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law.” *Ibid.*, at 555.

51 See Articles 8(2)(c) and 8(2)(e) of the Rome Statute of the International Criminal Court.

52 See, in particular, Articles 8(2)(c) and 8(2)(e) of the Rome Statute of the International Criminal Court, as well as Article 2 of the Statute of the International Criminal Tribunal for Rwanda.

53 In a study on international customary humanitarian law by the International Committee of the Red Cross, Rule 151 states that “Individuals are criminally responsible for war crimes they commit.” According to the study: “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.” Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules* (New York: Cambridge University Press, 2005), at 623–28.

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 5.2:

According to the International Court of Justice, Common Article 3 is a basic general principle of humanitarian law and the rules contained therein reflect what the 1949 judgment on the Corfu Channel referred to as “elementary considerations of humanity.” In its 1996 Advisory Opinion on nuclear weapons, the International Court of Justice stressed that the humanitarian nature of the rules set out in Common Article 3 served as the underpinnings for the whole of international humanitarian law and applied to all types of conflicts and weapons: “The intrinsically humanitarian character of the legal principles in question (...) permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.” The Criminal Tribunal for the former Yugoslavia also underscored the obligatory nature of the humanitarian principle underlying Common Article 3 and international and regional human rights instruments when it stated that “the provisions of Common Article 3 and of the universal and regional human rights instruments share a common nucleus of fundamental standards which are applicable at all times, in all circumstances and to all parties, and which are non-derogable.” The Inter-American Commission on Human Rights has stated that the obligation to comply with Common Article 3 of the Geneva Conventions is absolute and is not subject to reciprocity. Likewise, the Criminal Tribunal for the former Yugoslavia has declared that the essential obligation imposed on the parties to an international or internal armed conflict by Common Article 3—whose status as customary law is unassailable—entails complying with certain fundamental humanitarian standards through “the application of the rules of humanity which are recognized as essential by civilized nations” and the establishment of minimum protections for persons who do not take active part in the hostilities; *all of which contributes to Common Article 3 constituting, in and of itself, an autonomous and customary source of individual criminal liability.* [Emphasis added]

VENEZUELA, *Decision on the extradition of José María Ballester Tirado (List of Judgments 15.a)*, Whereas:

In the same sense, one of the basic purposes of humanitarian criminal law [*sic*] is to protect the human rights of persons who do not take part in armed hostilities (Common Article 3 of the four Geneva Conventions of 1949 and Protocol II), and, to this end, it imposes limits on the means of waging war. In situations of national armed conflict, the aforementioned Article 3 stipulates that at minimum there is an obligation to treat noncombatants “humanely.” It therefore prohibits attacks on life and personal integrity, especially homicide (in all of its forms) and cruel treatment, as well as hostage taking. The norms contained in Article 3 have the rank of customary law and constitute a minimum—in terms of obligation—that the belligerent parties must always respect [...].

## ii. War crimes under Common Article 3 and Additional Protocol II of the Geneva Conventions

PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, Whereas 16:

Both Common Article 3 and Article 4(2) of Additional Protocol II contain norms that explicitly prohibit engaging in acts that result in a person's disappearance. Common Article 3 also prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture. Depriving a person of due process of law and ordering or carrying out deliberate acts intended to cause him to disappear amounts to a grave breach of international humanitarian law which the State must punish.

See also PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 20 (identical).

### a. *Willful homicide against a protected person*

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 5.4:

The prohibition against the murder of civilians and persons *hors de combat* is itself a rule of *jus cogens*. It must be recalled that this prohibition in international Humanitarian Law corresponds to a non-derogable right under International Human Rights Law—the right to life—which, as indicated above, is proof of its obligatory and peremptory character. Likewise, in the context of internal armed conflicts, the deprivation of life of civilians or persons *hors de combat* is tantamount to the violation of obligatory prohibitions, such as the principle of distinction, the prohibition against attacking the civilian population, or the prohibition against indiscriminate attacks and weapons with indiscriminate effects.

*A violation of this prohibition gives rise to criminal liability as a war crime* if the constitutive elements of the crime are present, as set forth in international jurisprudence. The Rome Statute, in Article 8(2)(c)(i), defines a war crime in international armed conflicts as “murder of all kinds,” insofar as it is a manifestation of “violence to life and person.” This definition is also found in the Statute of the Criminal Tribunal for the former Yugoslavia, the Statute of the Criminal Tribunal for Rwanda, and the Charter of the Special Court for Sierra Leone. As the ICRC has painstakingly demonstrated in its study, the prohibition against the murder of civilians and persons placed *hors de combat* has been widely reaffirmed in international and comparative jurisprudence and in international practice in general.

Now, aside from the possibility that the murder of a civilian or a person *hors de combat* may constitute a war crime, the Constitutional Court observes that the underlying physical act, i.e., that of taking the life of a person protected by the principle

of distinction, may also constitute other types of crimes under International Humanitarian Law, including genocide and the crimes against humanity of extermination, persecution, attacks on civilians, or violence against persons; each case depends on the context in which the act was committed and the presence of the various specific prerequisites to establish such crimes. They all share a common nucleus of elements with the definition of murder as a war crime, namely, “the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.” [*Footnote omitted*]

### ***b. Hostage taking***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 5.4:

The basic prohibition against hostage taking during non-international armed conflicts, both as an integral part of the humanitarian principle as well as in its own right, has a triple nature as a rule of conventional and customary law and of *jus cogens* under International Humanitarian Law. Any breach thereof constitutes a war crime that gives rise to international criminal liability and may also constitute a crime against humanity committed in the context of an internal armed conflict. The crime of hostage taking has been the subject of the most vigorous condemnations on the part of international entities at all levels.

It is defined as a crime in the Statute of the International Criminal Court and in the statutes of the Special Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone. The Rome Statute, which is directly binding on Colombia in this area, [establishes the crime of hostage taking] in Article 8(2)(c) (iii), for internal armed conflicts.

The customary definition of the crime of hostage taking is found in the Elements of Crimes subject to the jurisdiction of the International Criminal Court; in other words, on the date the instant judicial decision was adopted, there was already a customary definition of the elements that constitute this war crime, which also forms part of the Colombian bloc of constitutionality. Thus, the presence of the following elements establishes the war crime of hostage taking in the context of non-international armed conflicts: (a) the detention or holding of one or more persons (the hostage or hostages), (b) the threat to kill, injure, or continue to hold the hostage, (c) with the intention of forcing a third party—which could be a State, an international organization, a natural or juridical person, or a group of people—to carry out, or to refrain from carrying out, a particular action, (d) as an explicit or implicit condition for the release or safety of the hostage.

*c. Attack against civilian population during a non-international armed conflict*

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas, D, 3.3:

Prohibited attacks are those in which *the civilian population is the primary target of the attack*. When determining whether an attack has, in effect, targeted the civilian population, international jurisprudence has taken into account factors such as the means and methods used during the attack, the number and status of the victims, the nature of the crimes committed during the attack, resistance to the attackers as they advanced, and the extent to which the attacking force complied with, or attempted to comply with, the principle of precaution set forth in International Humanitarian Law. It is not necessary that the attack be directed against the entire civilian population of the geographic entity where the events occurred; it is necessary to prove, however, that the attack was not directed against a limited number of individuals. “It is not required that every single member of that population be a civilian—it is enough if it is predominantly civilian in nature, and may include, for example, individuals placed *hors de combat*.”

*Any breach of conventional and customary rules of international humanitarian law prohibiting attacks against the civilian population gives rise to individual criminal liability.* Hence, attacks against the civilian population may constitute war crimes under conventional and customary international humanitarian law *applicable to internal armed conflicts*. The Statute of the International Criminal Court defines attacks against the civilian population as war crimes in international and non-international armed conflicts. According to Article 8, war crimes in internal armed conflicts include “(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ‘i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.’” According to the Criminal Tribunal for the former Yugoslavia, the prohibition against attacks against the civilian population, and its constitutive elements, are applicable in international and internal armed conflicts, and any breach thereof constitutes a war crime in both circumstances. Intentional attacks against the civilian population or against individual civilians not taking direct part in hostilities have been defined by the Special Court for Sierra Leone (Article 4-a) as grave breaches of international law subject to the jurisdiction of that Court. [...]. [*Emphasis added*]

***d. Prohibition against acts designed to sow terror among the civilian population***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 3.3:

The prohibition against acts designed to sow terror among the civilian population in the course of internal armed conflicts is closely linked to the general proscription of terrorism, without being identified with it. It is also directly related to the fundamental guarantee envisaged in Article 4-2(d) of Additional Protocol II, which prohibits acts of terrorism committed in the course of an armed conflict as part of the humanitarian principle, though conserving its specific character. Any breach of this prohibition in internal armed conflicts gives rise to criminal liability under international customary law and has been classified as a war crime in the Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

***e. Prohibition against intentional attacks on cultural and religious property***

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 3.3:

Even though cultural objects fall under the general category of “civilian objects” and, as such, are protected by the aforementioned principles of distinction and precaution, International Humanitarian Law stipulates special care, respect, prevention, and protection of cultural objects on the part of all parties involved in armed conflicts.

Any breach of the guarantees of special protection for cultural objects is a war crime under conventional and customary international humanitarian law. The Rome Statute of the International Criminal Court defines this crime in Article 8(2)(e) (ix), which states that intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives, is considered a war crime in non-international armed conflicts.

The conventional and customary protection afforded religious institutions is separate from the protection afforded cultural objects. It is therefore not necessary that these institutions form part of the cultural heritage of peoples, or of a particular people, in order to qualify as objects specially protected under international humanitarian law, attacks on which give rise to individual criminal responsibility. This responsibility may be classified as war crimes or crimes against humanity, in particular, the crime of persecution.



## CHAPTER II

# INDIVIDUAL CRIMINAL RESPONSIBILITY AND FORMS OF PUNISHABLE CRIMINAL INTERVENTION

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The principle of individual criminal responsibility is premised on the notion that people can exercise control over their acts and omissions and that, ultimately, the perpetration of an act considered punishable under the criminal laws of a particular system gives rise to certain consequences for the perpetrator.<sup>1</sup> While the concept may seem self-explanatory, it is nonetheless important to highlight the three terms that compose it: (i) *responsibility*, which entails the duty to face the consequences of failure to comply with an obligation;<sup>2</sup> (ii) *criminal*, which refers to the nature of the prohibition and the specific ways in which the perpetrator must be held accountable—in other words, the applicability of criminal law for the determination of the consequences derived from the failure to comply; and (iii) *individual*, which means that physical persons, rather than groups or legal persons, must answer for their own behavior.<sup>3</sup>

The principle of criminal responsibility, which is found in every legal system in the world in relation to crimes recognized in their laws, has also been recognized and upheld with respect to crimes set forth by the international norms discussed in this study. Specifically, in the framework of the prosecutions after World War II, the Nuremberg International Military Tribunal affirmed in judgments against major Nazi criminals that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>4</sup> This unequivocal affirmation of the principle of individual criminal responsibility for the perpetration of such crimes does not mean that enforcement efforts have been free of challenges, as observed in judicial practice.

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- 1 Christine T. Sistare, *Responsibility and Criminal Liability* (Dordrecht, Netherlands: Kluwer Academic Publishers), 1989.
  - 2 More specifically, according to some basic definitions, “[...] responsibility presupposes a duty (for which the individual must be accountable) but must not be confused with it. The duty or the obligation is the action that, according to the legal system, must be taken or omitted. The one who must take or omit is the obligated subject. Responsibility presupposes this obligation but is not to be confused with it. Responsibility determines who must be held accountable for carrying out or failing to carry out the said obligation. In this sense, responsibility is a second-degree obligation (it is triggered when the first is not fulfilled, that is, when an illicit act is committed).” Ronaldo Tamayo Salmorán, “Responsabilidad,” in *Diccionario Jurídico Mexicano*, vol. 8 (Mexico City: Instituto de Investigaciones Jurídicas, UNAM, 1983), at 44. [*Unofficial translation*]
  - 3 See, for example, Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008).
  - 4 Judgment of the Trial of the Major War Criminals before the Nuremberg International Military Tribunal, September 30 and October 1, 1946. This principle was reaffirmed in *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, in United Nations International Law Commission, *Yearbook of the International Law Commission 1950*, vol. 1 (New York: United Nations, 1958). More recently, it has been consolidated in the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, as well as that of the International Criminal Court.

In order to establish the specific consequences of noncompliance with an obligation—and in particular, the penalty that should be meted out to an individual—it is essential to clearly establish his/her degree of responsibility based on the acts that can be imputed to him/her. In other words, in terms of individual criminal responsibility, it is necessary to explicitly establish “[...] the nature and scope of [a particular individual’s] participation [...]” in the crime.<sup>5</sup> While admittedly complicated, the imputation process is a common exercise with respect to crimes under domestic law, which are usually committed by one person or a small group of people, possibly with nominal assistance from other individuals. This is to say that in “traditional” approaches to criminality, if we may refer to them as such, the ways in which individuals participate in a crime, and the relationships between these individuals, are generally clear and defined.

In contrast, as several studies on this issue have pointed out, crimes under international law inherently require the participation of a large number of individuals, entities, and structures.<sup>6</sup> These studies have described this phenomenon as “collective criminality”<sup>7</sup> or “macrocriminality.”<sup>8</sup> As a result, the determination of individual criminal responsibility in this specific category of crimes is particularly challenging since “within networks of collective action, [...] the degree of criminal responsibility does not diminish as distance from the actual act increases; in fact, it often grows.”<sup>9</sup> At the same time, in most cases it is difficult to precisely establish the specific conduct or the exact nature of each person’s intervention in a way that distinguishes it from the conduct of the rest of the group.

None of these characteristics of collective criminality detracts from the need to specifically establish the individual responsibility of each person. To the contrary, in view of the inherent nature of these types of criminal regimes, the legal precision and technique brought to the determination of individual responsibility is of unprecedented importance.

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- 5 Kai Ambos, *La parte general del Derecho Penal Internacional: Bases para una elaboración dogmática*, trans. Ezequiel Malarino, 2nd ed. (Montevideo: Fundación Konrad Adenauer, 2005), at 74. [*Unofficial translation*]
- 6 According to international jurisprudence, “[M]ost of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question.” ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Appeals Chamber, Judgment, July 15, 1999, para. 191.
- 7 See, for instance, Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute,” 5 *Journal of International Criminal Justice* 953 (2007); and Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser, 2003).
- 8 See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 5.
- 9 Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute,” *supra* note 7, at 954. In this regard, the International Criminal Court, citing the Jerusalem District Court in the *Eichmann* case, has emphasized that “[i]n such an enormous and complicated crime [...] wherein many people participated at various levels in various modes of activities [...] committed in masse [...] the extent to which any one of many criminals were close to, or remote from, the actual killer of the victim means nothing as far as the measure of his responsibility is concerned. In the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command.” ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Situation in the Democratic Republic of Congo, Pre-Trial Chamber, Decision on Confirmation of Charges, ICC-01/04-01/07-717, September 30, 2008, para. 503.

Despite the critical nature of such determination, national legal systems frequently are not specifically designed or equipped to deal with the particular characteristics inherent to international crimes.<sup>10</sup> This can lead to an incorrect determination of each individual's role and thus to the application of penalties that do not precisely reflect the degree of individual responsibility. As a result, accuracy in establishing the facts, together with the legal interpretation developed by courts based on applicable legal theories and international standards, will be critical in ensuring that the true culprits are punished. In other words, an appropriate judicial interpretation of the existing norms will lead to administration of the correct punishment to those who truly bear the most responsibility for the commission of atrocious crimes.

This chapter presents excerpts from Latin American rulings that examine different "forms of criminal intervention"<sup>11</sup> as they have evolved in domestic and/or international jurisprudence, albeit not always in a parallel or coordinated manner. It is not organized based on the traditional distinction between direct perpetration and participation (or direct and accomplice liability), but rather offers a separate description of each of the doctrines that various courts have developed and applied in the context of attributing individual responsibility for international crimes.

As far as the international jurisprudence on this subject and its implications for domestic jurisprudence, priority has been given to most recent interpretations by the International Criminal Court, although not to the exclusion of rulings by the *ad hoc* tribunals. This means, for example, that greater emphasis has been placed on theories of perpetration-by-means and co-perpetration than on the doctrine of joint criminal enterprise or the principle of command responsibility, in keeping with Latin American jurisprudence itself. It is interesting to note that this chapter might have been organized in a completely different way had this study been conducted a few years ago, when the jurisprudence of the *ad hoc* tribunals was defining the course of international criminal law.

Finally, this chapter includes several different categories of judgments. Some of them do indeed refer to the determination of individual responsibility with respect to particular individuals who have been accused of committing crimes under international law. Others are in response to appeals lodged by the defense or defendants, unconstitutionality proceedings, or the constitutional review of international treaties. Consequently, it is important to underline that not all the decisions included in this section are ones where the courts have actually applied one (or more) of these theories. In some cases the courts have referred to the various doctrines or principles of imputation only in the abstract, while in other cases they take up situations that, in the authors' view, illustrate the subject matter presented in this digest, even if the court did not explicitly refer to the doctrines in question.

10 According to van Sliedregt, in her study on international responsibility for violations of humanitarian law, "This explains why in the Nuremberg Judgment and the subsequent proceedings many of the convictions were based on accomplice liability or criminal participation. Yet the concept of accomplice liability—at least as understood in certain national legal systems—has shortcomings when applied to a certain category of war criminals [as well as other international crimes]." Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, *supra* note 7, at 15.

11 This expression is used by Kai Ambos in his study on the general part of international criminal law, *La parte general del Derecho Penal Internacional*, *supra* note 5.

## 1. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CRIMES UNDER INTERNATIONAL LAW

As a general basis for examining forms of punishable criminal intervention in crimes under international law, the following excerpts from Latin American jurisprudence address certain basic principles, such as: (i) the commission of international crimes gives rise to individual criminal responsibility; (ii) responsibility is assigned to individuals rather than to abstract entities; and (iii) the degree of responsibility must reflect the individual's degree of culpability.

URUGUAY, *Case "Condor Plan" in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 5:

The proceedings of the Nuremberg Tribunal affirmed the concept of individual responsibility in relation to international crimes: "That international law imposes duties and liabilities on individuals as well as upon States has long been recognized (...) Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" [*footnote omitted*].

See also PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 233:

We must be clear that it is not a political organization or an ideology, much less those whom the defendants refer to as "*las masas*" [the support base], that is on trial and subject to the impending verdict. The trial, and the ruling that is to be handed down, refer instead to the specific acts attributed to the defendants, who are accused of directing a terrorist organization and deciding, planning, carrying out, and supervising numerous systematic attacks that constitute grave violations of Human Rights and International Humanitarian Law.

### A. Subjective responsibility versus objective responsibility

PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 460:

[One cannot] confuse subjective responsibility (the requirement of intentionality) with the agent's motives and conclude that objective responsibility refers to allegations of murder and other crimes that do not take into account what the perpetrators had in mind, since the traditional definition of intentionality requires only knowledge and volition. In criminal law, the concept of objective responsibility is applied to normative hypotheses in which the accusations are focused on the outcomes, regardless of intentionality or negligence (random act, circumstances beyond one's control, etc.), and not on the existence or nature of any motives the perpetrator may have had, since, ultimately, it is not the political or social inclinations or aims that are being pe-

nalized. For example, suppose that in an effort to curb the proliferation of murderers and rapists of children under age seven, a group of residents in a Human Settlement decides to establish a group to physically eliminate such individuals. Altruistic as their motives might be, murdering human beings is a criminal, unlawful, wrongful, and punishable act.

## 2. DIRECT PERPETRATION

Every criminal code in the region provides for the individual liability of persons who directly commit an act constituting a crime. They also recognize the responsibility of those who, as perpetrators or principals, exercise control over the crime (*dominio del hecho*), even though they may not have directly carried out any of the objective elements provided in the criminal definition. In contemporary domestic and international jurisprudence, it is precisely this criterion—i.e., domination of the act or control of the crime—that distinguishes perpetrators from participants.<sup>12</sup> The critical question, then, is no longer who physically carried out the *actus reus*, but rather who had control over it, once it has been determined exactly when, where, and how the crime was committed.

The following excerpts from Peruvian and Argentine jurisprudence refer generally to the issue of perpetration and specifically to the criterion of control over the act. These paragraphs also lay the groundwork for two doctrines that have become particularly relevant in domestic and international jurisprudence and that will be developed later on: perpetration-by-means and co-perpetration.

PERU, *Habeas corpus submitted by Máximo Humberto Cáceda Pedemonte (List of Judgments 13.d)*, Whereas 33–35:

The Criminal Code recognizes two forms of criminal involvement: direct commission and other forms of participation. Article 23 [...] of the Substantive Code [Código Sustantivo] stipulates that “anyone who commits the offense as an individual or through another person, and those who commit it jointly, shall be punished with the penalty established for that infraction.” It also distinguishes three ways in which a person may commit an offense (carry it out) as a direct perpetrator: (a) when he carries out the offense on his own; (b) when he carries out the offense through another person; (c) when he carries out the offense together with one or more other persons.

The doctrine specifies that this distinction applies only in the case of intentional crimes or *malum in se* offenses. Hence, it defines the principal perpetrator of an intentional crime or *malum in se* offense as follows: “anyone who, conscious of the end result, steers the causal event toward the criminal outcome, is responsible for the

12 The criterion for distinguishing between perpetrators and participants is set out by the International Criminal Court in recent decisions: ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Situation in the Democratic Republic of Congo, Pre-Trial Chamber, Decision on Confirmation of Charges, ICC-01/04-01/06-803-tEN, January 29, 2007, and ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 9, among others.

commission of the offense” [footnote omitted]. In other words, the direct perpetrator may manipulate the outcome of the conduct and may even desist. Meanwhile, the participant is subject to the actions of the direct perpetrator, in that his participation in the crime only occurs when the latter has at least reached the level of attempt, without which there is no aiding and abetting or incitation. Consequently, the participant has no control over the act.

The direct perpetrator, then, is someone who has the power to influence the outcome of the act. While his contribution may vary, it is taken as a whole, and the overall result is attributable to him regardless of the substantive import of his involvement. And a participant is someone whose involvement is contingent on the outcome obtained by the direct perpetrator, or someone whose actions do not contribute in a decisive manner to the commission of the offense, but whose participation is instead limited to aiding in its commission.

ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*, Whereas:

[In defining the perpetrator of a crime,] the doctrine holds that “... *the objective element of direct commission lies in having in one’s hands the course of the criminal event, or the real potential, at all times, to direct the composition of the crime,*” [footnote omitted] “... *the perpetrator controls the act; the course of events is in his hands and he can decide the whether and the how or, put more succinctly, he is able to determine the core composition of the event*” [footnote omitted].

### 3. PERPETRATION-BY-MEANS

#### A. Overview

Perpetration-by-means is an autonomous form of punishable criminal intervention based on the notion that the person truly responsible for the crime, the one who exercises real control over it, is not the one who directly commits it but rather another person who is operating *through the direct perpetrator*.<sup>13</sup> According to this doctrine, which is well established in neo-Roman legal systems, the perpetrator-by-means uses the direct perpetrator as an instrument over which he/she has control. The direct perpetrator, in turn, in the classic conception of the theory, will be “[...] a person exempt from responsibility, for reasons of absence of conduct, duress, error, or having no capacity of culpability.”<sup>14</sup> In other words, in the classic theory of perpetration-by-means, the direct perpetrator would be a person who is not fully criminally liable, but is an innocent agent used by the perpetrator-by-means.<sup>15</sup>

13 See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 5.

14 Francisco Pavón Vasconcelos, *Manual de Derecho Penal Mexicano*, 13th ed. (Mexico City: Editorial Porrúa, 1997), at 551. [Unofficial translation]

15 Hector Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford, UK: Hart Publishing, 2009), at 111–12.

Drawing on the work of German scholar Claus Roxin, the International Criminal Court has stated that the doctrine of perpetration-by-means is premised on “control over the crime” as a criterion for distinguishing between perpetrators and participants.<sup>16</sup> This criterion “[...] corresponds to an evolution of subjective and objective approaches, such that it effectively represents a synthesis of previously opposed views and doubtless owes its broad acceptance to this reconciliation of contrary positions.”<sup>17</sup> On these bases, the Court continued, “principals to a crime are not limited to those who physically carry out the objective element of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide *whether* and *how* the offence will be committed.”<sup>18</sup>

The Peruvian judgments transcribed below develop these and other basic principles of perpetration-by-means. Significantly, the Peruvian courts have emphasized the most recent interpretative developments concerning this doctrine, particularly with respect to what is currently referred to as “perpetration-by-means through an organized apparatus of power,” which is discussed at more length in subsequent sections. These judgments also contain other relevant interpretations concerning the difference between perpetration-by-means and co-perpetration, a separate form of participation that will also be discussed later on.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 719:

Perpetration-by-means characterizes cases in which the crime is perpetrated by an agent or person behind the scenes through a direct intermediary [*persona interpuesta*, a person who is placed in between]. The specialized literature has assigned various labels to the latter: the front man, the immediate perpetrator, the direct perpetrator, or simply the perpetrator. The expression “instrument” [*footnote omitted*] is also accepted, although it has been criticized as erroneous by some national authors such as HURTADO POZO [*footnote omitted*] and VILLAVICENCIO TERREROS [*footnote omitted*].

Therefore, the perpetrator-by-means shall be someone who takes advantage of, or uses, the behavior of another person to achieve his criminal objective. This traditionally has been accomplished by using coercion against the direct perpetrator, by taking advantage of an error on the latter’s part, or by using a person with limited capability.

*The dogmatic category of perpetration-by-means is designed to ensure that the true perpetrator is held criminally liable for an offense that has been committed by a third party. It is, therefore, a special form of perpetration in which the agent carries out the pu-*

16 In domestic Latin American jurisprudence, this criterion is usually expressed as *dominio del hecho*, as in the decisions transcribed in the preceding section, “*Direct perpetration*.”

17 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 9, para. 484, citing Claus Roxin, *Strafrecht, Allgemeiner Teil II* (Munich: C. H. Beck, 2003), para. 25–30.

18 *Ibid.*, para. 485. This same criterion for distinguishing between perpetration and participation is used in various domestic legal systems and also has been invoked by the International Criminal Court as grounds for co-perpetration. These two types of theories of perpetration should not be confused, even though they are based on the same distinguishing criterion, and even though they can coexist and are not mutually exclusive, as the ICC has underscored.

nishable act through the intermediary and must therefore be held accountable for the criminal consequences of that unlawful act [*footnote omitted; emphasis added*].

At present, three forms of perpetration-by-means are recognized. In each case, the agent prevails on, or influences, the actual intermediary. Therefore, “*the perpetrator-by-means must have the de facto ability to control and direct the behavior of the person he uses to commit the crime*” [*footnote omitted*]. Initially, only [the first] two types of perpetration-by-means were recognized:

(1) The first was “*control by error*.” In such situations, the perpetrator-by-means would control the will of the direct perpetrator by deceiving him about the real circumstances of the act he was to commit, or by assigning an inaccurate meaning or significance to the situation in which he was to intervene.

(2) The second was “*control by coercion*.” Here the man behind the scenes would direct the perpetrator by using intimidation or the threat of some imminent and serious misfortune that the former was in a position to bring about. In both cases, it was the man behind the scenes who determined and orchestrated the crime so that the act carried out by the intermediary could be attributed only to the latter, as his own handiwork.

(3) A third type is known as “*perpetration-by-means through domination of an organized power apparatus*,” and its characteristics, assumptions, requirements, and consequences will be discussed later [*footnote omitted*].

It is important to point out that this category of perpetration-by-means has been the subject of some controversy among national [*footnote omitted*] and international authors [*footnote omitted*], who have confused it with normative hypotheses of co-perpetration, incitement, or complicity, despite the lack of horizontality, or the direct or peripheral relationship characteristic of the latter [*footnote omitted*] [...]. In relation to co-perpetration, [...] [Claus] ROXIN has explained, “*A common resolve with respect to the act is missing, which, according to the absolutely dominant doctrine, is a prerequisite for any sort of ‘joint commission’ in the sense of co-perpetration. The fact is that the man behind the scenes and the perpetrator usually do not even know each other, they make no joint decision about anything, and they do not consider themselves to be decision makers of equal rank. The carrying out of a requirement, such as that found in the cases in question, is based on an order as opposed to a joint decision*” [*footnote omitted*]. With reference to incitement, he has argued that “*the critical difference also resides in the fact that the one who induces does not have control over the perpetration of the act; the commission of the crime is not contingent on his will. This is different when it comes to an intellectual author: he is the dominant central figure in a crime ordered by him, and the henchmen who carry it out, while liable as perpetrators due to their control over the act, cannot compete with the superior domination of the one issuing the order, derived from his position of leadership in the apparatus*” [*footnote omitted*].

See also PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 531–533:



[In certain cases] [t]he crimes are not the work of individual perpetrators or persons acting in association to carry out a common, more or less delineated plan. This traditional perspective has changed with the emergence of new organizations, groups, or structures that, acting collectively and with a common design, perpetrate various crimes in order to amass larger quotas of power through crime, while facilitating the impunity of those in positions of authority and command. Because of their dimensions, capacity, wherewithal, strategies and resources, adaptability, and coverage, these organizations are in a position to commit serious crimes with devastating consequences and to fulfill their objectives more efficiently and quickly [*footnote omitted*].

The concept of domination over the organization has emerged because other criminal categories, specifically the rules of perpetration and participation, are inadequate to explain and resolve cases involving those who direct and control an organization.

The search for attribution mechanisms that adequately and fairly address the new problems associated with illegal organizations—particularly those involving the authorities, leaders, and commanders of the organization—aims to reinforce the deterrent effect of punishment, which would be profoundly undermined should the punishment target only the direct perpetrators [*footnote omitted*].

## **B. Perpetration-by-means through an organized apparatus of power**

ARGENTINA, *Case of “Circuito Camps” and others (Miguel Osvaldo Etchecolatz)* (*List of Judgments 1.d*), Whereas:

In regard to the level of Etchecolatz’s participation in the alleged crimes—excepting those in which he was personally involved, which makes him a co-perpetrator—the court held that the concept of control over the crime was applicable to appropriately characterize Etchecolatz as a perpetrator-by-means in those crimes.

In this regard, in the cited case 13/84, the Federal Criminal and Correctional Court of the Capital [known as the Trial of the Military Juntas] upheld this principle. In regard to perpetration-by-means, it stated “...in a situation of perpetration-by-means, control over the crime means control over the direct perpetrator, as opposed to control over the action, which is inherent to direct perpetration, and functional control, which is characteristic of co-perpetration. In perpetration-by-means, the author does not actually carry out the criminal act, but he retains control over the crime through a third party who, for whatever reason, is willing to submit to the designs of the former.... It allows a normative hypothesis in which a perpetrator-by-means may coexist with a liable perpetrator. According to Claus Roxin, domination of an organized apparatus of power must be considered alongside control through fear or error...” [*footnote omitted*].

Similarly, in its review of the ruling handed down by this Court, the Supreme Court of Justice of the Nation stated that “...superiors retain control over events through the use of an organized apparatus of power, which makes them the pepe-

trators-by-means of crimes committed in such a manner. Characteristic of this type of perpetration-by-means is the control wielded by the person who runs the system at his discretion, not control over the will of one specific individual, but rather control in an indeterminate sense, since the crime will occur regardless of who carries out the criminal order. This is also the case owing to another important feature of this type of perpetration, which is the fungibility of the direct perpetrator, who does not operate as an individual but rather as part of the system's machinery. Here, the perpetrator-by-means must only control the levers of power in the structure, so that even if one of the direct perpetrators eschews the task, he will immediately be replaced by another who is willing to carry it out. This conception of perpetration-by-means is fully applicable to the case, since the hierarchical structure of the military institution allows the person at the helm to use all or part of the forces under his command in the commission of illegal acts" [*footnote omitted*].

Professor Claus Roxin articulated his theory about this aspect of perpetration-by-means in a lecture titled "Crime in the Framework of Organized Apparatuses of Power," given in Hamburg in 1963.

Forty years later, Dr. Roxin recalled this episode when lecturing at Lusíada University in Lisbon, Portugal. On that occasion, he said, "The historical example that came to mind as I was developing this form of perpetration-by-means was the violent power of National Socialism. Whenever Hitler or Himmler or Eichmann gave orders to kill, they could be sure they would be carried out..." He then added, "In my conception, here, a perpetrator-by-means is anyone who is situated at the helm of a power apparatus—regardless of the hierarchical level—and is able, by giving orders, to cause crimes to be committed, notwithstanding the individual identity of the direct perpetrator." Later, reiterating the concept of "fungibility," which was discussed by our highest court in the aforementioned ruling, he made a clarification concerning the responsibility of the killer that left no room for doubt. Professor Roxin stated, "This in no way alters the fact that whoever ultimately carries out the murder with his own hands is punishable as the immediate perpetrator" [*footnote omitted*].

PERU, *Motion for annulment and consults (Case Leaders of the Shining Path) (List of Judgments 13.i)*, Whereas 4.5.4. and 5.5.4:

Perpetration-by-means is a dogmatic category associated with the theory of control over the crime that emerged long before the entry into force of the 1991 [Peruvian] Code. Specifically, it dates back to Hegler's work in 1915 and Loeb's contributions in 1933, which were published in 1939 by Hans Welzel and later systematized by Professor Claus Roxin [...]. As such, it is the type of allegation that does not necessarily have to be described in a legal text in order to discern its compatibility with the existence of a (broadened) criminal definition. It is, in synthesis, a theoretical device that lends meaning to the objective elements of the particular crime by linking an individual to the elements of the crime through his control over the direct perpetrator.

Perpetration-by-means through apparatuses of power involves the abuse of the State power structure and, particularly, of a non-governmental structure, as in the ca-

ses of macrocriminality or organized crime [...]. What is relevant from the standpoint of perpetration-by-means through the use of apparatuses of power is the presence of a structural hierarchy with fungible direct perpetrators and a man behind the scenes who wields control over the act. The latter's decisions are transmitted through a chain of command and each agent of transmission is equally a perpetrator-by-means. This dynamic of transmission of will on the part of the perpetrator-by-means is likely to be present in a criminal organization, and even more so if the power structure is extremely hierarchical and the fungibility of its members (the actual perpetrators of the crime) strongly conditioned on verticality and centralism. In consequence, it is theoretically possible to evaluate the conduct of the leader or head of a terrorist organization within this organizational context.

[O]ne of the advantages of the control-over-the-crime theory is that it distinguishes more clearly between the perpetrator and the participant: the perpetrator shall be the one with control over the configuration of the wrongdoing and the participant the one who does not exercise such control and only collaborates in the intentional wrongdoing of another.

[T]he concept of perpetration relates the perpetrator-by-means to a specific crime, but the crime is attributed to the perpetrator, who does not actually carry it out, based on the domination or functional control he exercises through the direct intermediary. This is not a form of objective responsibility, because in this form of perpetration, the intentionality of the actions of the perpetrator-by-means is established equally. The perpetrator-by-means is directly linked to the crime through his knowledge of the causal direction of the act itself and his ability to exercise his will to control the act through the direct intermediary.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 723–725:

In 1963 [*footnote omitted*], German jurist CLAUD ROXIN began to develop the theoretical basis for a new form of perpetration-by-means, which he called “*perpetration-by-means through domination over an organized apparatus of power*.” He sought to provide a dogmatic solution to the problems of perpetration that arose in the debate over the nexus and criminal status that should be attributed to the central or strategic organs of organized apparatuses of power, which, while not directly involved in the commission of the crimes committed by those structures, did decide, schedule, and plan them. According to his main premise, it was possible in such cases to identify a form of domination distinct from the traditional normative hypotheses based on duress and error [*footnote omitted*].

This theory emerged from an analysis of the *Eichmann* [*footnote omitted*] and *Staschynski* cases [*footnote omitted*]. It was apparent from an examination of these legal proceedings that the defendants could not be linked to the crime using the classic categories of perpetration-by-means. ROXIN, however, observed that both of the accused belonged to an organized apparatus of power and that the crimes of which they were accused were the result of plans and orders issued by the central organs

of those structures, which controlled and directed their commission. On this basis, it was possible to conclude that the direct perpetrators of the crime, the mid-level commanders and the central organ of the power structure that had ordered their commission, exercised different forms of control over the crime, which were not, however, mutually exclusive. The former exercised *control over the action*, that is, the actual commission of the crime, while the latter two had *control over the organization*. In other words, they were in a position to influence and control the commission of the crime from their respective operational levels, using the power apparatus at their disposal. The latter, therefore, were the true perpetrators-by-means since “*control over the act by the man behind the scenes is based on his ability, through the apparatus at his disposal, to produce the outcome with even more certainty than in the normative hypothesis of control through duress and error, which are virtually unanimously recognized as cases of perpetration-by-means*” [footnote omitted].

The issue, then, is the commander’s specific control over the organization, rather than his direct control over—or personal relationship with—the direct perpetrator. This being the case, the grounds for this form of perpetration-by-means are not found in control over the intermediary [*persona interpuesta*], since ultimately “he is a free person and responsible for his own actions” [footnote omitted]. The perpetrator-by-means exercises control over the apparatus, and its structure, to which the direct perpetrator belongs and is joined [footnote omitted].

ROXIN’s theory was invoked legally for the first time in 1985 and 1986 in the rulings handed down by the Argentine courts responsible for trying and reviewing the convictions of the military juntas that ruled Argentina from 1976 to 1983 [...]. The first instance judges concluded that the military commanders were criminally responsible as perpetrators-by-means [and emphasized that they] had consistently maintained their domination over the perpetrators and should therefore answer as perpetrators-by-means for the crimes committed [footnote omitted].

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 6:

Perpetration-by-means is a form of commission of a crime frequently observed in acts carried out by what criminal doctrine refers to as an “organized apparatus of power.” The ones ultimately responsible for crimes committed through the use of that “apparatus” are the individuals who direct it, even though they did not participate directly in commission of the acts.

### **C. General requirements of the theory of perpetration-by-means through an organized apparatus of power**

The following section presents excerpts from Latin American rulings that address each of the elements, or general requirements, of the theory of perpetration-by-means through an organized apparatus of power. They are self-explanatory and therefore require little introduction. It

suffices to point out the virtually exact correspondence between the Latin American jurisprudence and the interpretation of these elements offered to date by the International Criminal Court, which has identified them as follows: (i) the existence of an organized, hierarchical apparatus of power; (ii) control over the organization; and (iii) a guarantee that the crimes will be carried out through virtually automatic compliance with orders.<sup>19</sup> Each of these elements has been taken up in Latin American jurisprudence, which has also added a fourth element: deviation from legality or from the law on the part of the organized apparatus in question.

### **i. Existence of an organized apparatus of power**

*PERU, Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j), Whereas 726 and 727:*

Perpetration-by-means through control over an organized apparatus of power is premised on “*the prior existence of a structured organization.*” The latter has a clearcut hierarchy, in which the highest strategic level will be responsible for any criminal decisions and plans that may be adopted internally. These will subsequently be assigned to the direct perpetrator following the vertical structure inherent to the organization’s design.

Therefore, a critical characteristic of such organized hierarchical structures, and one that underscores their rigid verticality, is (i) “*the assignment of roles.*” This expression is more ideographic than those commonly used in contemporary criminal doctrine [*footnote omitted*] to explain the relationship between the strategic level and the direct perpetrator in reference to a division of labor or distribution of functions.

Such references, moreover, may lead to confusion over the distinction between perpetration-by-means and situations of co-perpetration. In this regard, as ROXIN has pointed out, “[*it is not*] possible to speak of a ‘division of labor’—which at present is generally considered central to co-perpetration—when the one wielding the power leaves it entirely to the executing organs to carry out his order” [*footnote omitted*].

Another characteristic of power apparatuses with organized hierarchies is that (ii) they have a functional life independent of that of their members. This is not premised on any particular mindset of the highest strategic level, but rather on “*the functional mechanism of the apparatus*” [*footnote omitted*], meaning its “*automatism*” or its ability to develop its own process or functionality. As a result, the man behind the scenes can always be confident that his criminal order or design will be carried out, without having any need to know who the immediate perpetrator is. It is, then, this “*automatic functioning of the apparatus*” that actually guarantees that the order will be carried out [*footnote omitted*]. There need not be an explicit, written directive in which the highest strategic level directly orders the direct perpetrator to undertake a particular task. This is not to say that the former is completely dissociated from the specific conduct of the organization, but rather that its presence is manifest in the configuration or operability of a series of mechanisms that interact within,

<sup>19</sup> See ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 9.

and outside of, the power structure and enable the apparatus to remain active and to pursue its criminal enterprises.

The process of identifying hierarchical organizations that constitute organized power apparatuses capable of the form of perpetration-by-means examined herein also entails verifying the presence of what the German Federal Supreme Court has termed “*framework conditions*” [*footnote omitted*], referring to the following functional conditions and prerequisites: (1) command authority; (2) the organization’s disengagement from the legal order; (3) the fungibility of the immediate perpetrator; and (4) the immediate perpetrator’s strong inclination to commit the act.

See also PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 535 on; PERU, *Motion for annulment and consults (Case Leaders of the Shining Path) (List of Judgments 13.i)*, Whereas 4.5.4.

## ii. Command authority of the perpetrator-by-means

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 729–731:

Command authority is the capacity of the highest strategic level—the man behind the scenes—to issue orders or assign roles to subordinate parts of the organization. This capacity is obtained, or may be conferred, based on a position of authority, leadership, or rank derived from political, ideological, social, religious, cultural, economic, or other similar factors.

The perpetrator-by-means expresses command authority by issuing *orders*, whether explicit or implicit, which will be carried out due to the inherent automaticity of the functional make-up of the apparatus. In other words, the one issuing the order need not also, or alternatively, resort to coercion or deceit with respect to potential direct perpetrators. This is especially true because [...] the direct perpetrator shares the organization’s criminal aims and is predisposed to obey an order to carry out an illegal act. This means that the *control wielded and exercised by the perpetrator-by-means, who holds command authority, is conferred by virtue of the intermediary’s or direct perpetrator’s integration into the organizational apparatus*.

In this context, it is useful to distinguish between the command authority exercised at the highest strategic level and that wielded at the middle levels. It is important to distinguish the two ways in which command authority may be expressed. The first flows from the highest strategic level down to the tactical or operational levels, and the second flows from the middle levels down to the direct perpetrators. In both cases, command authority is always expressed in a vertical line. The latter will be critical for imputing perpetration-by-means to all of the commanders along the chain of command in the apparatus of power, since the form and scope of decisions transmitted by the highest strategic level cannot be equated with that of the orders issued by mid-level commanders to direct perpetrators, precisely because of the different status each stratum occupies in the criminal organization. The highest strategic level, then,

will have a different level of control over the organization than that exercised by mid-level commanders, since whoever is at the top of the hierarchy has total control over the apparatus, while those at the intermediate level may only issue orders within the particular sector of the organization under their purview.

The degree of criminal responsibility is also different for someone at the highest rung and will greatly exceed that attributed to someone at the intermediate level. The Court of Jerusalem underscored this higher level of responsibility in the Eichmann case, when it pointed out that “[o]n the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command [...]” [This served as] a juridical confirmation of ROXIN’s argument that “... the decrease in proximity to the acts on the part of the leadership spheres of the apparatus is offset by their increasing organizational control” [footnote omitted].

In this context, it is important to note that the degree of blameworthiness that should be meted out to the person in command will always be greater when that command authority has been conferred by the legally established framework. There is even more ignominy associated with such cases insofar as the abuse of authority has a dual impact on the system when such a commander establishes and directs a hierarchical, criminal structure that is, at the same time, parallel and covert. First, because he deviates from the legally established order, which is the source of his legitimate exercise of power, and second, because he uses his knowledge of the law in force to design and activate the criminal structure in such a way as to render it less vulnerable to detection by the authorities responsible for law enforcement and crime prevention.

It should be noted that someone acting peripherally or collaterally to a chain of command, whether as an adviser or as a mere emissary of directives from the strategic or intermediate levels, or someone whose role is limited to providing the means necessary for the commission of the crime, may only be considered an aider. However, in order to be able to determine that the person’s role is in fact subsidiary to the chain of command, it is necessary to know the individual’s actual status in the organization and his specific contribution to the commission of the crimes. The term “*inferior mid-level commanders*,” as used by part of the national doctrine, is therefore incompatible with the composition and role of this peripheral or collateral sector. This is especially true because the term “*commander*” always connotes the ability to issue an order based on the level of domination over the criminal structure. It follows, then, that anyone who, by virtue of his rank, activates the machinery of the organized apparatus of power for the commission of a crime must always be treated as a perpetrator-by-means.

A particular case that should be taken into account is *command authority between intermediate levels* or what could also be referred to as *commander-to-commander status* [posición de mando a mando]. This variation is generally found in complex organized apparatuses of power. The presence of mid-level chains of command does not preclude the equal attribution of responsibility to any one of them. It is important to reiterate that in such situations, anyone occupying a specific privileged position with

the ability to issue orders shall be treated as a perpetrator-by means, since his directives will enable the criminal structure to remain active.

At the level of these mid-level or sequential commanders, therefore, the argument that “*he was only responsible for transmitting the order*” from another commander cannot be accepted as an exonerating circumstance, inasmuch as the latter’s directives and authority also play a decisive role in the commission of the crime. In such cases, the argument that “*if he had not done it, someone else would have*” also cannot be used to escape liability, since the mid-level commander is completely aware, owing to his status in the hierarchy, that his involvement will play an active role in bringing about the crimes ultimately committed by the direct perpetrators. According to ROXIN, the Court of Jerusalem also underscored this point to justify Eichmann’s status as a perpetrator, which was not affected “... *despite his subordinate position in relation to the organ, as a mere executor. Because the definition of the unwitting victim, as important as it is, in the author’s theory, to punish the conduct of the commander, goes beyond that, in reference to the personal conduct of the executor, to the old and previously mentioned pretext of being a superseding cause*” [footnote omitted]. As a result, the author underscores that “*anyone who commits a crime shall not escape liability based on the circumstance that, had he not done it, someone else would have consummated the act. Moreover, Eichmann was not just an executor; in the eyes of his subordinates, he was also a commander, and therefore the criteria based on which his sources of inspiration qualify as perpetrators-by-means apply also to him*” [footnote omitted].

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 6:

The definitive element is control over the act. Whoever has control over the act is responsible for the crime, even though he is not personally involved in carrying it out. The “apparatus” is imbued with sufficient objective structure to justify transferring the status of perpetrator to the person giving the orders, without relieving the direct perpetrator of the crime of that same status. Dr. Julio César Strassera, prosecutor in the trial against members of the Argentine military juntas, was referring to such an “organized apparatus of power” when he said that the expression “is accepted today without question in criminal doctrine and involves a type of organization with a decision-making center, from whence directives are issued. The potential for the crimes in question to be committed, or not, resides in that decision-making center. The latter’s control over the act is such that, once the decision to commit a particular crime has been made, it happens automatically [...]” [footnote omitted].



### iii. Deviation from the law

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 733:

[T]he distancing or disconnection from the law means that the organization is structured, operates, and remains outside of the national and international legal system.

As ROXIN points out, in such cases “*the apparatus functions wholly outside of the legal system*” [footnote omitted]. In other words, it produces its illicit effects as an integral structure operating completely outside of the law. In his analysis of the Eichmann and Staschynski cases, he observed that State power was operating outside of the law since legal safeguards were not being enforced. This did not necessarily mean, however, that those in power were not ultimately governed by that same legal system, especially in its international dimension. In ROXIN’s view, the disconnection from the law does not refer only to the domestic legal system of each State but also, very particularly, to international law: “*For the sole reason that all nations of the world are connected to certain values, we have the opportunity to regard as criminal and punishable the behaviors of high-level State organs that engage in flagrant human rights violations*” [footnote omitted].

ROXIN recognizes other circumstances giving rise to perpetration-by-means through control over an organized power apparatus in the crimes committed by clandestine movements, secret organizations, and similar groups that collide with the domestic law of the State. In other words, they operate as “*a sort of State within a State, which has emancipated itself from the community order in general or in certain community relations*” [footnote omitted]. To summarize, in ROXIN’s view, this distancing or disconnection from the law not only would be present in crimes committed by State organs or the apparatuses of State power, but also would be applicable to cases of “*non-State organized crime*” and in many “*manifestations of terrorism*” [footnote omitted].

In relation to “deviation from the law” through legal reforms and the enactment of new laws leading to the “restructuring” of the State so that the national legal system no longer establishes the necessary guarantees, see ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón)* (*List of Judgments 1.e*), Whereas:

The extreme gravity of the situation in 1975 due to terrorist activity [which had intensified beginning in 1970] led to the enactment of special legislation for the prevention and repression of this phenomenon.

While the aforementioned analysis could address any number of facets, our main interest here has to do with the legal framework imposed by the Military Junta and those involved in operationalizing the so-called “struggle against subversion” unleashed by the Armed Forces, with the active participation of the various security forces. A distinctive feature of this repressive system was the way it handled public opinion, which goes hand in glove with the clandestine nature of the operations.

In its first administrative measure, the Military Junta partially suspended the National Constitution, imposing a new legal order in the country, in which our Magna Carta was relegated to the status of a supplementary text.

The top military commanders deemed it necessary to institute the “Statute for the Process of National Reconciliation” in the exercise of the constituent power that they had assumed.

According to this instrument, the General Commanders of the Armed Forces of the Nation would form a Military Junta, which would establish itself as the supreme organ of the Nation. They would, at the same time, serve as the High Command of the Armed Forces and appoint the citizen who, with the title of President of the Argentine Nation, would preside over the Executive Branch of the Nation. The Commanders were granted the authority to remove the President of the Nation; to remove and appoint the members of the Supreme Court of Justice of the Nation, the members of the provincial superior courts, and the General Prosecutor for Administrative Investigations [Procurador de la Fiscalía de Investigaciones Administrativas] [...].

Article 5, which dissolved the National Congress, also vested the President of the Nation with legislative powers that the National Constitution reserved for the Congress. It also created a Legislative Advisory Committee [Comisión de Asesoramiento Legislativo] that would participate “in drafting and enacting laws according to the procedure established.” This committee would be made up of nine superior officers, three from each branch of the Armed Forces.

While we can argue that the new legal system was established through the modification of the basic body of law that gave primacy to the “Statute,” we cannot claim that no legal system at all was in place during the self-designated “National Reorganization Process.”

It should be clarified that the provisions of the Criminal Code of the Nation were never derogated, the various procedural codes remained in effect, and no legal exception of any kind to the application of those laws was ever envisaged or stipulated. The intention here is to show that even under the military regime, a system of laws was in place that envisaged and established punishments for anyone who engaged in kidnapping, torture, or murder.

In light of these arguments, it has been correctly stated that *“the so-called Process of National Reconciliation entailed the coexistence of a clandestine terrorist State responsible for repression and another overt State subject to the law, which was established by the same revolutionary authorities but adhered to a certain degree of legality in its actions”* [footnote omitted].

The groundwork had been laid. The legal framework that we have briefly summarized was in effect until the coup d’état on March 24, 1976, and it must be borne in mind that all of these norms and directives were the immediate predecessors to what would become a criminal plan of repression that served as the backdrop for the events under examination at this trial.

For further information on the evolution and content of the laws and regulations adopted during the “National Reorganization Process” in Argentina, including authorizations for searches

and prolonged detentions, criminal law reforms establishing harsher penalties for certain crimes, the declaration of a national state of siege, the appeal to the Argentine Army to intervene in internal security, and so forth, see the first section of the judgment cited herein, ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón)* (*List of Judgments 1.e*).

Similarly, for an indirect discussion of “deviation from the law,” when the security forces or apparatus of power act pursuant to laws that have not been adopted through the regular process and are not known to citizens, see, for example, CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.)* (*List of Judgments 3.a*), Whereas 17 and 23:

[According to the appellant], the authors of the ruling disregarded the provisions of Article 10 of Decree Law No. 521 of 1974, explicitly authorizing the National Intelligence Directorate [Dirección de Inteligencia Nacional] to conduct searches and apprehend people [without a judicial order], and therefore an error has been made in the criminal definition of the circumstances [...].

[In the view of this Tribunal] [...] it is also important to take into account that the aforementioned Article 10 of Decree Law No. 521 invoked by Godoy García’s defense was never published in the Official Gazette [*Diario Oficial*], meaning that it is, in plain language, a secret rule, the tenor of which is unknown to the public. According to Article 6 of the Civil Code, however, a law is not binding until it has been enacted in accordance with the Political Constitution of the State and duly published as stipulated therein. Similarly, Article 7 of the same Code provides that the law shall be published by means of its inclusion in the Official Gazette and, from that date forward, shall be considered common knowledge and shall be binding in nature. Although the aforementioned decree law established different rules concerning its publication, unpublished provisions may never be considered to be in force in our legal system, insofar as they have never been made known to the public. They may not, therefore, be used to justify the commission of criminal acts such as those perpetrated by the defendant—even if he was among the few who were aware of its contents—particularly in view of their illegality. The doctrine bears out this conclusion when it explains that, if observance of a law is to be mandatory, then it must be published and its text made known to those who will be affected by it, and that this consists of simply making it known to those belonging to the group that will be bound by the legal text. [...] It is therefore unacceptable for a public official, who is bound to serve as a guarantor of institutionality, to contend that he was authorized to arrest people under a secret provision that was completely unknown to the affected party, who had no way of knowing which of his actions was being punished by the arrest or the other pernicious consequences of it. Furthermore, convicted defendant Godoy has at no point during the trial clarified the grounds for arresting the victim, the charges pursuant to which the arrest was made, the authority on whose order this was done, the person who issued that order, and for how long the victim was to be deprived of his liberty.

#### iv. Fungibility of the direct perpetrator

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 737:

[A] widely recognized characteristic of the direct perpetrator is that he may be exchanged or replaced by the highest strategic level in the operationalization and perpetration of its criminal design.

[A]s FERNÁNDEZ IBÁÑEZ points out, fungibility, then, is contingent not on the way in which the direct perpetrator commits the crime, but rather on his particular position in the criminal structure: “*The apparatus is arranged in such a way that the executor becomes an arbitrarily interchangeable instrument... He is fungible from the moment the man behind the scenes can be assured of his replaceability... Of course, the direct perpetrator is replaceable, even though he may not have been replaced in the specific act*” [footnote omitted].

As ROXIN has repeatedly pointed out in his descriptions of the characteristics of fungibility, it serves as a guarantee for the man behind the scenes that the crime will be carried out, while simultaneously ensuring his control over the act. The direct perpetrator is nothing more than “*a changeable little wheel in the power machinery*” [footnote omitted], a “*cog*” [footnote omitted] that is easily replaceable but plays a pivotal role in bringing about the illicit acts. From this standpoint, fungibility affords the highest probability that the criminal outcome will materialize, since the criminal apparatus will always have at its disposal an indeterminate pool of potential perpetrators to eliminate even the remotest risk that the order will not be carried out.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.)* (*List of Judgments 14.a*), Whereas 6:

[Dr. Julio César Strassera, the prosecutor in the trial of members of the Argentine military junta, observed that in situations of perpetration-by-means through domination over organized apparatuses of power] “[...] [t]he task is carried out without any need for the decision-making center to know who the specific perpetrator is; this is the fungibility of direct perpetrators. Should one of them fail to carry out the decision that has been made, another will carry it out in his place, because the structure is endowed with the capacity for substitution necessary to replace each part of the machine with another, so that the order will inexorably be carried out in the end” [footnote omitted].

[In this regard] [i]t is worthwhile to mention Roxin’s perspectives on the “man behind the scenes,” based on his study of perpetration-by-means. His theory is based on the functioning of the apparatus at the subject’s will, particularly when he is the one directing it. Hence, asserts Roxin, “An organization takes on a life of its own, independent of the variable identity of its members; it functions ‘automatically,’ regardless of who the individual perpetrator may be” [footnote omitted].

See also PERU, *Case against the Leaders of the Shining Path (Manuel Rubén Abimael Guzmán Reynoso, et al.) (List of Judgments 13.f)*, Whereas 548 and 549:

In regard to the objection that perpetration-by-means presupposes control over will and the facts do not suggest that control was exercised over the will of the direct perpetrators, and that the fungibility of the direct perpetrator has not been satisfactorily demonstrated inasmuch as members of the Communist Party of Peru are not interchangeable, we must point out that the man behind the scenes does not exercise control over the perpetrator directly, but rather indirectly through the apparatus. This is no small matter if we take two factors into account: first, the decisive direction of the apparatus, and second, the perpetrator's connection to, and membership and subordination in, the hierarchy of the apparatus.

According to the doctrine, a careful examination of organized apparatuses of power shows that the control the man behind the scenes exerts over the direct perpetrator is a function of his control over the organization. The control over the direct perpetrator, pursuant to which the man behind the scenes may be considered a perpetrator-by-means, is not direct—and it cannot be, inasmuch as the man behind the scenes does not know the individuals subject to his control. It is, rather, indirect yet sufficient, just like that exercised over the other components of the machinery, and it is achieved through direct control over the apparatus itself [*footnote omitted*].

In contrast, see PERU, *Motion for annulment and consults (Case Leaders of the Shining Path) (List of Judgments 13.i)*, Concurring vote of Chief Justice Javier Villa Stein:

While I agree with my colleagues as to the legal consequences of the accused's responsibility and that he is deserving of the punishment, [...] I arrive at the same conclusion through partially different technical arguments [...]. [I] argue that the responsibility has been incurred through co-perpetration rather than through perpetration-by-means [...].

The question that must be revisited is whether perpetration-by-means is, in effect, applicable, in the terms in which it has been argued [...]. Considering the structure and the dynamics of the (extremely vertical and centralized) terrorist organization; the horizontal compartmentalization of its executing organs (cells); and the autonomy of execution that could be expected of extremely ideological militants with a manifestly high degree of political and military formation, with a shared vision of the State and contemporary society and propaganda produced and distributed, and with common strategic political plans, it is debatable whether this form of perpetration is admissible, precisely on grounds of the dubious fungibility of its executing organs.

In the paradigm of perpetration-by-means that Günther Jakobs calls "direct perpetration in disguise" [*footnote omitted*], the actual perpetrator, the operator, the instrument comes from an **outside** organizational circle and his contribution is mechanical, impersonal, and noncommittal. This is, of course, not the case of a subordinate in a terrorist organization such as the one to which the co-perpetrators on

trial here belong. The latter is a context of co-criminality in which control over the act is co-control or, to put it another way, control over the act in its entirety is “solely possessed by the collective” [*footnote omitted*]. This is the case because it is a collective community that is objectively connected to each of the aims and successful instances of damage to society, and to each can be attributed the expected outcome of the crime under examination. The direct perpetrators of the factual circumstances that have been demonstrated by the Supreme Court are fully responsible subjects who meet conditions and contribute their part in the framework of an organized division of labor within an overarching task, in respect to which they are co-perpetrators. Greater or lesser control over the big picture is not indicative of the type of perpetration, but rather of their greater or lesser degree of participation [...]. In this context, the perpetrators cannot be taken as merely fungible direct intermediaries [or middlemen], even if it is shown that, in effect, there was a (vertical) distribution of roles and tasks. In the instant case, it is, in reality, a matter of finding the appellant responsible as a co-perpetrator.

***a. Predisposition of the direct perpetrator to carry out the crime***

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 740:

Specifically, this category refers to the direct perpetrator’s psychological predisposition to carry out an order involving the commission of a crime. Here it is not the fungibility of the perpetrator that ensures that the order will be carried out, but rather the latter’s internalized interest and conviction in making it happen. It is a matter, then, of eminently subjective factors, which some authors identified through the justifying motivation, capable of transforming “*millions of people into potential and obedient instruments*” [*footnote omitted*].

Significantly, a characteristic of criminal structures, and particularly those with a vertical hierarchy, is that the direct perpetrator no longer acts as an individual entity but becomes part of a strategic, operational, and ideological whole that forms and steers the organization’s existence. A collective psyche gradually develops, which is manifest in the perpetrator’s adherence and strong predisposition toward the crime that the structure has ordered and planned.

There is a psychosocial explanation for this, based primarily on the direct perpetrator’s sense of the legitimacy of his own membership in the criminal structure, which fosters in him an inclination to adapt positively to any goal, action, or role that may be assigned to him, even those having a manifestly criminal content. This will contribute to a higher likelihood of success of an order issued at the highest strategic levels and contribute to the control over the act attributable to the latter as perpetrators-by-means [*footnote omitted*]. Because of this psychological predisposition, the perpetrator conveys to the hierarchical superior, implicitly or indirectly, through his behavior and his obedience, his willingness to submit to their designs. In this way, as PARIONA ARANA asserts, the man behind the scenes will have achieved control

over the middleman “*through behaviors that precede the commission of the act*” [footnote omitted].

## D. Examples of structures or organized apparatus of power

### i. Bolivian case: Irregular armed groups or paramilitary groups

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)*, Section VII, Whereas:<sup>20</sup>

Armed groups, obeying the orders of the accused, perpetrated those crimes, as clearly shown in classified official note No. 689/80 of August 14, 1980, sent by Luis Arce Gómez to Luis García Meza, the text of which is as follows: “I attach for Your Excellency’s knowledge and approval, the organigram and activity plan of the groups that made possible the triumph of the Armed Forces over international extremism” [...]. The text of this official note demonstrates that the accused, Luis García Meza and Luis Arce Gómez, are the ones who organized and directed the armed paramilitary groups that committed the crimes that have been enumerated.

In the commission of those crimes, there is a direct and close link between the material authors and those who gave the order to commit the crime. In effect, Luis Arce Gómez and Luis García Meza rewarded the paramilitaries by assigning them to or recommending them for civil servant positions [...]. Not only did Luis García Meza and Luis Arce Gómez give government positions to the paramilitaries, they also gave them weapons of the Bolivian State with which to commit the crimes, as shown in official note No. 935/80 of September 24, 1980, sent by Arce Gómez to García Meza, which states, textually, “Reiterating the conversation with your authority, allow me to respectfully inform you as to the urgent need to replace the obsolete weapons used by the assault groups under the jurisdiction of this Office [...]. To that end, we require the following: Assault group: 300 Uzi submachine guns and 3,600 9-millimeter bullets.” The paramilitary or irregular groups were commanded or led by mid-level military commanders directly subordinate to Luis García Meza and Luis Arce Gómez, as shown in Service Order No. 380/80 of October 20, 1980 [...]. This order is from Luis Arce Gómez and is addressed to Major Javier Hinojosa (“The Lynx”) and states, “As of this date, you will assume the position of National Chief of the Special Operations Group [Grupo de Operaciones Especiales (GOES)].” In classified letter No. 266 of February 17, 1981, signed by Luis Arce Gómez and addressed to the Chief of Department II of the Army Commando, Arce Gómez states, “On the order of His Excellency the President of the Republic, I

20 It should be noted that the decision from which the paragraphs below are transcribed *did not use the doctrine of perpetration-by-means through an organized apparatus of power*. Nonetheless, the authors viewed the texts cited as *potential* cases which, should the applicable law and jurisprudence of each country permit, *could be analyzed*, based on the evidence presented, from the standpoint of this doctrine.

would be grateful if you would proceed with the release from duty of the paramilitaries under your control in that department of the Army [...].”

The documentary evidence described demonstrates with absolute reliability that the accused, Luis García Meza and Luis Arce Gómez, are the organizers of those paramilitary groups, since the latter operated under their immediate command and hierarchy. The most unusual and incredible aspect is the agreement of February 12, 1980, signed by Klaus Altmann Hausen and accused Luis Arce Gómez, who, at that time, was in charge of Department II of the Army. The document reads: “I. I, Klaus Altmann Hausen, pledge to serve unconditionally with the Army of Bolivia in the specialized area of intelligence. II. I further pledge to participate directly in planning and operations as required by the Army of Bolivia and where my active participation may be required. III. I pledge to maintain confidentiality concerning what is done or exists, and what I know or participate in, with my life as guarantee. IV. I, Col. DAEM, Luis Arce Gómez, on behalf of the National Army, with the powers vested in me, and with the authorization of my superiors, bestow on Mr. Klaus Altmann Hausen the honorary rank of Lt. Col.” A reading of the preceding document, signed on February 12, 1980, by accused Luis Arce Gómez with a foreign subject condemned as a Nazi “war criminal” by the French justice system, reveals the preparations made for the organization of irregular groups, with the blessing and approval of Luis García Meza. This demonstrates that the aforementioned individuals initiated, in a premeditated manner, the organization of irregular groups that acted under their immediate command; as high-level military personnel—they were officers of the Armed Forces—they had the constitutional obligation to ensure the stability of the legally constituted government. Far from proceeding in that way, they prepared and carried out the coup of July 17, 1980, with all of its aggravating circumstances.

[Furthermore], [...] it is observed that [...] there is a secret official note identified as No. 675/80, of August 13, 1980, sent by Luis Arce Gómez to Luis García Meza, President of the Republic. This note states as follows: “Following Your Excellency’s instructions, I am forwarding you the list of members of the GOES (paramilitaries) of the city of La Paz, who were in charge of leading the actions before and after the patriotic deed of last July 17, together with the Armed Forces.” This official note is conclusive evidence that Luis García Meza and Luis Arce Gómez are responsible for the organization of those armed groups that violated the rights and guarantees set forth in the Political Constitution of the State, and also directed them.



## ii. Chilean case: National Intelligence Directorate within the military structure

CHILE, *Application for revocation of immunity of Augusto Pinochet Ugarte (Clandestine Detention Centers of DINA) (List of Judgments 3.c)*, Whereas 3:<sup>21</sup>

According to its legal statutes, the National Intelligence Directorate [Dirección de Inteligencia Nacional, DINA] operated under the government Junta. In practice, however, its director, Manuel Contreras Sepúlveda, reported only to the President of the Junta, Augusto Pinochet Ugarte, and acted as his delegate. Manuel Contreras Sepúlveda has stated that the mission of the DINA was to eradicate and eliminate Marxist extremism, by carrying out to the letter the orders given to him directly by the President of the Republic, under whose jurisdiction it operated. The President, therefore, knew exactly what the National Intelligence Directorate, and its delegate and Executive Director, were doing and not doing, since it did not operate autonomously and any mission undertaken would have had to have come, as it always came, from the President of the Republic. Contreras has stated that he met with Augusto Pinochet early each morning to inform him about national events and intelligence matters. In relation to the foregoing, it is also important to recall Orlando Manzo Duran's statement on pages (27 or 875) of the Asrael Retamales case record, to the effect that he was chief of the Cuatro Alamos detention center and, in that capacity, he attended two meetings at DINA general headquarters with officers of that agency, led by its chief, General Manuel Contreras Sepúlveda. At that time, the latter pointed out to Manzo Duran the importance of arriving on time to give his reports on the status of the detainees, noting that he was sometimes late in arriving at general headquarters and that he—Contreras Sepúlveda—needed the reports very early in the morning, since he met with General Pinochet at 8:00 a.m. to inform him about the detainees so that they could be discussed with his High Command.

The Army is a hierarchical institution, and the National Intelligence Directorate had a militarized and therefore equally hierarchical structure in which, as a general rule, the direct chief and the superior officers order and decide what their subordinates are to do. The latter may not act of their own volition and must, in addition, give their reports at scheduled times, at the behest of their commanders. Furthermore, for personnel, institutional, and national security reasons, every direct chief—and through his intermediary, the superior officer—must be informed of all activities of his staff. All army officers must report to their unit daily, and their failure to do so activates a security measure designed to establish their whereabouts. This is parti-

21 The clauses transcribed here are found in a decision on the “merits of the request for withdrawal of immunity in respect to Augusto Pinochet Ugarte, in order to investigate his alleged responsibility in the planning, implementation and cover-up of the deprivation of liberty [of the victims indicated in the court records].” Therefore, this is not, obviously, a determination of his individual criminal responsibility for the events included in the indictment. Furthermore, it should be noted that the decision from which the paragraphs below are transcribed *did not use the doctrine of perpetration-by-means through an organized apparatus of power*. Nonetheless, the authors viewed the texts cited as *potential* cases which, should the applicable law and jurisprudence of each country permit, *could be analyzed*, based on the evidence presented, from the standpoint of this doctrine.

cularly the case in an intelligence agency such as the DINA, where personnel were not allowed to engage in any activity without the knowledge of the commander, or on their own initiative. Such information sources, which concur with others that the doctrine classifies as evidence, reinforce the previously stated conclusion: thorough, coherent, and rational consideration, taking into account motives, functions, and means, gives rise to the well-founded suspicion that Augusto Pinochet Ugarte was, at the very least, aware of the acts.

### iii. Peruvian case: Shining Path (non-State actors)

PERU, *Motion for annulment and consults (Case Leaders of the Shining Path) (List of Judgments 13.i)*, Whereas 4.2.1:

[I]n the oral proceeding, it was established that the accused, Manuel Rubén Abimael Guzmán Reinoso, was the founder of the “Red Faction” of the Communist Party of Peru and that, in that capacity, he served as the number one ranking member of the Central Committee, the Politburo, and the Permanent Committee of said faction.

The Court considers that the accused has been denounced not only as the highest-level and primary leader of the terrorist organization but also as the architect of the ideological current known as “Pensamiento Gonzalo,” which sets out the general political framework, its military underpinnings, and the practice of terrorist violence.

The Court takes the view that the violence occurred in the context or in the implementation of the so-called Operational Strategic Plans or Major Military Plans approved by the Central Committee, wherein Guzmán Reinoso wielded real power through the Central Directorate. The Court likewise notes that the operational strategic plan became the overarching plan for the organization’s criminal activities, so that none of its members could decide, of their own volition, to carry out actions independently of that regulated process. [...] [T]he accused planned the place, the method, and the objective of the attacks, including the progressive use of catastrophic means, such as vehicle or car bombs. For decision-making purposes, the convicted individual adopted principles such as centralism and discipline to ensure the obedience of members of the organization. The Supreme Court points out that his control over the organization was complemented by control over the activities of its members, who presented reports following the attacks.

The convicted individual [has also been found] liable in the case of the massacre of residents of Lucanamarca and the surrounding areas. [In accordance with the evidence submitted at trial], members of the Central Directorate, with Guzmán Reinoso at the helm, decided to strike a decisive blow against the residents of Lucanamarca as opponents of his organization, since members of the aforementioned peasant community had allegedly killed the local Shining Path leader.

The High Court concludes that since the accused held the highest position in the Shining Path terrorist organization, he is the one mainly responsible for all of the charges substantiated in the ruling; he is thus a perpetrator-by-means of the crimes of aggravated terrorism by virtue of his control over the organization.

#### iv. Peruvian case: National Intelligence Service within the *de facto* regime of Alberto Fujimori (since April 1992)

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 745:

The defendant [Alberto Fujimori] occupied the highest position at the strategic level of the State in general and the National Defense System in particular. From that position, he had obvious command authority for the direct conduct of political and military strategies to combat the terrorist subversive organization that had been operating in the country since the early 1980s.

In that context, the accused, Fujimori Fujimori, together with his advisory and support staff, and using the State secret (intelligence) services—which, consistent with their functions, have been characterized by the compartmentalization of their organs or units, the hierarchical subordination of their structures, and the secrecy and quasi-clandestinity of their agents and actions—delineated and defined special objectives and strategies for combating terrorist subversion, focusing particularly on the nuclei that had begun to operate in the urban areas of the country, especially the capital of the Republic and its environs.

In this domain, the government's main objective, the policy established, general strategies, and orders to be carried out were issued or transmitted by the defendant and retransmitted through the other strata of the organized apparatus of power in many different ways [...].

In this context and praxis, the underlying common thread was the elimination of presumed terrorists and their organizations or support bases. The specific strategy adopted for this purpose was the identification, location, intervention, and physical elimination of members and sympathizers of the terrorist groups. At the tactical level, the operational pattern for applying the strategy began with gathering intelligence on subversive targets and their components, followed by their elimination in special intelligence operations carried out by specialized units of the SIE [Army Intelligence Service]. The SIN [National Intelligence Service] would assign and supervise these operations with logistical support and coordination from the Army General Command.

The criminal activities and operations of Barrios Altos and La Cantuta, and in the underground areas of the SIE, carried out by the organized apparatus of power built and activated by the defendant from within the SINA [National Intelligence System]—whose basic implementing nucleus with respect to control of terrorist subversive organizations was the Colina Special Intelligence Detachment—were a manifestation of State human rights crimes featuring an evident distancing from, and constant infringement of, domestic and international law.

#### 4. CO-PERPETRATION

Co-perpetration is a distinct form of criminal intervention that is widely recognized in legal systems of the neo-Roman family,<sup>22</sup> although it has only recently been incorporated into international jurisprudence.<sup>23</sup> According to this theory, two or more persons acting with a common purpose and in concert are considered perpetrators of the crime as a whole, even if none of them carries out all of the material elements (*actus reus*) set out in the criminal definition.

Doctrinal studies of the subject have noted that co-perpetration “[...] connotes two or more perpetrators who each contribute to the commission of the crime. Their co-operation must be close as their contributions are *mutually attributed*, holding each co-perpetrator responsible for the *whole* crime.”<sup>24</sup> To expand on this, and bearing in mind the potential variation among legal or doctrinal definitions in different jurisdictions, we can say that co-perpetration requires *a common plan shared by the parties*, as well as *a functional distribution of roles*, based on which each person makes a *fundamental and essential contribution* to the commission of the crime.<sup>25</sup> Given the importance of each contribution, it is therefore understood that each of the authors “[...] has co-control [over the criminal whole], which makes them ‘co-owners of the act as a whole.’ [footnote omitted]; co-perpetration is the joint commission of the crime.”<sup>26</sup>

Coinciding with scholarly works on the subject, international jurisprudence has affirmed that co-perpetration, understood in these terms, is also based on the criterion of control over the crime [*dominio del hecho*] to distinguish between the perpetrators and participants of a crime.<sup>27</sup> As the International Criminal Court has observed, “[...] although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her own task.”<sup>28</sup>

The paragraphs below present Latin American court rulings that have applied the theory of co-perpetration as a form of punishable criminal intervention. In the first decision, it is important to note, in particular, the basic elements of co-perpetration as the courts have clearly defined them: (i) a common plan; (ii) distribution of roles; and (iii) the indispensable nature of the contribution made by each of the accused. The second decision refers to the concept of “necessary cooperators,” which various Latin American countries have compared to co-perpetrators because they provide “[...] necessary aid to achieve the proposed criminal outcome.”<sup>29</sup>

22 As an additional point of reference, the theory of co-perpetration has posed serious problems for Anglo-Saxon national systems in which perpetration is based on the direct or immediate commission of the *actus reus* by the person to whom such status is attributed. Any other person who participates in the crime through a means other than physical commission will be considered in the context of the different theories of accomplice liability. In this regard, see, for example, Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, *supra* note 7, and Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 5.

23 See, among others, Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, *supra* note 7.

24 *Ibid.*, at 72.

25 See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 5.

26 *Ibid.*, at 181.

27 See *supra* note 12 and *infra* note 30.

28 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 12, para. 342.

29 Note in the original: “The activity of the co-perpetrator or perpetrator *through cooperation* is set out partic-

Excerpts from the next two decisions address particularly complex forms of co-perpetration. The first one, referred to by the Spanish term *coautoría impropia*, is co-perpetration by virtue of failing to act in compliance with a legal duty.<sup>30</sup> In the second type, known as successive co-perpetration, the contributions occur at different moments and a co-perpetrator may “join in” the crime after its execution has already begun. Both forms merit particular attention insofar as they could offer appropriate responses to the complex realities of macrocriminality. Nonetheless, they must be interpreted and applied carefully to avoid infringing on the principles of culpability and individual responsibility.

## A. Overview

COLOMBIA, *Case Pueblo Bello (Pedro Ogazza P.) (List of Judgments 4.d)*, Whereas 5 and 11–12:

[The defense argues that] the defendant’s role was that of “doing intelligence work,” referring exclusively to the taking of Pueblo Bello—an effort that was, in turn, confined to establishing which inhabitants of that town belonged to, or had some tie or sympathies with, the guerrillas—but that *he* was not present when it was carried out[.] [T]he Court understood the opposite by imputing to him participation in all of the crimes committed, [...] which was impossible since he was not present during the takeover.

[Based on the evidence submitted, this Court concludes that the defendant was part] of a criminal organization that, among its various activities, duly planned the capture of Pueblo Bello *for a specific purpose*, which was to kill all of the people they believed had ties to the guerrillas. *And it is in relation to this specific objective that the informer identified OGAZZA PANTOJA as “the intelligence chief”* whose task was to establish which of those residents had ties to the guerrillas in order to subsequently apprehend them, kidnap them, gag them, take them to one of the properties of his

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ularly in Article 4 of the Argentine Criminal Code, which describes it as consisting of ‘aid or cooperation’ [*auxilio o cooperación*] without which *the crime could not have been committed*. In order for the cooperator’s actions to be punishable, he must have *representation in the act and its illegality* and must have acted *voluntarily* in bringing about the result, since otherwise it would be necessary to consider the subjectivity of the act with respect to its perpetrator. As a result, the necessary but innocent aider is excluded from liability with respect to the criminal aim or to whomever he provides necessary aid for a different criminal aim.” See Francisco Pavón Vasconcelos, *Manual de Derecho Penal Mexicano*, *supra* note 14, at 551, n. 43. [*Unofficial translation*]

30 It is important to say a word or two about the difference between this particular form of co-perpetration and the theory of command or superior responsibility. Even though the issue was not directly addressed by the judgment, based on the characteristics of each doctrine, it would be plausible to affirm that the main difference lies in the absence of a command or superior relationship between the direct perpetrator and the person accused of the crime according to this theory (*coautoría impropia*). Nonetheless, it is important to acknowledge that some of the most important scholars in the field, including Antonio Cassese, have indeed affirmed that, when the superior has knowledge of the crimes that his/her subordinates were perpetrating or were about to perpetrate and does nothing to prevent them, he/she should be considered as a co-perpetrator of the crime. For a more detailed discussion, see “*Responsibility of the superior*,” particularly *infra* note 57, in this chapter.

chief, Castaño, on the banks of the Sinú river, torture them, kill them, and then bury them in hidden locations so that their bodies would not be discovered, so as to ultimately ensure impunity for the whole affair.

Therefore, the fact that it was [the person known as] “Patecumbia” who actually apprehended the individuals previously identified by OGAZZA in no way erases the latter’s participation in the criminal plan. The “*intelligence work*” was, beyond any doubt, the initial basic task, critical to the plan’s implementation and without which it could never have actually moved forward, since without knowing which people were to be killed, the criminal plan obviously would not have had a target—or, to put it another way, the act conceived could not have reached even the preparation stage, much less the implementation stage or, of course, consummation. In sum, it would never have come about.

This was the magnitude of OGAZZA PANTOJA’s role in the commission of the acts of Pueblo Bello. The Court understood it as such: far from merely providing aid in terms of an accessory, he was, rather, a co-perpetrator through a clear division of labor that is beyond question in view of the role assigned him [...].

See also GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*, Whereas II:

[The admitted testimonies, which the lower court deemed to have evidentiary value], stated that defendant BONIFACIO CUXUN LÓPEZ arrived in Río Negro on the day of the events, but they made no mention of any concrete action [beyond being there] [...] watching over the women. In view of the foregoing, and the fact that the lower court itself pointed out that while the defendants may not have carried out all the elements of the crime, in each case it is inferred by logical deduction from the external acts committed, collectively and individually, that they all had control over the crimes, that *it was a general action that they planned opportunely*, together WITH THE OTHER MEMBERS OF THE CIVILIAN SELF-DEFENSE PATROLS and army personnel, [therefore,] it was not a matter of selective killings but rather of mass murder, indicating a general intention to bring about the deaths of the women and children of the village of Río Negro [...]. With this, the lower court explains in practical terms the reason why it believes there was illicit association to commit the crime for which the defendants are being tried and why that same reasoning applies to the accused, BONIFACIO CUXUN LÓPEZ. Because even though none of the witnesses directly identified him as having killed a particular person, he collaborated on the day of the events, as the lower court has confirmed through [some of the testimonies given] [...]. [The] Criminal Code sets out the criminal definition of necessary cooperators who, while not strictly perpetrators, are participants whom the legislature equates with the former for political criminal reasons; this is to say that they are regarded as perpetrators and by extension are subject to punishment as such [...]. [...] [T]he action of defendant BONIFACIO CUXUN LÓPEZ would be comparable to a perpetrator in the degree of consummation of the crimes of murder,

taking into account [...] that the crimes proven involved premeditation, cruelty, and brutally perverse impulses [...].

## **B. Co-perpetration by virtue of failing to act in compliance with a legal duty (coautoría impropia)**

COLOMBIA, *Case La Gabarra (Luis Fernando Campuzano Vásquez) (List of Judgments 4.j)*, Whe-reas Second:

[With respect to the crime of “illicit association,”] the evidence leaves no room for doubt as to the permissive attitude of Army personnel who, instead of combating the constantly present members of the illegal armed group, tolerated their illegal movements and checkpoints, which validates the conclusion that they acted in this way to help ensure that the illegal activity would continue unhindered in the zone.

In the conditions described, the Court is confident about the defendant’s active participation in the activities of the illegal armed organization, behavior that was evidently free and voluntary since, although his military training and the express orders he received warned against such behavior, he steeled his conscience and his will against those premises and also against the many complaints from the citizens he had pledged to protect.

The defendant, therefore, played an active role in the illegal acts carried out by the AUC [Colombian Self-defense Forces], and his actions, which have already been described, were his “part” or “quota” to enable the group to fulfill its mission. This is to say, as the charge implied, that he was a “*coautor impropio* of the unlawful act” [a co-perpetrator by virtue of failing to act in compliance with a legal duty].

[In regard to the murders], [g]iven the behavior of the defendant described above—which in terms of the actions of the illegal armed group could be said to have consisted of “let it be done” or “let it happen,” or of “turning a deaf ear” to his indisputable duty to combat the irregular group that was leaving a trail of blood and refusing to protect the civilian population, in respect to whose lives he served as guarantor, with the argument that “whoever owes something should pay it”—the defendant unquestionably allowed the massacre of that disastrous night to happen, not only through his omissions but also through his proactive behavior.

The implication of the accused officer, therefore, stems from his approval, his acceptance, his consent, his agreement, his knowledge; in a word, his *acquiescence* to the massacre that the AUC, through every means, had reported they were going to commit against those citizens, whom they referred to as guerrillas or guerrilla supporters. His acquiescence is deduced beyond doubt from his public statements to the effect that he would not combat the illegal individuals and that, tacitly, he would allow their crimes because “whoever owes something should pay it.”

*Acquiescence and connivance* also denote knowledge of the structural elements or components of the crime, the actual commission of which is attributed to the illegal armed group.

Hence, the officer in charge of the troops who, in order to facilitate the group's armed action against the civilian population, should cleverly decide to withdraw the contingent of men under his command, shows his absolute knowledge of the criminal nature of the act or acts that he essentially knows are going to be carried out.

The Court concludes, then, that any uncertainty was dispelled with respect to the defendant's participation in the murders committed, with the understanding that he tacitly and expressly allowed the members of the AUC to act however they pleased, just as they had been announcing, and he promised, and he made it known, that he would not fight them and would let them do whatever they wanted with the civilian population, because "whoever owes something should pay it."

The group's known criminal background, and its public statements to the effect that they "would take La Gabarra" in order to kill the citizens for being guerrillas or for collaborating with subversion, after having previously carried out selective murders to lend credence to the threats, are circumstances through which the accused officer was forewarned of the commission of multiple murders. Despite this, he expressed, and ultimately fulfilled, his intention not to defend the civilians or combat the illegal group.

It is clear, then, that he consciously and freely covered up those actions and that his contribution to the result consisted of those concrete acts.

Intention must therefore be imputed to him for that consequence, since he had knowledge, through every means, of the impending massacre and did nothing to stop it, though it was his constitutional and legal duty to do so.

This allegation is consistent with international standards. Intention has been described as follows in reference to the "result" or "consequence" of the act under Article 30 of the Statute of the International Criminal Court:

"Intermediate or secondary results necessary for the final result that are a virtual certainty and not based on a wholly improbable supervening event must be imputed to the perpetrator. For example, if the perpetrator causes an airplane to fall from the sky to obtain the insurance money (final objective), then it falls within the 'ordinary course of events,' that the passengers would also perish (intermediate or secondary result).

"The imputation therefore requires no more than the knowledge of the production of the result produced based on general life experience; the necessary knowledge can be objectively determined based on the criterion of 'ordinary course of events.' Such secondary consequences can also be deemed to have been 'desired' because the perpetrator has certainty vis-à-vis his production. In any case, this requires more than a situation of *dolus eventualis*, which requires that the production of the result is a serious possibility, while in this case, there is relative certainty that the result will be produced. This criterion corresponds more closely to that proposed in Norway and Finland as far as 'awareness' that it is 'certain' or 'highly probable' (*sikkert eller mest sansynlig*) that the action contains the elements of the crime.' In regard to *dolus eventualis* being deemed sufficient, it also refers to the fact that this concept had been suppressed before the Rome Conference" [*footnote omitted*].



By virtue of the foregoing, the Criminal Cassation Chamber of the Supreme Court of Justice [...] declares Luis Fernando Campuzano Vásquez, of the personal circumstances described herein, to be a criminally liable co-perpetrator of the series of offenses of aggravated homicide and illicit association [...].

Prior to the judgment discussed hereinabove, the Constitutional Court of Colombia developed a line of jurisprudence with respect to crimes of commission by omission attributable to people in positions of guarantors. It serves to complement and better explain the theory of *coautoría impropia* [co-perpetration by virtue of failing to act in compliance with a legal duty], as discussed by the Supreme Court of Justice of Colombia in the paragraphs transcribed above. COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán)* (List of Judgments 4.e), Whereas 17:

The State may be a guarantor (institutional competency) when it comes to certain unrenounceable duties in a social and democratic State governed by the rule of law. For example, protection of the life and integrity of all inhabitants of the land and the defense of internal and external security are unrenounceable duties. Since the State cannot be held directly accountable in the criminal sphere, the trial focuses on the person occupying the relevant position [*footnote omitted*]. Ultimately, in order for a member of the public force to be a guarantor, the specific duty to protect the constitutional rights of the citizens of the Republic must fall **specifically** within his sphere of competence (material, functional, and territorial). Therefore, if the duty to safeguard a population sector threatened by outlaw groups falls within the sphere of responsibility of a member of the public force, and he fails to take saving action when the material means to do so were at his disposal, then any harmful consequences to the inhabitants (gross violations of human rights) committed by such groups are imputed to him.

[T]he military forces, along with the National Police, are in a position of guarantors; this derives from their obligation to perform unrenounceable duties in a State governed by the rule of law. Article 217 of the Constitution assigns to the military forces the function of guaranteeing the constitutional order. This order is not limited to preserving the democratic structure of the country, but encompasses the duty to participate actively and effectively (C.P. Article 209) in the defense of the constitutional rights of its members [citizens].

The armed forces play a fundamental role when it comes to this duty. Indeed, an essential aspect of respect for constitutional rights is the State's obligation to protect anyone who is entitled to such rights against violations by private individuals. The safeguarding of rights does not only require the State to refrain from violating these rights itself. It also, as indicated previously, requires the State to confront those who would violate those rights.

[T]he military forces have the duty, as guarantors, to confront individual or collective attacks against the constitutional rights of persons, and, in general, against human rights. Therefore, they may not refrain from taking saving action—except where a *de jure* or *de facto* impossibility exists—when gross violations of those rights

occur, in particular crimes against humanity such as (i) violations of the prohibitions set out in Protocol II Additional to the Geneva Conventions, and international humanitarian law in general, or in the treaties restricting the use of arms in wartime (or in internal armed conflicts); (ii) actions against cultural assets in wartime or in internal armed conflicts; or (iii) atrocities committed in wartime or in internal armed conflicts, such as mutilation, torture, murder, rape, prostitution, and forced disappearance, and other cruel and inhuman treatment incompatible with the concept of humanity, since the armed forces have the obligation to keep such acts from occurring.

The existence of this role as guarantor means that **the charge will be of a crime against humanity** or of gross human rights violations in general, regardless of the type of involvement in the crime (perpetration or participation), the degree to which it was carried out (attempt or consummation), or the subjective attribution assigned to it (intention or recklessness). The internal structures of the charge do not alter the nature of the crime committed; they are not changed by the fact that the subject's involvement (in this case, by omission) is limited to aiding the commission of a principal offense, or by the fact that the offense was never successfully consummated.

The foregoing does not, of course, mean that confirmation of the role of guarantor immediately gives rise to liability, since that would require the presence of all of the elements of the crime: fulfillment of the elements of the criminal definition [*tipicidad*], illegality [*antijuridicidad*], and culpability/guilty mind [*culpabilidad*]. It may be that the guarantor (who is accused of a crime against humanity) is not criminally responsible because of the absence of *mens rea* [*dolo*] (he was unaware of the specific risk to legally protected values) or recklessness [*imprudencia*] (he could not have known the risk to fundamental rights), or the fact that there was a justifying state of need due to conflicting duties (facing two simultaneous attacks against population sectors, he was only able to protect one), etc.

### C. Successive co-perpetration: Permanent crimes

ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*, Whereas:

It has been widely held, by the authors and in this jurisdiction, that the crime of illegal deprivation of liberty is the archetype of the permanent crime [...].

Significantly, the analysis below concerning the perpetratorship of the imputed crimes follows the theory of control over the act as the main criterion in the doctrine as well as in jurisprudence.

As a logical consequence of the permanent nature of the illegal deprivation of liberty, the fact that the accused was only present when the victims in the instant case arrived at the clandestine detention center is not an impediment to considering him a co-perpetrator of this crime. In this regard, it has been held: “*It may be that the act was consummated but its execution has not been completed, a normative hypothesis in which the doctrine recognizes the possibility of co-perpetratorship*” [footnote omitted].

Nonetheless, since the accused has not been implicated in the apprehension of José Poblete and Gertrudis Marta Hlaczik, the violence employed in the commission of that act, which amounts to the aggravating factor set out in Article 142(1), cannot be imputed to Simón in transferring that aggravated crime, based on the principles of what is referred to in the doctrine as successive co-perpetration. The latter is said to occur when a person becomes involved in an act that was initiated by another perpetrator, with the caveat that any related aggravating factors shall not be attributed to the person who joins in subsequently, if he did not participate in them. It has thus been pointed out that “[t]he person who joins in later shall not answer for aggravating factors that have already occurred. [...] [footnote omitted] [...] Events carried out before the second subject became involved cannot be imputed to him, because there can have been no objective control over the act on the part of that individual [footnote omitted]. The rule governing the decision in such cases is that the successive co-perpetrator is not liable for an act that had already occurred when his involvement began, as that would amount to recognition of a *dolus subsequens*” [footnote omitted].

Conversely, the aforementioned aggravating factor is applicable to the duration of the deprivation of liberty, if it is proved that such deprivation extended beyond the one-month period required under Article 142(5) of the Criminal Code.

It should be noted that the accused is considered a co-perpetrator in the event, but even when the event continues over an extended period of time, he would only be liable for the deprivation of liberty during the time period in which he retained decision-making power, in terms of both the conditions in which it came about and those in which it ended, in other words, for such time as he had control over the act.

Based on the foregoing, the control over the act that the accused would have had with respect to the illegal deprivation of liberty experienced by José Liborio Poblete and Gertrudis Marta Hlaczik culminated when they were taken from the clandestine center, inasmuch as it has not been proven that he had any power after that time to interrupt or bring that state to an end.

While it is true that even co-perpetrators involved in only one part of the incident are held liable for its entirety based on the principle of reciprocal imputation inherent to this type of criminal activity, the co-perpetrator’s loss of control over the act is a boundary that cannot be crossed. It has been pointed out [by Professor Claus Roxin], although [not] in reference to successive co-perpetration, but still with relevance to the present discussion, that “[t]his is necessarily inferred from the basic idea of the theory of control, pursuant to which **someone is a co-perpetrator when (and as long as) he has control, together with others, over the course of the event**” [footnote omitted].

## 5. JOINT CRIMINAL ENTERPRISE

In the framework of the theory of co-perpetration of a crime, international jurisprudence has developed the doctrine of common purpose or joint criminal enterprise (JCE) as a specific form of punishable criminal intervention.<sup>31</sup> In this regard, the *ad hoc* tribunals, and the International Criminal Tribunal for the former Yugoslavia in particular, have stressed that joint criminal enterprise must be understood as a form of perpetration distinct from other forms of direct or accomplice liability.<sup>32</sup> Here, the subjective criterion is used as the basis for distinguishing between the former and the latter.<sup>33</sup>

In accordance with the same international jurisprudence, the basis for this doctrine derives directly from the types of collective criminality in which “[...] it is extremely difficult to pinpoint the specific contribution made by each individual participant in the [crime].”<sup>34</sup> Nonetheless, to consider as simple accomplices all of those who, while intervening in the crime, are not the material perpetrators of the *actus reus*, might lead to an underestimation of their degree of responsibility.<sup>35</sup>

It should be noted that although the *ad hoc* tribunals have applied the JCE doctrine extensively, it has also been strongly criticized by scholars and litigators. Some of its detractors contend that it represents an overextension of international instruments resulting from a high degree of judicial activism on the part of the *ad hoc* tribunals. These critics argue that such an expansion could jeopardize basic criminal law principles such as the principles of legality and individual criminal responsibility.<sup>36</sup> Moreover, and perhaps even more relevant for the evolution

31 Many doctrinarians, including Antonio Cassese, have identified the judgment of the International Criminal Tribunal for the former Yugoslavia in the case against Duško Tadić as the first legal decision that proposes the doctrine of “joint criminal enterprise” as a form of punishable criminal intervention. Antonio Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” 5 *Journal of International Criminal Justice* 109 (2007). See also Jens David Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,” 5 *Journal of International Criminal Justice* 69 (2007).

32 According to the International Criminal Tribunal for the former Yugoslavia, “as joint criminal enterprise is a form of ‘commission’ rather than a form of accomplice liability, with the term ‘accomplice’ being understood in this instance to refer to one who aids and abets the perpetrator, the accused is understood to be a perpetrator (or, more accurately in many cases, a co-perpetrator) rather than an accomplice.” ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Trial Chamber, Judgment, January 17, 2005, para. 696. See also ICTY, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, June 31, 2003, para. 432.

33 See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 12, para. 329.

34 Antonio Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” *supra* note 31, at 110.

35 See ICTY, *Prosecutor v. Duško Tadić*, *supra* note 6, para. 192.

36 See, among others, Kai Hamdorf, “The Concept of a Joint Criminal Enterprise and Domestic Models of Liability for Parties to a Crime: A Comparison of German and English Law,” 5 *Journal of International Criminal Justice* 208 (2007). In a more detailed critique of the doctrine of joint criminal enterprise as it has been developed to date by the international jurisprudence, Jens David Ohlin presents three conceptual problems: “(1) an inadequate treatment of intentionality and what level of intentionality is required for a criminal contribution to a conspiracy, (2) a misguided imputation of liability for the ‘foreseeable’ actions of one’s co-conspirators and (3) a violation of the basic principle that individuals should only be criminally liable to the extent of their own culpability.” See Jens David Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,” *supra* note 31, at 71. While these critiques might be well founded,

of international criminal law, the International Criminal Court in recent decisions has virtually discarded JCE as a form of perpetration recognized in the Rome Statute, displaying a preference for co-perpetration and perpetration-by-means instead.<sup>37</sup> Depending on the lines of judicial interpretation that this court will continue to develop in the coming years, the perpetuation of this jurisprudential approach toward direct and indirect perpetration of international crimes would mean the relegation of the JCE, which could ultimately become obsolete as an autonomous form of perpetration.

In light of these international debates, the following sections present excerpts from Latin American jurisprudence that examine JCE through the lens of the relevant international law, jurisprudence, and doctrine. Several of these decisions could serve as examples, depending on the interpretation criterion adopted, of the application of different forms of JCE in the development of international jurisprudence.<sup>38</sup> In this regard, it should be noted that these decisions were included because they highlight some of the constitutive elements of the doctrine as it has been developed in international jurisprudence. However, none of the courts expressly referred to the JCE theory. Ultimately, and depending again on the interpretation used, these decisions could also be taken as examples of the judicial application of traditional norms pertaining to co-perpetration.

## A. Overview

*ARGENTINA, Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b), Whereas 11:*

[The Rome Statute] not only includes “traditional” forms of participation (Article 25(3)(a, b, c)), it also refers explicitly to anyone who “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose” (Article 25(3)(d)), when that contribution is made “with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court” (Article 25(d)(i)).<sup>39</sup>

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it is important to note that they are based in part on the Anglo-Saxon doctrine concerning forms of criminal responsibility, which differs in several key aspects from the prevailing doctrines in Latin American countries.

37 See, for example, ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 12; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 9; ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case ICC-02/05-01/09, Situation in Darfur, Sudan, Pre-Trial Chamber, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, March 4, 2009; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case ICC-01/05-01/08, Situation in the Central African Republic, Pre-Trial Chamber, Decision on Confirmation of Charges, ICC-01/05-01/08-424, June 15, 2009.

38 Again, it is important to recall the analysis of the International Criminal Court, which has identified three basic criteria for distinguishing perpetrators from participants: (i) objective, (ii) subjective, and (iii) control over the crime. JCE is based on a subjective criterion.

39 Note added to the original: Complementing this decision, it is relevant to mention the International Criminal Court’s current interpretation with respect to Article 25(3)(d) of the Rome Statute. In its decision upholding the charges in the case against Thomas Lubanga Dyilo, the relevant Pre-Trial Chamber pointed out that “[the] concept [enshrined in article 25(3)(d)]—which is closely akin to the concept of

COLOMBIA, *Appeal motion (Manuel Enrique Torregrosa Castro) (List of Judgments 4.k)*, Whereas 25:

Bearing in mind that the documentation prepared by the petitioners has to do with forced disappearances, forcible displacement, torture, politically motivated homicides, etc., since such forms of wrongdoing are understood to be included in the category of crimes against humanity, the same qualification should extend to *aggravated agreement to commit a crime* [*concierto para delinquir*], insofar as the criminal pact was developed for that purpose.

The Court points out that the Rome Statute creating the International Criminal Court not only has taken into account the conduct of the perpetrator or participants, but also has given special consideration to the existence of plans to commit crimes against humanity. This means that such preparatory acts for the commission of crimes, which include agreeing to, as well as taking part in, an activity undertaken for that purpose, as is the case with *conspiracy to commit a crime*, must be punished in equal measure. In order for those responsible for conspiracy to commit a crime to be considered perpetrators of crimes against humanity, the following elements must be present [according to certain academic studies on the issue] [*footnote omitted*]:

- (i) The public activities of the organization must include some of the crimes against humanity;
- (ii) Its membership must be voluntary; and
- (iii) The majority of the organization's members must have been cognizant or aware of the criminal nature of the organization's activities.

[A]rticle 25 of the Rome Statute of the International Criminal Court [...] establishes that, while criminal liability is individual in nature, anyone who [...] (d) [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose shall also answer for crimes under its jurisdiction. Such contribution shall be intentional and shall either (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime; [...]. [*Complete text of Article 25 is included in the original judgment, excerpted in this version*]<sup>40</sup>

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joint criminal enterprise or the common purpose doctrine adopted in the jurisprudence of the ICTY—would have been the basis of the concept of co-perpetration within the meaning of article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories. [...] Moreover, the Chamber observes that the wording of article 25(3)(d) of the Statute begins with the words “[i]n any other way contributes to the commission or attempted commission of such a crime. [...] Hence, in the view of the Chamber, article 25(3)(d) provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made.” ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 12, paras. 335–37.

40 Note added to the original: See the criterion currently used by the International Criminal Court with

## B. Types of joint criminal enterprise

To date, international jurisprudence and doctrine have proposed three forms of joint criminal enterprise that can be used to accurately characterize an individual's participation in a complex common criminal plan. These are distinguished mainly by the characteristics of the common plan and the link between the accused and the plan, in consonance with the subjective criterion of differentiation among perpetrators and accomplices.

### i. Liability for a common intentional purpose

In the first category, referred to as “basic” or “liability for a common intentional purpose,”<sup>41</sup> all of the individuals who participate in the enterprise share the same common purpose and the same criminal intention, and they act in keeping with that purpose. According to the International Criminal Tribunal for the former Yugoslavia, “(i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing [for example], must nevertheless intend this result.”<sup>42</sup>

In the examples below, Latin American jurisprudence draws from the norms inherent to its own system to identify the basic elements required to establish liability for the perpetration of a crime under international law through a group, collectivity, or enterprise whose members share a common purpose.

See, in section 4.A of this digest, COLOMBIA, *Case Pueblo Bello (Pedro Ogazza P.) (List of Judgments 4.d)*, Whereas 5 and 11–12; as well as GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*, Whereas II. These decisions could possibly have been considered as examples of joint criminal enterprise if, as has been stated before, the courts had adopted subjective criteria to differentiate between perpetrators and accomplices.

### ii. Liability for participation in an institutionalized common criminal plan

The second category of JCE identified in international jurisprudence is termed “systematic” or “liability for participation in an institutionalized common criminal plan.”<sup>43</sup> It is “[...] characterized by the existence of an organized criminal system, in particular in the case of concentration

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respect to the interpretation of Article 25(3)(d) of the Rome Statute in *ibid.*

41 This expression was proposed by Antonio Cassese in “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” *supra* note 31.

42 See ICTY, *Prosecutor vs. Duško Tadić*, *supra* note 6, para. 196.

43 This expression was proposed by Antonio Cassese in “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” *supra* note 31.

or detention camps.<sup>44</sup> This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the common criminal purpose of that system.”<sup>45</sup>

The following excerpts present the analysis offered by some Latin American courts using ordinary crimes—such as illicit association (*asociación ilícita*) or agreement to commit a crime (*concierto para delinquir*)—to characterize the individual participation of those who, with a common criminal purpose, participated in highly organized and institutionalized schemes. It should be noted that in both instances, the courts focus not only on the alleged physical acts of murder and torture, but also, and more precisely, on the intelligence, organizational, or administrative roles that the accused might have played at certain times.<sup>46</sup> Once again, while it is clear that these decisions do not exactly constitute a direct application of the second category of JCE, they do include characteristics of the latter and could serve to exemplify it.

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 3:

Enrique Lautaro Arancibia Clavel was a member of an illicit association from March 1974 to November 24, 1978, namely DINA Exterior, the external division of the National Intelligence Directorate, an agency of the *de facto* government of Chile. This entity had at least 10 members and its main activity was the persecution of political opponents of the Pinochet regime living in exile in Argentina. Its activities included kidnapping, interrogation under torture, removal of the victim’s identification documents so that they could be forged and reused, etc. Within the organization, Arancibia Clavel was responsible for creating a parallel informers’ network in Buenos Aires that would generate intelligence about the targeted individuals. He was also present during the raid carried out against Chilean citizen Laura Elgueta and during her torture; identification documents that were found in his possession were used to

44 Note added to the original: The International Criminal Tribunal for the former Yugoslavia has pointed out that while this category evolved based on the forms of criminality that were promoted in World War II concentration camps and in the detention centers in Bosnia-Herzegovina, it is not confined to such scenarios. This category encompasses all organized systems featuring a common criminal purpose; the emphasis, therefore, is on the degree to which the system is organized and institutionalized. ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeals Chamber, Judgment, September 17, 2003, para. 89. This doctrine is clearly relevant for many Latin American countries where detention centers played a key role in repressive systems and the forced disappearance of persons.

45 ICTY, *Prosecutor v. Miroslav Kvocka, et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, February 28, 2005, para. 82. See also ICTY, *Prosecutor v. Fatmir Limaj, et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, November 30, 2005, para. 511.

46 Doctrinal studies of this second category of joint criminal enterprise have underscored that in a detention camp or center, for example, or in another highly organized structure, the director of the center, the guards, or the individuals who directly torture or inflict suffering on the victims are not the only ones responsible for the crimes committed there. Based on the distribution of roles, “[a]lso those who discharge administrative duties indispensable for the achievement of the camp’s main goals (for example, to register the incoming inmates, record their death, give them medical treatment or provide them with food) may incur criminal liability. They bear this responsibility so long as they are aware of the serious abuses being perpetrated (knowledge) and willingly take part in the functioning of the institution.” Antonio Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” *supra* note 31, at 112.



impede the identification of the dead. He used fake identities and he concealed his intelligence activities by pretending to be an employee of the State Bank of Chile.

PERU, *Habeas corpus submitted by Máximo Humberto Cáceda Pedemonte (List of Judgments 13.d)*, Whereas 21:

[T]he appellant is accused of belonging to an illicit group with criminal aims, because he contributed to the collusion between high-level Peruvian Army officials and members of his institution who belonged to the Colina Group. In his capacity as a Peruvian Army commander, the Chief of Finances of the Intelligence Service, he allegedly authorized financial benefits such as operational expenses and remuneration for those members and also funded his “own strategies,” which consisted of surveillance, detention, interrogation under torture, annihilation, and physical disappearance.

This criminal group has been identified as the responsible entity in the kidnapping, detention, torture, and disappearance of journalist Pedro Herminio Yauri Bustamante, a crime perpetrated with an FAL rifle and a military pineapple grenade in the early morning hours of June 24, 1992. On this date, [“][r]emoving him from his home in Huacho, they took him to a nearby beach, made them [*sic*] dig a pit and interrogated them; they buried them after killing them with a gunshot to the head fired from an FAL rifle[”] [*footnote omitted*].

### **iii. Incidental criminal liability based on foresight and voluntary assumption of risk**

In the third form of joint criminal enterprise, “extended” or “incidental criminal liability based on foresight and voluntary assumption of risk,”<sup>47</sup> the person is liable “for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.”<sup>48</sup> According to international jurisprudence, in order to satisfy the required element of intentionality, “[t]he accused must have the intention to participate in and contribute to the common criminal purpose. Additionally, in order to be held responsible for crimes which were not part of the common criminal purpose but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.”<sup>49</sup>

The following excerpt could be considered an example of the application of this doctrine. In it, the Colombian Supreme Court of Justice, pursuant to the requirements mentioned above, establishes the liability of the accused as a perpetrator of all of the crimes, whether or not these crimes were part of the original plan. In doing so, the Court stresses the assumption of risk based on participation through concrete and significant actions. It does so without using the term “joint criminal enterprise.”

47 Ibid.

48 ICTY, *Prosecutor v. Miroslav Kvocka, et al.*, *supra* note 45, para. 83.

49 Ibid.

COLOMBIA, *Case Pueblo Bello (Pedro Ogazza P.) (List of Judgments 4.d)*, Whereas 7:

[T]he offenses in this [case], which include the capture of Pueblo Bello, were not perpetrated by individuals acting in isolation. To the contrary, they acted as members of a paramilitary group with a duly constituted hierarchy, and a chief, and with specific aims and duly preestablished plans, and the activities to be undertaken had been duly assigned to each one of them. This division of labor, however, does not permit a legal dissociation from the result obtained through the individually implemented actions, inasmuch as genuine criminal unity was involved. [...] [E]ach member of the organization *participated as necessary to achieve the common aim, taking ownership not only of previously planned actions but also of any others that had to be carried out given the sophistication of the proposed objective*, whether because it had been anticipated in this way or because it became necessary in the course of events, in order to fulfill the proposed objective. [*Emphasis added*]

## 6. RESPONSIBILITY OF THE SUPERIOR

Today, the principle of command responsibility, or in a broader sense, superior responsibility, is clearly recognized by international custom.<sup>50</sup> According to international jurisprudence and doctrine, under this principle the imputation of a superior's responsibility for international crimes committed by his/her subordinates is based on the failure to act by someone who either knew or should have known about the criminal behavior of his/her subordinates,<sup>51</sup> and yet did not act to prevent or punish the commission of such crimes.<sup>52</sup>

50 "The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law." ICTY, *Prosecutor v. Zejnil Delalic, et al.*, Case No. IT-96-21-A, Appeals Chamber, Judgment, February 20, 2001, para. 195. See also ICTY, *Prosecutor v. Milomir Staki*, *supra* note 32, para. 458; and ICTY, *Prosecutor v. Fatmir Limaj, et al.*, *supra* note 45, para. 519. Additionally, see Articles 7(3) and 6(3) of the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, respectively; Article 28 of the Rome Statute of the International Criminal Court; and Rule 153 in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules*, (New York: Cambridge University Press, 2005), at 632.

51 It should be noted that under this principle, superior responsibility does *not* derive from an order that the superior may have given; his/her responsibility is established by the failure to take adequate measures to prevent and/or suppress the commission of crimes under international law by a subordinate, when the other elements mentioned below are present. In a circumstance where a superior explicitly gives an order to a subordinate to commit a crime, wrongdoing may be imputed to the superior either as a perpetrator, based on the doctrine of perpetration-by-means through an organized apparatus of power, or as an accomplice, depending on the specific circumstances of the case and the order given. See "*General requirements of the theory of perpetration-by-means through an organized apparatus of power*" and "*Orders*," sections II.3.C and II.7.B in this digest.

52 Based on a comprehensive and detailed study of the jurisprudence of the *ad hoc* tribunals, Human Rights Watch has concluded that "[a]s to whether there is a duty to 'prevent or punish' or 'prevent and punish' the formulation could be considered to be as follows. If the commander has taken reasonable steps to prevent the commission of the crime and has succeeded, there is no obligation to punish since no crime occurred and the word 'or' is appropriate. If the commander has taken reasonable steps to prevent the commission of the crime but failed, the commander has an obligation to punish the perpetrators, which would absolve

While important, the different elements of this doctrine are beyond the scope of this study and therefore will not be examined in depth.<sup>53</sup> It is important to recognize, however, as Kai Ambos has done, that “[...] superior responsibility is a juridical construct that originated in international criminal law [footnote omitted], and while it may be applied in an absolutely general sense to imputation models based on the oversight of the superior [footnote omitted], it has no direct parallel in domestic law [...]”<sup>54</sup> Similarly, Elies van Sliedregt underscores the unique characteristics of this principle when she asserts that “[t]he superior responsibility concept encapsulated in Articles 6/7(3) of the ICTR/Y Statutes [and Article 28 of the Rome Statute] is a curious concept. It is formulated as an extension of a subordinate’s liability, where the superior is held responsible both for his own failure to intervene and for the crimes committed by his subordinates.”<sup>55</sup> This is a clear departure from the criminal or disciplinary punishment that would be imposed in many countries on the (usually military) superior for negligent supervision or control over his/her subordinates.

According to various doctrinarians, the texts of the aforementioned articles actually specify different forms of liability on the part of the hierarchical superior that must be distinguished and interpreted by the competent judicial organs. This understanding of the relevant international norms has also served as a guidepost for the implementation of the principle in some domestic legal systems. According to Ambos, for example, it is important to distinguish between “[...] an *intentional* [*doloso*] crime of omission—in the presence of the superior’s *knowledge* of the crimes committed by his/her subordinates—and as a *separate offense*, the violation of the duty to control and the failure to report the crime—in the case of negligent ignorance [...]”<sup>56</sup>

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the commander of criminal responsibility. If the commander has taken no reasonable steps to prevent a crime, a violation has already occurred; however, the commander still has a continuing obligation to punish the perpetrators of the crime. In these latter instances, the word ‘and’ is appropriate. If only one word is used, it seems preferable to use ‘and,’ because the word ‘or’ fails to reflect that there are two distinct legal obligations.” Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch, 2006), at 484, n. 51.

53 The elements of the theory of responsibility of the hierarchical superior, as identified in international jurisprudence and doctrine and set forth in Article 28 of the Rome Statute of the International Criminal Court, are as follows: 1. Responsibility of a military commander or person effectively acting as a military commander: (i) commission of one or more crimes under international law by subordinates; (ii) the military superior-subordinate relationship, which may be *de jure* or *de facto*, having effective command and control over subordinates; (iii) knowledge, “knew or owing to the circumstances at the time, should have known”; (iv) failure to take all “necessary and reasonable measures within his or her power” to prevent and/or repress those crimes. Almost the same elements are required under Article 28 of the Rome Statute of the International Criminal Court to establish the responsibility of other nonmilitary hierarchical superiors. The only differences have to do with: (i) knowledge (point iii *supra*), since, for the latter, it must be established that the superior “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes”; and (ii) the relationship (point ii *supra*), since it must be established that the “crimes concerned activities that were within the effective responsibility and control of the superior.” See also Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), as well as Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity*, *supra* note 52, among others.

54 Kai Ambos, *La parte general de Derecho Penal Internacional*, *supra* note 5, at 296. [Unofficial translation]

55 Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, *supra* note 7, at 219.

56 Kai Ambos, *La parte general de Derecho Penal Internacional*, *supra* note 5, at 301. [Unofficial translation]

In a similar argument, Antonio Cassese refers to three categories of liability of the hierarchical superior, depending on the superior's knowledge and actions prior to and following the crime.<sup>57</sup>

These reflections go hand in hand with the practice of the international criminal tribunals, which, despite their frequent references to the principle of superior responsibility, have only in exceptional cases used it as the sole basis for determining individual responsibility. In most cases, the responsibility of the accused has been established based on other theories of imputation.<sup>58</sup> Moreover, as William A. Schabas has noted, the few findings of guilt exclusively on grounds of the liability of the hierarchical superior have resulted in shorter sentences relative to those in other cases of direct perpetration of joint criminal enterprise.<sup>59</sup>

In light of these debates, in the decisions presented below, Latin American courts have addressed general aspects of the liability of the hierarchical superior, identifying its basis in international law and choosing to interpret it in the framework of theories on the failure to fulfill the role of guarantor that have been recognized and developed in domestic law. It should also be noted that none of the decisions presented here rely on this principle to establish the individual liability of a specific person. They refer in the abstract to certain relevant aspects of the theory, or mention it in order to distinguish such theory from other doctrines of criminal participation.

COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán) (List of Judgments 4.e)*, Whereas 17:

57 The following three categories are proposed by Cassese: "1. A commander or superior breaches his *duty to prevent* his subordinates from engaging in criminal conduct. He knows that an offence is about to be, or is being, committed by his subordinates and willingly fails to stop the crime. In this case, the superior has *knowledge* of the crime and its omission is deliberate (*intent*). According to one view the offender should be legally treated as a co-perpetrator [...] or at least as an accomplice[,] [...] [since,] if he had acted to stop it, the delinquency would not have been perpetrated. There is therefore a causal link between the superior's attitude and the commission of crimes. [...] 2. A commander or a superior breaches his *duty properly to supervise* the conduct of his troops or underlings. He intentionally or negligently omits to monitor the action of his subordinates, where he could have become cognizant of the imminent commission of the offence or the fact that the offence was being committed, and therefore prevented it. Here the superior does not know that the subordinate is about to commit or is committing a crime: he lacks knowledge. However, his failure to know derives from his negligent or deliberate breach of his duty of supervision, with the consequence that he does not impede the perpetration of crimes that he could foresee and avoid. In these cases the offence imputable to the superior is arguably different from and less serious than that perpetrated by the subordinate, in that it merely consists of the deliberate or negligent *dereliction of superior duties*. [...] One can contend that failure by the superior to exercise his duty of supervision has a causal link with the crime, in that by breaching his supervisory duty he has in some way *contributed* to bringing about the offence. [...] 3. A superior breaches his *duty to report* to the appropriate authorities crimes committed by his subordinates unbeknownst to him. Here the superior know that a crime has been perpetrated and fails immediately to draw the attention of the body responsible for the investigation or prosecution of the crime. In this case, the superior is liable to be punished for the specific crime of failure to report. His offence is plainly different from that of his subordinates: he is responsible if, upon becoming cognizant of the crime of his subordinates, he deliberately or with culpable negligence fails to report them to the appropriate authorities for punishment. Here the superior's conduct may not be held to have caused, or contributed to cause, the criminal offence." Antonio Cassese, *International Criminal Law*, *supra* note 52, at 244–46.

58 William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (New York: Cambridge University Press, 2007), at 219–25.

59 *Ibid.*

[In] hierarchical relationships, the superior exercising authority or command has the duty to take special measures [...] to prevent people under his effective control from acting in ways that violate fundamental rights. For example, if the superior fails to stop—when he could have stopped—a soldier under his immediate supervision from committing an act of torture, or an extrajudicial murder, or a crime against humanity in general, **because the superior is a guarantor, the harmful consequences of his inferior’s actions are imputed to him, as opposed to simply the failure to carry out a functional duty.**

Beginning with the famous Yamashita case, in which a Japanese Army general was convicted in 1945 for having “...unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines...,” customary international criminal law has increasingly recognized that the member of the public force exercising authority or command must adopt special measures to prevent individuals under his effective control or subordination from engaging in acts that violate human rights. This has been reiterated in the jurisprudence of the various International Criminal Tribunals, from Nuremberg to the *ad hoc* tribunals for the former Yugoslavia and Rwanda. It has been legally established as doctrine in Article 28 of the Rome Statute [*footnote omitted*].

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 6.2:

A recent precedent concerning [the] criminal liability [of a hierarchical superior for failure to fulfill a duty as a guarantor] is found in Colombian criminal law itself. In effect, domestic jurisprudence has developed and applied criminal doctrine on the role of guarantor as it applies to the public forces [as follows]:

“[T]he military forces have the duty, as guarantors, to confront individual or collective attacks against the constitutional rights of persons, and, in general, against human rights. Therefore, they may not refrain from taking saving action—except where a *de jure* or *de facto* impossibility exists—when gross violations of those rights occur, in particular crimes against humanity such as (i) violations of the prohibitions set out in Protocol II additional to the Geneva Conventions, and international humanitarian law in general, or in the treaties restricting the use of arms in wartime (or in internal armed conflicts); (ii) actions against cultural assets in wartime or in internal armed conflicts; or (iii) atrocities committed in wartime or in internal armed conflicts, such as mutilation, torture, murder, rape, prostitution, and forced disappearance, and other cruel and inhuman treatment incompatible with the concept of humanity, since the armed forces have the obligation to keep such acts from occurring.

“[...] *The existence of this role as guarantor means that the charge will be of a crime against humanity or of gross human rights violations in general, regardless of the type of involvement in the crime (perpetration or participation), the degree*

to which it was carried out (attempt or consummation), or the subjective attribution assigned to it (intention or recklessness). The internal structures of the charge do not alter the nature of the crime committed; they are not changed by the fact that the subject's involvement (in this case, by omission) is limited to aiding the commission of a principal offense, or by the fact that the offense was never successfully consummated."

The preceding quote from national constitutional jurisprudence shows that, in Colombia, the responsibility of the chief or superior applies to an official or a de facto military commander.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 742 and 743:

[The] theory of superior responsibility [...] is a mode of criminal liability that emerged and evolved in the aftermath of World War II and was applied at the Nuremberg and Tokyo trials [*footnote omitted*]. According to analysts of those proceedings, "*Those trials made it clear that the commanders had not only the duty to respect the laws of war, but also the obligation to ensure that [these laws] were respected by their subordinates*" [*footnote omitted*]. Subsequently, in the mid-1990s, the International Criminal Tribunal for the former Yugoslavia relied on the same theory to convict the army commanders of the Republic of Serbia, Bosnia and Herzegovina [*sic*] who failed to stop their subordinates from committing crimes against humanity and neglected to punish or investigate the direct perpetrators of such crimes [*footnote omitted*].

*Superior responsibility* is interpreted by the doctrine, and regulated in International Criminal Law, as an act of omission that gives rise to the liability of the individual with command authority over the direct perpetrator of the crime [*footnote omitted*]. In general, it is suggested that in such case, the superior fails to discharge his duty of prevention, supervision, and the punishment of any crime that may be or is committed by his subordinates. This denotes a legal obligation to act on the part of the superior, an obligation he fails to fulfill. According to [Kai] AMBOS, "*The concept of command responsibility—or more aptly, superior responsibility—establishes the superior's responsibility for the failure to act to prevent criminal acts by his subordinates. The superior is responsible for the failure to control and supervise subordinates in the event that they commit crimes. In this way, the superior is responsible for his own failure to intervene, as well as for the criminal conduct of the others. The concept seems to create, on the one hand, an indirect responsibility for the criminal acts of third parties... The superior has a dual responsibility: it is an act of omission... and a dangerous crime...*" [*footnote omitted*].

It is clear, therefore, that because of its inherent characteristics and assumptions, this form of imputation of liability is distinct from perpetration-by-means through domination of an organized apparatus of power. The latter, in essence, will always be an act of commission, though one that is transmitted from the order issued at the highest strategic level to the actual execution of that order by the middleman.

The Rome Statute also develops this distinction from the normative standpoint. It regulates both forms of imputation as two distinct levels of involvement and pu-

nishability of the strategic organs associated with the perpetration of human rights crimes [*sic*]. Article 25(3)(a) of this international instrument offers a fairly precise definition of perpetration-by-means (“Commits such a crime, whether as an individual, jointly with another or *through another person, regardless of whether that other person is criminally responsible*”) [*footnote omitted*]. Conversely, Article 28 provides a detailed definition of the types of omission that give rise to *superior responsibility* (“... *as a result of his or her failure to exercise control properly...*”) [*footnote omitted*].

## A. Responsibility of the superior under the Rome Statute of the International Criminal Court

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 6.2:

The struggle against impunity for the commission of atrocious crimes has led signatory countries to codify the doctrine of command or superior responsibility. Article 28(a) covers not only the military heads of official military forces but also the *de facto* heads of irregular armed groups. Any person who is a military commander, whether official or *de facto*, by virtue of the fact that he is a guarantor of certain behaviors on the part of the individuals under his control, may be held criminally responsible for crimes committed by the forces under his effective command and control, as a result of the failure to exercise that control. This imputation arises when the commander in question knew, or should have known, that his forces were committing or were about to commit a crime and failed to take any of the necessary measures to prevent that commission, or to repress it, or to submit the matter to the competent authorities for investigation.

The most important aspect of this article is that it broadens the criminal liability of military commanders or those exercising *de facto* military authority to avoid the impunity of formally and publicly vested superiors as well as of the *de facto* superiors of irregular groups. This norm is based on the experience of humanity in this regard, as synthesized by a decision handed down two years previously by the International Criminal Tribunal for the former Yugoslavia:

“The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes” [*footnote omitted*].

Furthermore, it is not necessary to prove that the military commander or someone acting as a military commander issued a specific order to commit a crime under the jurisdiction of the International Criminal Court. The said military commander may be responsible for crimes by his subordinates that he did not know about, but that, in the circumstances of the case, he should have known about, prevented, repressed, or reported, as established in the well-known case of Yamashita [*footnote omitted*].

In other words, it is a normative hypothesis in which liability may be incurred for recklessness with respect to the crimes set out in the Statute. Protocol I [to the Geneva Conventions of 1949], in Article 86(2) [*footnote omitted*] set out in international positive law the principle that already had been established in jurisprudence [*footnote omitted*]. This principle, known as command or superior responsibility, was later developed in the Statutes of the *ad hoc* Tribunals [*footnote omitted*].

Moreover, Article 28(b) of the Statute creates a different parameter for measuring the criminal liability of superiors for the crimes of their subordinates in circumstances other than those described in subparagraph (a). In the first place, it does not refer to the responsibility of someone acting as a military commander, whether in a regular army or in an irregular force, nor to command, authority, and control over “forces.” In regard to the latter, Article 28(b) establishes a parameter for the criminal liability of civilian superiors for the acts of their subordinates, subject to the following three conditions: (i) they knew that such crimes had been committed or planned, or consciously disregarded information clearly indicating that this was the case; (ii) those crimes concerned activities under their responsibility and effective control; and (iii) the superior failed to take all necessary and reasonable measures to prevent, repress, or report [these acts].

## 7. OTHER FORMS OF PUNISHABLE CRIMINAL INTERVENTION

In addition to the forms of intervention presented thus far, Latin American jurisprudence has referred to other forms of participation traditionally identified in domestic and international jurisprudence and doctrine as *accomplice liability*. As some scholars have noted, this type of liability “suggests that a person’s act had a substantial effect on the commission of a crime by someone else, while in the case of commission as a principal, the crime is ascribed to one’s own conduct.”<sup>60</sup>

As mentioned earlier, this study is not intended to categorize different forms of criminal intervention. However, because of the differentiated system found in Latin American jurisdictions, it should be recalled that, in general, these forms of participation will produce lighter sentences relative to those imposed on the direct perpetrator, co-perpetrator, or perpetrator-by-means of the crime.

It is therefore important to bear in mind the specific nature of crimes under international law and the complexity of the structures through which they are committed. Based on these considerations, courts and tribunals must identify the doctrine or theory of imputation that best reflects the level of responsibility of those involved in the criminal act, since, as some doctrinarians have pointed out,

[t]he accomplices in international crimes are extremely peculiar in their official position and their social composition. These are not some Tom, Dick or Harry of unknown lineage, without hearth or home. These are ‘titled personages’, upper classes, Ministers, generals, ‘leaders’. But the particularly complicated character of responsibility for complicity in international crimes is determined, of course, not by the high

60 Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute,” *supra* note 7, at 955.



ranks and titles of the accomplices. The complexity and exceptional peculiarity of the structure of complicity in international crimes are caused by the extremely complex connections between the individual accomplices in international offences.<sup>61</sup>

## A. Complicity

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 14:

In this regard, the contested judgment observed [...] that it is evident, from the witness statements and confrontation with the defendant, that he acted as an accomplice in the wrongful act, under the provisions of Article 16 of the Criminal Code, inasmuch as he has been shown to have been a member of the “Tucán” group under the “Caupolicán” Brigade, an operational group made up exclusively of members of the Chilean Carabineros [Federal Police] who were responsible for arresting people and taking them to clandestine detention centers of the National Intelligence Directorate (DINA), including the one known as Villa Grimaldi. Here, it should be recalled that defendant Godoy participated in those operations and was seen in the aforementioned facility witnessing the interrogations under torture of some detainees. In particular, this ruling reinforces the fact that during the process of witness confrontation with Hugo Salinas Farfán, [...] the defendant admitted that he had, in fact, acted as an accessory to the crime by arresting people, as well as in his capacity as an analyst, and that he was already performing such duties on January 3, 1975. [...] During the same hearing, Salinas also directly identified Godoy as Lieutenant Marcos, who was present when the witness was confronted with Sandoval in Villa Grimaldi. Therefore, the allegations were based on real and proven facts, rather than on other indirect evidence, [...], and point to a set of serious circumstances sufficient to establish his participation in the events under examination.

61 A. N. Trainin, *Hitlerite Responsibility under Criminal Law* (London, 1945), at 79, cited by Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, *supra* note 7, at 15.

## B. Orders

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 732.<sup>62</sup>

[T]he order is the primary expression of command authority. It must be understood as a command to carry out an act or mission, which the subordinate must fulfill because of the status and operational rank of the one issuing the order. It may be verbal or written. It may also, however, be expressed through signs and gestures. It is possible, therefore, to distinguish two tiers of orders. The first tier would include *formal orders*, so defined because they take the form of *provisions, directives, and commands*. A second tier, in contrast, includes *orders based on real effectiveness*, in other words *signals, gestures, concrete actions, or various similar expressions*. It is important to note that the commander may, depending on the case and the circumstances of his intervention, express his orders in either of the two ways described herein.

First-tier orders are common in organizations that deviate from their formal, legitimate governing structure to commit criminal activities. In such cases, they attempt to use their original legal foundations to “*disguise*” their crimes. First-tier orders, then, whether identified as *inter alia* provisions, directives, commands, and/or regulations, may or may not be consistent with the regular procedures within the formal legal framework. The latter becomes irrelevant, however, since the power apparatus is acting outside the law, for the specific purpose of perpetrating crimes. Moreover, the experiences of organized power structures of a governmental nature or origins that have been taken up by the legal system have shown that illegal commands frequently are not written down in any decree or document. What matters is the concrete, effective, and real power wielded by the command authority of the organization, which its subordinates recognize as such.

Organized power apparatuses originally organized to operate outside the law generally use second-tier orders. This is true of terrorist organizations seeking to take political power through violent means.

### i. Bolivian case

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)*, Section VII, Whereas section:

The crime of deprivation of freedom is duly and fully established by the two testimonies examined. It is compounded by the arbitrary and dictatorial arrests ordered by

62 The paragraphs transcribed here are excerpts from the judgment handed down by the Special Criminal Chamber of the Supreme Court of Peru, by virtue of which former president Alberto Fujimori Fujimori was found criminally responsible as the perpetrator of crimes committed in Barrios Altos, La Cantuta, and the underground rooms of the SIE, based on the doctrine of perpetration-by-means through an organized apparatus of power, rather than as an accessory/participant pursuant to issuing orders. However, in the view of the authors of this digest, these paragraphs are useful for the current discussion.

Luis García Meza and Luis Arce Gómez in the aftermath of July 17, 1980, as shown in the official note and list of “subversive criminal” detainees that was sent by Carlos Valda Peralta, Departmental Chief of the SES [Servicio Especial de Seguridad], to the National Director of the DIN [Dirección de Investigación Nacional], Guido Benavidez Alvizuri, on October 1, 1980. Luis García Meza used the term “subversive criminal” detainees in a defamatory manner and with disregard for the human person. An examination of the preceding testimonies fully attests to the commission of the crime of “deprivation of freedom,” which was ordered by Luis García Meza and Luis Arce Gómez, who personally oversaw those crimes [...].

[T]he arrests ordered by García Meza and Arce Gómez did not end with the apprehensions; rather, they were followed by acts of psychological and physical intimidation, which, while ordered by Luis Arce Gómez, were carried out with the full knowledge and under the orders of Luis García Meza.

### C. Planning

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)*, Section VII, Whereas:

Despite the alibi offered by García Meza in the form of the certificate [...] issued by Av. General Guillermo Escobar Uhry, explaining that he was absent from La Paz on the day of the tragic incident and was informed of the events by his Minister of Interior on the following day, [...] there is no question that he was aware of what was going to happen in the implementation of Plan “Tiburón” [which resulted in the bloody massacre of Left Revolutionary Movement leaders], a plan that he had promoted and in the preparation of which he had personally taken part.



## CHAPTER III

# GROUNDS FOR EXCLUSION FROM CRIMINAL RESPONSIBILITY

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In his study on the general part of international criminal law, Kai Ambos asserts that it “[...] follows a bipartite structure of the crime. In it, a basic division is drawn between general principles describing, at the first level, the circumstances that trigger *individual responsibility* and, at the second level, those that, as potential defenses, would exclude individual responsibility.”<sup>1</sup> In light of the discussion of the principle of individual criminal responsibility, we turn now to some of the Latin American jurisprudence on defenses, or, as they are generically known in Spanish, grounds for exclusion from responsibility (*eximentes de la responsabilidad*).

As some scholars have pointed out, the first stage in the development of international criminal law focused on consolidating the principle of individual criminal responsibility, leaving aside the matter of causes or circumstances that might exclude it.<sup>2</sup> It was not until the *ad hoc* tribunals were established that defenses began to take on greater relevance internationally.<sup>3</sup> This trend ultimately was reflected in the Rome Statute, which established a more solid body of international rules on this subject, despite the persistent limitations.<sup>4</sup>

With few yardsticks available in international law, specialized scholarly works in the field of international criminal law might serve as a springboard for examining the issue of defenses for the commission of international crimes, as they have been applied by domestic courts. It should be noted, however, that most of these studies have been shaped by concepts more akin to the Anglo-Saxon tradition, which has had the strongest influence on the establishment and work of the *ad hoc* international criminal tribunals over the past 20 years.

William A. Schabas has proposed a broad definition of defenses, a concept rooted in the Anglo-Saxon legal tradition,<sup>5</sup> asserting that “[a] defence is an answer to a criminal charge.

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1 Kai Ambos, *La parte general del Derecho Penal Internacional: Bases para una elaboración dogmática*, trans. Ezequiel Malarino, 2nd ed. (Montevideo: Fundación Konrad Adenauer, 2005), at 73. [*Unofficial translation*]

2 According to a study by Gerhard Werle, the statute of the Nuremberg International Military Tribunal did not even include standards relative to exclusion from responsibility. Because of this, the arguments put forth by the defense attorneys focused particularly on the international community’s lack of authority to conduct such trials and to establish individual responsibility. Gerhard Werle, *Principles of International Criminal Law* (The Hague: TMC Asser, 2005), at 138.

3 Ibid.

4 International analysts concur that the negotiations of the Rome Statute articles on exclusion from responsibility were possibly the most complicated of all of the negotiations on general principles of criminal law. This is due to the wide range of concepts relating to these norms, not just in each family of law but in each legal system. See, for instance, Per Saland, “International Criminal Law Principles,” in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, ed. Roy S. Lee (The Hague: Kluwer Law International, 1999), at 189–217, as well as Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 1.

5 The term *defenses* has not been widely accepted by neo-Roman countries. Moreover, the delegations of countries from the civil law family emphatically rejected this term in the negotiations of the Rome Statute

It is used to denote ‘all grounds which, for one reason or another, hinder the sanction of an offence—despite the fact that the offence has fulfilled all definitional elements of the crime.’<sup>6</sup> Within this overarching concept, other scholars have distinguished between substantive and procedural defenses,<sup>7</sup> the former being the only ones that could effectively exonerate an individual from responsibility for the perpetration of a crime.

Many of the world’s legal systems identify at least two subcategories of substantive defenses: justifications and excuses.<sup>8</sup> In this regard, and reiterating the potential for conceptual differences between the systems, Antonio Cassese has asserted that “[w]hen law provides for a justification, an action that would *per se* be considered contrary to law because it causes harm or damage to individuals or society is regarded instead as lawful and thus does not amount to a crime [...]. By contrast, excuses may be raised in defence when, although the law regards as *unlawful* an action that causes harm and is contrary to a criminal norm, the wrongdoer is nevertheless *not punished*.”<sup>9</sup> Similarly, Ilias Bantekas and Susan Nash have argued that justifications denote a harmful act that, in its particular context, is not considered illegal or wrong by the system. Excuses are, on the other hand, based on the notion that although a particular act is indeed wrongful, its particular circumstances mean that it would be unfair to attribute the act to the individual concerned.<sup>10</sup>

These concepts have also been strongly debated from the standpoint of the philosophy of law. And while a more in-depth discussion of these debates is beyond the scope of this study, it is important to acknowledge them. For example, in his critique of the classic concepts of justification and excuse, British scholar John Gardner argues that the prevailing trend among criminal jurists is to regard the wrongdoing as a prohibition *all things considered*.<sup>11</sup> Consequently, if there is a solid reason to justify the conduct (such as homicide in self-defense), then the conduct is not considered criminal and the justification inherently negates any wrongdoing.<sup>12</sup> An opposing view, one that Gardner himself espouses, argues that the wrong will always *prima facie* be a wrong, with respect to which there may or may not be a justification. From this viewpoint, invoking a justification for a crime is different from negating the crime itself. In other words, the crime effectively exists as a material, moral, and legal reality, but it may have a justification.<sup>13</sup> These theoretical differences take on particular relevance in light of what we understand as

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of the International Criminal Court. See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 1.

6 William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (New York: Cambridge University Press, 2007), at 226. Schabas is quoting Albin Eser, “Defences’ in War Crimes Trials,” in *War Crimes in International Law*, ed. Yoram Dinstein and Mala Tabory (The Hague: Kluwer Law International, 1996), at 251.

7 See, for instance, Ilias Bantekas and Susan Nash, *International Criminal Law*, 3rd ed. (New York: Routledge, 2007), at 51–52.

8 Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), at 255.

9 *Ibid.*, at 255–56.

10 Ilias Bantekas and Susan Nash, *International Criminal Law*, *supra* note 7.

11 The concept of “a wrongdoing all things considered” means that when the legal prohibition was established, all of the pros and cons applicable to the commission of a particular act had already been taken into account. John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (New York: Oxford University Press, 2007).

12 *Ibid.*

13 *Ibid.*

the primary objective of criminal law. Drawing again from Gardner's argument, the primary objective of criminal law is not to condemn, dissuade, and penalize the criminal conduct but rather to serve as "a vehicle for the public identification of wrongdoing (by certain standards of evidence and procedure) and for responsible agents, whose wrongs have been thus identified, to answer for their wrongs by offering justifications and excuses for having committed them."<sup>14</sup> Based on this approach to the objective of criminal law and the relationship between the crime and the justification, Gardner concludes that there will be situations in which the crime might be justified. This will not exclude, however, the possibility of requiring that the perpetrator be held accountable for certain consequences, apart from a sentence involving the deprivation of liberty, such as "the duty to show regret, to apologize, to make restitution, to provide reparation, and so on."<sup>15</sup>

These reflections are just a sampling of the intense intellectual and interpretive debate over causes of justification and excuses in the sphere of international criminal law. This issue has become increasingly relevant in the context of international courts and surely will continue to be addressed in domestic court interpretations as well.

Against this backdrop, this chapter presents Latin American judgments that address the issue of grounds for exclusion from criminal responsibility with respect to crimes under international law. It should be noted that, while the generic term "exclusion from responsibility" will be used for the purposes of this study, important and profound conceptual and terminological differences exist in this regard among the countries of the region. It is also important to mention that, in contrast to the preceding chapters, this discussion is structured according to the general principles that inform Latin American systems rather than international jurisprudence or law. As an example of the above, *necessity* and *duress* are examined separately, even though they seem to still be conceptually joined in international criminal law, as discussed later on.

In general, this chapter seeks to demonstrate the ways in which, drawing from the norms set out in their own legal systems, Latin American courts have approached the elements of each ground for exclusion. In so doing, the courts have taken into account the special nature of international crimes, as well as certain international norms and principles, in order to determine the applicability or non-applicability of such grounds in each of the cases.<sup>16</sup>

14 Ibid., at 80. Gardner cautions that identifying public identification of wrongdoing as the primary objective does not assign it greater social relevance than condemnation, dissuasion, and penalization of the conduct; instead, the latter is contingent upon the former.

15 Ibid., at 82.

16 As discussed in Chapter I of this digest, many of the prohibitions that constitute international crimes have acquired the status of *jus cogens* norms. This is particularly relevant for the application of any type of exclusion from responsibility, since, as the United Nations International Law Commission has recognized in its commentary on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*: "Circumstances precluding wrongfulness [including necessity and consent] cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law." United Nations International Law Commission, *Yearbook of the International Law Commission 2001*, vol. 2, part 2 (New York: United Nations, 2007), at 85. While this article refers to state responsibility, scholars such as Kai Ambos have used this norm as a yardstick for the development of international law in general. See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 1.

## 1. DUE OBEDIENCE TO SUPERIOR ORDERS

Due obedience to superior order (particularly military orders) is widely recognized in Latin American legal systems as a ground for exclusion from criminal responsibility.<sup>17</sup> Its regulation, however, varies significantly from one system to another. In Mexico, for example, it is included within the concept of an invincible mistake of law or prohibition (*error invencible de prohibición*), a ground for exclusion of responsibility set forth in the criminal code.<sup>18</sup> The Colombian Criminal Code expressly recognizes as a cause of justification acting “in the fulfillment of a legitimate order issued by the competent authority with all due legal formalities.” It explicitly excludes, however, the crimes of genocide, forced disappearance, and torture.<sup>19</sup> The criminal codes of other countries of the region also explicitly recognize due obedience as a ground for exclusion from responsibility,<sup>20</sup> including those of Argentina,<sup>21</sup> Peru,<sup>22</sup> Venezuela,<sup>23</sup> and Uruguay.<sup>24</sup> This brief overview is not intended to be exhaustive, but rather simply illustrative of domestic regulations in this sphere.

In the international plane, there has been much debate and analysis of obedience to superior orders as a ground for exclusion from responsibility with regard to the commission of international crimes. From the normative standpoint, the statutes of the Nuremberg International Military Tribunal and of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda do not recognize due obedience as a defense, although it can be used to argue in favor of mitigation of punishment.<sup>25</sup>

17 For a more in-depth analysis of this and other issues in certain countries of the region, see Kai Ambos and Ezequiel Malarino, eds., *Persecución penal nacional de crímenes internacionales en América Latina y España* (Montevideo: Fundación Konrad Adenauer and Instituto Max Planck de Derecho Penal Extranjero e Internacional, 2003), and Kai Ambos, Ezequiel Malarino, and Jan Woischnik, eds., *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de Roma de la Corte Penal Internacional* (Montevideo: Fundación Konrad Adenauer and Georg-August-Universität-Göttingen, 2006).

18 Prior to the 1993 reform, what is currently titled the Federal Criminal Code contained a section that referred to obedience to a superior. Currently, as noted in the text, scholars have asserted that this exclusion is incorporated into the mistake of law or prohibition. See, for example, Francisco Pavón Vasconcelos, *Manual de Derecho Penal Mexicano*, 13 ed. (Mexico City: Editorial Porrúa), 1997.

19 Article 32(4) of the Criminal Code of the Republic of Colombia. [*Unofficial translation*]

20 As noted in the introduction to this chapter, different systems have used various terms and concepts to define or classify the legal institutions that we refer to generically here as grounds for exclusion from criminal responsibility.

21 Article 34(5) of the Argentine Criminal Code: “The following are not punishable: [...] 5. Whoever acts by virtue of due obedience.” [*Unofficial translation*]

22 Article 20(9) of the Peruvian Criminal Code: “The following shall be exempt from criminal responsibility: [...] 9. Whoever acts based on an obligatory order issued by a competent authority, in the discharge of his duties.” [*Unofficial translation*]

23 Article 65(2) of the Venezuelan Criminal Code: “The following is not punishable [...] 2. Whoever acts by virtue of legitimate and due obedience. In this case, if the act committed constitutes a crime or wrong, the applicable punishment shall be imposed on the one who has been shown to have given the illegal order.” [*Unofficial translation*]

24 Article 29 of the Uruguayan Criminal Code: “Obedience to the superior. Whoever carries out an act pursuant to due obedience shall be exempt from responsibility. Obedience shall be considered as such when it meets the following conditions: a) The order has been issued by an authority; b) The authority is competent to issue it; c) Individuals have the duty to carry it out.” [*Unofficial translation*]

25 See Article 8 of the Statute of the Nuremberg International Military Tribunal, as well as Articles 7(4)



Regardless of the clarity of the rule introduced in these international instruments, according to the work of scholars such as Andreas Zimmermann, the non-applicability of superior orders as a complete defense has not been elevated to the status of a rule of customary law.<sup>26</sup> Instead, asserts Zimmerman, there appears to be consensus in the international community that due obedience does constitute a defense, except “[when] either the superior order was manifestly unlawful or [...] the subordinate was in a position to recognize the illegality of the order[.] [Under these circumstances] the defence of superior orders can no longer be relied upon.”<sup>27</sup>

The most recent international norm on this issue, Article 33 of the Rome Statute of the International Criminal Court, seems to opt for a middle ground. The general premise is, in effect, that due obedience is *not available* as a defense and that it may only be argued if all of the requirements explicitly set out in the norm are satisfied, including the condition that the order not be manifestly unlawful.<sup>28</sup> The same article specifically states that orders to commit genocide and crimes against humanity will always be manifestly unlawful.<sup>29</sup> As consequence of the above, this argument may only be used as a possible defense in relation to certain war crimes.

As Ambos has concluded, in practical terms, due obedience has never been accepted as a defense *per se* in international jurisprudence. Instead, it has always been applied in conjunction with other defenses, particularly that of error.<sup>30</sup> This view is consistent with studies of the norms found in domestic systems, according to which “[t]he duty of obedience does not derive from the existence of a binding order, since even in such a case, the inferior must not carry it out if it is manifestly illegal or if he is aware of that circumstance. The exclusion of the subordinate’s responsibility stems from his ignorance of the unlawfulness of his behavior, an error that a binding order renders insuperable inasmuch as he is hindered from verifying the validity of the order.”<sup>31</sup>

With this background, the following excerpts from Latin American judgments examine the concept of due obedience as a ground for exclusion from criminal responsibility. The first set of decisions presented below recognize, in general terms, the basic requirements for the applicability of particular rules that, should the requirements be met, would constitute a

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and 6(4) of the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, respectively. The International Criminal Tribunal for the former Yugoslavia states as follows: “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”

26 Andreas Zimmermann, “Superior Orders,” in *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (New York: Oxford University Press, 2002), at 957–75.

27 *Ibid.*, at 965.

28 Article 33(1) of the Rome Statute of the International Criminal Court states, “The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.”

29 Article 33(2) of the Rome Statute of the International Criminal Court: “For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”

30 See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 1.

31 Esteban Righi, “Obediencia jerárquica,” in *Diccionario Jurídico Mexicano*, vol. 6 (Mexico City: Instituto de Investigaciones Jurídicas, UNAM, 1983), at 281.

ground for exclusion from responsibility. In light of these considerations, the next two sections focus more specifically on the reasons for which due obedience cannot constitute ground for exclusion from responsibility with respect to international crimes. In consonance with existing international norms, these judgments underscore the manifest unlawfulness of the order and the subordinate's knowledge of that unlawfulness. Additionally, Latin American jurisprudence appears to have ruled out the applicability of this exclusion when it can be determined that the direct perpetrator intentionally exceeded the orders given. Finally, some of the decisions emphasize certain international crimes with respect to which due obedience can never be admitted as an exclusion from responsibility.

## A. Overview

BOLIVIA, *Case of the Leaders of Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)*, Section VII, Whereas:

[H]ierarchical obedience [is] a true defense and not simply a justification, and even less a case of non-attribution; it constitutes an authentic defense [and therefore eliminates] criminal liability. Consisting of “subjection or subordination to the will of a superior, carrying out his orders,” in order to be valid, it must be subject to explicit and unequivocal conditions established by law. It is enough to recall the provisions of Article 16(4) of the current Criminal Code, which states literally: “(Hierarchical obedience). Hierarchical obedience [means that] as long as the order is issued by a competent authority, the agent is obligated to carry it out and it is not contrary to the Constitution. In this case, the one who is liable for punishment is the person who issued the order.”

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 4.5:

Colombian constitutional jurisprudence has pointed out that relief from criminal responsibility on grounds of due obedience or carrying out an order is subject to certain requirements, which are compatible with the concurrent requirements set out in Article 33 of the Rome Statute. As follows:

“Relief from responsibility, in addition to not *proving to be manifestly against the law*, must be subject to other requirements. First, *there must be a hierarchical relationship of subordination recognized by public law* between the person who issues the command and the person who receives and carries it out. For the order to be considered binding, it must have *come from a hierarchical superior with command authority over the recipient*. Second, the order must exist as such, in other words, as a *clear and distinct manifestation of intent to ensure that the inferior does or does not do something*. Third, *the superior must be acting within his competence*, but since the subordinate generally lacks a detailed power of analysis, the doctrine requires not specific competence but rather competence

in the abstract. This refers to the superior's authority to order the types of acts normally included in the inferior's sphere of duties. Finally, for the relief to serve as a justification of the punishable act, *the order must be endowed with the legal formalities*" [footnote omitted].

## B. Exclusion of due obedience to superior orders as a defense

### i. Order is manifestly illicit

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 4.5:

[This] Court has interpreted the exclusion from criminal responsibility set out in Article 91(2) of the Constitution for an act committed in the course of carrying out superior orders *to rule out obedience as ground for exclusion from criminal liability when the content of the order is manifestly criminal for the agent carrying it out, inasmuch as it is certain to give rise to a violation of an intangible fundamental right* [footnote omitted].

In this regard, the Court stated:

"Article 91, subparagraph 2 of the C.P. relieves from constitutional responsibility the soldier who carries out an order of service issued by his superior, but it does not do so in a total and unrestricted manner. If the inferior is aware that by carrying it out, he is certain to cause a violation of an intangible fundamental right of a person, and he carries it out anyway even though he could have avoided it, then he shall have acted with intent. To accept that the Constitution, in this case, has condoned the intention is to also accept that it has consented to create the seed of its own destruction. The notion of a Constitution, at least in a non-totalitarian system, is incompatible with the existence of subjects with absolute powers in society and in the State. The Court emphatically rejects the premise of absolute relief from responsibility of the subordinate, because should it be maintained despite his intent, then his power takes on an incommensurate dimension capable of eradicating every last vestige of law, justice, and civilization" [footnote omitted].

ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*, Whereas:

According to the doctrine, "[...] [i]t]he most egregious cases of the illegality of an order [tend] to be evident ('manifest'). This will be true of orders to commit murder or inflict torture or to commit crimes against decency, or bribery, etc." [footnote omitted].

We ourselves have also stated that "*the abuse of the superior does not obligate the inferior, who is only enjoined from examining the propriety or justification of a legitimate order, but not if it is a matter of refusing to participate in a crime. The obedience that is due*

perinde ac cadaver,<sup>32</sup> even when it comes to a military order, pertains to orders related to the inherent object of each legal system, but rest assured that no such order has a criminal objective. Military obedience is owed service-related orders” [footnote omitted].

In light of these principles, it is obvious that the orders received by Simón were manifestly illegal, and ultimately, not only should he not have obeyed them, it was his obligation not to do so.

It should be reiterated here that in no case can an order be considered legitimate when it involves illegally depriving another person of his liberty, confining him in a clandestine detention center in subhuman living conditions, subjecting him to other forms of torture, and concealing from him the whereabouts of his children.

An order that includes *insita* the obligation to carry out such acts is devoid of even the most minimal trappings of legality inasmuch as no one may order, under any circumstances, the commission of acts that amount to gross violations of basic human rights.

Neither Simón’s low rank in the police force nor his submission to the military hierarchy can justify his behavior. The defendant was a longstanding member of a security force and it is therefore not reasonable to accept that he might have believed that the actions for which he is being punished amounted to an act of obedience that he was bound to carry out.

Simón himself acknowledged the illegality of the scheme in which he was involved in statements he made to the television program *Telenoche Investiga*, which were taped on videocassette and broadcast to the audience for discussion. When asked why he had used a method such as the one under examination here, he said he thought it was “because it could not be done legally.”

GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*,  
Whereas I:

[I]n order to invoke due obedience (as a defense against criminal liability), certain requirements must be met, and the principle is that the legality [*sic*] of the order not be evident [...].

[I]n this case, it is totally impossible to establish due obedience, given the claim by the defense that the accused received a direct and explicit order to commit crimes.

32 Editors’ note: The expression *perinde ac cadaver*, in the context of this judgment, should be understood as “The obedience that is due [unconditionally and without offering any resistance whatsoever], even in the military order [...]” The expression was first used by Ignacio de Loyola, founder of Society of Jesus religious order, in the context of the standards of obedience owed to a superior. In this context, the phrase had a narrow meaning, referring to the obedience that members of the order must show their superior. The phrase implies absolute obedience, “in the manner of a corpse,” which can be made to move and act without offering any resistance. The relevant paragraph in the Constitutions of the Society of Jesus states textually: “everyone who lives under obedience should let himself be carried and directed by Divine Providence through the agency of the superior as if he were a lifeless body [*perinde ac cadaver*], which allows itself to be carried to any place and treated in any way; or an old man’s staff, which serves at any place and for any purpose in which the one holding it in his hand wishes to employ it...” *The Constitutions of the Society of Jesus and Their Complementary Norms: A Complete English Translation of the Official Latin Text*, ed. John W. Padberg SJ (St. Louis: Institute of Jesuit Sources, 1996).

[...] The defense should instead have argued why that order was apparently legal, since the fact of murdering a considerable number of defenseless people, in a bloody and cruel manner, is not an apparently legal act. To the contrary, it is eminently, categorically, and clearly illegal, and a violation of a sacred human right, namely the right to life.

## ii. The will of the direct perpetrator goes beyond the order

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 26:

[Although it has been established that the defendant received certain orders], it has not been proved that there was a superior order to transfer Sandoval to a clandestine detention center and torture him, much less to cause him to disappear. In this way, military personnel—which in the case at hand also applies to the Carabineros [Federal Police] [...]—acting in the discharge of their duties or on superior orders, are prohibited from acting arbitrarily. [They must act] in keeping with the laws and regulations, since the authority and powers conferred by law exist for social or institutional benefit and not for the benefit of military personnel in particular.

GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*, Pleadings and Whereas I:

[According to the defense pleadings], in this case there was a failure to observe [the applicable law] because there was hierarchical subordination between the members of the army and the accused [members of the Civilian Self-Defense Patrols]. The orders were issued pursuant to military authority and were endowed with the relevant legal formalities, so that despite the manifest [il]legality of the command, the defendants could not choose to behave differently for fear of what would happen should they fail to carry out those orders. [According to the evidence submitted] [...] the lower court accepted that there was a military structure, not only because the defendants were obligated to join the civilian self-defense patrols but also because they were acting under those military orders. Therefore, this [would] constitute a situation of due obedience.

[Disagreeing with that opinion, this court considers that] it has been demonstrated in this case that the henchmen were acting at their own discretion, in other words, of their own volition and independently of any coercion or superior order, given that, as indicated [...], they had the power to select their **defenseless victims (children and women)** and that they selected some women for rape. As indicated, therefore, they enjoyed a range of action independent of the [army's] directives [...]. And these arguments are also germane to this plea on the merits.

See also URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 2:

[I]t is not possible to argue exclusion from responsibility for reasons of due obedience as set out in Article 29 of the Criminal Code, since none of the defendants acted within their strict sphere of duties.

There is also nothing to suggest that they had received an order from their hierarchical superiors to deprive the detainees of their freedom, torture, transport, and kill them.

### **C. Due obedience to superior order (as a defense) is not applicable to certain crimes under international law**

COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.B:

[The Inter-American Convention on Forced Disappearance of Persons stipulates that as far as forced disappearance is concerned,] due obedience will not be admitted as grounds for escaping liability (Article VIII) [...]. Given the nature and gravity of the acts regulated therein, the Court finds no unconstitutionality whatsoever in [this] or in any other provision of the Convention that impose extremely harsh measures as a potential means to achieve the disappearance—and here the term is apt—of this kind of practice, which apparently still persists on the Continent despite the progress made toward democratic systems in recent years.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 4.5:

With respect to the constitutionality of the due obedience exclusion in national constitutional law, the Court has echoed the Colombian State's acceptance of the international consensus on the matter:

“Apart from the fact that *absolute due obedience and the unconditional exclusion from criminal responsibility of the subordinate army member has been universally deemed, in practice, usage, custom, and jurisprudence, to be contrary to international humanitarian law*, it has also been specifically prohibited in several treaties to which Colombia is a signatory [...]. [These treaties include] [t]he Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [...]. Exclusion from criminal responsibility based on a superior order also has not been admitted as valid grounds with respect to the international crime of genocide [...].

“Because it is incompatible with international humanitarian law that a soldier, aware of his actions, should shield himself behind a superior order to completely elude his responsibility for infractions he commits against its rules and principles, the legal norm that the Court is examining, which incorporates

that body of law, clearly contravenes its provisions concerning international and non-international armed conflicts” [*footnote omitted; emphasis added*].

ARGENTINA, *Case of Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*, Whereas:

The accused’s conduct could not be justified even if he were operating under the assumption that he was acting in a situation of war, since it is common knowledge that domestic and international laws concerning the treatment of detainees are in effect for armed conflicts, and they may not be ignored (Articles 18 and 23 of the National Constitution, and Article 3 and other related articles of the Geneva Conventions related to the protection of civilians in time of war, Convention IV).

## 2. DURESS (INSUPERABLE FEAR)

National and international norms have recognized that a person may be exonerated from responsibility if it is proved that he or she acted under duress from a third party. This ground of exclusion, which is comparable with what is known as insuperable or invincible fear, is also expressly recognized in several criminal codes in the region.<sup>33</sup>

To better elucidate this concept, it is useful to address some of the specific circumstances surrounding its codification and application at the international level. First, according to some scholars, there has been a tendency in practice to conflate *duress* (the term used in international criminal law) and due obedience. Nonetheless, the nature of each of these concepts must be understood in its own right. In regard to the former, the exclusion stems from the threat or the arguable moral impossibility of acting otherwise. In the latter case, in contrast, the exclusion derives from the mistake of law or prohibition with respect to the order received.<sup>34</sup> Moreover, a clear distinction has not been drawn in the international sphere between *duress* and *necessity*, the latter being comparable to the state of necessity found in Latin American systems. According to Ambos, the former “refers to the lack of freedom of will or choice in the face of an immediate threat, [while] necessity is based on a choice of evils, with the decision taken in favor of the lesser evil.”<sup>35</sup>

33 These include Article 10(9) of the Chilean Criminal Code: “The following are exempt from criminal responsibility: [...] 9. Whoever acts dragged by an irresistible force or driven by an insuperable fear” [*unofficial translation*]. Article 32(9) of the Colombian Criminal Code: “There will be no finding of criminal responsibility when: [...] 9. The action is impelled by an insuperable fear” [*unofficial translation*]. Article 25(1) of the Guatemalan Criminal Code: “The following are causes of exculpability: [...] 1. To carry out an act impelled by an invincible fear of an equal or greater harm, sure or imminent, according to the circumstances” [*unofficial translation*]. Article 20(7) of the Peruvian Criminal Code: “The following are exempt from criminal responsibility: [...] 7. Whoever acts compelled by an insuperable fear of an equal or greater evil” [*unofficial translation*].

34 See, for instance, Antonio Cassese, *International Criminal Law*, *supra* note 8, and Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 1.

35 Kai Ambos, “Other Grounds for Excluding Criminal Responsibility,” in *The Rome Statute of the International Criminal Court*, vol. 1, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (New York: Oxford University Press, 2002), at 1036.

At the level of international jurisprudence, the International Criminal Tribunal for the former Yugoslavia has concluded that duress cannot constitute an absolute or complete defense, but rather is an element that merely mitigates the punishment. This criterion is applicable, according to the tribunal, at least to those cases involving the murder of innocent people amounting to crimes against humanity and war crimes.<sup>36</sup> This decision has been criticized in some academic studies, which note that duress inherently takes into account that the accused did not have another viable moral choice in the matter.<sup>37</sup> And it is precisely in light of this argument that the following Guatemalan judgment is particularly interesting. The ruling handed down by the Court of Appeals seems to focus on establishing whether it can be concluded that, despite the coercive circumstances, the agents acted of their own volition. Once this has been established, it becomes possible to determine that other viable moral and legal choices were available, and the court concludes by rejecting the invincible fear argument as a ground for exclusion from criminal responsibility.

GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*, Pleadings and Conclusion of Law I:

[The first instance court] indicated that the patrols' participation was direct and voluntary, but [according to the defense's pleadings, that participation] was not voluntary because the patrols were commanded by the military and faced severe penalty if they did not act, and it had not been demonstrated that they organized voluntarily[.] [With respect to this] the court itself has said that it does not deny that the national army used coercive tactics against the communities of the country to [force them to] form civilian self-defense patrols, indicating that this is a historical fact thoroughly

36 ICTY, *Prosecutor v. Dražen Erdemovic*, Case No. IT-96-22-A, Appeals Chamber, Judgment, October 7, 1997, para. 19. The majority of the chamber cited as the basis for their decision the argument put forth in the joint separate opinion of Judge McDonald and Judge Vohrah, paras. 55, 66, 72, 75, and 88, which reads in part: "no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings." In the absence of a customary rule, the justices examined "the general principles of law recognized by civilised nations" and held that there is "a general principle of law recognised by civilized nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress," with the term "duress" meaning "imminent threats to the life of an accused if he refuses to commit a crime." However, the justices held that "[i]t is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons." The justices expressed concern that "in relation to the most heinous crimes known to humankind, the principles of law to which we [the ICTY] give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations," and they concluded that "international law . . . cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale." The justices held that "duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined." Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch, 2006), at 507.

37 See, for instance, William A. Schabas, *An Introduction to the International Criminal Court*, *supra* note 6.



documented by the Historical Clarification Commission and that, accordingly, it has been shown that the accused did not act of their own volition.

[In the view of this court,] [...] for overwhelming fear to be considered present, a person cannot have the power to decide whether or not to commit a particular crime. In the instant case, it has been shown that the defendants, as members of the civilian self-defense patrols, *did have such broad and discretionary powers, that is, they were acting of their own volition*. They even beat their victims, ridiculed them, and selectively raped [women] [...]. For the reasons indicated, we consider that in the instant case, overwhelming fear was not a factor in the defendants' actions, because in order for this to be present, the will of the perpetrator must be erased, which is not what occurred in this case [...]. With respect to whether the members of the civilian self-defense patrols were organized voluntarily or not, the fact is that it is not relevant to the instant case, since [not having organized voluntarily] does not necessarily imply that they were blindly obeying orders because of an "overwhelming fear." What is essential in the instant case is the actions of the defendants in the crimes of which they have been accused [...].

### 3. STATE OF NECESSITY

In general terms, Latin American legal systems recognize another ground for exclusion from criminal responsibility: acting out of necessity to safeguard a legally protected interest of the agent or of a third party from a real, actual, or imminent threat. Other basic requirements of this ground are that (i) the threat must not have been occasioned willfully or intentionally by the agent, and (ii) the legal interest impaired must be of equal or lesser value than that which the agent is seeking to protect. Additionally, the accused must have met any other requirements set out in the applicable national law.<sup>38</sup>

38 See, for example, Article 12 of the Bolivian Criminal Code: "Whoever commits a crime to avoid harm to a legally protected value pertaining to himself or another, that is not superable in any other way, shall be exempt from responsibility when the following requirements have been satisfied: 1. The harm caused is not greater than that which it seeks to avoid, taking into account mainly the relative quality of the legally protected values at stake; 2. The harm prevented is imminent, actual, and important; 3. The situation of necessity has not been intentionally brought about by the subject; 4. The one in a state of necessity does not have the obligation to confront the danger pursuant to his office or duty" [*unofficial translation*]. Article 32(6) of the Colombian Criminal Code: "Criminal responsibility shall not be incurred when: [...] 6. The subject is acting out of necessity to defend his rights or those of a third party against an actual or imminent wrongful attack, as long as the defense is proportionate to the attack" [*unofficial translation*]. Article 24(2) of the Guatemalan Criminal Code: "The following are causes of justification: [...] 2. Whoever has been compelled to commit an act out of necessity to save himself or others from danger that was not caused by him voluntarily or avoidable in any other way, as long as the act is proportionate to the danger. This exclusion shall apply to someone who harms the property of another, if the following conditions are met: a) Reality of the harm that he seeks to avoid; b) The harm is greater than that caused to avoid it; c) There is no other practical and less prejudicial way to prevent it" [*unofficial translation*]. Article 27 of the Salvadoran Criminal Code: "The following shall not be held criminally responsible: [...] 3. Whoever commits an act or omission out of necessity to safeguard a legal value pertaining to himself or to another from a real, actual, or imminent danger that has not been brought about by him intentionally, resulting in harm to another value of equal or lesser importance than the one safeguarded, as long as the act is proportionate

As stated earlier, international criminal law has yet to clearly define the concept of *necessity* as a ground for exclusion from responsibility or to differentiate it clearly from the concept of *duress*.<sup>39</sup> As a result, the international criminal tribunals do not provide an analysis that could be considered relevant to the purposes of this study.<sup>40</sup> In the academic realm, Cassese has asserted that “generally speaking, necessity is a broader heading than duress. It designates *threats to life and limb emanating from objective circumstances* and not from another person.”<sup>41</sup>

Obviously, these interpretations correspond to the Anglo-Saxon tradition and therefore they are only marginally useful for the development of Latin American jurisprudence. As a result, the legal analysis that might emanate from regional courts will be critical to reaffirming, in domestic and perhaps international law, the inherent elements of a state of necessity as a circumstance giving rise to an independent and differentiated ground for exclusion from responsibility. In the context of this judicial exercise, the courts will have to bear in mind the specific nature of international crimes, the importance of the protected values, and the gravity of the consequences for the victims.

In light of these debates, the following judgment handed down by the Peruvian Supreme Court addressed, to a certain degree, the state of necessity argument during the trial to establish the criminal responsibility of former president Alberto Fujimori for the perpetration of crimes that the court itself characterized as crimes against humanity.

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to the danger and he does not have the legal duty to confront it” [unofficial translation]. Article 15(V) of the Mexican Federal Criminal Code: “The offense is excluded when: [...] V. An individual is acting out of the need to safeguard a legally protected value pertaining to himself or another from a real, actual, or imminent danger, not intentionally caused by the agent, which harms another value of equal or lesser importance than that safeguarded, as long as the danger is not avoidable by other means and the agent does not have the legal duty to confront it” [unofficial translation]. Article 20 of the Peruvian Criminal Code: “The following shall be exempt from criminal responsibility: [...] 4. Someone who, facing an actual danger that is insuperable by any other means and threatens life, physical integrity, liberty, or another legally protected value, commits an act intended to avert that danger to himself or others, as long as the following requirements are met: a) When an evaluation of the conflicting legally protected values and the intensity of the threat shows that the protected value takes precedence over the one harmed; and b) When appropriate means are employed to overcome the danger” [unofficial translation]. Article 27 of the Uruguayan Criminal Code: “A person shall be exempt from responsibility when, in order to defend his life, physical integrity, liberty, honor, or possessions, attacks any of these rights pertaining to others, provided that the harm caused is equal to or less than that he is seeking to avoid, that the harm has not been brought about by his own conduct, and that it is both imminent and unavoidable” [unofficial translation]. Article 65(4) of the Venezuelan Criminal Code: “The following shall not be punishable: [...] 4. Someone who acts out of necessity to save himself or others from grave and imminent danger, which he has not caused voluntarily and which cannot be otherwise avoided” [unofficial translation].

39 See Kai Ambos, *La parte general del Derecho Penal Internacional*, *supra* note 1.

40 For a discussion of the ways in which the international criminal tribunals have used the *necessity* and *duress* arguments, see, for example, Kai Ambos, “Other Grounds for Excluding Criminal Responsibility,” *supra* note 35.

41 See Antonio Cassese, *International Criminal Law*, *supra* note 8, at 281.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 681:

[In the first months of 1992, in Peru], [n]ot only was there no situation of necessity—the dangers and risks associated with the terrorist attacks could, and should, have been confronted and defeated democratically—but the danger that terrorism posed to society and the State was, and could have been, avoided by other means. There was no reason to sacrifice the rule of law or the personal liberty of citizens, especially since, as has been shown, the alleged strategic equilibrium between the State and the terrorist organizations did not exist. The action taken—the destruction of constitutional institutions and the deprivation of the personal liberty of the injured party, among the numerous other people affected by or because of the coup d'état—was not necessary, since *there were other less damaging means of avoiding the ills that were threatening*. Furthermore, the legally protected value at stake—the survival of the established State—could not be deemed essentially superior to that of preserving the democratic system and the freedoms that such a system must uphold. It was not, then, a matter of safeguarding legitimate interests. Clearly, the installation of a state of emergency, outside the bounds of and contrary to the Constitution, does not fulfill any legitimate interest whatsoever, and even less so when its purpose is to violate some of the most important legally protected values, such as the freedom of innocents who have absolutely nothing to do with terrorist violence, and to declare, in that measure, impunity for acts incompatible with the underlying principles of the Rule of Law.

The demand for punishment of the perpetrators of the coup d'état is recognized by the Constitution of 1979, which was in force at the time of the coup and has—it must be reiterated—been upheld by the Constitutional Court. This gives rise to additional consequences in criminal law, chief among them the impossibility of arguing non-criminality on grounds such as the lack of objective imputation, justification, or exemption from criminal liability—necessity and consent—which could result in the perpetrators being absolved based on arguments of an alleged threat to the survival of the State, its political system, and society due to terrorist activity, or, in any case, pursuant to ex post considerations based on public support for such actions at the time, which ultimately led to the installation of a dictatorship [...], unacceptable from every point of view [*footnote omitted*].

#### 4. CONSENT

Consent is another basis for exclusion from responsibility that is recognized explicitly in the general part of many Latin American criminal codes.<sup>42</sup> In general terms, it denotes the notion

<sup>42</sup> See, for example, Article 32 of the Colombian Criminal Code: “Criminal responsibility shall not be incurred when: [...] 2. [The agent] is acting with the validly issued consent of the holder of a legally protected value, in cases in which the latter is entitled to dispose of the same” [*unofficial translation*]. Article 15 of the Mexican Federal Criminal Code: “The crime is excluded when: [...] II. [The agent] is acting with

that a person will not be held responsible for a wrong when the individual legally entitled to dispose of the affected legally protected value has consented to the act. Despite widespread recognition of this exclusion in domestic systems, no international precedent of a conventional or judicial nature expressly refers to consent as ground for exclusion from responsibility for crimes under international law.<sup>43</sup> In the absence of international standards, domestic courts will have to be particularly cautious when consent is argued in cases of crimes under international law.

It is difficult, if not impossible, to imagine a hypothetical situation that satisfies the requirements for consent as a basis for exclusion from responsibility for an international crime. As discussed in Chapter I of this digest, many of these types of crimes have acquired the status of *jus cogens*. Given their inherent nature, they cannot allow any agreement to the contrary.<sup>44</sup> The same can be said of basic rights that are legally protected values under many international crimes and are therefore unrenounceable. Finally, as argued in the excerpt from the judgment presented below, the legally protected values in play might sometimes be collective in nature, meaning that they belong to more than one individual and/or to a collectivity. In these cases, it would be impossible to argue that one person can legally dispose, through consent, of such protected values.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 681:

The events leading up to the coup d'état, moreover, and despite the argument of the defense, also do not fall within the scope of validity of consent (Article 20(10) of the Criminal Code) [*footnote omitted*]. When the criminal definition, such as in this case, is intended to protect a collective legally protected value—in crimes against the collective that transcend the will of an individual or group of individuals—the protection of the person and of the values to which he is entitled operates at a general level. The consent of such a person or persons clearly does not rule out the fact that the conduct still fits the criminal definition. The legally protected value cannot be

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the consent of the holder of the legally protected value, as long as the following requirements have been satisfied: a) The legally protected value is available for disposal; b) The holder of the legal value is legally entitled to dispose of it freely; and c) The consent is explicit or tacit and not marred by any defect; or, that the circumstances surrounding the act give rise to a well-founded presumption that, should the holder have been consulted, he would have granted such consent" [*unofficial translation*]. Article 20 of the Peruvian Criminal Code: "The following shall be exempt from criminal responsibility: [...] 10. Whoever acts with the valid consent of the holder of a legally protected value of which he is freely entitled to dispose" [*unofficial translation*].

43 For a reference to international criteria on this subject, see the work of the United Nations International Law Commission on State responsibility for wrongful acts. In *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, the Commission has included consent as one of the circumstances excluding wrongfulness: "Article 20. Consent. Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent." United Nations International Law Commission, *Yearbook of the International Law Commission 2001*, vol. 2, part 2, *supra* note 16, at 72. As stated earlier, although this article refers to state responsibility, scholars such as Kai Ambos have taken these norms as a reference point for the development of international law in general.

44 See *supra* note 16.

limited by the consent of [a person or group of persons] since it belongs to the community. Moreover, consent, where it exists, must be given prior to, or at the time of, the act, and never after the fact. In the case of the coup d'état, above and beyond any possible relevance of opinion polls or the outcomes of electoral processes held some time after the event in question, it is clear that even if the injured party had expressed his approval of what happened, that action would only serve to pardon the agent for what he did and would not rule out the fact that the conduct fits the criminal definition [*footnote omitted*].

## 5. IMMUNITIES

Specialized literature on international criminal law also includes the issue of immunities within the general category of circumstances giving rise to exclusions from responsibility.<sup>45</sup> Immunities are derived directly from international and constitutional law and are regulated by other applicable rules under the legal system of each State.

It is important to distinguish between two types of immunities in order to arrive at a more thorough understanding of this issue. The first are the functional immunities that are afforded all public servants in the discharge of their duties and responsibilities, regardless of where they are carried out. The second, which are referred to as personal immunities, are only applicable to certain government officials who discharge their duties outside of the national territory.<sup>46</sup>

Of the two categories, only functional immunities could constitute grounds for exclusion from responsibility and they cover *de jure* or *de facto* official acts whose effects do not end when the duty has been completely discharged.<sup>47</sup> While this is the general rule, in the current state of development of international law, functional immunities no longer constitute an exclusion from responsibility for the commission of international crimes.<sup>48</sup> The London Agreement establishing the Nuremberg International Military Tribunal was the turning point in this regard. Pursuant to this accord, heads of state and other high-level government officials were not ex-

45 See Antonio Cassese, *International Criminal Law*, *supra* note 8. See also William A. Schabas, *An Introduction to the International Criminal Court*, *supra* note 6, at 226–32. See also Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court* (New York: Oxford University Press, 2002), in which the topic “Official Capacity and Immunities” was included under the broader section “Defences,” at 975–1003.

46 See Paola Gaeta, “Official Capacity and Immunities,” in *The Rome Statute of the International Criminal Court*, vol. 1, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (New York: Oxford University Press, 2002), at 975–1003. More specifically, Cassese has pointed out that “[t]he first category is grounded in the notion that states must respect other states’ internal organization and may not therefore interfere with the structure of foreign states or the allegiance a state official may owe to his own state. Hence no state agent is accountable to other states for acts undertaken in an official capacity and which therefore must be attributed to the state.” He goes on to say, in contrast, that “[t]he second category is predicated on the need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of a state agent under the pretext of dealing with an exclusively private act (*ne impediatur legatio*, i.e., the immunities are granted to avoid obstacles to the discharge of diplomatic functions).” Antonio Cassese, *International Criminal Law*, *supra* note 8, at 303.

47 *Ibid.*

48 Paola Gaeta, “Official Capacity and Immunities,” *supra* note 46.

cluded from international responsibility, and their posts could not be taken into consideration for purposes of mitigation of punishment.<sup>49</sup> This principle was also included in a significant number of international instruments including the Nuremberg Principles<sup>50</sup> and, of course, the statutes of the *ad hoc* international criminal tribunals and the International Criminal Court.<sup>51</sup>

That said, domestic and international judicial practice has posed another question about immunity in relation to criminal jurisdiction for international crimes. Evidently this question no longer has to do with functional immunity as an exclusion of responsibility, but rather with the personal immunity to which an official may be entitled when facing criminal prosecution while he/she still holds his/her official post.<sup>52</sup> While this does not fall strictly within the subject matter of this chapter, it is worth mentioning that the prevailing criterion to date appears to be that put forth by the International Court of Justice in *Democratic Republic of the Congo v. Belgium*.<sup>53</sup> In its judgment, the Court distinguished between different types of jurisdictions and concluded that, in accordance with customary international law, government officials are not entitled to immunity with respect to the criminal jurisdiction (i) of their own State; (ii) of another State, if their State has waived immunity; (iii) of another State when the official posting is over, for crimes committed prior to and after having held that post, or during that time, for acts committed in a personal capacity; and (iv) of an international criminal court with jurisdiction over the case.<sup>54</sup>

The following paragraphs transcribe segments of Latin American judgments that discuss various issues related to the immunities afforded government officials. The first section includes decisions that generally acknowledge the existence of domestic and international norms establishing functional and personal immunities. The second presents a judgment that is emblematic in terms of its meaning; it also demonstrates the importance of this issue and the distinctions that might exist in the domestic venue when a state prosecutes one of its own officials, in this case, former president Alberto Fujimori. A third and final section presents decisions that generally discuss the issue of immunities in relation to international jurisdictions such as the

49 Article 7 of the London Agreement of August 8, 1945, subscribed by and between the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis.

50 Principle III of the *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, adopted by the United Nations International Law Commission, in *Yearbook of the International Law Commission 1950*, vol. 1 (New York: United Nations, 1958).

51 See Articles 7 and 6 of the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, respectively, as well as Article 27 of the Rome Statute of the International Criminal Court.

52 In this regard, the International Court of Justice has stressed that “[...] the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.” “Arrest Warrant of 11 April 2000” (*Democratic Republic of the Congo v. Belgium*), Judgment, ICJ Reports 2002, at 3, para. 60.

53 Ibid.

54 Ibid., para. 61. For a doctrinal analysis of the issue, see, for example, Paola Gaeta, “Official Capacity and Immunities,” *supra* note 46.

International Criminal Court. While clearly relevant, these decisions do not distinguish clearly between functional and personal immunities in their discussions, with the attendant consequences already cited in this brief introduction.

## A. Overview

COSTA RICA, *Constitutional review of the bill to approve the Rome Statute of the International Criminal Court (List of Judgments 5.b)*, Whereas XII:

[O]ne of the prerogatives constitutionally granted members of the Supreme Powers, because of their position and function, is “privilege” [*fuero*] or “constitutional privilege,” better known as immunity, which serves as an impediment to attempts to criminally prosecute those officials. It is a functional criterion that, for political reasons, protects the investiture of the subject in order to ensure continuity in public service and avoid untimely interruptions that could cause more damage to the public interest than the investigation into the imputed act. It is also designed to ensure the independence of the branches of government and the balance of power between them, given the potential for a judicial excess of authority.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 4.5:

In accordance with the principle of immunity of heads of State, *in sensu stricto*, such officials may not be tried by the national courts of other States. The internal regulation of this principle has led to significant variations in its legal treatment, ranging from the absolute impossibility of heads of State being tried, even by their own States, and the extension of such protection to government officials other than the Head of State or Government, to the recognition of special courts which, in principle, bars any court other than the one expressly authorized from trying them.

## B. Peruvian case: Immunity of the head of State

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 695 and 696:

In the case of the accused, because the crime was committed in the discharge of his duties as President of the Republic, it is necessary to take into account Article 210 of the Constitution of 1979, which is similar in its provisions to Article 117 of the Constitution of 1993 [*footnote omitted*]. [Pursuant to this, the President] may only be accused of certain types of wrongdoing during his mandate or term, those referred to as presidential crimes—a list that obviously does not include the crimes of murder, severe bodily harm, and aggravated kidnapping.

This constitutional norm, which is one of the grounds for immunity, envisages a procedural obstacle or a condition on admissibility that is justified by the need to ensure the adequate functioning of the presidential institution by insulating it from political machinations, as constitutionalist TORIBIO ALAYZA Y PAZ SOLDÁN outlined in his day [*footnote omitted*]. Therefore, a proceeding, the criminal prosecution itself, may not be initiated until such time as the presidential term has ended; that is its substantive scope, and Article 84 of the Criminal Code is therefore applicable [...].<sup>55</sup>

In the case of a high-level public official, such as a President of the Republic, the initiation of a criminal prosecution is contingent, first, on the culmination or termination of the presidential mandate, and second, under Article 99 of the Constitution, on a criminal indictment handed down by the Congress—Article 100 of the *Lex Superior*.

## C. Non-applicability of immunities before the International Criminal Court

*COSTA RICA, Constitutional review of the bill to approve the Rome Statute of the International Criminal Court (List of Judgments 5.b), Whereas XII:*

[I]t is clear that while the “immunity” enjoyed by members of the Supreme Powers constitutes an obstacle to normal criminal prosecution at the domestic level, [...] the latter, as public servants subject to the principle of legality, are liable for their actions in the discharge of their duties, even when these actions are criminal in nature. [This is because] they are mere repositories of authority and their immunity may not be taken to the extreme of impeding the proceedings of a tribunal such as the International Criminal Court, in light of the nature of the crimes set out in the Statute. It

55 Notes in the original: Note 992: “Presidential immunity, therefore, is relative and temporal: relative to the extent that it must only be oriented toward preserving the exercise of the Presidency of the Republic, and temporal inasmuch as it should be understood within the time frame up until the end of the presidential mandate. Thus it cannot be understood as an assumption of impunity that is unacceptable in a Constitutional State. [Citing Defensoría del Pueblo, *Exposición de Motivos del Proyecto de Ley No. 290/2006-DP*, of September 21, 2006, at 11 and 12.]” Note 993: “National criminal doctrine appears to be consistent in this regard. Scholars beginning with BRAMONT ARIAS, followed by HURTADO POZO, and culminating with VILLAVICENCIO TERREROS have agreed that once the presidential mandate has ended, it is possible to proceed to prosecute the former president for other offenses—not the presidential ones—that he may have committed during the presidential term. And the time that has transpired may not be counted for purposes of the statute of limitations. [Luis A. Bramont Arias, *La ley penal: Curso de dogmática jurídica* (Lima: Librería Mundial de R. Meza S. y Cía, 1950), at 249; José Hurtado Pozo, *Manual de Derecho Penal: Parte General I* (Lima: Grijley, 2005), cited work at 342; Felipe Villavicencio Terreros, *Derecho Penal: Parte General* (Lima: Grijley, 2006), cited work at 216]. In regard to the presidential immunity enshrined in this norm [Article 150 of the Constitution of 1933] BRAMONT ARIAS, in the work cited earlier, states as follows: ‘Immunity only means that the action cannot be pursued during the transitory position held. The statute of limitations cannot be argued. Limitations on action do not expire when the action is impeded.’”



is not necessary, therefore, to await a pronouncement from the Legislative Assembly to initiate proceedings.

See, in contrast, COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.B:

The [Inter-American] Convention [on Forced Disappearance of Persons] imposes a commitment that these types of crimes [include] [...] [the non-applicability of] privileges, immunities, or special jurisdictions (Article IX) [...]. Here, the Court would only observe that in terms of the “immunities,” which the Convention discards on principle and, we would say, rightly so, it is necessary to exclude public servants who are constitutionally protected by immunity, such as members of the Supreme Powers (Article 121(9) of the Political Constitution). With this sole observation, the provision of Article XI is unobjectionable.<sup>56</sup>

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 6.1:

An important agreement among the countries that signed the Rome Statute is the irrelevance of official capacity, and the immunity that might be associated with it, for purposes of being held harmless from criminal liability for the commission of any of the crimes under the jurisdiction of the International Criminal Court set out in Article 5. The Rome Statute stipulates as follows:

“Article 27. Irrelevance of official capacity.

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

“2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

The aforementioned precept rules out what would, *in sensu stricto*, be a defense. The norm covers not only immunity in the strict sense of the term but also any defense based on official capacity, parliamentary inviolability, or the existence of a special court. This is meant to ensure that not even high-level public officials in a State—for example, a Head of State or Government, a member of the government or of a parliament—regardless of their level and rank, are held harmless from investigation and trial by the International Criminal Court when they commit any of the acts set out

<sup>56</sup> Note added to the original: This decision is dated well before the determination of constitutionality of the bill to approve the “Rome Statute of the International Criminal Court” and obviously it is based on a different set of circumstances inasmuch as it does not deal with a potential surrender to the International Criminal Court.

in the Statute. The legally protected values of all of humanity set out in the Statute were thus placed above the protection conferred upon rulers by virtue of their inauguration. *This change is extremely significant: human rights clearly take precedence over the principles of immunity for Heads of State and Government and other high-level government officials recognized under international law [footnote omitted]* and the domestic law of States, thus validating the trend reflected in several international instruments, including the Genocide Convention, the Nuremberg Principles, the statutes of the *ad hoc* tribunals, and the Code of Crimes against the Peace [and Security of Mankind]. The criminal immunity of the authorities has ceded ground to the imperative and the need to protect the dignity of human life—though not without resistance, given the constitutional reforms that certain countries such as France had to implement in order to create exceptions to the principle of immunity for the chief executive [*footnote omitted; emphasis added*].

Article 27 of the Statute, as noted, uses the term immunities in the broad sense in reference to Heads of State and Government as well as other high-level government officials, whether they are covered by immunities *in sensu stricto* or by special courts or rules of inviolability recognized in the various domestic legal systems. While the scope of the norm does not entirely eliminate the immunity, inviolability, or privilege that might be attached to certain public capacities at the domestic level, this in no way inhibits the jurisdiction of the International Criminal Court or constitutes grounds for escaping criminal liability or for a sentence reduction.

Article 27 of the Rome Statute has thus set important precedents of international law, such as the cases of the trial of Augusto Pinochet or the *ad hoc* Tribunal for Yugoslavia [*footnote omitted*].

## CHAPTER IV

# NATIONAL LEGISLATION ON CRIMES UNDER INTERNATIONAL LAW AND THE PRINCIPLE OF LEGALITY

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A study of domestic jurisprudence in relation to international crimes cannot overlook decisions in which the region's courts have addressed one of the key features of the international criminal law system: the interrelation and interaction between international and domestic law norms, and the obligation to adapt domestic legal systems to bring them into harmony with international law. At present, the prosecution of crimes under international law relies directly on the ability of domestic legal systems to effectively investigate and prosecute such crimes and, where warranted, to punish those responsible. In the words of Hugo Relva, this constitutes “the real cornerstone of the international criminal law system.”<sup>1</sup>

In this context, the work of application, integration, and interpretation undertaken by domestic courts will be critical to the criminal prosecution of crimes and criminal groups distinguished by their complexity. Often, however, this judicial labor will be insufficient to compensate for structural defects in domestic legal systems. As mentioned in other chapters in this digest, international crimes are defined in international law norms that often do not have an equivalent in many domestic systems. Moreover, the latter generally are not designed to address the specific characteristics of the structures of collective criminality inherent to the commission of international crimes, and they do not include all of the norms associated with the legal regime that governs such crimes.<sup>2</sup>

These circumstances have at least two consequences. First, courts must devote a large part of their interpretative work to the harmonization of international and domestic norms. Second, other government branches and organs must, pursuant to the procedures established in each country, adopt all the legislative and other measures necessary to adapt their legal system so that it becomes consistent with the relevant international standards for prosecuting this specific category of crimes. This second process, known as implementation, is an obligation that is explicitly set out in the text of certain treaties,<sup>3</sup> as the Latin American jurisprudence reflects, or that derives from the needs implicit in the international criminal justice system.<sup>4</sup>

Scholarly works on the subject have identified various formulas for implementing international treaties and standards at the domestic level.<sup>5</sup> Regardless of the formula selected, what

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1 Hugo Relva, “The Implementation of the Rome Statute in Latin American States,” in *16 Leiden Journal of International Law* 331, at 332 (2003).

2 See *infra* note 45. See also Chapter VI in this digest.

3 See *infra* notes 12–14 and 18.

4 See the body of the relevant text in *infra* notes 16 and 17.

5 In general terms, implementation can be done by reference to the relevant treaty, or it can be done through a *codification* process that might include the enactment of special laws, the amendment of existing codes, or the derogation of laws that contravene the principles and rules set out in the international treaties. See Kai Ambos, Ezequiel Malarino, and Jan Woischnik, eds., *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de Roma de la Corte Penal Internacional* (Montevideo: Fundación Konrad

is important is that Latin American States effectively enact the required legislation that will enable them, *de facto* and *de jure*, to try the perpetrators of international crimes. This is especially true because implementation is not only an obligation but also a legal imperative derived from the nature, characteristics, and basic principles of criminal systems in most civil law countries. As Relva has asserted:

In Latin American countries, which are civil law countries, each time a treaty which recognizes the rights of individuals is ratified, the enjoyment of such rights is immediately acknowledged without the need to adapt them to domestic legislation: a subsequent law implementing the provisions included in the treaty or convention is not necessary. However, if instead of recognizing rights the treaty prohibits certain acts, and imposes on states parties an obligation to prevent and punish them, it cannot be asserted that such acts are punishable under domestic legislation unless a subsequent legal rule has been passed expressly punishing them. The prohibited behavior must be narrowly defined and a certain and particular penalty established before it can be considered a crime.<sup>6</sup>

This raises yet another issue concerning the prosecution of international crimes that has been widely debated in the jurisprudence and the doctrine: the principle of legality in criminal law. Litigants and scholars have long argued that the international definitions of these crimes do not satisfy the principle of legality since, among other issues, they are vague and open-ended and purport to apply to acts that occurred prior to the adaptation of the respective criminal definitions.<sup>7</sup>

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Adenauer and Georg-August-Universität-Göttingen, 2006), at 19. See also Gerhard Werle, *Principles of International Criminal Law* (The Hague: TMC Asser, 2005), at 76. As an example of implementation through reference in Latin America, see Articles 378 and 379 of the Costa Rican Criminal Code: “Article 378. War crimes. A prison term of ten to twenty-five years shall be imposed on someone who, in the context of an armed conflict, commits or orders the commission of acts that could qualify as serious violations or war crimes, in accordance with the prohibitions set out in international treaties to which Costa Rica is party relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of the cultural property, in cases of armed conflicts, and according to any other instrument of International Humanitarian Law” [*unofficial translation*]. “Article 379. Crimes against Humanity. A prison term of ten to twenty-five years shall be imposed on someone who commits or orders the commission, as part of a widespread or systematic attack against a civilian population or with knowledge of such an attack, acts that could be characterized as crimes against humanity according to the prohibitions set out in international treaties to which Costa Rica is party, relative to the protection of human rights, and the Rome Statute” [*unofficial translation*].

6 Relva continues as follows: “[F]or the great majority of the civil law states and particularly [...] for Latin American states, [the] principle [of legality] always involves the enactment of additional domestic laws to criminalize such acts and specify penalties. Failure to criminalize proscribed acts means that they cannot be punished in a national court. If torture, the forced disappearance of persons, or war crimes are not classified as crimes in the state’s domestic legislation, it is not possible to force a person presumed responsible for such crimes to appear before the courts. This is true even though the states may be parties to treaties requiring punishment for such acts and regardless of the rank in the constitutional hierarchy these treaties may have.” Hugo Relva, “The Implementation of the Rome Statute in Latin American States,” *supra* note 1, at 333. For similar studies, see, for example, Santiago Corcuera Cabezut, *Derecho constitucional y derecho internacional de los derechos humanos* (Mexico City: Oxford University Press, 2002).

7 For a comprehensive study of the principle of legality in international law and comparative law in respect to the prosecution of international crimes, see Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (New York: Cambridge University Press, 2009).

This chapter presents some of the most relevant Latin American judgments relating to this subject. By way of introduction, it is important to bear in mind that, as M. Cherif Bassiouni has asserted, “there is [...] an important underlying assumption in what can be called a wanting in the specificity of content, drafting style and legal method reflected in the formulation of international crimes, and that is the assumption that these crimes are going to be enforced through national criminal systems [...]. The assumption is based on the knowledge that national legislative bodies will enact appropriate domestic legislation that will conform to each legal system’s requirements [...].”<sup>8</sup> With this, Bassiouni is underscoring the profound and irrefutable nexus between the factual-juridical ability of justice systems to investigate, prosecute, and punish these crimes and the legislative action required to do so at the domestic and international levels.

This also implies a complex process of legal choices, which will have a direct bearing on a State’s ability to prosecute international crimes and which involve all State actors. According to Ward N. Ferdinandusse, “at the national level, these choices are made, first, by the legislature and executive when they shape the national framework, second, by the prosecuting authorities when they select the legal basis on which to press charges, and, third, by the courts when they decide whether or not to uphold these changes. [Thus], [t]he choices of the legislature and executive largely determine the possibilities of the prosecutor, while the courts are constrained by the choices of all these actors.”<sup>9</sup> Not only is an implementation process required, therefore, but the legislative and the executive branches must also engage in a highly effective process to equip the legal system with the required norms.

The indisputable obligation to implement does not imply, however, that a domestic system might not opt to apply, in some cases, its own preexisting norms. This might occur, for example, when the definition of a crime under domestic law contains all of the elements of the international definition but offers broader protection.<sup>10</sup> It might also be the case when an ordinary crime is used as the basis for prosecution, in the absence of the appropriate implementing legislation. Even when this occurs, the specific nature and extraordinary gravity of international crimes, as well as the particular rules and principles applicable to them, cannot be disregarded. This could lead to a process of subsuming common crimes under international norms, as discussed later on.

Based on these brief comments, this chapter presents the criteria upheld by various Latin American courts in relation to these three issues, namely, the obligation to implement international criminal law norms in domestic systems, the principle of legality and international crimes, and subsumption of the conduct under national and international norms. Domestic jurisprudence is particularly relevant in this regard, as it has no real parallel in international jurisprudence.<sup>11</sup> The judgments that follow exemplify the need to adapt domestic systems to

8 M. Cherif Bassiouni, “The Sources and Content of International Criminal Law: A Theoretical Framework,” in *International Criminal Law*, vol. 1, *Crimes*, ed. M. Cherif Bassiouni, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999), at 5.

9 Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006), at 89.

10 Concerning the possibility of adopting criminal definitions that broaden standards of protection, whether by incorporating other international norms or by achieving political-juridical consensus at the domestic level, see *infra* notes 39 and 40.

11 International criminal courts and regional human rights courts frequently have had to address issues related to the principal of legality and the prosecution of conducts that, according to the accused and the petitioners, did not constitute offenses under the relevant domestic law at the time. See, inter alia, Judge-

international law standards while respecting their foundations, principles, and nature, in order to effectively prosecute those accused of perpetrating atrocious crimes against humankind.

## 1. STATES HAVE AN OBLIGATION TO ADOPT THE NECESSARY LEGISLATION RELATED TO CRIMES UNDER INTERNATIONAL LAW

As noted above, Latin American States have the explicit or implicit obligation to adopt all of the legislative means necessary to bring their domestic systems into harmony with the international treaties to which they are party. A number of international instruments explicitly set out this obligation, including the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>12</sup> the four Geneva Conventions of 1949,<sup>13</sup> and Protocol I Additional to the Geneva Conventions.<sup>14</sup>

On the other hand, the Rome Statute of the International Criminal Court,<sup>15</sup> which has revived the momentum with respect to implementation, sets forth the implicit duty of States

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ment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, September 30 and October 1, 1946; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, July 29, 2004, para. 141 and following; ICTY, *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Trial Chamber, Judgment, December 5, 2003, paras. 92 and 93; ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeals Chamber, Judgment, November 17, 2003, para. 220; European Court of Human Rights (hereafter ECtHR), *Streletz, Kessler and Krenz v. Germany*, App No. 34044/96, 35532/97 and 44801/98, 2001; ECtHR, *Kononov v. Latvia*, App No. 36376/04, 2008; Inter-American Court of Human Rights (hereafter IACtHR), *Case of Castillo-Petruzzi et al. vs. Peru*, Merits, Reparations and Costs, Judgment of May 30, 1999, Series C, No. 52, para. 121; IACtHR, *Case of Cantoral-Benavides v. Peru*, Merits, Judgment of August 18, 2000, Series C, No. 69, para. 157; IACtHR, *Case of de la Cruz-Flores v. Peru*, Merits, Reparations and Costs, Judgment of November 18, 2004, Series C, No. 115, para. 79 and following; IACtHR, *Case of Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, Judgment of August 31, 2004, Series C, No. 111, para. 174; IACtHR, *Case of Lori Berenson-Mejía v. Peru*, Merits, Reparations and Costs, Judgment of November 25, 2004, Series C, No. 119, para. 125. While these and other judgments are relevant to the examination of the principle of legality in the prosecution of international crimes (and in some cases, of ordinary crimes), the unique richness of the Latin American decisions stems from the ways in which *domestic courts* have interpreted the principle in accordance with the neo-Roman-Germanic tradition to which most countries of the region subscribe.

- 12 Article V of the Convention on the Prevention and Punishment of the Crime of Genocide, approved December 9, 1948, entered into force January 12, 1951.
- 13 Article 49 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 50 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Article 129 of the Convention (III) relative to the Treatment of Prisoners of War, and Article 146 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, all approved August 12, 1949, and entered into force October 21, 1950.
- 14 Article 80 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), approved June 8, 1977, and entered into force December 7, 1979.
- 15 At the time this study was concluded, three of the 15 countries included had ratified the Rome Statute of the International Criminal Court: Venezuela, June 7, 2000; Costa Rica, January 30, 2001; Argentina, February 8, 2001; Paraguay, May 14, 2001; Peru, November 10, 2001; Ecuador, February 5, 2002; Panama, March 21, 2002; Bolivia, June 27, 2002; Uruguay, June 28, 2002; Honduras, July 1, 2002; Colombia, Au-

Parties to adapt their domestic legislation. According to Relva, “[D]ue to the complementary nature attributed to the ICC, [...] it is the primary obligation of states to try persons responsible for the crimes under international law defined in the Statute. Therefore, we can conclude that, in order to fulfill this duty, states parties to the Rome Statute must enact the laws that may permit them to do this.”<sup>16</sup> In a subtly different interpretation, Gerhard Werle has asserted that while there is no obligation to directly implement the Statute, since the power and autonomy to decide on the most appropriate normative formulas have been left to States, “the message of the ICC Statute as regards the quality of domestic criminal legislation is that states should be both willing *and* able (through their domestic legislation) to prosecute genocide, crimes against humanity, and war crimes in a capacity similar to that of the International Criminal Court.”<sup>17</sup>

In addition to these treaties, Latin American jurisprudence also addresses the obligation to implement contained in many international human rights treaties.<sup>18</sup> As noted in previous chapters, while these treaties do not refer directly to any of the three international crimes discussed in this study, the legal values safeguarded through the prohibition on perpetration of these crimes frequently coincide with the rights recognized in international human rights instruments.

In light of these obligations, States must implement all of these treaties by adopting the formulas that offer the best protection at the domestic level.<sup>19</sup> It would be insufficient, therefore, to enact implementing legislation for the crimes enumerated in the Rome Statute while leaving out, for example, other humanitarian treaties that establish war crimes.<sup>20</sup> Similarly, a comprehensive implementation process should adapt the domestic legal system to other rele-

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gust 5, 2002; Mexico, October 28, 2005; and Chile, June 29, 2009.

16 Hugo Relva, “The Implementation of the Rome Statute in Latin American States,” *supra* note 1, at 338.

17 Gerhard Werle, *Principles of International Criminal Law*, *supra* note 5, at 75.

18 Some of the key conventional provisions establishing the duty to implement are Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, and entered into force June 26, 1987; Article 6 of the Inter-American Convention to Prevent and Punish Torture, adopted December 9, 1985, and entered into force February 28, 1987; Article I of the Inter-American Convention on Forced Disappearance of Persons, adopted June 9, 1994, and entered into force March 28, 1996; and Article IV of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted November 30, 1973, and entered into force July 18, 1976. Additionally, see Article 2 of the International Covenant on Civil and Political Rights, adopted December 16, 1966, and entered into force March 23, 1976, and Article 2 of the American Convention on Human Rights, adopted November 22, 1969, and entered into force July 18, 1978.

19 In this regard, see, for example, the position of some Latin American courts with respect to the crimes of genocide and torture in “*Genocide and political groups*” and “*Minimums of protection set forth by international treaties may be broadened by national legislation*,” sections I.2.B.ii.a and IV.2.D, respectively, of this digest.

20 In this regard, Hugo Relva has noted that “[...] domestic legislation must be fully consistent not only with the Rome Statute—which sets out the minimum standards—but also with other, stricter, obligations imposed on them by international law generally. For example, other conventional instruments or custom may impose an obligation to criminalize acts not covered by the Statute, whose long list of crimes under international law is by no means exhaustive.” Hugo Relva, “The Implementation of the Rome Statute in Latin American States,” *supra* note 1, at 338. This hypothesis would apply, for example, to Protocol I Additional to the Geneva Conventions of 1949, which criminalizes certain conducts not covered under Article 8 of the Rome Statute. Another example of international norms that offer broader protections to certain individuals is the Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict, adopted May 25, 2000, and entered into force February 12, 2002. This instrument prohibits the participation of children under 18 years of age in hostilities, in contrast to the Statute, which stipulates 15 years of age.

vant norms. Such additional norms include those establishing the bases for cooperation with the International Criminal Court<sup>21</sup> and with other States,<sup>22</sup> as well as those that set forth the specific legal regime governing this category of crimes.

The following sections transcribe excerpts from Latin American court judgments that discuss the obligation of States to implement the relevant treaties. In this context, the courts acknowledge that legislators are free to determine the formulas they consider most appropriate for this purpose, in accordance with each State's crime policy. Nonetheless, in consonance with academic studies on the subject,<sup>23</sup> the courts also have concluded that constitutional principles and values, international human rights treaties, and general principles such as nondiscrimination impose clear limits on legislative power with respect to international crimes.

MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Twelve:

[By virtue of] [Article] V [...] of the Convention on the Prevention and Punishment of the Crime of Genocide [...], the contracting parties undertook to adopt, in accordance with their respective Constitutions, the necessary legislative measures to ensure the application of the provisions of the Convention itself and, in particular, to establish specific criminal penalties to punish those guilty of genocide or any of the other acts listed in Article III.

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 34:

Article 146 [of the Third Geneva Convention of 1949] sets out the commitment of the Contracting Parties to undertake to enact the legislation necessary to establish effective criminal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Convention [...].

21 See Part IX of the Rome Statute of the International Criminal Court. Also, with respect to some practical experiences with the implementation of norms of cooperation in Germany and some Latin American countries, see, inter alia, Kai Ambos, Ezequiel Malarino, and Jan Woischnik, eds., *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de Roma de la Corte Penal Internacional*, supra note 5.

22 As in other areas, States will have the flexibility to identify the most suitable formulas for cooperation in accordance with their own legal systems. Nonetheless, the domestic system must include certain basic norms, such as those relating to the extradition of persons accused of the commission of these crimes. Moreover, the United Nations' *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity* can serve as a useful guide for the harmonization of norms concerning international cooperation. These principles were adopted by means of General Assembly Resolution 3074 (XXVIII) of December 3, 1973.

23 See, for instance, Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, supra note 9.



COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas, D, 1.3:

States, including the Colombian State, have the basic obligation to respect and ensure respect for international humanitarian law. On the international plane, this obligation is derived from conventional and customary sources and falls within the general duty of States to respect international law and to honor their international obligations. At the constitutional level, this obligation is set out in various articles of the Constitution.

Various international bodies have affirmed the binding nature of international humanitarian law and have urgently called on States to comply with, and to ensure compliance with, their obligations in this regard. The United Nations Security Council, for example, in Resolution 1674 of April 28, 2006, [...] called on States to “take appropriate legislative, judicial and administrative measures to implement their obligations under these instruments.” [...] Likewise, the General Assembly of the Organization of American States has, in various resolutions, called on States Parties to comply with their obligation to promote, respect, and ensure respect for international humanitarian law. Thus, [for example], in Resolution 2226 (XXXVI-O/06) of 2006, the General Assembly [...] underscores “the need to strengthen the rules of international humanitarian law by means of their universal acceptance, their broader dissemination, and the adoption of national measures for their application”; [...] (h) urges “the member states to adapt their criminal law in order to meet their legal obligations under the 1949 Geneva Conventions and their 1977 Additional Protocol with respect to the definition of war crimes, universal jurisdiction, and the responsibility of superiors”; and (i) invites “member States that are party to the Rome Statute [...] to define under their criminal law the crimes that are within its jurisdiction.”

With regard to the obligation to adopt criminal definitions to protect fundamental rights, which can overlap with the legal values protected by crimes against humanity, see, for instance, PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Whereas 10:

The rights to life, liberty, and personal security serve as the basis and rationale for all human rights; their effective exercise must therefore be respected without restriction [...]. It is the responsibility of the State to ensure respect for these rights and their full and free exercise. If the judicial system lacks an explicit rule that guarantees them, it must adopt, in accordance with constitutional procedures and the provisions of the American Convention [on Human Rights], such legislative or other measures as may be necessary to give them effect.

Regarding in particular the crime of forced disappearance, see COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.B:

[The Inter-American Convention on Forced Disappearance of Persons] imposes on the Costa Rican State, through its Legislative Assembly, the duty to enact legislation to establish the CRIME OF FORCED DISAPPEARANCE OF PERSONS, based on the initial language that has been drafted; this language may be improved upon in any particular, taking into account the circumstances of time and place, which are not always identical in different countries. In the view of the Court, it is important to point out that even though Costa Rica is regarded as a country with a civic, pluralistic, or tolerant tradition, it might not be exempt from the acts that the Convention seeks to regulate and suppress.

*VENEZUELA, Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b),* Whereas IV.1:

The foregoing constitutional provision was included in the Constitution as a result of the Venezuelan State having signed and ratified the Inter-American Convention on Forced Disappearance of Persons [...]. It should also be noted that Venezuela also signed and ratified the Declaration on the Protection of All Persons from Forced Disappearances, approved by the United Nations General Assembly on December 18, 1992.

In effect, pursuant to the Inter-American Convention on Forced Disappearance of Persons, the Venezuelan State—as set out in Article I—undertakes to punish, in its sphere of jurisdiction, the perpetrators and accessories of the crime of forced disappearance of persons, as well as the attempt to commit that crime, and also to take such legislative, administrative, judicial, or other measures as may be necessary to comply with the commitments acquired in that Convention.

## **A. Legislative action in the development of criminal law**

*COLOMBIA, Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.b),* Whereas 5:

The Court has been emphatic in its recognition that the legislative organ has broad and exclusive jurisdiction when it comes to defining the penal policy of the State and, in particular, defining in criminal law what constitutes an offense. This is clearly premised on the principle of democracy and the sovereignty of the people [...].

Because of this, the legislative organ is free to pursue different strategies toward penal policy, as long as the alternative that is approved, in addition to being legitimate in its design, respects constitutional values, precepts, and principles. That being the case, it is evident that penal policy and criminal law are not defined in the language of the Constitution, and that it instead is up to the legislative body to develop them [...].

[T]he Constitution allows the legislative body a margin of discretion in developing crime policy and in determining offenses and punishments, or not, according to its judgment, within the framework of the Constitution [*footnote omitted*].

## B. Limits to legislative action

### i. Constitutional principles and fundamental rights

COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 4:

[T]he supreme principles and values, and the fundamental rights that place the citizen at the center of the rules of coexistence embodied in the Political Constitution of 1991, become the constitutional limits on the regulatory powers to be exercised by the Congress, as the vested authority in the general jurisdiction clause. Thus, the Congress may not, under the pretext of exercising its powers to legislate, disregard values such as life, personal integrity, and the prohibitions against all types of discrimination with respect to inalienable individual rights, which, in accordance with the Political Constitution, are the founding principles of social and political organization, as proclaimed by the Supreme Statute.

[T]he general jurisdiction clause favoring the Congress and its attendant freedom to make laws may not be put forward as a constitutionally valid justification for the failure to protect or recognize superior values such as life and personal integrity. These values enjoy the highest degree of protection and their enjoyment must not be subject to restrictions or differential treatment, since that would distort the very essence of the constitutional mandate.

See also COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas C (similar).

Additionally, see COLOMBIA, *Remedy of unconstitutionality (Article 101 of Law 599-2000, Criminal Code) (List of Judgments 4.h)*, Whereas 5:

The Court has specified that in the exercise of its powers, the Congress “may not overstep the bounds of the Constitution and is subordinate to it, because that Charter is the supreme law of the land (CP Art. 4)” [*footnote omitted*].

### ii. International treaties

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas C:

The norms that constitute the bloc of constitutionality[,] [including international human rights treaties], have several functions in the Colombian legal system. The bloc of constitutionality has two different functions when it comes to setting the parameters of legislative power to define and punish crimes: an interpretive function, wherein it serves as a guidepost for interpreting the language of constitutional clauses

and identifying permissible limitations on fundamental rights, and an integrating function, through which it establishes the specific boundaries of constitutionality in the absence of explicit constitutional provisions [...]. The Constitutional Court has exercised both of these functions in its jurisprudence concerning the parameters of the legislature's power to define and punish crimes, whether by identifying a breach of the Constitution through an interpretation of the norms included in the bloc, or by directly applying the parameters established by those norms in the absence of a specific constitutional clause.

It should be reiterated, however, that [...] the norms composing the bloc of constitutionality are not autonomous benchmarks for the supervision of constitutionality, nor is the Constitutional Court [...] called upon to verify the theoretical compatibility between domestic law and the international treaties that are binding on the State: "(...) In this sense, drawing a comparison between a law and an international treaty cannot give rise to an automatic declaration of constitutionality or inconstitutionality, since this must be interpreted methodically in light of the language of the Constitution."

### iii. Principle of non-discrimination

COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 4:

[T]he said restriction [i.e., introduction of the phrase "outside the law" in the definition of the crime of genocide] is also unacceptable insofar as it directly contradicts the principles and values of the 1991 Constitution in its blatant disregard for the guarantees of unrestricted respect for the rights to life and personal integrity, which must be recognized equally for all individuals since these rights have equal value for all human beings.

According to the jurisprudence of this Court, when it comes to these supreme values, no distinction of any kind is constitutionally admissible, as established by Article 5 of the Political Constitution, which provides that in a State governed by the rule of law such as Colombia—which professes human dignity as a primary value—"the inalienable rights of persons" are recognized "*without discrimination of any kind.*"

## C. Absence of legislation does not eliminate the gravity of the conduct

PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Whereas 4:

Even though the Inter-American Convention on Forced Disappearance of Persons was not in force at the time the alleged detention of the beneficiary occurred, nor had the crime of forced disappearance been defined in our Criminal Code, that circumstance in no way justifies the commission of the crime, nor does it prevent us

from regarding it as a gross violation of human rights, since the rights violated by this crime are protected under the Constitutions of 1979 and 1993 as well as under international instruments that Peru has signed and ratified, such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

## 2. PRINCIPLE OF LEGALITY IN CRIMINAL LAW

This study does not attempt to offer an in-depth analysis of the principle of legality,<sup>24</sup> but rather examines the ways in which Latin American courts have interpreted this principle and its relationship to the prosecution of crimes under international law. It is important, however, to provide some context.

According to Sergio García Ramírez, Cesare Beccaria, a prominent early advocate of criminal law reform, developed his body of work at a time when the administration of justice was regarded as erected on the foundations laid by Constantine: “Vestiges of the legislation of an ancient conquered people, compiled at the order of a prince who reigned twelve centuries ago in Constantinople and enveloped in the voluminous hodgepodge of books prepared by obscure interpreters with no official capacity, made up the tradition of opinions that much of Europe still honor[ed] with the name ‘Laws.’ [...] These were [the] foundation[s] for the construction of the crimes and punishments, which the court carried out pursuant to its own competence and by its own force.”<sup>25</sup> In response to this reality, Beccaria’s proposals triggered profound changes in the way in which the law and institutions were understood.<sup>26</sup> The new conceptions found fertile ground and were consolidated in the work of other prominent scholars such as Paul Johann Anselm Ritter von Feuerbach, who proposed the tenet of *nullum crimen sine lege, nulla poena sine lege*,<sup>27</sup> as well as in classic legal instruments such as the Declaration of the Rights of Man and of the Citizen.<sup>28</sup>

Today, as reflected in the judgments emanating from Latin America as well as in the international jurisprudence and doctrine, the principle of legality is recognized nationally and internationally as a principle of justice and as a human right that must be interpreted and applied in keeping with its ultimate purpose,<sup>29</sup> taking into account the legal reality at the time. In contrast

24 For one of the most thorough studies on the principle of legality in international and comparative law, see Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, *supra* note 7.

25 Sergio García Ramírez, “Estudio Introdutorio,” in *De los delitos y de las penas*, by César [Cesare] Beccaria (Mexico City: Fondo de Cultura Económica, 2000, facsimile of the first edition in Italian of 1764), at 19. [*Unofficial translation*]

26 *Ibid.*

27 For more information on the work of German jurist Paul Johann Anselm Ritter von Feuerbach, see, for example, Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, *supra* note 7.

28 Article 8 of the Declaration of the Rights of Man and of the Citizen: “The law ought only to establish penalties that are strict and obviously necessary, and no one can be punished except in virtue of a law established and promulgated prior to the offense and legally applied.”

29 See, for instance, ECourtHR, *Kononov v. Latvia*, *supra* note 11, para. 113; ECourtHR, *SW v. UK*, App No. 20166/92, 1995, para. 34; and ECourtHR, *CR v. UK*, App No. 20190/92, 1995, para. 32. In his study on the direct application of international criminal law by domestic courts, Ferdinandusse has identified

to the challenges Beccaria described in his day, the challenges of today include, for example, the integration of different legal norms into the same legal system<sup>30</sup> and the orderly and correct interaction among various jurisdictions and institutions.

This is not to say that the substance of the principle of legality has been negated by the evolution of international law.<sup>31</sup> To the contrary: jurisprudence and doctrine have confirmed that the principle of legality in criminal law means, in general terms, that only the law can establish and punish crimes (*nullum crimen sine lege, nulla poena sine lege*), and they impose prohibitions on the retroactive application and overextension of the law to the detriment of the accused.<sup>32</sup> It has further been established that criminal law must be certain and clear,<sup>33</sup> although this does not preclude a future judicial interpretation of the norm in question.<sup>34</sup>

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two main objectives of the principle of legality in its construction in domestic and international law: “The first is to guarantee the legal certainty of the individual. Legal certainty requires offences to be specific and forbids their retroactive application. These are essential conditions for individuals to know in advance both the ‘moral quality’ (acceptable or unacceptable) and the legal consequences of their behavior [footnote omitted]. Second, the principle of legality delimits and separates the powers of the institutional actor involved in the (international) criminal justice system [footnote omitted]. It prevents the legislature from punishing past acts by legislation, instead of criminalizing future conducts [footnote omitted]. It also stops the judiciary, national or international, from imposing arbitrary punishment and effectively drawing up new offences.” Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, *supra* note 9, at 222–23.

- 30 At the domestic level, see, for example, Judgment C-148/05, of February 22, 2005 of the Constitutional Court of Colombia (Justice rapporteur Álvaro Tafur Galvis), in which this high court examines the constitutionality of a norm based on the incorporation of different international rules concerning the definition of the crime of torture. In the international plane, see ECourtHR, *Kononov v. Latvia*, *supra* note 11, in which the European Court of Human Rights examines a set of legal norms, including the criminal codes of Latvia and other relevant States, as well as humanitarian law treaties, particularly the Hague Regulations of 1907, in order to determine the “civilian” or “combatant” character of the alleged victims of a crime imputed to the accused. See also ECourtHR, *Streletz, Kessler and Krenz v. Germany*, *supra* note 11.
- 31 For a more in-depth examination of the evolution of the principle of legality in international criminal law and its relationship to domestic processes, see, for example, Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law,” in *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (New York: Oxford University Press, 2002), at 733–66, as well as Beth Van Schaack, “Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals,” in *97 Georgetown Law Journal* 119 (November 2008).
- 32 See, for instance, IACourtHR, *Case of Fermín Ramírez v. Guatemala*, Merits, Reparations and Costs, Judgment of June 20, 2005, Series C, No. 126, para. 90; ECourtHR, *Kononov vs. Latvia*, *supra* note 11, para. 114; ECourtHR, *Streletz, Kessler and Krenz v. Germany*, *supra* note 11, para. 50. From the doctrinal standpoint, Susan Lamb points out that “[t]he *nullum crimen* principle is founded upon four essential attributes: (a) the concept of written law; (b) the value of legal certainty; (c) the prohibition on analogy; and (d) non-retroactivity [footnote omitted].” Susan Lamb, “Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law,” *supra* note 31, at 734.
- 33 IACourtHR, *Case of de la Cruz-Flores v. Peru*, *supra* note 11, paras. 79–82; IACourtHR, *Case of Ricardo Canese v. Paraguay*, *supra* note 11, paras. 174–77; IACourtHR, *Case of Lori Berenson-Mejía v. Peru*, *supra* note 11, para. 125.
- 34 ECourtHR, *Achour v. France*, App No. 67335/01, 2006, para. 41. On this point, the European Court of Human Rights has sustained that the requirements of clarity and certainty “cannot be [understood] as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.” ECourtHR, *Streletz, Kessler and Krenz v. Germany*, *supra* note 11, para. 50; ECourtHR, *Kononov v. Latvia*, *supra* note 11, para. 114.

Latin American jurisprudence has upheld these same criteria, contributing a wealth of interpretation that is difficult to match in terms of the domestic prosecution of international crimes and its relationship to the principle of legality. In keeping with international doctrine, Latin American jurisprudence has identified the two dimensions of the principle of legality: as a principle of justice and as a human right. Similarly, the decisions transcribed below recognize the general criteria that criminal definitions must satisfy in order to comply with the principle of legality in criminal matters.

## A. Overview

PERU, *Habeas corpus submitted by Máximo Humberto Cáceda Pedemonte (List of Judgments 13.d)*, Whereas 28:

This Tribunal takes the view that the principle of legality in criminal law is not only a principle but also a subjective constitutional right of all citizens. As a constitutional principle, it informs and delineates the legislature's province of action when it comes to determining which acts are prohibited and their respective punishments. At the same time, in its dimension as a subjective constitutional right, it guarantees to anyone subject to a punitive process or procedure that the prohibited act has been defined in a previous, strict, and written norm and that the punishment also has been previously determined in a legal norm.

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.1:

[T]he principle of legality “is the basic pillar of the Rule of Law and a keystone of the principle of juridical security. It replaces the rule of men with the rule of law. It is, therefore, a principle that informs the entire legal system of the nation.”

The principle of legality is grounded in the need for certainty in legal rules, so that the individual is aware of which behaviors are allowed and which are proscribed. This eliminates State arbitrariness in crime fighting and punishment. Consequently, the principle is grounded in juridical security [...] inasmuch as the individual can predict his actions and their legal consequences, but also because the State alone, through the legislature, holds a monopoly on criminal lawmaking.

[T]his principle is also grounded in the democratic principle [...], which has to do with citizens' participation in the governance of the community to which they belong and, in this vein, with the need to ensure that the acts that a particular community will regard as criminal are defined by representatives of the people through a law *in sensu stricto*; in other words, a formal law dictated by the legislative branch [...].

The principle of legality is particularly important in the criminal sphere as it is the foundation upon which liberal criminal law has been constructed. In most countries, it has become an individual constitutional right that limits the punitive action

of the State. In regard to this principle, the Constitutional Court [...], after examining its original definition and current formulation, [has] establish[ed] that

“[...] the most significant precedents for this guarantee are found in the eighteenth-century ideals of the Enlightenment, which were later set out in the Petitions of Rights [...] and, fundamentally, in the Declaration of the Rights of Man and of the Citizen [...]. [From this basis, the principle of legality] grew to become part of the universal juridical conscience, since there is no country in this cultural orbit that has not incorporated it into its law. And indeed, as stated unequivocally by Professor Madrid Conesa, ‘few principles are as prestigious or as central to positive law, or have been accepted as unanimously in doctrine and jurisprudence as the principle of *nullum crimen sine lege*, which is, at the same time, so frequently disregarded in practice by the legislature and courts alike.’”

As a complement to the previous decisions, see EL SALVADOR, *Habeas corpus submitted by Reyna Dionila Portillo (List of Judgments 7.b)*, Whereas 4:

[T]he principle of legality means that the administration is bound to carry out the powers and duties conferred upon it by law. In other words, all government entities are united by this principle insofar as all of their actions must be presented as the exercise of an authority vested in them by a law that both creates and limits it. This principle not only refers to ordinary law, but extends to the legal system as a whole; in other words, legality implies respect for the legal system in its entirety, which includes the Constitution. In this sense, legality means adhering not only to the law, but—in a preferential way—to the Constitution as well.

## B. Principle of legality and criminal definitions

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.1:

In its original form, the principle signified a guarantee that no act could be considered criminal unless a law declaring it so was in place prior to its commission, nor could any punishment be imposed unless it had been previously established by law. This later led Beling to develop the concept of a criminal definition [*tipo*] and adherence of the conduct to the criminal definition [*tipicidad*], with the attendant repercussions for the technical-dogmatic development of criminal law theory. The crime, then, emerges as the “technical precipitant of *nullum crimen, nulla poena sine lege*,” based on which, for an act to be punishable, it is not enough that it be against the law in the general legal system; rather it must fit one of the criminal definitions that constitute grounds for the punishment that is to be applied. The criminal definition complements and invigorates the struggle against the inherent uncertainty and insecurity of authoritarian criminal law by setting precise boundaries for the punitive



power of the State and protecting individual rights from any arbitrary intervention on the part of the government authorities.

Additionally, see COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 4:

[T]he distinction introduced by the contested phrase [in the definition of the crime of genocide, i.e., groups that are “outside the law”], moreover, is asserted on grounds that lack precision and clarity and is also unconstitutional for this reason, in view of its ambiguity and uncertainty. In other words, [this phrase] lacks the necessary univocality to unequivocally establish that the conduct fits the criminal definition. It therefore contradicts the principle of the general definition of an offense at the constitutional level and, in turn, the constitutional guarantees inherent to due process and the right to a defense in criminal matters, mainly the principle of “*nullum crimen, nulla poena sine lege praevia, scripta et certa*.” To reiterate, [the phrase under review] does not, strictly speaking, [meet the requirements of precision and clarity of] a criminal definition (*tipicidad*), which is a structural element of the legality of the crime and the punishment and a safeguard of democratic freedoms in a State governed by the rule of law, whose essential purpose is to guarantee the effective protection of human rights.

### **i. Criminal definitions must be previous, written, strict, and clear**

PERU, *Habeas corpus submitted by Máximo Humberto Cáceda Pedemonte (List of Judgments 13.d)*, Whereas 27:

As this Tribunal has stated on numerous occasions, “[...] under the principle of legality, crimes must be set out in the law and prohibited acts must have been previously and clearly defined by the law. This principle, therefore, supports the prohibitions against the retroactive application of criminal law (*lex praevia*), against the application of a law other than the written law (*lex scripta*), against the use of analogy (*lex stricta*), and against unclear or vague legal provisions (*lex certa*).”

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.1:

[T]he principle of legality does not end with Feuerbach’s classical definition: “*Nullum crimen, nulla poena sine lege praevia*.” Today, four additional requirements flesh out the principle, strengthening it and enhancing its content:

(a) *Nullum crimen, nulla poena sine lege scripta*: This means that criminal law is prohibited from invoking customs or general principles as a source in establishing offenses and punishments, inasmuch as only written law is valid. This refers to law in the formal sense, emanating from the Legislature (Articles 29 and 59(1) of the Political Constitution), since only that organ, as the representative of the public will,

has the authority to define the acts that will be considered criminal and to establish the respective sanctions.

b) *Nullum crimen, nulla poena sine lege stricta*: Crimes and punishments must be determined exclusively by law. This means that analogy may not be used as a means to derive unfavorable consequences, even if the intent is to criminalize an act that is similar to one set out in criminal law.

The basis for the prohibition against analogy is that, due to the severity of the punishment contained in the criminal law, such punishment must only apply to those scenarios that have been lawfully set out by the representatives of popular sovereignty (legislators). This is to ensure that the judge cannot act arbitrarily, but rather is required to act in accordance with the law.

The foregoing, however, does not mean that the deciding body has no authority whatsoever to interpret the rules. Clearly, the deciding body must discern their meaning in order to determine what types of normative hypothesis are set forth in the norms and whether the law is applicable to a particular case. Once the law has been interpreted, however, what the deciding body clearly may not do is extend the law's unfavorable consequences to other situations that, while similar or analogous, are not covered therein.

c) *Nullum crimen, nulla poena sine lege certa*: The laws must be clear, precise, and accessible to the public. This requirement is known as the principle of specificity and is intended to provide judicial security to members of society. For this reason, any norm that defines the material elements of the crime in an open, diffuse, discretionary, or vague manner would contravene the specificity principle, leaving it to the deciding bodies to actually regulate those elements.

However, criminal law often contains normative terms (value judgments) that require an examination of other codes or laws (for example, the Civil or Commercial Code) or other normative standards, such as moral standards. In such cases, it will fall to the interpreter—the deciding body—to determine the meaning of the legal rule through an evaluation of the codes, laws, or normative frameworks referenced in the law. Such clauses are known as clauses requiring interpretation [*cláusulas pendientes de valoración*]. While according to one segment of the doctrine, their inclusion in criminal definitions could contravene the requirement of certainty, insofar as the effective application of criminal law will be contingent on the decision of the deciding body, it is no less true that certain criminal laws require the use of terms set out in specific nonlegal normative frameworks. This would not violate the principle of legality as long as their meaning can be specified through the interpretation developed by the deciding body at each moment in time.

Otherwise, we would be confining criminal law to terms that can be understood without any difficulty whatsoever, and this is surely impossible, since criminal law is rooted in a particular historical situation with its dominant value systems, moral codes, and social mores. These change over time at a faster pace than does the law. It is therefore impossible for the law to constantly adjust its rules so as to lend a specific meaning to particular valorative expressions derived from the moral or ethical identity of a society. In any case, it will fall to the deciding body to determine the

content of such terms by consulting the various sets of rules to which the legislative body has referred.

d) *Nullum crimen, nulla poena sine lege praevia*: This refers to the principle of non-retroactivity of an unfavorable criminal law, by virtue of which the law must have existed prior to the commission of the act; however, retroactivity is allowed if it is favorable to the offender [...].

VENEZUELA, *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b)*, Whereas IV.2:

[T]he Constitution of the República Bolivariana de Venezuela stipulates that no one may be punished for acts or omissions that were not previously established as crimes, misdemeanors, or infractions in preexisting laws. This constitutional provision envisages the principle of the legal definition of an offense under the principle of legality, which has been established in the doctrine as follows: *nullum crimen, nulla poena, nulla mensura sine lege praevia, scripta, stricta, et certa*. This principle delimits the punitive power of the State.

### C. *Lex praevia*: Non-retroactivity of the law and the principle of legality

As noted earlier, the non-retroactivity of the law is at the heart of the principle of legality.<sup>35</sup> In the words of Theodor Meron, “the prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances [...] by national and international tribunals.”<sup>36</sup> If it is to be properly applied in the prosecution of international crimes, however, non-retroactivity must be understood and interpreted in the context of the current evolution of the law.

The Latin American jurisprudence presented below underscores the importance of this issue. Significantly, the courts of the region have concluded that international law must be considered part of the legal system and be given full effect as *lex praevia* for the purpose of applying the principle of non-retroactivity. More importantly, the jurisprudence of various Latin American countries has affirmed that customary norms are an important and recognized source of international law. As such, they constitute a precedent that must be taken into account in the criminal prosecution of international crimes, even when the crime had not yet been criminally defined in domestic law at the time it was committed. In another take on the issue of retroactivity of the law, some Latin American courts have concluded that in the specific case of permanent crimes such as forced disappearance, the applicable criminal definition shall be the one in force at the time the criminal conduct ceases, rather than when the act of commission began.<sup>37</sup>

35 Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, *supra* note 9, at 223.

36 Theodor Meron, *War Crimes Law Comes of Age: Essays* (New York: Oxford University Press, 1998), at 244.

37 For additional references to the nature of forced disappearance as a crime against humanity and a permanent crime, see “*Forced disappearance as a crime against humanity*” and “*Forced disappearance is a permanent*

URUGUAY, Case “*Condor Plan*” in Uruguay (*José Nino Gavazzo Pereira, et al.*) (*List of Judgments 14.a*), Whereas 8:

The principle of non-retroactivity of criminal law is an offshoot of the principle of legality for crimes. As the Human Rights Committee has stated, this principle is “the requirement that both criminal liability and punishment be limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty.” It is also a recognized principle of international criminal law and international humanitarian law. Similarly, it is an essential safeguard in international human rights law, and a number of treaties enshrine the non-derogable nature of the right not to be convicted for acts or omissions that were not criminal at the time they were committed.

### **i. International law constitutes *lege praevia***

URUGUAY, Case “*Condor Plan*” in Uruguay (*José Nino Gavazzo Pereira, et al.*) (*List of Judgments 14.a*), Whereas 8:

International law clearly defines the nature of the applicable criminal law: it is a matter of both domestic law and international law. Hence, Article 15 of the International Covenant on Civil and Political Rights provides that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

Likewise, Article 7 of the European Convention on Human Rights stipulates that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”

Article 9 of the American Convention on Human Rights provides that “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed.” International humanitarian law confers a similar scope on the concept of applicable law. As Sylvie-Stoyanka [Junod] has pointed out, “A violation of international law may not go unpunished based on the fact that the act or omission was not prohibited under national law at the time it was committed.” The International Covenant on Civil and Political Rights and the European Convention on Human Rights are more precise in establishing the scope of the principle of non-retroactivity of criminal law. Thus, Article 15 of the Covenant stipulates, “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” Article 7 of the European Convention on Human Rights contains a similar provision. While little doctrine exists on the matter in the inter-American sphere, some authors take the view that the formula employed by Article 9 of the American

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*crime*,” sections I.3.E and I.3.E.iii of this digest.

Convention on Human Rights, “under the applicable law,” envisages the same situation.

While this rule is sometimes treated as an exception, it is, in reality, an aclaratory provision on the scope of the principle of non-retroactivity of criminal law.

The aim and purpose of this scope of the principle of non-retroactivity of criminal law is to allow the prosecution and punishment of acts recognized as criminal under general principles of international law, even when those acts were not defined as crimes at the time of their commission under international or domestic criminal law. This clause was incorporated into both treaties for the express purpose of responding to situations such as those of World War II [...].

Torture, extrajudicial execution, and forced disappearances are per se international crimes.<sup>38</sup> Likewise, the massive, systematic, or large-scale practice of extrajudicial execution, torture, forced disappearance, and political persecution, inter alia, constitute aggravated international crimes, meaning crimes against humanity. These are precisely the acts referred to, inter alia, in Article 15 of the International Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, and Article 9 of the American Convention on Human Rights. The foregoing has several consequences, based on different factual premises and hypotheses. Under international law, it is possible to prosecute and convict, without violating the principle of non-retroactivity of criminal law, a perpetrator of a criminal act that was and is not, at the time it was committed or afterward, a crime under domestic law, provided that, at the time it was committed, the act was already considered a crime under international law.

The trials for crimes against humanity conducted by the international military tribunals for Nuremberg and for the Far East, and those conducted by the Allied tribunals pursuant to Law No. 10 of the Allied Control Council, reaffirmed the application of this principle. The perpetrators of crimes against humanity were prosecuted, tried, and punished for acts characterized as crimes against humanity based on general principles of law recognized by the international community and using criminal definitions adopted after the commission of the crimes. Similarly, several international tribunals have retroactively applied domestic law to acts that were considered crimes under international law at the time they were committed.

In one of the first precedents, in 1961 the Supreme Court of Israel tried Adolf Eichmann for the crime of genocide. The Court specified that the acts imputed to Eichmann compromised the basic underpinnings of the international community and that the State of Israel could try him in its capacity as a guardian of international law, under the principle of universal jurisdiction. In Sri Lanka, the Court of Appeals tried and convicted a person for the crime of hijacking an aircraft, even though it did

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38 Note added to the original: While it is true that, in light of their serious nature, international conventions and treaties define torture, extrajudicial execution, and forced disappearance as having criminal characteristics, and ultimately they could be considered international crimes in the broad sense, in this and other studies on the issue, this term is used in the strict sense to refer to genocide, crimes against humanity, and war crimes. In this sense, the court’s judgment underscores that such acts will only be crimes against humanity when they include the element of having a systematic or widespread nature.

not constitute a crime under domestic law; the court argued that the offense already constituted the crime of air piracy under international law. *A state, therefore, may not invoke the absence of a criminal definition in domestic law reflecting the international prohibition of this category of crimes, in order to justify its failure to try and punish the perpetrators of that crime, if, at the time of its commission, the conduct was already a crime under international law or considered criminal pursuant to the general legal principles recognized by the international community.* [Emphasis added]

***a. Customary international law constitutes lege praevia***

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 13:

[I]t could be argued that our country's recent ratification of the Inter-American Convention on Forced Disappearance of Persons, as already noted, is but a conventional reaffirmation of previous characterizations of that State practice as a crime against humanity since, based on the evolution of international law following World War II, it is possible to contend that, at the time the alleged events occurred, international human rights law had already condemned forced disappearance of persons as a crime against humanity.

This is true because “the expression forced disappearance of persons is nothing more than a *nomen iuris* for the systematic violation of multiple human rights that the Argentine State had undertaken internationally to uphold, since the very inception of the evolution of these rights in the international community in the aftermath of the war (United Nations Charter of June 26, 1945, Charter of the Organization of American States of April 30, 1948, the adoption of the Universal Declaration of Human Rights on December 10, 1948 and of the American Declaration of the Rights and Duties of Man on May 2, 1938).”

CHILE, *Case Molco of Choshuenco (Paulino Flores Rivas, et al.) (List of Judgments 3.d)*, Whereas 6 and 7:

[I]nternational human rights law establishes the existence of peremptory norms with the status of positive law for the first time in the Vienna Convention on the Law of Treaties of 1969, in which they are conceptualized as norms that the international community as a whole recognizes cannot be voided by a conflicting agreement and are subject to derogation only pursuant to a norm of the same nature (Articles 53 and 64).

As the Inter-American Commission on Human Rights has pointed out, “violations of such peremptory norms are considered to shock the conscience of humankind and therefore [in contrast to traditional customary law] bind the international community as a whole, irrespective of protest, recognition or acquiescence” [footnote omitted]. While no international law treaty or declaration lists peremptory law norms one by one, there is a broad doctrinal consensus that they include large-scale human

rights violations or “crimes against humanity,” a category in which the crime in the instant case should be included in accordance with the consistent jurisprudence of the Inter-American Court of Human Rights.

[T]he prohibition against retroactivity found in traditional criminal codes such as ours has been progressively weakened by the ongoing codification of crimes under international criminal law[.] [...] [U]nder international criminal law, non-retroactivity cannot be construed in a strictly formal sense, that is, as a principle that requires a written criminal definition at the time of commission. *It is enough, for these purposes, that the act be punishable pursuant to unwritten principles of customary law. This is the case because the acts in question, “war crimes and crimes against humanity,” were already punishable under international law at the time the instant offenses were committed, as well as under domestic law as aggravated homicide. [Emphasis added]*

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas D, 2.1:

In the first place, it should be recalled that customary rules enjoy primacy in international humanitarian law. [...] [R]ules of customary international humanitarian law are binding on Colombia in the same measure as the treaties and principles that compose this legal system.

Customary rules in contemporary international humanitarian law are so important that *they constitute per se the basis for the international criminal liability of those who commit war crimes*. Thus, the Statute of the International Criminal Court refers directly to the customary rules of international humanitarian law when it stipulates, in Article 8 (“War Crimes”), that “2. For the purpose of this Statute, ‘war crimes’ means: (...) (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law (...)” Article 3 of the Statute of the Criminal Tribunal for the former Yugoslavia grants that organ jurisdiction to investigate and prosecute those responsible for “violating the laws or customs of war.” Moreover, the latter Tribunal has, in various judgments, established the individual criminal liability of criminals from the Yugoslav conflict based exclusively on customary, and not conventional, rules of international humanitarian law. It was so recommended by the Secretary General of the United Nations in his report, which stated that in relation to “violations of the laws or customs of war,” this organ should apply on a preferential basis the rules of international humanitarian law that are clearly customary in nature, in accordance with the principle of *nullum crimen sine lege*, so as to avoid problems associated with the fact that only some States have become party to the relevant treaties. Beginning with the seminal case of *Prosecutor v. Dusko Tadic*, and throughout its jurisprudence, the Criminal Tribunal for the former Yugoslavia—after confirming that the Hague Regulations and Common Article 3 of the Geneva Conventions undeniably form part of customary law—declared the individual responsibility of several defendants based on the language of these provisions, while specifically ruling out the need to

rely on Protocol 1 of the Geneva Conventions, stating that “international customary law imposes criminal liability for serious violations of Common Article 3.”

In this same context, see PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, Whereas 17:

[T]he application of international humanitarian law provisions requires no formal validation, since they are automatically applicable whenever an act occurs that is contrary to the minimum standards of humanity.

See also PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 21 (identical).

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 8:

[According to Article 15 of the International Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, and Article 9 of the American Convention on Human Rights,] [...] the fact that torture did not constitute a crime in domestic law is not an obstacle to trying and convicting the perpetrators of acts of torture when this act already constituted a crime under international law.

[Similarly] [...], the *ex post facto* existence of the criminal definition of forced disappearance in domestic law does not preclude the trial and conviction of the perpetrators of forced disappearances committed when this act already constituted a crime under international law: [...] [in particular, of] a perpetrator of a crime that, although it did not constitute a crime under domestic or international law at the time it was committed, *did in fact, at the time it was committed, already constitute a crime pursuant to the general legal principles recognized by the international community.* [*Emphasis added*]

## ii. For permanent crimes, the applicable definition is the one in force when the conduct ceases

PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Whereas 26:

[W]hile our Criminal Code did not include the crime of forced disappearance at the time of the alleged detention of Genaro Villegas Namuche, this is not an impediment to the prosecution and punishment of the perpetrators for the other concurrent offenses in the case.

In any event, while the principle of legality in criminal law recognized in Article 2(24)(d) of the Constitution includes the guarantee of *lex praevia*, according to which the law proscribing the activity must precede the criminal act, in the case of permanent crimes, the applicable criminal law does not necessarily have to be the one in force at the time the crime was committed.



The guarantee of *lex praevia* requires that, at the time the crime is committed, a criminal law is in force establishing a particular punishment. Hence, in the case of instantaneous crimes, the applicable criminal law will always be the one preceding the crime. In contrast, in the case of permanent crimes, new criminal laws may enter into force and shall be applicable to those who are engaged in the commission of the crime at that time, and this does not give rise to the retroactive application of criminal law.

A case in point is the crime of forced disappearance, which, according to Article III of the Inter-American Convention on Forced Disappearance of Persons, shall be deemed permanent as long as the fate or whereabouts of the victim has not been determined.

For a broader discussion of this argument, see PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, Whereas 22:

[F]rom May 7 to July 1, 1992, the Criminal Code did not include an explicit criminal definition for forced disappearance of persons. This Tribunal, however, has previously ruled on the permanent nature of this crime, when it has expressly pointed out that there is no violation of the guarantee of *lex praevia* under the principle of legality in criminal law when the criminal norm applied to a permanent crime was not in effect prior to the beginning of its commission, but was in effect while the crime was still ongoing. The fact that [the law establishing] the crime of forced disappearance has not always been in force, then, is not a barrier to pursuing the relevant criminal proceeding and punishing those responsible. This interpretation is also based on the provisions of Article III of the Inter-American Convention on Forced Disappearance of Persons, approved in Belem do Pará on June 9, 1994, which expressly stipulates that States Parties must undertake to adopt, in accordance with their constitutional procedures, such legislative measures as may be necessary to define forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. [*Emphasis added*]

See also PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 17.

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 4:

[W]hen characterizing the conduct of Arancibia Clavel as a member of the aforementioned association, the oral tribunal took the view [...] that the legal definition set forth in Article 210 *bis*, of the current version of the Criminal Code, [...] did apply to the case. It cited as grounds for the application of the text currently in force that, *as far as permanent crimes (such as illicit association) are concerned, the law that is applicable at the moment of commission is the one that is in force at the moment the criminal behavior ends [...]*. [*Emphasis added*].

VENEZUELA, *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b)*, Whereas IV.2:

According to our domestic jurisprudence, a crime must have been previously defined under the law in order for a particular act to be punished as such. Nonetheless, the principle of legality has evolved in contemporary criminal doctrine, which accepts that a particular behavior (act or omission) that has not been completely consummated may be defined as an offense if a legal provision that enters into force during the period of consummation includes it as an offense. This is the case of permanent or continuous crimes, in regard to which the following stipulation has been made: “*if the new law enters into force while the permanence or continuation persists, this law will be applicable in all cases, regardless of whether it is more or less favorable, and the preceding acts remain unpunished*” [footnote omitted].

Therefore, concurring with the doctrinal premise that operationalizes Article 45 of the Magna Carta, this Court clarifies that if, during the unlawful deprivation of liberty of the victim, there is a persistent refusal on the part of the perpetrator to reveal the fate or whereabouts of the person deprived of liberty or to acknowledge that he is in that state, and if, in such a situation, a legal definition of the crime of forced disappearance of persons enters into force, then it must be concluded that those involved in the aforementioned act may be prosecuted and found guilty and liable for the crime of forced disappearance of persons, without incurring the retroactive application of the law, since it is a matter of applying the law governing an open-ended crime.

#### **D. Minimums of protection set forth by international treaties may be broadened by national legislation**

The adaptation of the domestic legal system to international standards and norms, as required for the effective prosecution of international crimes, does not entail the literal reproduction or transcription of international instruments in local codes and laws. As noted earlier, the international system affords States considerable flexibility to adopt the formula they consider most suitable in defining such crimes at the domestic level, as long as the domestic criminal definition contains the essential elements of the international prohibition.<sup>39</sup> At the same time, in their implementation processes, States must harmonize all of their international commitments in order to adopt the norm that ensures the highest standards of protection.<sup>40</sup>

39 In this regard, in its judgment in *Gómez Palomino v. Peru*, the Inter-American Court examined the definition of the crime of forced disappearance in Peruvian law and concluded that it was incomplete and ambiguous in respect to the essential content required by the Inter-American Convention on the Forced Disappearance of Persons and other international instruments on the subject. As a result, the Inter-American Court ordered the Peruvian State to “adopt the measures necessary to amend, within a reasonable time, its criminal legislation so as to adapt it to the international standards on forced disappearance of persons.” IACourtHR, *Case of Gómez-Palomino v. Peru*, Merits, Reparations and Costs, Judgment of November 22, 2005, Series C, No. 136, paras. 90 and 110, as well as operative paragraph 12.

40 This principle has been expressly set out in various international treaties in provisions that, while formu-

None of this is to say that, taking advantage of this margin of discretion, states may violate their commitments under international treaties by enacting laws that fail to satisfy the standards set forth therein. The relevant international instruments, then, serve as guides that set out legislative minimums. Specifically in reference to the International Criminal Court, for example, Gerhard Werle has concluded that “[...] the ultimate aim of the Statute is not to effect that crimes be tried by the International Criminal Court, but to provide a source of norms and legal standards that would provide states the basis to effectively investigate and prosecute the most serious crimes under international law themselves.”<sup>41</sup>

Latin American jurisprudence has upheld this criterion in the decisions transcribed below, which underscore that international treaties represent only the minimum standards that must be reflected in domestic law. Similarly, Latin American courts have also recognized that any criminal definition that contains more restrictive elements will not be compatible with the obligation to implement the provisions set out in international treaties.

COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 4:

[I]n contrast to the international definition of genocide, Article 322A of Law 589 of 2000, which defined this offense in Colombian criminal law, broadened the scope of the crime to include the genocide of political groups.

This Court finds that there can be no objection to broadening the protection against genocide to include political groups, as the contested norm does. It is common knowledge that the rules found in international treaties and covenants envisage a minimum standard of protection, so that there is nothing to prevent States from broadening the scope of that protection in their domestic legislation.

There is, then, nothing to prevent domestic legislation from adopting a broader conception of genocide, *so long as it preserves the essence of the crime*, which consists of the systematic and deliberate destruction of a human group having a defined identity, something that a political group clearly has. [*Emphasis added*]

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lated in different ways, affirm that nothing in the content of the treaty shall be understood as imposing a limitation on other norms that afford greater protection or have been developed in other normative systems. See, for instance, Article 10 of the Rome Statute of the International Criminal Court: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” Article 29(b) of the American Convention on Human Rights, *supra* note 18: “No provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.” Article 16 of the Inter-American Convention to Prevent and Punish Torture, *supra* note 18: “This Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture.” Article XV of the Inter-American Convention on Forced Disappearance of Persons, *supra* note 18: “None of the provisions of this Convention shall be interpreted as limiting other bilateral or multilateral treaties or other agreements signed by the Parties.”

41 Gerhard Werle, *Principles of International Criminal Law*, *supra* note 5, at 75.

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.3.2:

The second paragraph of the aforementioned Article 138 stipulates: “The same sanction shall be applied to the perpetrator or perpetrators or others directly or indirectly guilty of the bloody massacres in the country.”

The latter rule is challenged in the instant appeal [...], [which argues] that the normative hypothesis defined therein [...] is not related to what the doctrine and international treaties envisage in regard to genocide and that there is no law that defines what must be understood by bloody massacre. This gives rise, therefore, to a definition so broad that any act could be punished at the discretion of the deciding body.

[The principle of] [c]omplementarity [which rules over the relationship between the International Criminal Court and national jurisdictions] also means that the signatory State, which acquires an international obligation, is bound to prosecute and suppress the acts envisaged in the Statute, in its territory, and under its domestic law. In this context, although the Statute defines what constitutes the crime of genocide, it is equally true that member States, paying heed to general international guidelines, may include other normative hypotheses in their domestic criminal law in response to a particular social reality.

**i. National criminal definition cannot incorporate elements that restrict the international definition**

COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 4:

[F]ar from adopting the necessary legislative measures to adapt the national legal system to the international obligations that the Colombian State had acquired and that require [States Parties to certain conventions] to define and severely punish offenses considered to be crimes against humanity—in particular, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which, as previously stated, the Colombian State approved by means of Law 28 of 1959—[Colombia] instead chose to defeat the purpose of that normative recognition. It did so by placing restrictions on the protection of the rights to life, personal integrity, and individual liberty, so that such protection would only be granted when, and as long as, the breach was perpetrated against a member of a national, ethnic, racial, religious, or political group “*acting within the law*.” It thus sacrificed the full enjoyment and unrestricted protection of those rights, which are recognized in international humanitarian law and international human rights law, and in the international treaties and covenants that codify them.

## E. Principle of legality and international criminal law

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 4.2:

While the principle of legality has been articulated in a less rigorous manner in international criminal law than in domestic legal systems—based on the term *nullum crimen sine jure* rather than *sine lege*—this Court observes that the Rome Statute was intended to further the definition of punishable acts in written positive law, rather than relying on the certainty of customary international criminal law.

Although at the constitutional level, the punishable acts must be defined with precision, international criminal law has allowed a lesser degree of precision in describing acts that constitute international crimes, basically for historical reasons and in view of the gravity of the acts prosecuted under these four categories.

[Nonetheless, as already mentioned, the Rome Statute is an effort to advance in this regard. Among the general principles of criminal law recognized in the Rome Statute,] [t]he principle of *nullum crimen sine lege* bars the International Criminal Court from exercising its jurisdiction over crimes that are not set out in [that] Statute. This principle encompasses critical safeguards in criminal proceedings, such as the rules of *lex scripta*, *lex praevia*, *lex stricta*, and *lex certa* [footnote omitted]. Hence, the Rome Statute stipulates that a person shall not be held criminally responsible unless his behavior, at the time it takes place, constitutes a crime within the jurisdiction of the Court (Article 22.1). It also establishes a principle that the definition of the crime must be strictly construed and prohibits its extension by analogy (Article 22.2). The foregoing does not affect the characterization of any conduct as criminal under international law, independently of the stipulations contained in the Rome Statute (Article 22.3). Articles 22 and 23, for their part, embody the principles of *nullum crimen* and *nulla poena sine lege*, as does Article 29 of the Constitution.

### 3. SUBSUMPTION OF CONDUCT UNDER NATIONAL AND INTERNATIONAL LAW: NATIONAL LAW DEFINITIONS AND INTERNATIONAL CRIMES

Subsumption, generically understood as the legal adaptation of the facts to the norm, can take on certain unique characteristics in the prosecution of crimes under international law. Justice system operators must address the question that Ferdinandusse has raised to the effect of “which crimes, which law?”<sup>42</sup> Just as this scholar has asserted, “core crimes can be prosecuted as ordinary crimes, as international crimes defined in national law, and by direct application of international offences.”<sup>43</sup>

42 Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, *supra* note 9, at 89.

43 *Ibid.* In terms of the latter option, it is important to reiterate Werle’s assertion that the direct application, at least of crimes established under customary norms, is limited almost exclusively to countries following the Anglo-Saxon tradition, where the existence of a written criminal definition is required. Gerhard

In practice, many prosecutions for international crimes in Latin America have been pursued on the basis of common crimes—homicide, bodily harm or assault (*lesiones*), kidnapping, and so forth.

Although no international norm or principle actually prohibits this practice, it is the least desirable option.<sup>44</sup> In the absence of certain specific characterizing elements in the domestic criminal definition, prosecutions might ultimately disregard the extraordinary gravity of these crimes. Ultimately, as the United Nations International Law Commission has asserted:

“The characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law. It is conceivable that a particular type of behaviour characterized as a crime against the peace and security of mankind [...] might be characterized merely as a crime under national law, rather than as a crime against the peace and security of mankind under international law. None of those circumstances could serve as a bar to the characterization of the type of conduct concerned as criminal under international law. The distinction between characterization as a crime under national law and characterization as a crime under international law is significant since the corresponding legal regimes differ. This distinction has important implications with respect to the *non bis in idem* principle [and the nonapplicability of statute of limitations, among others].”<sup>45</sup>

In order to mitigate the negative repercussions of trials based on common crimes, some Latin American courts have resorted to a practice that some academics have dubbed “double subsumption.”<sup>46</sup> In this process, the conduct is adapted to a crime under domestic law. At the same time, the crime is adapted to the relevant international norms in order to characterize it as genocide, a crime against humanity, or a war crime and to give full effect to the legal regime to which the International Law Commission is referring.

The following sections present decisions in which Latin American courts recognize that the absence of domestic criminal definitions implementing the relevant international definitions does not preclude the qualification of the conduct as international crimes. In this way, these courts have brought this conduct under the rubric of international norms.

These decisions also acknowledge the consequences of that subsumption, including the non-applicability of statutes of limitations and, in general, the applicability of the international regime to this category of crimes. Finally, it is important to highlight the criterion adopted by some courts of the region in affirming that this subsumption under international norms does not violate the rights of the accused.

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Werle, *Principles of International Criminal Law*, *supra* note 5, at 76. With respect to Latin American jurisdictions, it is important to underscore Relva’s conclusion that, given the way in which the principle of legality is formulated in the neo-Roman tradition, the direct application of international criminal norms will face serious problems, to say the least. See *supra* note 6.

44 Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, *supra* note 9.

45 United Nations International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, in *Yearbook of the International Law Commission 1996*, vol. 2, part 2 (New York: United Nations, 1998), at 18.

46 Pablo Parenti, “Argentina,” in *Jurisprudencia latinoamericana sobre Derecho Penal Internacional*, ed. Kai Ambos, Ezequiel Malarino, and Gisela Elsner (Montevideo: Fundación Konrad Adenauer and Georg-August-Universität-Göttingen, 2008), at 21–66.

## A. Subsumption of conduct under international law

VENEZUELA, *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b)*, Whereas IV.1:

[A]rticle IV of [the Inter-American] Convention [on Forced Disappearance of Persons] states that “[t]he acts constituting the forced disappearance of persons shall be considered offenses in every State Party.” Ultimately, since those treaties were signed, ratified, and deposited, the absence of explicit regulations governing crimes of this nature is not a justification for allowing acts that the Venezuelan State has undertaken to punish pursuant to signed treaties to go unpunished or to receive only a token punishment under domestic law. Therefore, and borrowing the following excerpt from Argentine jurisprudence: “*Subsumption under domestic criminal definitions would in no way negate or eliminate the nature of the acts [analyzed] as crimes against humanity (which establishes jus gentium by means of the rules of jus cogens), nor would it pose an obstacle to the application of the relevant legal rules and consequences as jus gentium crimes*” [footnote omitted] .

PANAMA, *Appeal motion (Case Cruz Mojica Flores) (List of Judgments 11.c)*, Whereas:

The court records show that [the crimes were committed] at a time when the country was confronting particular governmental circumstances, at the mercy of a military regime.

In that context, the legal security of citizens and judicial protection were in an obviously precarious state, and the right to life, together with the rest of the basic guarantees that must accompany human existence, were being undermined. Consequently, *the impairment of this first-order right [the right to life] is subsumed under what is now termed jus gentium.* [Emphasis added]

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 700, 701, and 714:

In the instant case, it is clear from commission of the act, and the main underlying motives for the deaths that occurred in the Barrios Altos neighborhood and on Ramiro Prialé Avenue, that the crime was prepared in advance—which presupposes the existence of a preconceived plan, at least in terms of an outline for implementation. A special intelligence detachment was created for this purpose with the specific mission, inter alia, of killing those deemed to have links to the political or military apparatus of the “Shining Path” terrorist organization. The direct perpetrators acted with absolute cold-bloodedness and determination in what they understood to be a military operation to eliminate members of Shining Path. To this end, they deliberately and stealthily entered the Jirón Huanta–Barrios Altos neighborhood and the National University of Education “Enrique Guzmán y Valle,” [also known as] La Cantuta, where they pretended to be conducting a search operation for terrorists in

student and faculty buildings. They surprised the victims, who were not expecting such an operation, and proceeded to subdue and kill them using their weapons of war.

In the first case, they entered the building at 840 Jirón Huanta, taking advantage of the fact that the victims were busy with a fundraising activity. They singled out some of those present and shot them without any consideration whatsoever, even murdering a little boy. In the latter case, in the guise of an operation to identify possible subversives, they entered the La Cantuta university—which was under military control at the time—and selected individuals they deemed to be members of Shining Path based on a previous identification process. They took these individuals to an open area on Ramiro Prialé Avenue, and without further ceremony, murdered them using the weapons of war they carried. They subsequently buried and burned the bodies to cover up the crime they had committed.

In such circumstances, there is no question that the crime was premeditated. It was planned in a certain way and carried out accordingly. Furthermore, the military training of the direct perpetrators informed the commission of the crime. Surprise was used to immobilize the victims, care was taken to ensure that they would be found unarmed, and they were subdued and later shot with weapons of war in such a way as to preclude any defensive maneuver on their part and to ensure their death. There was, then, a situation of defenselessness of the victims and an effort to ensure a lethal outcome at no risk to the perpetrators. All of this, moreover, was undertaken deliberately.

The murders were carried out pursuant to a previously conceived plan, and, at least outwardly, the manner in which the crime was committed exhibited patterns inherent to military operations, albeit in deviation from and breach of military regulations. The conception was clearly based on a disregard for human life and on an overt defiance of the basic rules of civilized society, of the very essence of military honor, and of the guidelines governing confrontations and the treatment of a defeated or unarmed enemy.

In keeping with [the study of the elements of crimes against humanity], murder has been characterized as a crime against humanity [*footnote omitted*], specifically when it is the result or expression of systematic aggression by the State or its organs of power, which is promoted or endorsed by official or quasi-official policies and directives, and which is inflicted on the civilian population in a situation of military or social conflict. There is no obstacle, moreover, to including severe bodily harm in these considerations, not only because the Barrios Altos case formed part of a single attack aimed at eliminating presumed terrorists, but also because the outcome was consistent with that objective or mission.



**i. Subsumption under international norms of other national crimes not considered as underlying conduct according to international definitions**

*ARGENTINA, Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b), Whereas 10–14 and 17:*

[I]t is not possible to concur with the Cassation Chamber’s argument that Arancibia Clavel’s participation in the illicit association to which he belonged “has in no way been shown to fall within the category of ‘crimes against humanity.’” This has been argued on the grounds that the subject of the appealed ruling does not include the crimes that may have been committed by members of the band—not even the murder of [Carlos José Santiago] Prats and his wife, which is the subject of a separate appeal. It is limited instead to the charge under Article 210 [of the] Criminal Code, [which defines the offense of illicit association], an act that would not fall under any of the definitions of crimes against humanity that the appealed ruling transcribes and characterizes, moreover, as “uncertain.”

[S]trictly speaking, and based on the same definitions used by [the Cassation Chamber], Arancibia Clavel’s behavior should have been characterized as a crime against humanity, since the purpose of the group to which he belonged was to persecute political opponents of Pinochet through murder, forced disappearance of persons, and torture—the nature of which is indisputable—with the acquiescence of government officials. In effect, the language of the Rome Statute, from which the appealed ruling cites only Article 7, covers every possible form of involvement in these kinds of acts.

[I]t cannot be argued, therefore, that while murders, torture and mistreatment, and forced disappearance of persons may be crimes against humanity, belonging to an association whose purpose is to commit them is not; such an assertion would be contradictory, inasmuch as the latter would be a punishable preparatory offense for the former.

This has been established, for example, in Articles 2 and 3(b) of the Convention on the Prevention and Punishment of the Crime of Genocide, which includes the offense of “conspiracy to commit genocide.”

[I]t can be inferred from the international normative plexus that has been transcribed that the classification of crimes against humanity includes knowingly forming part of an organization whose purpose it is to commit them.<sup>47</sup>

47 The following international instruments are cited by the Supreme Court of Justice of the Argentine Nation in paragraph 13 of the judgment: the United Nations Charter of June 26, 1945; the Charter of the Organization of American States of April 30, 1948; the Universal Declaration of Human Rights of December 10, 1948; the American Declaration of the Rights and Duties of Man of May 2, 1948; Articles 2 and 3(b) of the Convention for the Prevention and Punishment of the Crime of Genocide; the Inter-American Convention on Forced Disappearance of Persons; Article 7(1)(h) of the Rome Statute of the International Criminal Court; and Article II of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

Therefore, membership in a group dedicated to perpetrating [crimes against humanity], regardless of the functional role carried out in that group, is also a crime against humanity.

COLOMBIA, *Appeal motion (Manuel Enrique Torregrosa Castro) (List of Judgments 4.k)*, Whereas 25:

[S]everal international and domestic courts take the view that association [agreement] to commit crimes against humanity also must be characterized as similarly punishable [*footnote omitted*], as the Court now determines in the Colombian case, and with all of the attendant consequences [*footnote omitted*].

Furthermore, several treaties and conventions that have been integrated into domestic law, whether by means of explicit annexation or through the bloc of constitutionality (Article 93 of the Political Constitution), support the assertion that *illicit association to commit a crime* is indeed included among crimes against humanity[.] [One of these is] [...] [the] Convention on the Prevention and Punishment of the Crime of Genocide [...], [in which Article III states] The following acts shall be punishable: [...] (b) Conspiracy to commit genocide.

## **B. Legal consequences of the subsumption of national crimes under international law**

ARGENTINA, *Case of “Circuito Camps” and others (Miguel Osvaldo Etchecolatz) (List of Judgments 1.d)*, Whereas I and IV.a:

The conduct of the accused satisfies the requirements set out in Article 144 *bis* (1) of the Criminal Code, along with the aggravating factor set out in the final paragraph of the same article in its reference to Article 142(1, 2, and 5) of the same law: that is, the crime of illegal deprivation of liberty committed while unlawfully abusing his position as a public official, aggravated by the circumstances that the act was committed with violence or threats and that the deprivation of liberty lasted for more than one month [...].

His conduct also falls under the provisions of Article 144 *ter*<sup>48</sup> of the Criminal Code, because of the torture inflicted on the victims in the instant case [...].

It must be recalled that *crimes against humanity are on trial here*, and precisely for that reason, no statute of limitations is applicable. This assertion is based on the different stages reflected in the case file characterizing them as such, each of which resulted in a rejection of the defense’s arguments to the contrary. [*Emphasis added*]

48 Note added to the original: The expression “ter” in this context refers to the numbering of the Article referenced in the Argentine Criminal Code. In criminal code reform processes in some Latin American countries, it is common to include new provisions or crimes using *bis*, *ter*, *quarter*, and so forth, so as not to change the existing numeration.

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 711:

The provisions indicated in the first case under the basic framework of the Nuremberg Charter are fully applicable for purposes of subsumption insofar as they form part of international customary law and were defined prior to the events of Barrios Altos and La Cantuta [*footnote omitted*]. It is necessary, however, to identify certain limits, that is, (i) to recognize these core provisions of the Nuremberg Charter as part of international customary law; (ii) to take into account the constitutional requirements of the principle of legality in criminal matters [*lex praevia, stricta, scripta, and certa*: Articles 2(24)(d) of the Constitution and Preliminary Title II of the Criminal Code], by virtue of which it should be noted from a substantive standpoint that at the time the acts were committed (1991–1992), our criminal system included no law that defined, on the one hand, an offense with all of the elements of the international crime set out in the aforementioned international customary rule (indeed, the ordinary legislature has yet to fulfill the obligation to substantively define certain crimes derived from Peru’s ratification of the Statute of the International Criminal Court), and, on the other hand, the respective punishment; and (iii) to acknowledge that crimes against humanity impair basic human rights, so that the essence of the acts prohibited as gross violations of individual human rights has been adequately established and could not have escaped the knowledge and foresight of the agent.

Therefore, it is important to examine and properly identify the contextual elements or circumstances—based on which certain acts are characterized as an international crime—surrounding the attacks that led to the deaths of and serious bodily harm to 29 people and that were, at the time, legally envisaged in our domestic law as the offenses of aggravated homicide and serious bodily harm, and that do not contradict the provisions of Articles 45 and 46 of the Criminal Code. In accordance with the rule of customary international law, the attacks must have occurred in the course of a widespread or systematic attack against the civilian population, or a part of it, and must present other elements that shall be specified in the following paragraphs, all of which are duly preestablished, or sufficiently delineated, by the aforementioned rule of customary international law. The existence of these circumstances, in turn, justifies their international prosecutability, the non-applicability of any statute of limitations, and the imperative to punish them. *It could be said, then, that these are crimes of murder and serious bodily harm which, because of their characteristics, constituted international crimes against humanity at the time of their commission [footnote omitted], and therefore the legal consequences envisaged under international criminal law are applicable. [Emphasis added]*

### C. Subsumption of national crimes under international law and rights of the accused

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 16 and 18:

[According to the appellant], the verdict under review inaccurately classified the wrongdoing and, based on this inaccurate characterization, applied an incorrect penalty. It erroneously evaluated the wrongdoing by qualifying as a crime an act that is not defined as such under criminal law, thereby effecting a fallacious application of the norms, invoking a nonexistent law, and declaring that the act falls under a particular criminal definition that is not found in our law. [...] To illustrate this critique, [the appellant] refers to the Inter-American Convention on Forced Disappearance of Persons—signed in 1994 and currently before the National Congress—to argue that a nonexistent law has clearly been applied in violation of our entire body of constitutional law, since the crime of kidnapping has been mischaracterized in an attempt to present it as the equivalent of the crime of forced disappearance of persons set out in that Convention, for the sole purpose of refuting the applicability of the amnesty and the statute of limitations. [...] [The] verdict under review [...] invokes the aforementioned Convention—which it describes as binding despite the fact that it has not entered into force in [Chile] since it has not been reviewed by our Parliament or examined by the Constitutional Court—to deny the applicability of the amnesty and the statute of limitations, both of which are in force in our legal system. Moreover, the sentences drew from what they referred to as the sound doctrine of the United Nations International Law Commission, which developed the principles recognized in the charter of the N[uremberg] Tribunal and the trials initiated by it and applied it to the case at hand. They likewise invoked Resolution No. 808 of February 1993 [...], which established the International Tribunal to try war crimes committed in the territory of the former Yugoslavia, arguing that the resolution would be applicable in our nation since the legal basis for the Tribunal is found in Chapter VI [*sic*] of the United Nations Charter. To further illustrate this point, he adds that [...] the authors of the verdict draw on the International Criminal Statute as a source of applicable law, which they declare to be valid even though it has not entered into force in our country, having been subject to a harsh reprimand by the Constitutional Court with respect to a previous modification of our magna carta [...].

[In the view of this Tribunal] it should be noted that the appellant's allegation, to the effect that the verdict *sub lite* applied a law that was not in force in our country at the time of the events, must be rejected for the reasons set out in the fourth argument in this ruling, in the sense that the second-level verdict does not rely on those norms to convict the defendant. It relies instead on Article 141 of the Criminal Code and illustrates its decision by referring to the principles of the [Inter-]American Convention on Forced Disappearance of Persons, the doctrine of the United Nations International Law Commission, the resolution creating the International Tribunal to prosecute crimes perpetrated in the former Yugoslavia, and the Statute of the

International Criminal Court. It can be clearly inferred from the foregoing that the sentence under study was based on Article 141(1) and (4) of the Penal Code, which criminalizes aggravated kidnapping, [...] and the rules that the appellant invokes only elucidate the gravity of the crime committed and the efforts made over time to reinforce the notion of respect for individual liberty as a legal right of greater import and recognition of the life and dignity of persons, and of those who have the just and legitimate right to know the whereabouts of the detained.

## D. Subsumption of conduct as a crime under national law

As mentioned, Latin American courts have frequently been forced to prosecute international crimes based on ordinary crimes defined in domestic law. As a result, the jurisprudence from the region has developed certain important criteria in this regard that are worth studying. First, it has affirmed that if domestic law includes a criminal definition that matches the international definition of the crime, the former should be applied preferentially over any other criminal definition under national law in the trial of potential perpetrators. If no crime is defined in domestic law in such a way as to include all of the elements, then the existing criminal definition that best fits the characteristics and nature of the crime in question should be chosen. This selection would exclude, for example, military offenses. Finally, the jurisprudence has clarified that some domestic crimes might include certain elements of the international definition of genocide, crimes against humanity, or war crimes. However, in the absence of the defining elements of such crimes,<sup>49</sup> the two will not be equivalents.

### i. Preference must be given to those crimes under national law that better reflect the nature of the international crimes

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 19 and 20:

[W]ith regard to the erroneous characterization of the act as the crime of aggravated kidnapping, the definition and punishment of which is set out in subparagraphs 1 and 4 of Article 141 of the Penal Code: given that the defendant qualified as a public servant at the time the incident occurred, since he was working in government entities such as the Army of Chile, which means that the act would fall under the criminal definition set out in Article 148 of the same code, which the doctrine refers to as unlawful arrest, and which, [...] in his judgment, is fully applicable to the wrongdoing under study here, it is useful to point out that *with respect to the crime known as unlawful arrest, our legislature assumes that the public servant is guided by a motive consistent*

49 Antonio Cassese has defined the elements of international crimes as follows: (i) for genocide, special intent or genocidal intention; (ii) for crimes against humanity, the systematic or widespread nature of the attack against the civilian population; and (iii) for war crimes, the context of an armed conflict and its direct relation to the conduct. Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008). These elements are addressed in more detail in the relevant section of Chapter I of this digest.

*with his assigned public role and acts in a manner that, while unlawful, is not entirely contrary to the legal system.* It is therefore logical to conclude that the privileged status granted to a public servant who commits unlawful arrest is equivalent to that granted to a private individual who arrests someone in order to present him before an authority, which is punishable under Article 143 of the same legal code. Hence, cases that do not meet the requirements to qualify for such a privilege fall under the generic conduct of deprivation of liberty; or, put another way, the punishment applicable to the public servant depends on the particular offense committed through his actions, which could be the special offense set out in the aforementioned Article 148 or the common offense set out in Article 141 of the same text, according to the following disjunctive premise: (a) *when it is possible to discern in the official's action a sufficient connection with the legitimate system for depriving persons of their liberty, criminal law affords a more benign treatment by means of the privileged, special offense defined in Article 148;* or, (b) if this is not the case, then the official's action is the common offense of deprivation of liberty set out in Article 141, whether in its generic premise or any of the aggravated forms of this offense, as is the case here. In order to determine which crime corresponds to the actions of the accused, it should be specified that not only must the official's actions be guided by an interest in the public welfare, but his intervention must also objectively demonstrate a significant degree of congruence or connection with the regular system or procedure governing the deprivation of individual liberty. *The critical point in this regard has been the obstruction or free evolution of judicial or administrative control procedures for depriving a person of his liberty, with the consequence that the convicted individual does not fall under the normative hypothesis set out in Article 148 of the Criminal Code, but rather that of Article 141. [...] [T]he following parameters are regarded as critical to determining which of the two provisions should be applied: (a) whether the arrest was associated with a crime-fighting activity; (b) whether some record was made of the arrest; and (c) whether the detainee was brought before the courts. In the absence of these requirements, Article 141 should be applied, in which case the criminal offense should be defined as unlawful arrest perpetrated with severe abuse of authority on the part of the official [footnote omitted; emphasis added]*

[T]he evidence collected during the course of the litigation does not support the conclusion that the aforementioned requirements to frame Krassnoff's action in the context of Article 148 have been met. In effect, there is no indication in any part of the proceeding that the arrest he carried out was related to a crime committed by the victim, nor is there any record of the arrest or that the victim was ever brought before any court of the Republic for prosecution. To the contrary, based on a reading of the facts irrevocably established in the ruling on appeal, Miguel Sandoval was arrested without an administrative or legal warrant to justify such an action and was taken to a clandestine detention center known as Villa Grimaldi, from whence he disappeared after a certain period of time. It is therefore not possible to reclassify the offense as an unlawful arrest, as the appellant is attempting to do.

### *a. Ordinary crimes versus military offenses*

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 26:

[I]t should be stated that the elements of the offense set out in Article 330 of the Code of Military Justice require that a perpetrator with special characteristics—in this case a military man—must have acted in the discharge of a superior order or of his military duties. This legal hypothesis has not been demonstrated since [...] the irregular detention of civilians cannot be considered intrinsic to military duties, nor [has it been proven] that there was ever an order to arrest any individuals, with respect to whom such an order might have been issued, or that they had participated in any wrongdoing. [...] [The military man will carry out the action] in the discharge of his military duties when his intervention relates to the missions inherent to his capacity as a soldier. [...] [I]f the actions of the military man do not relate to his duties, but rather to other motives, then the offense envisaged in Article 330 does not apply, inasmuch as the references or characteristics concerning the perpetrator are not present, which would qualify the wrongdoing as malfeasance by a public official.

### **ii. If there exists a definition of a crime under domestic law that corresponds to the international definition of the crime, it should be preferred to any other criminal definition**

GUATEMALA, *Case Massacre of Río Negro (Macario Alvarado Toj, et al.) (List of Judgments 8.b)*, Whereas II:

[T]his Court takes the view that the proper characterization of the Río Negro massacre was GENOCIDE, and as a result, this was what the prosecution and the complainant should have sought, since the event was absolutely horrendous: it was an attack on the lives of women and children that had an enormous impact on society and must be punished drastically. This Court regrets that neither the prosecution nor the complainant have even attempted to define the act as Genocide, since, given the specific circumstances of the event, the target in this particular case was an ethnic, racial, or national group, which is extremely relevant at the international level. [...]. [T]his point is made pursuant to International Criminal Law, because this Court had a duty to rule and to call upon the prosecution to assert International Criminal Law in future cases. [*Capitals in the original*]

See also COLOMBIA, *Remedy of unconstitutionality (Article 322 of Law 589-2000, Criminal Code) (List of Judgments 4.c)*, Whereas 4:

This Court must deem inadmissible the contention that the annihilation of groups acting outside the law may be penalized using other criminal definitions, for example,

homicide, since this disregards the specificity of genocide and the importance of criminalizing acts that constitute crimes against humanity [...].

### iii. Partial overlap between national and international law definitions of two distinctive crimes

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.3.2:

The “bloody massacres” referred to in [the same] article [defining the crime of genocide] have distinctive characteristics that cannot be subsumed under the normative hypothesis set out in the first paragraph of Article 138 [which is taken from the definition provided in the Convention on the Prevention and Punishment of the Crime of Genocide]. This is mainly true with regard to the victim, because the second paragraph of that article does not require the group to have a national, ethnic, or religious element, and therefore it may comprise a heterogeneous group of people. Moreover, the second paragraph also does not require, as a subjective element, the aim of destroying that group, in whole or in part.

In this context, it is appropriate to examine whether the grounds set out in the second paragraph are overly broad, in violation of the principle of specificity. To this end, it is necessary to examine what is grammatically understood by “bloody massacre.”

According to the *Diccionario de la Lengua Española de la Real Academia Española*, massacre means “the killing of persons, generally defenseless, as a result of an armed attack or similar cause.” This constitutes, then, the criminal act set out in the second paragraph of Article 138 of the CC [Criminal Code]. The definition, therefore, does not have to include other characteristics such as, for example, whether the group is defined by a particular ethnicity, nationality, or culture, since, as explained in the preceding paragraphs, the intention of the legislative body was not to delimit the victims, who, given their characteristics, may be of diverse origins.

#### a. Bolivian case

BOLIVIA, *Case of Leaders of the Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a)*, Section VII, Whereas:

Painful events took place on January 15, 1981, causing profound distress among the Bolivian people, when leaders of the Left Revolutionary Movement [Movimiento de la Izquierda Revolucionaria, MIR] were brutally murdered on Harrington Street in the city of La Paz in an extermination operation carried out by the State security forces.

It can be concluded from [the] evidence [submitted] that operational plans for the extermination of high-level leaders of the MIR were developed in the State security forces [...]. [O]n Wednesday, January 14, 1981, a final meeting was held in the



DIN [Dirección de Investigación Nacional?] [...], at which time an operation was planned “to physically eliminate the leaders of that party” [...].

[According to the testimony of one of the participants], “the operation consisted of storming the house where the MIR leaders were meeting. All of the groups and their participants took over the house, and we proceeded to capture eight leaders of the MIR who were gathered there. There was no armed resistance, as we had thought there might be, because the men of the MIR were not armed. My mission was to identify the MIR leaders. That is what I did when I arrived on the second floor of the house on Harrington Street, where I found that the eight leaders had already been captured. Once I had identified them all, they proceeded to eliminate them by shooting them with rifles.”

[The aforementioned acts constitute the following crimes:] the bloody massacre of Harrington Street, [...] the detention of several MIR leaders in Plaza Uruguay, and the genocide of Harrington Street, even more so if “the destruction of a group of politicians and intellectuals” is to be regarded as [genocide], since genocide has always been considered a crime against humanity. As such, it is not subject to a statute of limitations under the UN Convention of November 27, 1968, in which the United Nations also declared punishable the conspiracy, direct and public incitation, attempt, and complicity to commit genocide and punished the responsible rulers with the maximum penalties, which is what must occur in the instant case [...].



## CHAPTER V

# JURISDICTION OVER CRIMES UNDER INTERNATIONAL LAW

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The consolidation of the principle of individual criminal responsibility for the perpetration of core crimes under international law poses additional questions, such as, to what authority should an individual accused of committing such crimes answer? And once his or her responsibility has been established, which organ should be authorized to impose punishment? Latin American courts have explored questions of this sort, which are unique to international crimes.<sup>1</sup>

Traditionally, States may exercise their jurisdiction—understood as the capacity to adopt, apply, and enforce rules governing individual behavior—in their respective spheres of authority and in accordance with the applicable domestic and international principles and norms.<sup>2</sup> In criminal matters, this means that States may define crimes, prosecute breaches of prohibitions envisaged in their criminal laws, and determine their consequences, all of this within their sphere of jurisdiction. Hence, there are three categories of State jurisdiction: legislative, executive, and judicial. While each of these plays an important role, this chapter will focus exclusively on the latter. In the following discussion, then, the term “jurisdiction” will be used in a restrictive sense to mean adjudicatory or judicial jurisdiction.

There is still considerable debate over the nature of the norms that determine and demarcate each State’s sphere of authority. Some scholars take the view that international law determines when and under what circumstances States may exercise their jurisdiction. In other words, States may only act pursuant to an international rule that explicitly allows them to do so.<sup>3</sup> According to the opposing view, which has also been upheld in international jurisprudence, States may regulate their own jurisdiction and therefore have the power to determine in which cases they will exercise it, as long as there is no rule of international law that would prohibit them from doing so.<sup>4</sup>

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1 William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (New York: Cambridge University Press, 2007).

2 See Malcolm D. Evans, *International Law*, 2nd ed. (New York: Oxford University Press, 2006), at 335.

3 Ibid.

4 In the S.S. “*Lotus*” case, the Permanent Court of International Justice concluded that “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general

Without going into greater depth on this debate, it is fair to say that according to State practice and the relevant international jurisprudence and doctrine, the main general rule governing the application of a State's jurisdiction continues to be territoriality.<sup>5</sup> In other words, the courts of the State in which the crime has been committed will have the primary power to prosecute those responsible for it.<sup>6</sup> Obviously this is not the only basis for action by domestic courts. Other criteria recognized under what are still considered classic principles of criminal

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prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts [...], it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." See Permanent Court of International Justice, *The Case of the S.S. "Lotus"* (France v. Turkey), Judgment No. 9, Series A, No. 10, September 7, 1927, at 15.

- 5 See, for instance, Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York: Oxford University Press, 2003). For a more categorical position on the principle of territoriality and its repercussions for the adjudicatory jurisdiction of the State, see Malcolm D. Evans, *International Law*, *supra* note 2.
- 6 Relevant Latin American legal provisions include, for example, Article 1 of the Argentine Criminal Code: "This code shall apply: 1. To crimes committed, or whose effects should occur, in the Argentine Nation or in places subject to its jurisdiction [...]" [*unofficial translation*]. Article 1 of the Bolivian Criminal Code: "This Code shall apply: 1. To crimes committed in the territory of Bolivia or in places subject to its jurisdiction. 2. To crimes committed abroad, whose effects occur or should occur in the territory of Bolivia or in places subject to its jurisdiction" [*unofficial translation*]. Article 14 of the Colombian Criminal Code: "Colombian criminal law shall apply to any person who shall commit a breach in the national territory, without detriment to the exceptions envisaged in international law. The punishable conduct shall be considered to have been perpetrated: 1. In the place where the act has occurred in whole or in part. 2. In the place where the act of omission was to have occurred. 3. In the place where the result occurred or should have occurred" [*unofficial translation*]. Article 4 of the Costa Rican Criminal Code: "Costa Rican criminal law shall apply to anyone who commits a punishable act in the territory of the Republic, without detriment to the exceptions established in international treaties, conventions, or rules accepted by Costa Rica. For the purposes of this provision, the territory of the Republic shall be understood to include, in addition to natural or geographic, territorial waters, the air space that covers them, and the continental platform. Costa Rican ships and aircraft shall also be considered part of the national territory" [*unofficial translation*]. Article 8 of the Salvadoran Criminal Code: "Salvadoran criminal law shall apply to punishable acts committed in whole or in part in the territory of the Republic or in places subject to its jurisdiction" [*unofficial translation*]. Article 4 of the Guatemalan Criminal Code: "Save as provided in international treaties, this Code shall apply to anyone who commits a crime or misdemeanor in the territory of the Republic or in places or vehicles subject to its jurisdiction" [*unofficial translation*]. Articles 1, 2(1), and 3 of the Mexican Federal Criminal Code: "This Code shall apply to federal crimes throughout the Republic; [...]" Article 2. It shall also apply: I. To crimes that are originated, planned or committed abroad, when their effects occurred or were intended to occur in the territory of the Republic [...]" [*unofficial translation*]. Article 3 of the Venezuelan Criminal Code: "Anyone who commits a crime or misdemeanor in the geographic area of the Republic shall be punished according to Venezuelan law" [*unofficial translation*].

jurisdiction include (i) nationality of the perpetrator [*personalidad activa*];<sup>7</sup> (ii) nationality of the victim [*personalidad pasiva*],<sup>8</sup> and (iii) national interest or protection principle.<sup>9</sup>

- 7 Based on this principle, local courts shall take up crimes committed by their own nationals in the territory of another State. The main point of this jurisdictional principle is that nationality connotes an element of loyalty or affiliation to a particular State and is also an expression of the latter's sovereignty. Some authors have identified different criteria for establishing jurisdiction based on the nationality of the perpetrator: (i) based on the gravity of the offense; (ii) to avoid the extradition of a national to be subject to the jurisdiction of the territorial State; and (iii) to punish a conduct that is prohibited in the State of nationality but not in the territorial State. See, for instance, Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008); Ian Brownlie, *Principles of Public International Law*, *supra* note 5; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Mortsel, Belgium: Intersentia, 2005). For examples of regional criminal code provisions with respect to the jurisdiction for reasons of nationality of the perpetrator, see Article 1(3) of the Bolivian Criminal Code: "This Code shall apply: [...] 3. To crimes committed abroad by a Bolivian, as long as the latter is physically in the national territory and has not been punished in the place where the crime was committed" [*unofficial translation*]. Article 16(4) of the Colombian Criminal Code: "Colombian criminal law shall apply: [...] 4. To a national who, beyond the provisions set out in previous numbers, is present in Colombia after having committed a crime in foreign territory, which is punishable under Colombian criminal law by a prison sentence of no less than two (2) years and the individual has not been tried abroad" [*unofficial translation*]. Article 5 of the Mexican Federal Criminal Code: "Crimes committed in foreign territory by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans, shall be punished in the Republic, in accordance with Federal Laws, if the following conditions are met: I. The accused is present in the Republic; II. The prisoner has not been definitively tried in the country where he committed the crime, and III. The infraction of which he is accused is defined as a crime in the country in which it was carried out and in the Republic" [*unofficial translation*]. Article 10(5) of the Uruguayan Criminal Code: "Crimes committed by nationals or foreigners in foreign territory shall not be held liable under Uruguayan law, with the following exceptions: [...] 5. Crimes committed by an Uruguayan, punishable under foreign and domestic law, when the author is present in the territory of the Republic and has not been requested by the authorities of the country where he committed the crime, in which case, the most benign law shall be applicable" [*unofficial translation*]. Article 4 of the Venezuelan Criminal Code [*text omitted due to its length*].
- 8 Based on this principle, the courts of a State may take up crimes perpetrated outside its territory by a foreigner against one of its own nationals under the laws established in this regard by each legal system. Antonio Cassese, *International Criminal Law*, *supra* note 7; Ian Brownlie, *Principles of Public International Law*, *supra* note 5; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law*, *supra* note 7. For examples of regional criminal code provisions with respect to jurisdiction on grounds of nationality of the victim, see Article 16(5) of the Colombian Criminal Code: "Colombian Criminal Law shall apply: [...] 5. To a foreigner who, in addition to the provisions set out in numbers 1, 2 and 3, is present in Colombia after having committed a crime abroad to the detriment of the State or a Colombian national, which is punishable under Colombian law by a prison sentence of no less than two (2) years, and who has not been tried abroad" [*unofficial translation*]. Article 5(4) of the Guatemalan Criminal Code: "This Code shall also apply: [...] 4. To a crime committed abroad against a Guatemalan, when it has not been tried in the country where it was committed, as long as an accusation has been lodged by the party or by the Public Ministry and the accused is present in Guatemala" [*unofficial translation*]. Article 5 of the Mexican Federal Criminal Code [*complete text in supra note 7*]. Article 2(4) of the Peruvian Criminal Code: "Peruvian Criminal Law is applicable to any crime committed abroad when: [...] 4. It is perpetrated against a Peruvian [...] and the crime is envisaged as subject to extradition under Peruvian Law, as long as it is also punishable in the State where it was committed and the agent enters the territory of the Republic by any means" [*unofficial translation*]. Article 10(6) of the Uruguayan Criminal Code: "Crimes committed by nationals or foreigners in foreign territory shall be exempt from the application of Uruguayan law, with the following exceptions: [...] 6. Crimes committed by a foreigner to the detriment of an Uruguayan or to the detriment of the country, subject to the provisions of the preceding subparagraph, and as long as the circumstances set out therein are present" [*unofficial translation*].
- 9 In accordance with this principle, national courts may exercise jurisdiction over a crime when it affects the essential interests of the State. Antonio Cassese, *International Criminal Law*, *supra* note 7; Ian Brownlie, *Principles of Public International Law*, *supra* note 5; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law*, *supra* note 7. For examples of regional criminal code provisions with respect to jurisdiction on grounds of national interests, see Article 1(4) of the

This normative panorama with respect to the exercise of State jurisdiction in criminal matters becomes even more complicated when it comes to what are considered core crimes under international law, in relation to which other jurisdictional venues have been recognized. Here we are referring in particular to the *principle of universal jurisdiction* and to what some scholars call the principle of *aut dedere aut judicare*,<sup>10</sup> or jurisdiction pursuant to international treaties.<sup>11</sup> These issues will be discussed in greater detail later on.

The foregoing clearly refers to proceedings before domestic judicial organs which, taken together, comprise what M. Cherif Bassiouni describes as the *indirect enforcement system* for core crimes under international law.<sup>12</sup> Parallel to that, there is a *direct enforcement system*, which currently comprises the international courts and tribunals charged with taking up matters of individual criminal responsibility for the commission of such crimes.

Much has been written about the history and evolution of international criminal tribunals, from the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East in Tokyo to the international criminal tribunals for the former Yugoslavia and Rwanda and the International Criminal Court.<sup>13</sup> In addition to these purely international tribunals, the panoply of judicial bodies with jurisdiction to prosecute such crimes also includes what are generally referred to as “mixed” or “hybrid” courts,<sup>14</sup> including the Special Court for Sierra Leone<sup>15</sup> and the Extraordinary Chambers in Cambodia,<sup>16</sup> among others.<sup>17</sup>

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Bolivian Criminal Code: “This Code shall apply: [...] 4. To crimes committed abroad against the security of the State, the public faith and the national economy. This provision shall cover foreigners if they are present due to extradition, or in the territory of the Republic.” Articles 16(1) and 16(5) of the Colombian Criminal Code: “Colombian criminal law shall apply: 1. To anyone who commits a crime abroad against the existence of the security of the State, against the constitutional order, against the economic and social order, except for the conduct defined in article 323 herein, against the public administration, or who falsifies the national currency or incurs in the crime of funding terrorism and the administration of resources related to terrorist activities, even if he has been acquitted or convicted abroad with a lesser sentence than that envisaged under Colombian law. [...] 5. To a foreigner who, beyond the provisions set out in numbers 1, 2 and 3, is present in Colombia after having committed abroad a crime to the detriment of the State or a Colombian national, for which Colombian law imposes a prison sentence of no less than two (2) years and who has not been tried abroad.” Article 5(6) of the Guatemalan Criminal Code: [...] 6. For a crime committed abroad against the security of the State, the constitutional order, the integrity of its territory, and for forging the signature of the President of the Republic, and counterfeiting the currency or bank or legal notes, bonds and other credit titles and documents.”

10 See, for example, M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht, Netherlands: Martinus Nijhoff, 1995).

11 Malcolm D. Evans, *International Law*, *supra* note 2.

12 M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers, 2003), at 333.

13 See, among others, M. Cherif Bassiouni, “International Criminal Investigations and Prosecutions: From Versailles to Rwanda,” in *International Criminal Law*, vol. 2, *Enforcement*, 2nd edition, ed. M. Cherif Bassiouni (Ardsley, NY: Transnational Publishers, 1999); Antonio Cassese, *International Criminal Law*, *supra* note 7.

14 M. Cherif Bassiouni, *Introduction to International Criminal Law*, *supra* note 12, as well as Ilias Bantekas and Susan Nash, *International Criminal Law*, 3rd ed. (New York: Routledge, 2007), at 557–79.

15 The Special Court for Sierra Leone (SCSL) was established by the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, signed on January 16, 2002.

16 The Extraordinary Chambers in the Courts of Cambodia were established by the *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, signed on June 6, 2003.

17 Other tribunals for the prosecution of international crimes that some scholars have classified as mixed or

A detailed discussion of the creation, jurisdictional bases, and practice of each of these judicial organs is beyond the scope of this introduction. While these issues certainly merit further study, the international criminal tribunals (and perhaps also the mixed tribunals) unquestionably have become permanent fixtures in the global justice system today. Therefore, in addition to addressing their legitimacy per se, any analysis of these institutions should also examine their effectiveness and their nexus and coordination with domestic justice systems. In this regard, Antonio Cassese emphasizes that “the establishment of international criminal courts and tribunals has posed the tricky problem of how to coordinate their action with that of the national courts: whenever both classes of courts are empowered to pronounce on the same crime, which should take precedence and under which conditions.”<sup>18</sup>

In most cases, the constitutive and statutory documents of the international courts and tribunals themselves address this question. It is also worth mentioning that the response has varied significantly as international criminal law has evolved. The relationship between domestic and international jurisdictions has ranged from a special and extraordinary system established at the end of World War II, to the primacy of the international criminal tribunals for the former Yugoslavia and for Rwanda,<sup>19</sup> and later to the International Criminal Court’s complementary nature in relation to domestic jurisdictions. In this regard, Ezequiel Malarino has asserted that with the entry into force of the Rome Statute of the International Criminal Court, “a *binary model* has been adopted, which is stratified in multiple jurisdictions: the multiplicity of national systems—each with its own unique characteristics—is assigned a *primary* role and, on the other hand, the [International Criminal Court] has a *complementary* role. The Rome Statute, therefore, established a complex system that comprises several legal subsystems or normative levels and, therefore, that operates at different rhythms.”<sup>20</sup> [*Emphasis in original*]

This same question, namely, how to effectively coordinate the exercise of such a wide variety of jurisdictions in a global enforcement system, becomes even more complicated when two or more States claim jurisdiction over the same defendant or over the same set of facts, based on different principles of connection, including universal jurisdiction. In this scenario, in the absence of international norms that specifically establish primacy among national jurisdictions, State practice, and within it, the interpretations handed down by the courts, will play a crucial role in developing the applicable criteria to resolve conflicts of jurisdiction and, ultimately, in strengthening the global justice system.

Parallel to the consolidation of norms governing the relationship between different jurisdictions, strengthening of the solidity and effectiveness of inter-State and inter-institutional

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hybrid include (i) Special Panels for Serious Crimes, Dili, East Timor, established by UNTAET Regulation 2000/11 (*United Nations Mission of Support in East Timor*); (ii) Kosovo War and Ethnic Crimes Court (this project was eventually abandoned); and (iii) Iraqi Special Tribunal for Crimes Against Humanity, established by Order No. 48 of the Coalition Provisional Authority and later adopted by the Iraq Governing Council.

18 Antonio Cassese, *International Criminal Law*, *supra* note 7, at 336.

19 See Articles 9 and 8 of the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, respectively.

20 Ezequiel Malarino, “Evaluación comparativa: Implementación y dificultades de implementación del Estatuto de Roma a la luz de la experiencia latinoamericana,” in *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de Roma de la Corte Penal Internacional*, ed. Kai Ambos, Ezequiel Malarino, and Jan Woischnik (Montevideo: Fundación Konrad Adenauer and Georg-August-Universität-Göttingen, 2006), at 489–90.

cooperation will enhance the effectiveness of the global system for the prosecution of international crimes. In this regard, Bassiouni has identified at least eight essential forms of cooperation for the prosecution of international crimes: “(i) extradition; (ii) legal assistance; (iii) execution of foreign penal sentence; (iv) recognition of foreign penal judgment;<sup>21</sup> (v) transfer of criminal procedures;<sup>22</sup> (vi) freezing and seizing of assets deriving from criminal conduct; (vii) intelligence and law enforcement information-sharing; and (viii) regional and subregional ‘judicial spaces.’<sup>23</sup>”<sup>24</sup>

Continuing along these same lines, it is appropriate to emphasize that the most relevant international human rights and humanitarian law treaties also establish an implicit obligation to cooperate in criminal matters. With respect to the former, for example, the Inter-American Court of Human Rights has asserted that “the need to eradicate impunity [for international crimes] reveals itself to the international community as a duty of cooperation among states for such purpose.”<sup>25</sup> Similarly, international humanitarian law experts contend that the general obligation to “ensure respect” set forth in the relevant international treaties<sup>26</sup> extends beyond criminal prosecution to encompass the positive obligation to cooperate with national and international organs in criminal matters to the fullest extent possible.<sup>27</sup> Moreover, in accordance with Part IX of the Rome Statute of the International Criminal Court, all States Parties to that instrument have the explicit obligation to cooperate with the Court and to adopt all of the legislative measures necessary to ensure such cooperation.

Based on these considerations, this chapter presents Latin American court rulings that have recognized the various jurisdictions that may take up international crimes. Some of these decisions go so far as to articulate certain basic principles that govern the relationship between jurisdictions, pursuant to the applicable norms and the interpretation of these tribunals. Latin American courts have also taken up, albeit in a more limited manner, various aspects of the

21 Note added to the original: Recognition of criminal judgments is a broader category than that derived from the carrying out of such a judgment. M. Cherif Bassiouni, *Introduction to International Criminal Law*, *supra* note 12, at 357–58.

22 Note added to the original: Criminal proceedings are transferred when, after they have been initiated in one jurisdiction, it is determined that another jurisdiction might be more suitable for practical or legal reasons, giving rise to a situation of *forum conveniens*. *Ibid.*, at 358–59.

23 Note added to the original: In terms of the “creation of regional and subregional judicial spaces,” Bassiouni proposes the establishment of criminal cooperation agreements more appropriate to the specific cultural, legal, political, and economic characteristics of the regions and subregions. *Ibid.*, at 377.

24 *Ibid.*, at 333.

25 IACourtHR, *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of November 29, 2006, Series C, No. 162, para. 160. This judgment from the Inter-American Court of Human Rights was chosen because it relates to events that the State itself characterized as “crimes against humanity” in the international proceeding. When the ruling was issued, the Court was awaiting the State of Chile’s decision on the Peruvian State’s request for the extradition of former president Alberto Fujimori Fujimori. Peru’s Truth and Reconciliation Commission also characterized these events as crimes against humanity in its final report, and the Supreme Court did likewise in its finding of criminal responsibility against former president Fujimori.

26 See Common Article 1 of the four 1949 Geneva Conventions, adopted August 12, 1949, and entered into force October 21, 1950: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

27 See, for instance, International Committee of the Red Cross, *Improving Compliance with International Humanitarian Law: ICRC Expert Seminars* (Geneva: ICRC, 2003).



inter-State cooperation system and particularly the issues of extradition and the cooperation due the International Criminal Court.

## 1. CRIMINAL PROCEDURE: OBLIGATION TO INVESTIGATE, PROSECUTE, AND PUNISH CRIMES UNDER INTERNATIONAL LAW

As noted in other sections of this study, the relevant international treaties governing international crimes explicitly or implicitly establish the State obligation to repress, and more pointedly, to investigate, prosecute, and punish the perpetration of such crimes. Furthermore, as mentioned above, it is clear that the international justice system currently is premised on actions by domestic jurisdictions and that the latter have the obligation to respond in the first instance to the commission of international crimes, whether by means of criminal prosecutions or international cooperation. While this has been well established, the doctrine and the jurisprudence of the international criminal courts thus far have said very little about what these obligations specifically entail.

In contrast, international jurisprudence in the area of human rights, and particularly that emanating from the inter-American system, has stated in no uncertain terms that “the duty to investigate and eventually conduct trials and impose sanctions, becomes particularly compelling and important in view of the seriousness of the crimes committed and the nature of the rights wronged [...]. Therefore, suffice it to repeat that the investigations and prosecutions conducted [...] warrant the use of all available legal means and must aim to determine the whole truth and to prosecute and eventually capture, try and punish all perpetrators and instigators of the acts.”<sup>28</sup> From this standpoint, and clearly influenced by the inter-American jurisprudence on human rights, Latin American courts not only have upheld the obligation to investigate, prosecute, and punish in an abstract sense, but they have also determined more specifically the content of these obligations, as well as the due process standards that must accompany such proceedings if they are to comply with the aforementioned obligations. This interpretive exercise is commendable inasmuch as it develops an aspect of international criminal law that has hardly been examined in other forums. It is also crucial since, as presented here, *national institutions are establishing a more precise formulation of the State's international obligations* in relation to the prosecution of international crimes.

In this context, to respond to potential objections to the use of jurisprudence emanating from human rights organs in matters concerning the prosecution of international crimes, it is important to recall that the jurisprudence cited herein does not refer to the determination of individual responsibility, which clearly would fall outside its sphere of jurisdiction. It refers instead to the determination of State obligations, and in this respect there is a clear corres-

28 IACourtHR, *Case of La Cantuta v. Peru*, *supra* note 25, para. 157. Also, on the specific obligations of States in regard to investigation and due diligence in prosecutions, see, inter alia, IACourtHR, *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of May 11, 2007, Series C, No. 163; IACourtHR, *Case of Cantoral-Huamani and García-Santa Cruz v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 10, 2007, Series C, No. 167; IACourtHR, *Case of Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 12, 2008, Series C, No. 186.

pondence between those established under international criminal law instruments and under human rights instruments.<sup>29</sup>

Second, as noted in Chapter I of this study, international human rights law has played a crucial role in developing the legal definition of international crimes. Therefore it should come as no surprise that this normative system would also have a substantive impact on judicial interpretations of the obligation to prosecute and punish the commission of such crimes.

Based on these brief reflections, some of the more relevant Latin American decisions concerning the investigation, prosecution, and punishment of international crimes are presented below. Of particular note are the decisions that examine special obligations, due process standards, and victims' rights, all of which are meant to ensure that prosecutions are pursued seriously and not taken as a mere formality.

PARAGUAY, *Remedy of unconstitutionality submitted by Modesto Napoleón Ortigoza (List of Judgments 12.a)*, Whereas 2:

[A]t all times during the so-called trial of the plaintiff, the previously mentioned [Universal Declaration of Human Rights] and [the] Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] were in effect. It was not possible to argue that the practice of torture was even remotely legitimate in Paraguay. To the contrary, *the relevant authorities had an obligation to investigate, find out about, and punish such an affront to human dignity*. This is especially true since under the Constitution in force at the time, and even more so under the current one, the laws are ranked such that after the Constitution, international treaties and conventions clearly take precedence over any provision that might be found in the procedural codes.

COSTA RICA, *Constitutional review of the bill to approve the Rome Statute of the International Criminal Court (List of Judgments 5.b)*, Whereas VII:

[T]he prevention and suppression of the crimes of genocide, crimes against humanity, and war crimes] has been and remains a national obligation, and one of which we have been fully aware even before the signing of the Statute [of the International Criminal Court]. Historically our country has been cognizant of its obligation to punish all types of practices that are contrary to human dignity, an obligation that clearly has been undertaken by the Costa Rican State not only domestically but also before the international community, and that is an undeniable manifestation of the democratic nature of the rule of law.

29 According to the jurisprudence of the Inter-American Court of Human Rights, "The obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention." IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006, Series C, No. 154, para. 110.

MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Twelve:

[A]rticle VI [of the Convention on the Prevention and Punishment of the Crime of Genocide] stipulates that persons accused of genocide or of any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in whose territory the act was committed or by a competent international criminal tribunal whose jurisdiction has been recognized by the contracting parties.

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 34:

[According to the Geneva Conventions] [...] States are also obliged to search for persons [who might have committed grave breaches of those Conventions], bring them before their own courts, and take measures necessary for the suppression of all acts contrary to the provisions of the Convention. It specifies that all accused persons are entitled to the safeguards of proper trial and free defense, which shall not be less favorable than those provided by Article 105 and consecutive articles of the Geneva Convention of the August 12, 1949, concerning the treatment of prisoners of war. Article 147 describes what is understood by grave breaches, which include intentional homicide, torture or inhuman treatment, intentionally causing great suffering or serious injury to body or health, unlawful deportation or transfer, and unlawful confinement.

PERU, *Habeas corpus submitted by Gabriel Orlando Vera Navarrete (List of Judgments 13.c)*, Whereas 5, 6, 9, and 10:

The Peruvian State must not tolerate impunity for [...] serious crimes and human rights violations, in view of its fundamental ethical obligation derived from the Rule of Law and [from] the explicit commitments acquired by Peru before the International Community.

Indeed, the international community recognizes the existence of a non-derogable nucleus of rights set out in peremptory norms of International Law. These norms are derived from International Human Rights Law, International Humanitarian Law, and International Criminal Law.

The State's obligations in the area of human rights call for it to respect and guarantee the fundamental rights of persons subject to its jurisdiction. These obligations have been expressly set forth in Article 2 of the International Covenant on Civil and Political Rights and in Articles 1 and 2 of the American Convention on Human Rights. Ultimately, the previously cited international norms constitute the mandatory standard for interpretation of the provisions of Article 44 of the Constitution, which is the obligation of the State to guarantee the full enjoyment of human rights.

The obligation to guarantee has been developed in the jurisprudence of the Inter-American Court of Human Rights. Thus, in the *Velásquez Rodríguez* case judg-

ment of July 29, 1988 (para. [166]), the Court indicates that the duty to guarantee means that the State must prevent, investigate, and punish any violation of the recognized rights and, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. *The obligation of the State consists of pursuing the relevant criminal proceeding* against any public official, or any individual, who is presumed to be responsible for the alleged violation. In this way, International Human Rights Law safeguards the rights of persons, but it also requires that Criminal Law be brought to bear against those found to be responsible for the infraction. [*Emphasis added*]

See also PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 7–9, 13, and 14 (some paragraphs are identical, others are similar.)

ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 18 and 19:

[T]he Inter-American Court [in the *Velásquez Rodríguez* case judgment] has established that States Parties have the duty not only to respect human rights but also to guarantee them, and thus, “in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. 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” [*footnote omitted*].

[T]he judgment cited herein clearly recognized the duty of the State to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of ensuring respect for human rights, which includes the duty to prevent, investigate, and punish any violation of rights recognized by the Convention. It is true that the specific derivations of that duty have been determined gradually through the evolution of the jurisprudence of that international tribunal, leading up to the current severe proscription of all domestic law provisions that might give rise to the failure of the State to fulfill its international obligation to prosecute, try, and punish serious violations of human rights.

See also ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 36 (similar text).

PERU, *Habeas corpus submitted by Juan Nolberto Rivero Lazo (List of Judgments 13.e)*, Whereas 17:

Judicial protection, [as it has been recognized in international jurisprudence], has two dimensions. On the one hand, it stems from the right of victims of human rights violations to truth, justice, and reparations relating to the circumstances they have experienced. On the other hand, it includes the explicit obligation of the courts to pursue the legal proceedings within their purview under strict security measures and through a determination of the applicable crimes in light of the relevant provisions of International Law.

COLOMBIA, *Remedy of unconstitutionality (Article 135 and others of Law 599-2000 and various of Law 522-1999, Criminal and Military Codes) (List of Judgments 4.i)*, Whereas, D, 1.3:

States, including the Colombian State, have the fundamental obligation to respect and ensure respect for International Humanitarian Law.

Various international entities have affirmed the binding nature of International Humanitarian Law and have called urgently on States to comply with, and ensure compliance with, their obligations in this regard. [...] [Thus, for example, the General Assembly of the Organization of American States], in Resolution 2226 (XXXVI-O/06) of 2006, [...] (e) emphasizes “the obligation of States to punish all violations of international humanitarian law” [...]. Similarly, [...] in Resolution 1944 (XXXIII-O/03) of June 10, 2003, the Assembly [...] (vii) declares itself “aware of the need to punish those responsible for war crimes, crimes against humanity, and other grave breaches of international humanitarian law”; (viii) recalls “that the Rome Statute of the International Criminal Court defines war crimes and crimes against humanity that the States parties thereto have committed must not go unpunished[.]”

As underscored by the aforementioned international bodies, the general obligation to respect and to ensure respect for international humanitarian law is manifested in several specific obligations, including, inter alia: [...] the duty to investigate, prosecute, punish, and make reparations for war crimes, crimes against humanity, and genocide committed during the course of internal armed conflicts, a duty that falls to the State, in principle, under international customary law, since it is States, through their legally constituted authorities, that must effectively establish individual criminal liability for grave breaches of International Humanitarian Law, without detriment to the principle of universal jurisdiction in regard to the commission of this type of crimes, which is generally accepted today [...].

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 23 and 26:

[The Inter-American Court added that] war crimes and crimes against humanity, regardless of the date on which they were committed, shall be subject to investigation, and the persons against whom there is evidence of guilt shall be sought, arrested, prosecuted, and, if found guilty, punished.

[In particular], the preamble of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly sets out “[...] the obligation of States under the [United Nations] Charter, in particular Article 55, to promote universal respect for and observance of human rights and fundamental freedoms,” and in its articles, imposes on States the duty to prosecute this category of crimes and impose the appropriate penalties (4.2).

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 9:

[T]he Inter-American Court of Human Rights recalled that States Parties have undertaken the general obligation to protect, respect, and ensure each one of the rights in the American Convention [on Human Rights]. This means that “they must prevent, investigate and punish all violations of rights recognized by the Convention.”

The Human Rights Committee has ruled along these same lines in its analysis of the scope of the obligations imposed on States by Article 2 of the International Covenant on Civil and Political Rights. The Human Rights Committee has stated that a State Party’s failure to investigate reports of an abuse may be a violation per se of the Covenant.

These obligations exist specifically in relation to infractions recognized as crimes under international or domestic law.

[Specifically] in regard to the duty to investigate, the Inter-American Court of Human Rights has stated that “the duty to investigate must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”

As complement to the previous decisions, see also EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascochea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

[From the standpoint of the international rules governing acts considered *crimes against humanity*], a United Nations resolution issued on December 3, 1973, set out the *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, which stipulates, in Article 1: “War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.” Therefore, at the level of international law, there is no pardon for those who have committed such crimes. The State, therefore, may not pardon genocides, as the offense transcends a particular society.

## A. Specific obligations

COLOMBIA, *Remedy of unconstitutionality (Article 220 of Law 200–2000, Code of Criminal Procedures) (List of Judgments 4.g)*, Whereas 17:

[T]he Inter-American Court has indicated, based on principles that this Constitutional Court endorses, that persons affected by human rights abuses are entitled to State action to investigate the acts in question, punish those responsible, and to the extent possible, restore the rights of the victims. According to this international high court, if the State apparatus acts in such a way that the human rights violation “goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, then the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction” (emphasis added) [*footnote omitted*]. The Inter-American Court then concludes with words that are perfectly valid under Colombian constitutional law:

“In certain circumstances, it may be difficult to investigate acts that violate an individual’s rights. The 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. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane (emphasis added)” [*footnote omitted*].

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 22:

The Inter-American Court of Human Rights has enumerated the obligations of States in regard to the duties to investigate and punish aberrant crimes. In this sense, the aforementioned tribunal has stated on numerous occasions that Article 25, in relation to Article 1.1. of the American Convention [on Human Rights], obligates the State to ensure that all persons have access to the administration of justice and, in particular, to a prompt and simple recourse to ensure, among other outcomes, that the perpetrators of human rights violations are prosecuted and to obtain reparations for the harm suffered. In particular, it has imposed the following obligations:

1. The general principle that it falls on States to clarify the relevant facts and responsibilities, which must be understood specifically as the State’s duty to provide effective remedies for that purpose; [*footnote omitted*]

2. The duty of States to guarantee the rights of access to justice and judicial protection; *[footnote omitted]*

3. The obligation to identify and punish the intellectual authors of human rights violations; *[footnote omitted]*

4. The adoption of such provisions of domestic law as may be necessary to ensure compliance with the obligation set out in Article 2 of the American Convention on Human Rights; *[footnote omitted]*

5. The imposition of duties to investigate and punish those responsible for serious human rights violations is not subject to exceptions; *[footnote omitted]*

6. The obligation of member States to heed the rights of victims and their next of kin and that the crimes of disappearance and death shall be duly investigated and punished by the authorities *[footnote omitted]*.

URUGUAY, *Case "Condor Plan" in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 9:

[The general obligations to respect and ensure human rights] exist concretely in relation to infractions recognized as crimes under international or domestic law, including torture and other cruel, inhuman, and degrading treatment, summary and arbitrary deprivation of life, and forced disappearances.

The jurisprudence of international human rights courts, as well as that of quasi-judicial human rights organs such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, is consistent in that the duty to ensure consists of five essential obligations that the State must fulfill in good faith:

- the obligation to investigate serious human rights violations;
- the obligation to provide an effective remedy for victims of human rights violations;
- the obligation to try and punish the perpetrators of human rights violations;
- the obligation to make fair and adequate reparations to the victims and their next of kin;
- the obligation to establish the truth of what happened.

The duties that make up the obligation to guarantee are complementary in nature; they are not alternatives or substitutes.

Additionally, see COLOMBIA, *Appeal motion (Manuel Enrique Torregrosa Castro) (List of Judgments 4.k)*, Whereas 26:

The State, in this case judges, are remiss in their duties when they fail to investigate, prosecute, and punish the perpetrators of grave human rights violations. Specifically, when it comes to providing an effective remedy, they commit a grave breach of international standards when (i) they do not pursue prosecutions in a serious, rigorous, and exhaustive manner, (ii) they do not pursue cases with diligence, celerity, and conviction, (iii) they do not take measures to protect the victims, (iv) they do not



allow the latter to participate in the processes, or (v) there are delays in resolving the manner.

## **B. Judicial processes must be carried out according to due process norms**

PANAMA, *Appeal motion (Case Rubén Oscar Miró Guardia) (List of Judgments 11.a)*, Whereas:

It is common knowledge that at the time of Rubén Miró's murder, and the court ruling ordering that the criminal case be temporarily set aside, a large percentage of government institutions, including the Public Ministry and the Judiciary, were subject to the decisions of the military regime, some of whose members are identified as possible perpetrators of or participants in the homicide.

In view of this, it should be noted that since the beginning of our existence as a Republic, the principle of due process has enjoyed constitutional rank to safeguard the rights of persons to be judged by a competent authority, pursuant to lawful procedures and no more than once for the same criminal or disciplinary case. According to jurisprudential criteria, this principle guarantees the "right of persons to turn to the courts of justice should they see fit, in order to secure the protection of their rights" [*footnote omitted*].

It is therefore incumbent on the authorities responsible for the administration of justice to investigate crimes and to make every possible effort to identify and prosecute the perpetrators and participants, in accordance with the Constitution and the law.

Although more than 20 years have transpired since the commission of the act referred to herein, it is undeniable that the judicial authorities at the time lacked the independence and impartiality required to administer justice. Therefore, the next of kin of Rubén Miró (RIP) never had a reasonable opportunity to be heard in order to ensure the effective protection of their rights, and this constitutes a clear violation of the principle of due process.

### **i. Right to a natural judge**

COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán) (List of Judgments 4.e)*, Whereas 8 and 9:

The right to a natural judge is a basic guarantee that, together with the right to a defense and the principle of legality, defines due process.

According to the jurisprudence of this Court, the natural judge is the one that the Constitution and the law assign competence to take up a particular matter [*footnote omitted*]. In this way, the Court has simply reiterated the language contained in the aforementioned body of law. The requirement that competence be legally assigned is insufficient to define the concept of natural judge, since [...] the right in question

also requires that there be no change to “the nature of the judicial official” and that *ad hoc* judges or tribunals will not be established. The implication is that inherent in the concept of the natural judge is the prior definition of who the competent judges are, that the latter are institutional in nature, and that once duly assigned competence to take up a specific case, their ability to hear the case shall not be revoked, except pursuant to modifications of the internal competencies of an institution.

[I]n addition to the characteristics already noted, the processes to establish the competency of such judges must be handled equitably, so that “the judgment of certain persons by judges pertaining to a special jurisdiction is naturally barred.” This clearly implies the introduction of egalitarian criteria—on principle—into the definition of the natural judge.

[T]he right to a natural judge also encompasses the right that only (actually, preferentially) judges will be the ones to dictate the law [*footnote omitted*].

It can be inferred from the foregoing that the right to a natural judge encompasses, inter alia, the right of access to the ordinary jurisdiction and, where authorized by the Constitution, to special jurisdictions. This is to say that the ordinary jurisdiction is the one common to all members of a society and, save where an explicit norm indicates otherwise, all matters shall fall within its competence.

As a common jurisdiction (the venue common to all Colombians), then, the competence of other jurisdictions must be given a restrictive interpretation, as an exception to the general rule of competence.

It can be concluded from the foregoing that a violation of the [right to a] natural judge has occurred when (i) there has been a disregard for the general constitutional rule of competence in criminal investigations, which is the Office of the Attorney General of the Nation, the exceptions to this principle being expressly set out in the aforementioned Charter; (ii) constitutional prohibitions have been breached, such as the prohibition against the trial of civilians by the military or the prosecution of criminal acts by administrative authorities; (iii) the investigation has not been conducted by constitutionally mandated special jurisdictions such as would be the case of indigenous peoples and minors; (iv) legal regimes established by the constitution (and laws) have been disregarded; (v) *ex-post* trials are conducted with *ad hoc* tribunals; and (vi) there is a disregard for the right to be tried by an ordinary judicial authority.

## 2. OTHER JUDICIAL PROCESSES

Latin American legal decisions pertaining to international crimes have not been limited to determining the scope and content of the duty to investigate, prosecute, and punish, or to establishing the criminal responsibility of particular individuals for the commission of such crimes. Significantly, in several countries, at least two categories of legal actions have been undertaken to protect the rights of the victims of criminal acts that can be characterized as international crimes, or to uphold the relevant standards in domestic law.

In the first category, Latin American courts have frequently and prominently used the process generically known as *habeas corpus* (or the *amparo* remedy in criminal matters) to affirm the duty of the State to protect people from attacks against their liberty or against other rights, which often correspond to the values legally protected under crimes defined in international law. In this sense, when the *habeas corpus* remedy is used, as it should be, to discover the whereabouts of a detained-disappeared person in the context of a systematic or widespread attack against the civilian population, it will have the effect of preventing or stopping the commission of an international crime. Significantly, the Inter-American Court has established that the duty to ensure is not limited to the investigation, prosecution, and, as the case may be, punishment of international crimes. The Court has asserted that

“[the] obligation [to ensure] implies the duty of the States Parties to organize the entire government system, and in general, all agencies through which the public power is exercised, in such a manner as to legally protect the free and full exercise of human rights. As a consequence of this obligation, the States must prevent [...] all violations of the rights recognized by the Convention and, at the same time, guarantee the reinstatement, if possible, of the violated rights, and as the case may be, the reparation of the damage caused due to the violation of human rights. If the State agencies act in a manner that such violation [or international crime]<sup>30</sup> goes unpunished, and prevents the reinstatement, as soon as possible, of such rights to the victim of such violation, it can be concluded that such State has not complied with its duty to guarantee the free and full exercise of those rights to the individuals who are subject to its jurisdiction.”<sup>31</sup>

Latin American jurisprudence has also underscored the importance of “unconstitutionality actions” as a form of constitutional review and abstract constitutional control. Such actions are a legal means of ensuring that inferior laws are adapted in consonance with the constitutional order and/or international treaties. Bearing in mind, as discussed earlier, that the adequate implementation of international norms and standards relating to these crimes is a basic prerequisite for effective performance by domestic jurisdictions, the correct use of these types of actions could be critical to ensuring the quality of domestic systems with respect to international criminal law.

30 Note added to the original: This paragraph is taken from a case involving events that the Inter-American Court itself characterized as crimes against humanity. The paragraph begins, moreover, by recognizing that the obligation to prosecute and punish these crimes is also derived from the general obligation to ensure all of the rights of persons. It would not be unreasonable, therefore, to infer a connection to all of the Inter-American Court’s jurisprudential interpretation of this obligation in cases where serious human rights violations also constitute an international crime, whether because they were committed in the context of a widespread or systematic attack against the civilian population, or because they were part of a pattern or policy to commit war crimes.

31 IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, *supra* note 29, para. 110.

## A. Habeas corpus

### i. *Habeas corpus* and forced disappearance

EL SALVADOR, *Habeas corpus submitted by Reyna Dionila Portillo (List of Judgments 7.b)*, Whereas 1–2 and 4:

The competence of this Court to take up the issue of *habeas corpus*, and the purpose of the latter, have been repeatedly emphasized in the jurisprudence of this Tribunal [...] [which has stated, in various rulings,] “*Habeas corpus is a constitutional guarantee intended to protect the right to personal liberty when any authority or individual unlawfully restricts it by means of imprisonment, confinement, custody, or any restriction not authorized by law*”; [...] “*Habeas corpus is focused primarily on protecting the freedom of movement of persons, and its nature as a legal instrument is to protect that aspect of the right to liberty. It is therefore necessary that some sort of restriction be placed on the beneficiary’s freedom*” [footnote omitted]. In view of the foregoing, it is clear that the proceedings of this Court—because it has so ruled—on the issue of *habeas corpus* are confined to any “restriction” imposed on the right to personal liberty [footnote omitted].

On this basis, the provisions of Article 11(1) of the Constitution of the Republic should also be taken into account in order to determine that, despite the stipulation that no one may be “*deprived*” of his freedom, among other rights, without having first been heard and defeated in a lawfully conducted trial, and despite the fact that Article 13 of the same legal instrument addresses, in subparagraphs 1, 2, and 3, certain conditions of “prison” and “detention,” whether administrative or legal, such grounds are not exclusive when it comes to obtaining the protection of this Court through a writ of *habeas corpus* when the right to liberty has been impaired, insofar as they represent only some of the many situations that may give rise to a breach of the aforementioned right. Therefore, to identify (negative) interference with the right to liberty only as detentions or deprivation of liberty would be to limit the protection or the purpose of the protection that must be provided through *habeas corpus* for such a fundamental right.

As can be inferred from Article 11(2) of the Constitution of the Republic, *habeas corpus* serves as a reactive safeguard against all illegal or arbitrary **restrictions** on personal liberty—which, of course, should also include breaches of constitutional principles—understanding the term “restriction” as referring to all measures that could act to the detriment of liberty, all of which share a common nucleus, which is interference by means of the limitation, decrease, rationing, or reduction of the aforementioned right, even where there is no specific intervening situation of detention, prison, or confinement, as previously determined.

In view of the foregoing, it is essential to consider the way in which cases of forced disappearance have been handled. Here the jurisprudential criterion upheld by this Court appears to have favored a restrictive premise in taking up such cases, through *habeas corpus*. It has required the existence of a real and proved “detention” in order to take up a case. [In previous rulings, this Court determined that] “[...] *habeas*

*corpus cannot translate into an unending investigation into the whereabouts of a person whose family does not even know where he is.”*

Based on the aforementioned criterion, this Court determined that *habeas corpus* was not the appropriate procedure to satisfy the purposes of the petitioners, since proof of “detention” was regarded as a prerequisite for obtaining a judgment from this Court, and it related, moreover, the “forced disappearance of persons” to a mere crime. In doing so, it excluded this particular circumstance from the subject matter falling under its purview and abstained from ruling on the matter.

Taking into account the points expressed in the preceding paragraph; this Court’s status as the highest—although not the only—guarantor of respect for fundamental rights, and specifically the right to personal liberty through *habeas corpus*; and lastly, the armed conflict, a historical reality in our country that has given rise to numerous complaints concerning the practice of forced disappearance of persons during the period that saw gross violations of the right to liberty and the rights to, inter alia, personal security, dignity, physical integrity, and life; [...] this Court deems it admissible to take up the case *sub judice* and, therefore, *to modify the existing jurisprudential criterion so that it does not exclude from habeas corpus proceedings such egregious violations of the right to liberty as forced disappearances or other violations that might arise in actuality.* Considering the underlying motivation of such petitions, it is not appropriate to limit this guarantee solely to circumstances of “detention.” Rather, it must be applicable to any sort of restriction that may be imposed, above and beyond the circumstances previously established under the law and the Constitution. [*Emphasis added*]

See also PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Whereas 24 and 25:

*Habeas corpus* is a constitutional process recognized in Article 200.1 of the Constitution, which is applicable in case of any violation of, or threat to, individual liberty or related rights. This may be the case with respect to rights directly related to that of liberty, and to rights other than liberty, if the alleged violation of the right occurs specifically as a direct consequence of a situation of deprivation or restriction of the right to individual liberty [*footnote omitted*].

In the instant case, we are before what the doctrine defines as investigative *habeas corpus*, in which the constitutional judge, “based on his investigations into the whereabouts of the detained–disappeared person, seeks to identify the perpetrators of the constitutional violation for their criminal prosecution and punishment in the ordinary venue [...]” [*footnote omitted*]. This should be the work of the *habeas corpus* judge when conducting a preliminary investigation pursuant to Law No. 23506 in a case of forced disappearance.

Nonetheless, because of the lack of an evidentiary stage in constitutional cases, such procedures will not be very effective in identifying those responsible and subsequently locating the victim or his mortal remains. This proceeding, therefore, cannot offer protection in the terms in which it has been requested; *it is fitting, however, to*

*order the organ or organs of jurisdiction to initiate and conclude the necessary investigations to provide the urgent information required. [Emphasis added]*

## **ii. Habeas corpus cannot be suspended during a state of emergency**

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori)* (*List of Judgments 13.j*), Whereas 687:

It is correct that Lima and El Callao were under a State of Emergency pursuant to Supreme Decree No. 019-92-DE-CCFFAA. The latter extended the State of Emergency in the Department of Lima and the Constitutional Province of El Callao for a period of 60 days, counted from March 28, 1992, and suspended the guarantees set out in Article 2 (7), (9), (10), and (20-g) of the Constitution of 1979 [*footnote omitted*]. It also placed the Armed Forces in charge of internal security pursuant to Law No. 24150 and Legislative Decree No. 749. The reasons given for this were that terrorist acts were still occurring, which in turn justified the declaration of a State of Emergency (first Whereas).

It is also true, in light of the foregoing, that personal liberty—understood as the fundamental right not to be detained by the police authorities except pursuant to a well-founded legal warrant or in cases of apprehension *in flagrante delicto*—was specifically suspended, not derogated, when the State of Emergency was declared, or more accurately, extended. (In any event, it is not the right, which is inherent to the person, that is suspended, but rather its full and effective enjoyment). In these circumstances, it is not that the State of Emergency causes the legally protected value of personal liberty to disappear. Rather, it establishes an authorization of sorts, pursuant to which the liberty of a person may be restricted under certain conditions, and it would therefore provide a justification, that is, acting pursuant to the law (Article 20(8) of the Criminal Code). Therefore, the legally protected value remains in force and must continue to be respected, except when proceeding within the parameters of the legal authorization.

However, *the judicial protection of habeas corpus may not be subject to suspension*, as the IACHR has stated emphatically in Advisory Opinions No. 8/87, of January 30, 1987, and No. 9/87, of October 6, 1987 [*footnote omitted; emphasis added*].

A State of Emergency, by its very nature, is declared for the defense of the Constitutional State and the system of values that it recognizes and upholds; it is declared in response to situations of public emergency and to preserve the highest values of a democratic society, as paragraph 20 of Advisory Opinion No. 8/87 states. A State of Emergency may not be declared for the purposes of installing and consolidating a coup d'état, which is inherently a negation of the Constitutional State; and this argument is even less valid with respect to citizens who are not associated with terrorist subversion.

## B. Remedy of unconstitutionality (constitutional review of laws)

EL SALVADOR, *Remedy of unconstitutionality (Articles 1 and 4 of the Legislative Decree No. 486, General Amnesty for the Consolidation of Peace) (List of Judgments 7.a)*, Whereas:

The jurisprudence of this Court has understood defense of the Constitution to embrace “all of the legal and procedural instruments that have been established to uphold the constitutional legal order, prevent its infringement, punish the failure to observe it, and, most importantly, further the development and evolution of constitutional provisions” [*footnote omitted*].

This description is confined to the formal aspect of defense of the Constitution—the provisions of the Supreme Law—and makes no reference to the content of the constitutional provisions. Nonetheless, [on other occasions] this Court has asserted—following the declarations of the German Federal Constitutional Court [...]—that the essence of defense of the Constitution lies in safeguarding basic order, understood as “a political order based on the rule of law and premised on the self-determination of the people according to the will of the majority, on freedom and on equality,” under the guiding principles of “respect for human rights, the sovereignty of the people, the separation of powers, and the principle of plurality of parties together with the right to constitutionally establish and practice dissent.”

In other words, one may conclude from a systematic interpretation of the Salvadoran Constitution that it has the constitutional order at its core. This concept comprises three main elements: (a) the unrestricted enjoyment of basic rights by all persons; (b) the form of government, which must be republican, democratic, and representative, and a pluralistic political system; and (c) the establishment of an economic system that guarantees all inhabitants a dignified life as human beings.

Supervision of the constitutionality of laws is one means to this end. In the Salvadoran system this takes the form of proceedings to determine unconstitutionality, which are intended to nullify general provisions or specific acts that may be carried out in direct and immediate application of the constitutional legal order when an analysis of compatibility concludes that they are not in accordance with the Supreme Law.

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 39:

[W]hile the declaration of unconstitutionality of a legal provision is an act of the highest institutional gravity that requires the Court to exercise the greatest restraint in its supervision of the constitutionality of laws [...], it is true that the purpose of such a decision is to fulfill the duty of the State to organize the structures of the governmental apparatus through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights.

### 3. EXCLUSION OF MILITARY JURISDICTION

According to each particular constitution and other relevant norms, most domestic legal systems include a specific legal regime to regulate the military function and to set out the criminal and other consequences of the failure to comply with the obligations and prohibitions established under the relevant laws. Normally, this is accompanied by a special court jurisdiction empowered to take up these specific categories of wrongdoing.

Nonetheless, as the Inter-American Court of Human Rights has repeatedly stated, “in a democratic State, the jurisdiction of military criminal courts must be restrictive and exceptional, and they must only judge military men for the commission of crimes or offences that due to their nature may affect any interest of military nature.”<sup>32</sup> In this same jurisprudential line, the Inter-American Court has also underscored two basic reasons why international crimes<sup>33</sup> can never be subject to military jurisdiction. First, “the nature of the crime and the legally protected interest”<sup>34</sup> can never correspond to the interests of the military system. Second, the prosecution of such crimes must adhere to standards of due process,<sup>35</sup> including independence,<sup>36</sup>

32 See, for example, IACourtHR, *Case of La Cantuta v. Peru*, *supra* note 25, para. 142; IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, *supra* note 29, para. 131; IACourtHR, *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of January 31, 2006, Series C, No. 140, para. 189.

33 All of the judgments cited from the Inter-American Court of Human Rights refer to events that have been characterized as international crimes in either domestic or international proceedings.

34 IACourtHR, *Case La Cantuta v. Peru*, *supra* note 25, para. 142.

35 This criterion has been reiterated in Latin American as well as international jurisprudence, as noted in the first section of this chapter.

36 With regard to the principle of independence, the Inter-American Court has pointed out that the competent authorities must ensure “[...] the *de jure* and *de facto* independence of the [judges and officers of the court] involved in the incidents. This requires not only hierarchical or institutional independence, but actual independence’ [IACourtHR, *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 5, 2006, Series C, No. 150, para. 81]. Along these lines, the Court has pointed out that “[...] One of the principal purposes of the separation of public powers is to guarantee the independence of judges’ [IACourtHR, *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 5, 2008, Series C, No. 182, para. 55] in order to preclude inappropriate connections or relations between the judicial organs and the other branches of government. At the same time, it has stressed that independence must be ensured at the institutional level, *i.e.* the independence of the courts and their staff, meaning, in particular, the independence of judges. [...] [In general, international jurisprudence has] underscored the absolute relevance of [this principle], emphasizing that, as a fundamental norm of legal due process [it] is one of the cornerstones of the entire scaffolding for the protection of human rights and that it ‘is an absolute right that is not subject to any exception’ [Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, August 23, 2007, para. 19].” *Amicus curiae* submitted to the Inter-American Court of Human Rights by a group of academics and students from the University of Notre Dame, in the context of the process of the Request for an Advisory Opinion submitted by the State of Argentina on August 14, 2008.



impartiality,<sup>37</sup> and the competence of the natural judge;<sup>38</sup> according to the Court, the military jurisdiction satisfies none of these requirements, in theory or in practice, when it comes to the prosecution of international crimes.

Latin American jurisprudence has also drawn on these criteria to a certain extent. The decisions transcribed below recognize, in the first instance, that the military jurisdiction must always be applied restrictively and strictly for crimes committed pursuant to the military function or service. As a second principle, Latin American courts have emphasized that in light of the nature and extreme gravity of international crimes, they can never be regarded as crimes of function or service and therefore are automatically excluded from military jurisdiction. Third, the jurisprudence from the region has recognized that crimes involving civilians also must be excluded from the military venue based on the right to the natural judge.

*COLOMBIA, Remedy of unconstitutionality (Article 25 and other of Decree 2550-1988, Military Code) (List of Judgments 4.a), Whereas II.1.2, Whereas 4 and 6-7:*

The constitutional law [establishing the military criminal jurisdiction] is based on the premise that a member of the public force is acting in that capacity but is also acting as an individual and as a citizen. Public service neither exhausts nor concentrates all of the duties of a member of the public force, any more than it would with any other person. The military jurisdiction, therefore, cannot encompass all of the acts or omissions of a member of the public force. *For the purposes of criminal law, it is imperative to distinguish between acts or omissions that may be attributed to the subject as an active member of a military or police force and those that are his unique personal actions as an individual and an ordinary citizen.* The distinction is basic and obligatory in order to uphold the special status of military criminal law, which complements ordinary criminal law but can never be a substitute for it. [*Emphasis added*]

The concept of service comprises the sum total of the missions that the Constitution and the law assign to the public force, which are implemented by means of decisions and actions that ultimately are moored to those same legal underpinnings.

37 Various international organs have asserted that the principle of impartiality of judges, which is closely related to the principle of independence, “normally denotes absence of prejudice or bias” [ECourtHR, *Kyprianou v. Cyprus* (App. No. 73797/01), ECHR 73797/01, December 15, 2005, para. 118]. In order to determine whether these prejudices or biases exist, the international jurisprudence ‘has thus distinguished between a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect’ [ECourtHR, *Kyprianou v. Cyprus*, para. 118. See also ECourtHR, *Castillo Algar v. Spain*, ECHR 28194/95, October 28, 1998, para. 43.] [...] This position, which the ICTY also adopted, emphasizes the importance of an appearance of impartiality as part of the objective proof of impartiality. [ICTY, *Prosecutor v. Anto Furundžija, “Lasva Valley,”* Case No. IT-95-17/1, Appeals Chamber, Judgment, July 21, 2000, para. 182.]” *Amicus curiae* submitted to the Inter-American Court of Human Rights by a group of academics and students from the University of Notre Dame, *supra* note 36.

38 In this regard, the Inter-American Court of Human Rights has stated that “when the military courts assume jurisdiction over a matter that should be heard by the ordinary courts, the right to the appropriate judge is violated, as is, *a fortiori*, due process, which, in turn, is intimately linked to the right of access to justice.” IACourtHR, *Case La Cantuta v. Peru*, *supra* note 25, para. 142.

The fact that a crime is committed by a member of the public force while on active duty, irrespective of whether he was in uniform, using officially issued instruments, or taking some advantage of his official status, is not, in and of itself, sufficient cause for that crime to be taken up by the military criminal justice system. In effect, the notion of military or police service has its own substantive and legal import, which is revealed in the tasks, objectives, occupations, and actions that must be undertaken to fulfill the constitutional and legal function that justifies the existence of the public force. The military uniform does not, in and of itself, signal that whatever the person wearing it has done is a military crime per se. It is necessary to examine, therefore, whether his action or omission is related to a specific military mission. Moreover, even a member of the public force on active duty can commit a crime that falls outside the bounds of the military mission assigned to him: in this case, the fact that he was on active duty does not, in and of itself, allow him to escape prosecution under ordinary criminal law. The prerogatives and status conferred upon members of the public force forfeit all relation with the service when they are deliberately used to commit common crimes, which do not stop being considered as such simply because the agent has taken advantage of the aforementioned prerogatives and status. This is the case because the latter are not synonymous with service, nor, by the same token, do they have the power to transform a common crime into a service-related act.

Besides the subjective element, that is, being an active-duty member of the public force, a functional element must also be operating in order to constitutionally establish military jurisdiction: the crime must be service-related. This does not mean that the commission of crimes is an acceptable way to carry out the missions entrusted to the public force. To the contrary, the Constitution and the law repudiate and punish anyone who should choose such a path to fulfill the extremely important tasks associated with the use and deployment of force under the rule of law.

The requirement that the punishable act be directly related to a legitimate military or police mission or task stems from the need to preserve the special status of military criminal law and to avoid expanding military jurisdiction to the point that it becomes nothing more than a privilege of the military class. Accordingly, not everything that is done as a substantive consequence of service, or while on duty, can be included in the scope of military criminal law, since the reprehensible conduct must have a direct and close relationship with the military or police function. The concept of service may not be mistakenly extended to cover everything that an agent actually does. Otherwise, his action will be delinked in practice from the functional element at the core of this specialized branch of law.

COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán) (List of Judgments 4.e)*, Whereas 17:

In order for an active member of the public force to be investigated and tried under the military criminal justice system, the acts committed must bear a direct relation to the service. This means that the acts basically were conceived to fulfill a constitutionally mandated purpose but were characterized by a quantitative excess in their

execution. In other words, the public servant is acting **ab initio** with a legitimate purpose, but an error in the intensity of his actions means he oversteps the bounds of public authority. This might happen when, for example, in the act of arresting a person (legitimate aim), unnecessary force is used that damages his personal integrity (quantitative excess).

Hence, a mere temporal or spatial correlation between the crime committed and the duty being performed is insufficient. This would apply in cases where during the discharge of, or as a result of, the service, the individual deviates fundamentally from an initially legitimate act toward wrongdoing that exceeds the assigned constitutional role: for example, when after searching a premises, the public servant sexually abuses a woman who happens to be present. In this case it is not a matter of a quantitative excess; rather than an error in the intensity of the behavior, what actually happens is that a new relationship of risk is created (qualitative excess) that is completely foreign to the scheduled act of service.

## A. Crimes under international law are excluded from military jurisdiction

COLOMBIA, *Remedy of unconstitutionality (Article 25 and other of Decree 2550-1988, Military Code) (List of Judgments 4.a)*, Whereas II.1.2:

[T]he link between crime and service-related activity [as a basic element in establishing military jurisdiction] *is ruptured when the crime is unusually egregious in nature*, as is the case with what are known as crimes against humanity. In such circumstances, the case must be assigned to the ordinary courts, given the total contradiction between the crime and the tasks constitutionally entrusted to the Public Force. It should be noted in this regard that this Court has already pointed out that acts constituting crimes against humanity are manifestly contrary to human dignity and the rights of persons, and thus they have no nexus to the constitutional role of the Public Force, to the point that an order to commit an act of that nature is not deserving of any obedience whatsoever.

*[A] crime against humanity is so foreign to the constitutional role of the Public Force that it can never have any relationship whatsoever with actions inherent to the service*, since the very act of committing such crimes dissolves any link between the agent's behavior and the military or police discipline and role. Such acts, therefore, must be taken up in the ordinary courts. *[Emphasis added]*

The Court explains: it is obvious that an act of service can never be criminal and therefore any conduct inherent to the service is never deserving of punishment. That is why the military justice system does not take up the commission of "acts of service" but rather the commission of crimes "in relation" to the service. In other words, what this Court is affirming is not that crimes against humanity do not constitute acts of service, since it is obvious that in a State governed by the rule of law, a crime—whether against humanity or not—will never constitute legitimate conduct on the part of the agent. What the Court is saying is that some punishable acts are

so blatantly contrary to the constitutional role of the Public Force that the very fact of their commission ruptures any functional nexus between the agent and the service.

This same interpretation was presented by the Colombian Constitutional Court in decision COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán)* (*List of Judgments 4.e*), Whereas 10.

With respect to crimes of omission in particular, and their exclusion from military jurisdiction, see COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán)* (*List of Judgments 4.e*), Whereas 17 and 20:

The military forces have the absolute obligation to prevent any disregard for international humanitarian law—an absolute restriction even in states of exception, according to the provisions of Article 214 of the Constitution—and for the rights that may not be suspended in such circumstances pursuant to the international treaties ratified by Colombia (C.P. Article 93). To allow such acts to occur, whether by actively participating in them or by omission with respect to the duty of the State to safeguard the rights of its citizens, is a flagrant violation of the military forces' status as guarantors of the minimum and basic conditions of social organization. Therefore, *such acts can never be taken to be service-related.* [*Emphasis added*]

This poses the following question: When may an omission by the public force be considered unrelated to the service? The [a]nswer is as follows: in the same cases in which an active behavior bears no relationship to the constitutionally mandated mission of the public force. This means that the following omissions cannot be covered under the military criminal jurisdiction: (i) those that occur in the context of an operation in contravention *ab initio* of the values, principles, and rights enshrined in the Constitution (the original intent was to arbitrarily arrest someone and no effort is made to prevent the violation of this right); or (ii) those arising in the context of a legitimately conceived operation, in the course of which a fundamental deviation occurs (failure to prevent the mistreatment of a person who is putting up no resistance whatsoever in a combat situation); or (iii) those that entail a failure to prevent gross violations of human rights or international humanitarian law (a member of the public force who has the duty to protect the civilian population from harm fails to prevent such harm from occurring). In the aforementioned cases, the guarantor must always have within his sphere of competence the specific duty to prevent the outcomes that violate fundamental rights.

When a member of the public force has the specific duty to prevent such an outcome (holds a position as guarantor) and fails to take saving action when the material means to do so were at his disposal (the logistical means to protect the legally protected value were available to him), then the harmful consequences that he failed to prevent are imputed to him; it is not merely the failure to discharge a duty. Therefore, if the guarantor fails to take saving action to protect the legally protected values under his sphere of responsibility, the human rights violation would be attributed to him just as if he had participated actively in it.

In view of the foregoing, we can draw the following four conclusions with respect to the military criminal forum:

(i) If the omission is equivalent to an active infringement of human rights, then a violation of fundamental rights is imputed, which ultimately bears no relation to the service. This equivalency is present when the member of the public force holds a position as guarantor based on the risks he must control (guarantors of surveillance or custody) or the legally protected values he must protect (guarantors of protection).

(ii) If the omission does not give rise to an imputation of liability for the outcome and amounts only to a violation in the discharge of duties, **the general rule** is that it is a service-related act. In other words, crimes of wrongful omission [*omisión impropia*], in which the outcome is a gross violation of a fundamental right or of international humanitarian law, are always unrelated to the service, while crimes of mere omission [*omisión propia*] as a general rule may be considered related to the constitutionally mandated mission of the public force.

(iii) Once the position as guarantor has been established, a gross violation of human rights shall be imputed regardless of the type of involvement in the crime (perpetration or participation), the degree to which the act was carried out (attempt or consummation), or the subjective attribution (intention or recklessness), since each of these cases amounts to participation in a single act.

(iv) Acts of omission designed to cover up a crime that was committed by someone else and that cannot be imputed to the member of the public force, when they occur in the aftermath of a gross violation of human rights, are forms of cover-up that are not directly related to the constitutional role assigned to the public force. An example would be facilitating the escape of groups acting outside the law following an attack on a civilian population and failing to take any action to apprehend those responsible. In general, the same can be said of related crimes (of commission or omission) designed to facilitate or cover up a gross violation of human rights.

Regarding this same topic, see MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Fourteen:

[The crime] of genocide [...] which is [attributed] to the accused [allegedly was committed] during the Argentine dictatorship, which lasted from 1976 to 1983, against a group of people who were regarded as opponents of the military regime to which [the accused] belonged, that is, against the civilian population that opposed the dictatorial regime to which [the accused] belonged. Therefore, their conduct cannot be considered to have endangered a legal military interest or one protected by the armed forces in the discharge of their constitutional mission, because, it should be underscored, the acts for which they are standing trial targeted the civilian population, endangering its personal security.

## B. Civilians are excluded from military jurisdiction

PERU, *Habeas corpus submitted by Alfredo Crespo Bragayraco (List of Judgments 13.a)*, Whereas 2:

[T]he Inter-American Court [of Human Rights] has stated that “all persons subject to trial of any kind before a State body must have the guarantee that such body is competent, independent and impartial” [*footnote omitted*]. The right to a competent judge guarantees, for the purposes of the case under study, that no person may be subjected to a process before an authority lacking in jurisdiction to resolve a particular dispute.

In this regard, the Constitutional Court notes that when the appellant was sentenced to life in prison for the crime of terrorism, on July 6, 1993, the 1979 Constitution that was then in force stated in Article 282 that “in cases of offenses committed during the course of duties, Members of the Armed Forces and the National Police shall be subject to the respective jurisdiction and to the Code of Military Justice, whose provisions are not applicable to civilians, except as stipulated in 235.”

Thus, since the military justice venue is reserved for the purpose of trying military personnel for offenses carried out during the course of their duties, as well as, in exceptional circumstances, civilians, only for the offense of treason committed during a foreign war, the appellant should not have been tried in said military court, and therefore a violation of the right to the natural judge has been established.

## 4. EXTRADITION

Extradition can be defined, in general terms, as the surrender of an individual accused or convicted under the jurisdiction of another State to face charges or to serve out a sentence. It is regulated by countless bilateral treaties as well as by the laws of more than half the countries of the world.<sup>39</sup>

According to some important studies on the subject, there are at least two basic principles governing extradition that have been elevated to rules of international custom. These are (i) the requirement of double criminality, which means that the conduct for which extradition is being requested is considered a crime in the country requesting extradition, as well as in the country to which the request is directed, and (ii) the specialty principle, which means that the requesting country may only prosecute the crimes for which extradition has been granted.<sup>40</sup> There are other criteria that some authors consider to be general principles governing extradition, while other scholars treat the same principles as circumstances based on which extradition might be denied. These criteria include the refusal to extradite (i) a national; (ii) a person accused of or penalized for a political offense; (iii) in cases where certain punishments might be imposed, such as capital punishment or life imprisonment; (iv) when the applicable statute of limitations

<sup>39</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, *supra* note 12.

<sup>40</sup> *Ibid.*

has expired under the laws of either of the States involved; and (v) when the same set of facts has already been the subject of a previous proceeding or has already been punished.<sup>41</sup>

In the case of international crimes, extradition has been established as one of the oldest and most important forms of inter-State cooperation in criminal matters, as it is directly related to the obligation to prosecute and punish such crimes.<sup>42</sup> In this regard, the Inter-American Court of Human Rights has concluded that

“[t]he full exercise of justice in this type of [crimes] imposes [on States] the compulsory obligation to have requested the extradition of the accused promptly and with due diligence. Consequently, according to the general obligation of guarantee established in Article 1(1) of the American Convention, [the States Parties] should adopt the necessary measures, of a diplomatic and judicial nature, to prosecute and punish all those responsible for the violations committed, which includes furthering the corresponding extradition requests by all possible means. The inexistence of extradition treaties does not constitute a motive or justification for failing to institute a request of this type.”<sup>43</sup>

In practice, when deciding on the validity of an extradition request for this category of crimes, States must bear in mind their nature and extreme gravity as well as the specific legal regime that should govern them. For example, specific rules on the non-applicability of the statute of limitations to such crimes or the inadmissibility of any exclusion from liability based on functional immunity must be observed in such cases.

At the same time, States must bear in mind the alternative obligation enshrined in some international treaties and identified in the doctrine as *aut dedere aut judicare*, pursuant to which the organs of the receiving State must exercise their jurisdiction should the request for extradition be denied.

While the Latin American jurisprudence presented below does not explicitly address all of the issues outlined in this brief introduction, it does include additional aspects that complement the criteria established in international jurisprudence and doctrine. First, some of these decisions focus on the nature of the extradition procedure and distinguish it from criminal proceedings to establish individual responsibility. Notwithstanding this distinction, the jurisprudence is also clear in asserting that extradition has a critical role to play in the fight against impunity. Second, the jurisprudence from the region upholds the obligation, set out in various international treaties, to establish the necessary legal framework so that States can request or grant the extradition of individuals accused or convicted of this specific category of crimes. Finally, and perhaps most importantly in light of their groundbreaking nature, rulings by some of the region’s courts have affirmed that all extradition processes must give particular consideration to the rights of victims of international crimes, including the right to access to justice and to know the truth about what happened.

41 For a more in-depth analysis of the principles and exceptions presented here, see, among others, Ilias Bantekas and Susana Nash, *International Criminal Law*, *supra* note 14.

42 According to Bassiouni, the first extradition treaty on record dates back to the year AD 1268. “It was a peace treaty between Ramses II, Pharaoh of Egypt, and Hatussilli, Prince of the Hittites, in which the parties solemnly promised to surrender to one another their nationals who were wanted fugitives.” M. Cherif Bassiouni, *Introduction to International Criminal Law*, *supra* note 12, at 348.

43 IACourtHR, *Case of Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgment of September 22, 2006, Series C, No. 153, para. 130.

## A. Overview

MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Ten and Twelve:

[A]n international extradition proceeding does not have the same purpose as a criminal prosecution. In the case of the former, the State receiving the request hands over the requested individual, who is present in its territory, to the petitioning State, because that individual has been accused, prosecuted, or convicted of committing a crime, so that he can be tried or imprisoned to complete his sentence. In contrast, the purpose of a criminal prosecution is to determine which acts may be characterized as crimes, in order to impose the relevant punishment as applicable. It follows, then, that as the judge in the case under appeal rightly determined, this extradition proceeding does not constitute a criminal trial or adversarial proceeding per se, nor are the applicable laws and treaties criminal laws, since the purpose of such a proceeding is not to prosecute and punish a defendant. Instead, it should be reiterated, it is designed to satisfy the requirements of the relevant international treaty and regulations so that, in compliance with those requirements, the requested individual may be turned over to the petitioning State. [...] [T]he State receiving the request does not have the obligation to verify the existence of a crime and the probable responsibility of the subject of the request, since such requirements may only be imposed for the issuance of an arrest warrant or an official order of imprisonment [...].

[...] The Mexican authorities have recognized that the *granting of extradition must be based on solidarity as a means of combating impunity* and on the principle of international reciprocity [...]. [*Emphasis added*]

## B. Conventional obligation to establish the normative bases for extradition

COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.B:

The Convention imposes the commitment to include this type of crime among those subject to extradition in any treaty that may be signed in the future (Article V).

MÉXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Twelve:

[Article] VII [of the Convention on the Prevention and Punishment of the Crime of Genocide] stipulates that, for purposes of extradition, genocide and the other acts listed in Article III shall not be considered political crimes, and it includes the commitment to grant extradition in accordance with the legislation and the treaties in force.



With regard to different positions on the obligation of the State to extradite and the refusal to extradite nationals, see GUATEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas IV:

The theory that States do not turn over their own citizens to foreign judiciaries is widely held and has sufficient expressions in comparative law. In this regard, the Spanish law of March 21, 1985, Article 3, states: “1. *The extradition of Spaniards or foreigners whose crimes should be taken up by Spanish Courts shall not be granted under Domestic Law. [...] 2. When extradition is denied on the grounds set forth in the preceding paragraph, if the State in which the acts were carried out should so request, the Spanish government shall notify the Attorney General’s Office [Ministerio Fiscal] of the acts giving rise to the request so that, where appropriate, legal action may be taken against the subject of the request. Should it be so decided, the requesting State shall be asked to forward the record of proceedings that have already taken place, or a copy thereof, in order to pursue the criminal case in Spain*” [*the complete text of Article 3 is included in the original decision*].

Even though this legal protection that the Kingdom of Spain affords its nationals, and even foreigners, for crimes which, under its domestic law, should be taken up by Spanish courts, has been limited by the Constitutional Court with respect to events that take place outside its territory, *the court has recognized the preferential application of international treaties over passive extradition law and has conditioned its acts on its evaluation of the requesting country’s respect for human rights (a situation that the court evaluates with regard to States, not individuals)*.<sup>44</sup> It has called for even greater supranational supervision for nationals of countries that are signatories of the Rome Convention, which are voluntarily subject to the jurisdiction of the European Court of Human Rights [*footnote omitted; emphasis added*].

The previously referenced [Spanish] ruling [...] reiterates that “the Spanish Constitution, in contrast to other constitutional texts, does not expressly prohibit the extradition of nationals,” meaning that it also does not expressly allow it, which lends constitutional legitimacy to the aforementioned Passive Extradition Law. This issue would not arise in Guatemala’s Constitution, which, pursuant to Article 27(3), would allow it, under the conditions set out therein, in the understanding that it was applicable to events occurring in foreign territory or to crimes against humanity or violations of international law subject to a supranational jurisdiction to which that country was party.<sup>45</sup>

44 Note added to the original: In the overall context of the judgment, by using this language, the Guatemalan Constitutional Court intends to emphasize that based on the criteria developed by Spanish jurisprudence on the extradition of persons of that nationality, the Spanish courts would no longer be evaluating the individual circumstances of the case in question, but rather the human rights “record” of the country requesting extradition. This would exceed the principles that normally govern the functions of a domestic organ of jurisdiction when processing an extradition.

45 Note added to the original: The complete text of Article 27(3) of the Constitution of the Republic of Guatemala, referred to herein, provides, textually: “Article 27. Right to asylum. [...] For political crimes, no attempt shall be made to extradite Guatemalans, who shall under no circumstances be handed over to a foreign government, *save as provided in treaties and conventions concerning crimes against humanity or against International law. [...]*” [*Emphasis added*]

This comparison demonstrates that the Kingdom of Spain is requesting that Guatemalan nationals be turned over to it with no guarantee of reciprocity (i.e., the turning over of Spaniards for crimes committed in Spanish territory), either under its Passive Extradition Law or under the interpretive conditionality emanating from its highest court of constitutional jurisdiction, including the fact that there is no supranational control organ to which both are party, since Guatemala does not have access to the European Court of Human Rights nor Spain to the Inter-American Court of Human Rights.

### **C. Rights of the person to be extradited and of the victims of the crimes must be guaranteed during extradition processes**

COLOMBIA, *Appeal motion (Manuel Enrique Torregrasa Castro) (List of Judgments 4.k)*, Whereas 28:

When the Court considers—in light of the powers of the domestic legal system, respect for the State’s international human rights commitments, and the effective exercise of fundamental rights—that a specific case of extradition would give rise to a violation of the rights of the victims, the decision [or opinion about the lawfulness of the extradition] should be negative; or, if it is favorable, it should be conditioned so as to avoid abandoning those who have suffered the consequences of the crimes confessed by the demobilization candidate, and the failure to heed these conditions should result in a negative response, with its respective consequences.

## **5. EXTRADITE OR PROSECUTE (PRINCIPLE OF *AUT DEDERE, AUT JUDICARE*)**

The principle of *aut dedere aut judicare* refers to the “alternative obligation to extradite or prosecute which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct.”<sup>46</sup> In other words, this principle requires States to exercise their jurisdiction to prosecute certain behaviors that are considered criminal under international law if they deny extradition of those allegedly responsible to the requesting State.

For the purpose of criminal procedures based on this principle, it is clearly irrelevant that the crimes were not committed in the territory of the State refusing extradition, which, according to this principle, will still have the duty to prosecute.

Significantly, while many international treaties that establish criminal definition contain a provision of this kind, very few of them refer to the *core* international crimes that are the subject of this study.

46 M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare*, *supra* note 10, at 3.

The four Geneva Conventions of 1949, for example, expressly provide for this alternative obligation with respect to grave breaches of their provisions.<sup>47</sup> In contrast, while this obligation is found in certain international human rights treaties,<sup>48</sup> there is no comparable conventional norm applicable to genocide,<sup>49</sup> crimes against humanity, and war crimes, other than the aforementioned grave breaches.

Despite this conventional shortcoming, Bassiouni argues that the principle of *aut dedere aut judicare* has been elevated to a customary rule with respect to this category of crimes, and therefore it is binding on the States of the international community.<sup>50</sup> While this position clearly leaves room for some criticism, it does provide a sense of the theoretical-legal debate that continues to surround this principle.

In other interpretations, the principle of *aut dedere aut judicare* has been regarded as a conventional form of universal jurisdiction,<sup>51</sup> which will be examined in subsequent sections. While these positions are certainly important, the principle of universal jurisdiction will be examined

47 Articles 49, 50, 129, and 146, respectively, of the 1949 Geneva Conventions: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case." In his study of this principle, Bassiouni has classified the aforementioned articles as the third type of formulation of the principle of *aut dedere aut judicare* in international treaties. The other three types correspond to (i) certain traditional extradition treaties that might contain a similar formulation, (ii) the International Convention for the Suppression of Counterfeiting Currency, and (iii) the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970.

48 See, for instance, Article 12 of the Inter-American Convention to Prevent and Punish Torture, adopted December 9, 1985, and entered into force February 28, 1987: "Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11." Article VI of the Inter-American Convention on Forced Disappearance of Persons, adopted June 9, 1994, and entered into force March 28, 1996: "When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition." Article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, and entered into force June 26, 1987: "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article."

49 The Convention on the Prevention and Punishment of the Crime of Genocide only establishes that States Parties undertake to grant the extradition of an individual accused or convicted of genocide, which cannot be considered a political crime for those purposes. In contrast, the convention does not include an article that envisages the principle of *aut dedere aut judicare*.

50 M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare*, *supra* note 10.

51 See, for instance, Institute of International Law, "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes," Seventeenth Commission, Krakow Session, Resolution III, 2005, operative paragraph 2: "Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person."

separately for the purposes of this study as a way to accentuate the particular characteristics of each principle. However, this should not be interpreted as discarding the possibility of a genus-species relationship between them.

In any event, the lack of clarity surrounding this principle may offer one explanation for the limited jurisprudential development in this area coming from Latin American courts. Of the decisions examined, only the following one specifically refers to this principle by reaffirming that States refusing extradition are bound to prosecute, even in the absence of an applicable conventional norm. Notwithstanding the importance of such statement, it is important to mention that in this particular case the Guatemalan State was bound by an explicit and irrefutable international obligation to exercise its criminal jurisdiction over the acts for which extradition was being requested, since the crimes were perpetrated in its territory and those allegedly responsible for them were its own nationals. As a result, it could be argued that the principle of *aut dedere aut iudicare* is not relevant in this case and has been invoked in error.

GUATEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas VI:

While the jurisdiction of the Guatemalan State cannot recognize as viable the request for extradition of citizens of this country [to the Kingdom of Spain, which requests the extradition based on the principle of universal jurisdiction in Spanish law,] [...] the interested party would still have the power to submit a complaint to the Public Ministry for the prosecution of any crimes as may be identified, and based on the rule of *aut dedere aut iudicare*, the State receiving such a request [that is, Guatemala,] would be bound to fulfill its essential function of imparting justice.

## 6. UNIVERSAL JURISDICTION

Universal jurisdiction is unquestionably the most controversial of the principles that a State might invoke to assert its jurisdiction over alleged international crimes. In the absence of a conventional or customary rule, or an international legal interpretation that defines this principle,<sup>52</sup> one must look to some of the more prominent scholarly works for a definition. The Institute of International Law,<sup>53</sup> for example, has concluded that “[u]niversal jurisdiction in criminal

52 In the case known as *Arrest Warrant, Democratic Republic of the Congo v. Belgium*, the International Court of Justice focused on the issue of immunities of certain state officials, leaving aside the issue of universal jurisdiction, which was only addressed in the joint dissenting vote of judges Higgins, Kooijmans, and Buergenthal. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002*. In addition, the issue of universal jurisdiction has been mentioned tangentially in certain decisions by the international criminal tribunals. These decisions include ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, December 10, 1998, para. 156, and SCSL, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, *supra* note 28, para. 71 and following.

53 The Institute of International Law (Institut de Droit International) was founded in 1873 and is composed of some of the most prominent scholars in international public law, who meet every two years to discuss matters that the institute considers most germane to the development of international law. The institute aims to contribute to the consolidation of and respect for international law through the adoption of resolutions, which are subsequently presented to States and international entities.

matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.”<sup>54</sup>

Beyond the concept itself, there are other technical debates surrounding the exercise of universal jurisdiction. Which crimes may, in fact, be subject to it? Must the accused be present in the territory of the State seeking jurisdiction based on this principle? Is universal jurisdiction a concurrent or complementary principle? Is it possible to argue immunity in proceedings initiated by a third State pursuant to this principle?

While it is important to continue to examine and debate these issues, currently there appears to be consensus around certain basic criteria: (i) universal jurisdiction is a customary rule and therefore need not be set out in an international treaty;<sup>55</sup> (ii) it “may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in an international or non-international armed conflict”;<sup>56</sup> (iii) trials may not be conducted *in absentia* under this principle, although an investigation may proceed without the presence of the person allegedly responsible, followed by a request for his or her extradition;<sup>57</sup> (iv) universal jurisdiction is of a complementary nature with respect to other jurisdictions;<sup>58</sup> and (v) international rules governing personal immunities must be observed.<sup>59</sup>

These questions are not merely a technical-legal exercise. They have clear implications and consequences associated with the reluctance to apply, and to accept the application of, universal jurisdiction in the context of an international system still dominated by political distrust between States, a tendency to cling to traditional interpretations of the sovereignty principle, and fears of destabilizing delicate international relations. As Bassiouni asserts:

54 Institute of International Law, “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes,” *supra* note 51, operative paragraph 1.

55 *Ibid.*, operative paragraph 3.

56 *Ibid.*

57 *Ibid.* “Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender.”

58 *Ibid.* “Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.” “Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.”

59 See ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, at 3, para. 61. Likewise, see Institute of International Law, “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes,” *supra* note 51, operative paragraph 6: “The above provisions are without prejudice to the immunities established in international law.”

“Unbridled universal jurisdiction can cause disruption in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes.”<sup>60</sup>

Despite these criticisms, the international community clearly has upheld this principle and called on States—through various international instruments adopted in the United Nations framework, for example—to incorporate the necessary normative framework into their domestic laws so that their courts may invoke universal jurisdiction to take up cases involving the commission of international crimes.<sup>61</sup>

In the context of these lively debates, which are reflected in Latin American legal interpretations, the following sections provide excerpts from some of the more relevant decisions concerning this principle. It is significant to note that the courts clearly uphold its existence, despite discrepancies in terms of its content and scope and the preconditions for its application. Equally important are the criteria set out in the jurisprudence concerning the organ empowered to determine the jurisdiction of a given court acting pursuant to this principle, in keeping with the principle of *compétence de la compétence*. Finally, as already mentioned in this brief introduction, in several noteworthy arguments Latin American jurisprudence has attempted to address, albeit peripherally, the question of sovereignty and the exercise of universal jurisdiction.

60 M. Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,” 42 *Virginia Journal of International Law* 81, at 82 (Autumn 2001). For a slightly more critical stance on universal jurisdiction in the international system, see, for example, Madeline H. Morris, “Universal Jurisdiction in a Divided World: Conference Remarks,” 35 *New England Law Review* 337, at 338 (2000–1): “The case for universal jurisdiction would be a strong one if we could assure that prosecutions would be brought and tried impartially and with due process; that the law applied would consist exclusively of the established content of international law; and that relevant national executive organs would hold a veto power over prosecutions, to be used (only) when a prosecution might bring dire international-relations consequences. The problem with universal jurisdiction is that we cannot ensure that these conditions are met. Rather, there is the real risk of prosecutions that are politically motivated; that are carried out without due process; that apply law that exceeds what is universally accepted as established international law; or that are undertaken without sufficient political control to avoid dire consequences on the international plane.”

61 See, for instance, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, United Nations Commission on Human Rights, Sixty-first session, E/CN.4/2005/102/Add.1, February 8, 2005 (hereinafter “Set of Principles to Combat Impunity”). Principle 21: “States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law.”

COLOMBIA, *Remedy of unconstitutionality (Article 13 and others of Decree 100-1980, Criminal Code) (List of Judgments 4.b)*, Whereas 3:

Under the principle of universal jurisdiction, all States of the world have the authority to assume jurisdiction over the perpetrators of certain crimes that have been especially condemned by the international community—such as genocide, torture, or terrorism—as long as the individuals in question are in their national territory,<sup>62</sup> even if the crime was not committed there. While this principle has not been generally accepted as customary, it has been explicitly enshrined in several international agreements that are binding on Colombia, including the Conventions against Torture, Genocide, Apartheid, and Illicit Traffic in Narcotic Drugs. One can therefore argue that, at this stage of development of international law, the principle of universal jurisdiction applies when it is enshrined in a treaty.

[E]ssentially, it is a mechanism for international cooperation to combat certain activities that have been repudiated by the community of nations, and, as such, it coexists with internal criminal jurisdictions of States without supplanting them. This is explicitly stated in the many treaties in which this principle is enshrined. Second, this principle, which has to do with the universal jurisdiction of States, should not be confused with the recently established jurisdiction of the International Criminal Court. They are two distinct manifestations of international collaboration to fight crime, which, although complementary, are different in nature. Once it has become operational, the Court's jurisdiction will be independent of that of its State Parties and its sphere of competence will be autonomous and distinct from theirs.

See also COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.3.

GUATEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas IV:

The notion of asserting jurisdiction when the events did not occur in the territory of the requester nor affect its citizens is not derived from the language of the Extradition Treaty, but rather from the modern concept of Universal Jurisdiction [...].

As complement to the previous decisions, see also EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascochea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

62 Note added to the original: As noted in the introduction to this section, States are free to regulate the principle of universal jurisdiction as they see fit under their domestic law. In this sense, some States have, in effect, made the presence of the accused in their territory a condition for the exercise of jurisdiction based on this principle. However, since there is no absolute criterion in this regard in international law, other States may exclude this requirement and use extradition as a means to secure custody of a person for the purposes of a criminal proceeding based on the principle of universal jurisdiction.

[I]t has been held that a [series of criminal acts or crimes against humanity] impair the rights of the individual and that it is in the general interest to protect these rights by authorizing the extraterritorial prosecution of these crimes based on the *principle of universal justice*.

*The principle of universal jurisdiction modifies the principle of territoriality in criminal law, which is closely linked to the concept of national sovereignty.* This is the case because crimes against humanity traverse borders and transcend national sovereignty and must therefore be prosecuted using a supranational approach. Regardless of where such crimes are committed, States must prosecute the perpetrators; they must try and convict them even though no citizen or national of the State in question was a victim of the crimes in question. This is because any one of the States represents Humanity whenever an offense has been committed against the latter, in the absence of an International Tribunal, and when the State where the crime was committed was not capable of prosecuting it.

## **A. Determination of a tribunal's jurisdiction when exercising universal jurisdiction**

*MEXICO, Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a), Whereas Twelve:*

[T]he appellant [...] essentially argued the Spanish government's lack of jurisdiction to request his extradition and stand trial for events that occurred in Argentina, by virtue of the fact that the positive law of a country is one manifestation of the sovereignty of a State and is essentially applicable in its territory.

[He further argued] [t]hat it is true that there may be exceptions to the foregoing premise, primarily based on interests involving a point of intersection, such as when the security of the requesting State is affected in one way or another, or when the perpetrator or victim is a national of that State. In such cases, the right of a State to prosecute incidents that occurred outside its territory is applicable in accordance with the principles set out in the different international conventions [...]. He reiterated, at the same time, that in order for universal jurisdiction to be applicable, the accused must be arrested within the territory of the State that intends to try him, as set forth in article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment [or Punishment] [...].

[This High Court states that in the absence of a] legal principle in this regard [...] it is necessary to conclude that, in an extradition process at the request of a foreign State, it is not feasible for the authorities of Mexico to analyze the competence of the court in the requesting country, since that would entail an analysis or study of the domestic law of the requesting country in order to determine the lawfulness or unlawfulness of the determination of competence by the court that issued the judicial ruling requesting extradition. This would violate the sovereignty of the requesting



State, because *it would infringe upon the said court's powers to examine the matter at the appropriate moment in the respective criminal proceeding.* [Emphasis added]

[It is true that the rules governing extradition] establish the obligation of the United Mexican States to demand of the requesting State that the allegedly extraditable individual be brought before a competent tribunal that was lawfully established prior to the crime of which he is accused in the request, so that he may be tried and sentenced under the law.

Nonetheless, this provision cannot be interpreted [as requiring] the Mexican State to examine the competence of the courts of the requesting State. This is because the aforementioned clause only requires the Mexican authorities, in processing the extradition request, to demand of the requesting State that the allegedly extraditable individual be brought before a competent tribunal that was lawfully established prior to the crime of which he is accused in the suit, so that he may be tried and sentenced under the law, and it is therefore neither an obligation nor a power of the Mexican authorities to examine the competence of the courts of the requesting country.

In contrast, see GUATEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Anibal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas V:

[T]his Court does not have any particular comment on the opinion contained in the judgment on the merits, to the effect that grounds for the universal jurisdiction claimed by the Kingdom of Spain are found in Article 24.1 of the Organic Law of the Judiciary [right to effective legal protection] “*and in the Convention on genocide.*” Regarding the first [i.e., the norms contained in the Organic Law of the Judiciary], because it is worthy and respectful of [the Kingdom of Spain’s] sovereignty to so decide [the scope of its national laws]. Second [regarding the Convention on Genocide], because the fact that an international convention does not prohibit it does not mean that it empowers a State to exercise a unilateral jurisdiction that purports to be binding with respect to other States that are also party to that Convention and have not given their consent in this regard. In any event, there is a similarity with the criteria for the exercise of power within States—which only enjoy the powers expressly vested in them by those who have granted them that sovereignty, unquestionably the people themselves—at the international level, where States can only enjoy the powers that the State parties have expressly conferred on them or recognized, whether through bilateral, multilateral, or universal conventions. The rejection of the Helms-Burton Law in the United States of America by significant sectors of international opinion could serve to illustrate this concept.

In [...] its Judgment 237/2005 [...], the [Spanish] Constitutional Court [...] summarizes: “*Hence, the conclusion reached by the Supreme Court would be that only when the remedy of universal jurisdiction has been expressly authorized in conventional law would it be legitimate and applicable under Article 96 CE [Spanish Constitution] and under Article 27 of the [Vienna] Convention on the Law of Treaties [...].*” The [Spanish] Constitutional Tribunal finds the interpretation set forth in the appeal judgment to be extremely harsh and therefore adopts its own understanding of the matter. In its view,

the Genocide Convention's silence on the matter of "*extraterritorial international jurisdiction*" cannot be construed to mean that it prohibits it. The Court goes on to state that, from this standpoint, the Convention "leaves open the possibility for signatory States to establish mechanisms for the prosecution of genocide (...) particularly when the underlying aim of the Genocide Convention is inclined toward an obligation to intervene, rather than toward any prohibition against intervention."

This Court can offer no objection to the Kingdom of Spain's establishment of an "extraterritorial jurisdiction," since it would not be valid to intervene in matters pertaining to the political sovereignty of Spain, even by means of a reproach. It is clear that Spain, like any other State, may introduce any organ it deems advisable in the exercise of its political authority. There must, however, be no doubt about the ability of another State, also sovereign and independent, to refuse to submit to a jurisdiction that the international community has not legitimately recognized, whether through bilateral, regional, or universal conventions or treaties. For example, it is impossible to deny the authoritative nature that an international jurisdiction would have, such as the International Criminal Court, the Inter-American Court of Human Rights, or the criminal tribunals established on an *ad hoc* basis by the United Nations, under the conditions of each of those international organs.

## **B. Incorporation and application of the principle of universal jurisdiction (extraterritoriality), international law, and state sovereignty**

*COLOMBIA, Remedy of unconstitutionality (Article 13 and others of Decree 100-1980, Criminal Code) (List of Judgments 4.b),* Whereas 3:

There is considerable doctrinal debate over the relationship between the exercise of jurisdiction and international law. Some argue that jurisdiction is a historical-political fact that encounters a series of limitations and prohibitions in international norms, while others assert that jurisdiction is, in fact, conferred by those same norms. Leaving aside that discussion, the fact is that today certain rules have been consolidated to which States must adhere in their jurisdictional exercise if they are to avoid incurring liability. These rules—bona fide principles of international law that are binding as norms of customary law—are obligatory for Colombia [...].

[Just as with the territoriality principle,] there is also constitutional support for the principles of extraterritoriality, so long as they are applied in accordance with the requirements of reciprocity, equity, and respect for foreign sovereignty.

[A]rticle 13 [of the Criminal Code] enshrines the territoriality principle as a general norm, while recognizing certain exceptions in light of international law precepts that would justify extending Colombian law to cover acts, situations, or individuals in other countries, as well as applying foreign laws, in certain cases, in Colombian territory. Consistent with this, Article 15 [of that code] enumerates the acceptable grounds for "extraterritoriality," including [...] the international principles

outlined [nationality of the perpetrator, nationality of the victim, the protective principle, and the principle of universal jurisdiction].

There is, therefore, a remarkable degree of consistency between the international rules, the Constitution, and the legal provisions being challenged. In order to preserve that congruence [...] it is essential to retain the disputed phrasing of Article 13,<sup>63</sup> as it is the only one that ensures respect for the principle of [international] reciprocity [...]. In other words, *it is pursuant to this particular phrasing that Colombia, just as it is legally vested with the power to exercise its extraterritorial jurisdiction, accepts that other States may do the same, in accordance with the applicable rules of international law. [Emphasis added]*

[T]he Court [reiterates] that: (a) international law is not confined to the treaties; (b) the exceptions to the territoriality of the law are not synonymous with diplomatic immunities, nor are they exhausted by them, and, moreover, their basis lies in customary rules as well as in general principles; and (c) as a result, it is neither valid nor reasonable, in light of the Constitution, the law, or international law, to assert that any crime committed in Colombia has to be tried by national judges.

In contrast, see GUATEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Antibal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas V:

This Guatemalan Court has held that, in effect, the human person may do anything that is not prohibited, while the public power may only do what it is expressly authorized to do. This Guatemalan Court cannot accept the Constitutional Court's argument that "*neither the Convention on Genocide, as stated earlier, nor the Treaties mentioned in the disputed judgment include any prohibition against the unilateral exercise of universal jurisdiction that might be considered to have been breached by provision of Spanish Law,*" since there is nothing to indicate that a "universal" community has conferred a "universal jurisdiction" on Spain that would enable the latter to represent the former by means of substantive powers to judge, and to enforce a judgment, which historically has been one of the non-delegable attributes of the legally and politically established society in International Law.

The interpretive guidelines of the meritorious Constitutional Tribunal, as has been noted repeatedly, must be respected. Its arguments with respect to its own competence should not be questioned by the Guatemalan constitutional justice system, before which these arguments lack legal consequence. While there was no reason to deny that Spanish "legal protection," in its sphere, might be *effective*, in the specific case it overlooks one of its own substantive elements: that it must also be *legal*.

In this respect, the question to ask is "on whom and on what does jurisdictional authority depend," and the response is that this authority is "conferred by the State, which delegates it to judges." Therefore, the provision found in Article 117.1 of the

63 "Article 13 [of Decree 100 of 1980, issuing a new Criminal Code]. Territoriality. Colombian criminal law shall apply to any person who breaches it within the national territory, except under the exceptions enshrined in international law." The underlined phrase in the text of the code is the basis for the request for a declaration of unconstitutionality.

Spanish Constitution, “Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates ...,” has no validity whatsoever in the sovereign territory of Guatemala, since, in the matter under consideration, norms cannot be peremptory when they obligate other independent States to yield their legitimate jurisdiction to another that has been decreed unilaterally, without having followed the course, whether codified or according to universally recognized custom, of International Law.

Nonetheless, there must be no doubt that the jurisdiction claimed by the Kingdom of Spain is intended to achieve justice, just as there can be no question that the Guatemalan Court is also pursuing the same purpose.

This Court has issued this opinion with respect for the domestic policy of the State requesting the disputed extradition, but making it clear that, with such antecedents, which are not common in other cases of activation of universal jurisdiction, the object of the Spanish Court in this regard crosses the natural boundaries of International Law.

Additionally, regarding the determination of the willingness and capacity of a given national judicial system to investigate and prosecute in relationship with state sovereignty, see GUATEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas V:

This matter is of utmost importance inasmuch as related judgment 237/2005 justifies the intervention of an extraterritorial State to take up circumstances such as those reported, when there are “*serious and reasonable indications of inactivity that come to constitute a lack of either the will or the capacity to effectively prosecute the crimes.*” That is to say that a State, acting unilaterally, could pass judgment on another State in matters having enormous import for national sovereignty (and even honor): the *will* to prosecute and punish horrendous crimes, such as, to quote the Spanish investigative judge, “*the extermination of the Maya people*” [...], or the ability to ensure the functioning of the country’s judicial organs. In both cases, this would entail a value judgment by one State with respect to another in regard to the latter’s political ethics or its ability to perform its most basic functions, such as administering justice. In both situations, foreign tutelage could be imposed on the so-called *rogue State* or failed State without a prior resolution by the Security Council or the United Nations General Assembly.

## 7. INTERNATIONAL CRIMINAL JURISDICTION

Up to this point, this chapter has focused on Latin American jurisprudence as it relates to the exercise of domestic jurisdiction over international crimes, as well as to one of the most relevant forms of inter-State cooperation in this regard, extradition. As already noted, however, domestic jurisdictions are just one part of a global system of international criminal justice. Over the past several decades, the establishment of several international criminal justice institutions has

led to the consolidation of the *direct enforcement system of international criminal law*. Among such institutions, the International Criminal Court might be considered as the ultimate materialization of the direct enforcement system.

There is much to be said about the international criminal courts and tribunals established since the end of World War II, from the legality of their establishment, jurisdiction, and proceedings and the political-legal motives behind their creation to the jurisprudential interpretations they have developed. All of these issues have been, and will continue to be, the subject of analysis and debate. Rather than delve more deeply into these important questions, however, the purpose of this study is to present domestic jurisprudence as it relates to the international criminal tribunals.

This section transcribes a series of rulings that examine the evolution of international criminal justice. These rulings, which cover the historical-legal trajectory dating back to the initiatives that preceded World War II, contribute to a better understanding of the present-day structure of the direct application system, its legitimacy, and its relationship to domestic jurisdictions.

Additionally, the decisions presented in the second section focus specifically on the International Criminal Court. It should be noted that some of these decisions refer to the principle of complementarity that governs the relationship between the court and domestic jurisdictions. Although this principle has been analyzed extensively in the doctrine, it would appear that erroneous interpretations persist, making the voice of domestic courts all the more important.

Finally, and of utmost relevance, Latin American courts have addressed and drawn attention to the salient characteristics and specificity of one of the most important forms of cooperation between the International Criminal Court and domestic jurisdictions, namely, the surrender of individuals to the former. Surrender, as the courts have recognized, is not equivalent to extradition and this should be understood. At the same time, in discussing this issue it is important to recall that the Rome Statute explicitly establishes the obligation of all States Parties to cooperate with the court, which includes the surrender of persons.<sup>64</sup>

## A. Evolution of international criminal justice

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.1:

During the last century, millions of human beings perished as a result of genocide, crimes against humanity, and war crimes, all serious crimes recognized as such under international law. Because of the limited legal instruments available under international humanitarian and human rights law to assign individual responsibility, the perpetrators of such acts were rarely handed criminal convictions. In order to break the cycle of violence and impunity, the international community has sought to promote the establishment of legal mechanisms to ensure that such acts are prosecuted and the perpetrators and their aiders punished at the domestic and international levels [*footnote omitted*]. This movement to combat impunity and uphold human rights

64 See Part IX of the Rome Statute of the International Criminal Court.

and international humanitarian law led to consensus around the need to establish a permanent international body to try those responsible for egregious crimes. This consensus is reflected in the 2002 entry into force of the Statute of the International Criminal Court [...]. This is in contrast to an earlier attempt, which failed to achieve consensus. The League of Nations was unsuccessful in its attempt to achieve the same purpose: a treaty establishing an International Criminal Court was adopted in 1937 but never entered into force because the number of ratifying States was insufficient.<sup>65</sup>

The first attempt in the twentieth century [*footnote omitted*] to define individual criminal responsibility at the international level and [create] a tribunal to prosecute it dates back to the end of World War I. The allied forces established an international investigatory commission during the preliminary peace conference in Paris in 1919 to try German Kaiser Wilhelm II [*footnote omitted*] and German and Turkish officers for crimes against the laws and customs of war [*footnote omitted*]. The commission completed its report in 1920, provided a list of 895 alleged war criminals, and drew up specific charges against several of them. Nonetheless, nothing further was done in terms of international prosecutions. For political reasons, the Allies did not pursue the trials of those responsible for such acts [*footnote omitted*]. It was agreed, however, that potential German perpetrators would be tried by German courts in what were known as the “Leipzig Trials” [*footnote omitted*].

Following the aforementioned failed attempt by the League of Nations, at the end [*sic*] of World War II, in January 1942, the allied powers signed the St. James Declaration [*footnote omitted*] for the creation of the “United Nations War Crimes Commission,” an intergovernmental investigatory body, as a first step toward establishment of the Nuremberg International Military Tribunal. Despite scant political support and a shortage of staff and funding, this Commission succeeded in putting together 8,178 files on alleged war criminals and operated as a documentation center for the governments. Nonetheless, the Commission had no institutional ties with the International Military Tribunals of Nuremberg and the Far East. The Commission continued its investigatory work and later developed a list of 750 Italian war criminals.

The International Military Tribunal of Nuremberg was established in 1945 by the London Agreement [*footnote omitted*], which set out, in the appendix, the statute of the new tribunal and the definition of the crimes for which mainly the leaders of the Nazi regime would stand trial [*footnote omitted*]. The process was fraught with controversy, not only because it was a tribunal of the victorious powers—meaning that criminals would be tried by a tribunal created by means of an act that their national State had not recognized—but also because the tribunal’s regulations were

65 Original note in Judgment C-578/02 of the Colombian Constitutional Court: “Convention for the Creation of an International Criminal Court, United Nations War Crimes Commission, Doc. C.50(1), September 30, 1944, drafted based on the Convention for the Creation of an International Criminal Court, League of Nations, OJ Spec. Supp. No. 156 (1936), LN Doc C.547 (I), M.384(I), 1937, V(1938), cited in W. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2001), page 5 [...]”

extremely complex as a result of the effort to create a procedure that would be compatible with the various criminal law systems. Something similar occurred with the Tokyo tribunal [*footnote omitted*] imposed unilaterally by the United States occupation forces in Japan, which also was not accepted by the national State of the defendants. For its part, the Nuremberg Tribunal culminated with the formal indictment of 19 Nazi criminals, 12 of whom were convicted and sentenced to death for crimes against peace, war crimes, and crimes against humanity. The Tokyo Tribunal, which only tried war crimes, handed down prison terms to 25 people, none of whom served their full sentences, as most were released near the end of the 1950s [*footnote omitted*].

This first step, the trial of war criminals [*footnote omitted*], was gradually complemented, beginning in 1948, by international conventions, including the pioneering Convention against Genocide, which provides for the establishment of an International Criminal Court [*footnote omitted*]. The United Nations assigned the International Law Commission the task of drafting a Statute for the International Criminal Court, but the Cold War impeded progress in this regard [*footnote omitted*].

[Decades later,] [i]n 1992, the perpetration of acts stemming from an ethnic cleansing policy in the provinces of Yugoslavia caused international public indignation and was condemned in several resolutions of the Commission on Human Rights and the Security Council. In Rwanda, a policy of ethnic extermination and atrocities also caused dismay in the international community. In both cases, representatives of the States and international experts concluded that circumstances warranted the creation of international criminal tribunals, which were established by United Nations Security Council resolutions in 1993 for the former Yugoslavia, based in The Hague, and in 1994 for Rwanda, headquartered in Arusha.

These two experiences strengthened the international consensus around the importance for the human rights system and international humanitarian law protections of creating a permanent international tribunal that would try individual perpetrators of crimes such as genocide, torture, war crimes, and crimes against humanity. Hence, in 1995, the United Nations General Assembly established a Preparatory Committee to complete the text of the Statute of the International Criminal Court based on the work that the International Law Commission had resumed in 1990, and the draft it had adopted in 1994; the text of the Statute of the International Criminal Court was adopted at a diplomatic conference [in 1998].

URUGUAY, *Case "Condor Plan" in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 5:

The Statute of the Nuremberg Tribunal, which was part of the London Agreement signed on August 8, 1945, by the United States, Great Britain, the Soviet Union, and the Provisional Government of France, was a turning point in upholding the principle of individual or personal responsibility in international crimes and was an early test of international criminal justice that tried universal crimes over and above the domestic jurisdiction of nations.

See also HONDURAS, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 9.a)*:

Historically speaking, we consider it germane, in substantiating this opinion, to refer to the role of the Honduran Delegation to the Paris Peace Conference held in Versailles following World War I. As is well known, the great allied powers decided that Wilhelm II of Hohenzollern, former Kaiser of Germany, should be extradited from the Low Countries, where he had taken refuge, so that he could stand trial for his war responsibilities. In response to this position, our delegate, Dr. Policarpo Bonilla, argued against “the opinion of the eminent jurisconsults who have drafted an article setting out the rules for asserting war responsibilities.”

In this brilliant piece of oratory, Dr. Bonilla argued as follows: “The written law of all civilized countries has enshrined the irrefutable principle of natural law, which is that no one may be tried or punished for a crime that has not been previously and explicitly defined and criminalized by law.” And referring to the trial against Kaiser Wilhelm II, he asserted, “There is truly no law or international precedent for doing it.” Dr. Bonilla ended his speech with these words: “We vigorously condemn the crimes and atrocities committed by the German army and its allies. We have not yet had the opportunity to observe firsthand the devastation that has been visited upon Belgium, France, Serbia, and the other invaded countries. We abhor it nonetheless, since the world is filled with the piteous cries of those ill-fated populations that have been martyred in every way. And it is for that reason that we would wish to see provisions included in the Covenant of the League of Nations, or in any other [covenant] that might be established, that are effective enough to ensure that such assaults on humanity can never be repeated and to guarantee harsh punishment should they ever be carried out. This would fill the present gap in International Law.”

Dr. Bonilla evidently saw the need for international rules to define and punish future offenses such as those committed in the conflagration that had just ended. In this sense, he was advocating international application of the principles enshrined in criminal law, such as the principle of legality, to avoid trying and punishing individuals for crimes that had not been previously established, when they obviously could not have known that their actions were illegal.

Dr. Policarpo Bonilla did not go so far as to anticipate the need for an international court to take up such crimes, but the gap in International Law that he so aptly pointed out has been filled by the Rome Statute, which sets out the crimes over which the [International Criminal] Court shall have jurisdiction and the respective punishments.

Following World War II, three months after the end of the war in Europe, the allied countries—Great Britain, the Soviet Union, the United States of America, and France—signed an agreement in London establishing an International Military Tribunal, known as the Nuremberg Tribunal, to try crimes against peace, war crimes, and crimes against humanity. We are all aware of the criticisms levied against the activities of that tribunal, particularly assertions that the tribunal’s decisions violated the principle of legality, just as Dr. Bonilla had pointed out decades before with re-



spect to the attempt to try Kaiser Wilhelm II. Similarly, with the end of the war in the Pacific, the Tokyo Tribunal was established with the same characteristics mentioned hereinabove.

Recently, International Tribunals have been created for the former Yugoslavia and Rwanda to prosecute crimes committed during the armed conflicts in those countries. The same inconsistencies noted in the aftermath of World War II have been pointed out with respect to those tribunals.

## B. International Criminal Court

COSTA RICA, *Constitutional review of the bill to approve the Rome Statute of the International Criminal Court (List of Judgments 5.b)*, Whereas IV and VII:

[T]he inadequate response of the international community to the serious violations committed in recent years (in the former Yugoslavia, Rwanda, etc.) highlighted the need to “institute a judicial organ of a permanent nature and with the broadest sphere of action possible, which would give expression to the desire of a large number of States to ensure that impunity is not the result of the most abhorrent cruelties between human beings.” [...] The preamble to the Statute of the Court, [...] moreover, recognizes that throughout the twentieth century, millions of children, women, and men have been victims of unimaginable atrocities, which, due to their grave nature, are a matter of concern to the international community as a whole, since in addition to harming the most precious attributes of those millions of people, they deeply shock the conscience of humanity and cannot—as has been the case up to now—continue to go unpunished. From this standpoint, *the Statute in question proposes measures at the national level and at the level of international cooperation, meant to ensure that the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression in their many forms, inter alia, will be effectively subject to the appropriate judicial action and punishment.* Such actions not only will contribute to putting an end to impunity, a direct outcome that would be sufficient in and of itself, but at the same time will have a dissuasive effect on the perpetration of such crimes in the future. Now then, although the context justifying the creation of an International Criminal Court is absolutely clear, it is important to closely examine certain specific aspects of the text of the Statute forwarded by the Legislative Assembly, whether because of their importance or because they represent a departure from the way they are usually treated in the jurisprudence. [*Emphasis added*]

The “Rome Statute of the International Criminal Court” [...] [is] an international legal instrument whose purpose is to create the International Criminal Court, an organ that is to be complementary to national criminal jurisdictions rather than a substitute for them. This International Criminal Court shall be a permanent institution and shall be vested with the power to exercise its jurisdiction over persons for the most serious crimes of concern to the international community, such as the crime of genocide, crimes against humanity, and the crime of aggression.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.3:

[The establishment of the International Criminal Court] is an enormous step forward in the effective protection of the dignity of human beings through international legal instruments. This is true for many reasons, among which the Court underscores the following.

First, for a historical reason. The establishment of an International Criminal Court with permanent jurisdiction represents a milestone in the construction of international institutions to effectively protect the nucleus of basic rights through trials to establish individual criminal responsibility that are conducted by a Court that is neither *ad hoc*, nor the product of the triumph of some States over others at the end of a war, nor the result of a decision by certain powerful States to impose their rules on the inhabitants of another [...]. Unlike its predecessors, the International Criminal Court was born of an international consensus around the creation of a permanent and independent international entity for the future prosecution of perpetrators of serious international crimes.

Second, for an ethical reason. The punishable acts under the jurisdiction of the International Criminal Court encompass violations of the basic parameters of respect for the human being that may not be disregarded, even in situations of international or internal armed conflict, and that have been gradually identified and defined by the international community over several centuries with the aim of prevailing over barbarity.

Third, for a political reason. The same power wielded by those who in the past have ordered, promoted, abetted, planned, allowed, or covered up punishable acts subject to the jurisdiction of the International Criminal Court also enabled them to keep the truth from being made known and justice from being done. The International Criminal Court was created by a statute, one of the core purposes of which is to prevent the impunity of transitory power holders, or those under their protection, up to the highest echelons, and to ensure the effective exercise of the rights of the victims and others who have been adversely affected to know the truth, obtain justice, and obtain fair reparations for the harm caused by those acts, so that they will not be repeated in the future.

Fourth, for a legal reason. The Rome Statute represents the crystallization of a process of reflection by jurists from different traditions, perspectives, and backgrounds. It is designed to broaden the sphere of international law by erecting a regime of international individual criminal responsibility buttressed by an organic structure that is institutionally capable of administering justice at the global level while respecting the dignity of each nation, but that remains unencumbered by prior political authorizations and acts under the aegis of the principle of impartiality.

### i. Principle of complementarity

COSTA RICA, *Constitutional review of the bill to approve the Rome Statute of the International Criminal Court (List of Judgments 5.b)*, Whereas VII:

According to the Rome Statute, [the International Criminal Court] shall serve as the last resort to punish crimes that cross the threshold of gravity, and, as indicated, it operates on the principle of complementarity. It has not been established, therefore, with the intention of replacing national courts, but rather to complement them. In this sense, it shall only act when the national courts of jurisdiction are unable or unwilling to perform their duty to investigate or prosecute alleged criminals for the crimes set out in the Statute, and it does so with the intention of putting an end to impunity for crimes.

In this way, there will be two avenues for the prosecution of such crimes: a domestic one that functions under the jurisdiction of each State, and another consisting of the International Criminal Court, whose competence, in any event, shall be decided in accordance with the rules set forth in the Statute itself for this purpose.

HONDURAS, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 9.a)*:

It is important to note the aspect of complementarity, pursuant to which the Court shall not admit a case when (a) it is the subject of an investigation or trial in the State with jurisdiction over the matter, unless the latter is unwilling to conduct the investigation or trial or is genuinely unable to do so; (b) the matter has been investigated by the State that has jurisdiction over it and the latter has decided not to prosecute the person concerned, unless the decision is a result of its unwillingness or genuine inability to do so; (c) the person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the Court, when a judgment has been made, is not permitted under the rule of *res judicata*.

Specifically, the principle of jurisdictional complementarity can be summed up as follows: the Court may not take up cases that are being tried or have been taken up by the courts of the State with jurisdiction over them, unless, as stated hereinabove, that State lacks the ability or the political will to do it, in which case the Statute contains precepts indicating the criteria to follow.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.3:

Article 1 of the Rome Statute generally states that the competence of the International Criminal Court is complementary to domestic criminal jurisdictions. The scope of this guiding principle of the Court is developed subsequently in Articles 17 and 19, Part II of the Rome Statute, and also in Article 20, which governs the principle of *res judicata*.

The aforementioned provisions regulate the conditions governing the relationship between domestic criminal jurisdictions and the exercise of the jurisdiction of the International Criminal Court. As a general principle, the Rome Statute provides that it falls to States to exercise, in the first place, their criminal jurisdictions against those persons who may be responsible for carrying out the acts described in Articles 5 and 8 of the Statute and who are present in their territory. Nonetheless, when a State Party to the Statute refuses (unwillingness) or is unable (inability) to investigate or prosecute such individuals, then the International Criminal Court may do so. It is therefore understood that the International Criminal Court is complementary to domestic criminal jurisdictions.

On this point it is important to stress the differences between the concepts of jurisdiction and admissibility as they are used in the Rome Statute, inasmuch as the distinction between the two was developed to guarantee the sovereignty of States and to ensure that the International Criminal Court does not supplant or substitute for domestic jurisdictions.

The term jurisdiction [*competencia*] refers to the parameters of the International Criminal Court's sphere of jurisdiction. This sphere is defined based on several criteria such as the types of crimes that may be taken up by the International Criminal Court (*ratione materiae*); the time the acts were committed, which also determines whether they may be taken up (*ratione temporis*); the place where the acts occurred, which determines whether or not the Court may exercise its functions (*ratione loci*); and the nationality of the individuals subject to its jurisdiction (*ratione personae*).

The term admissibility refers to a different issue, that is, the possibility that the International Criminal Court may not admit a case despite having jurisdiction over it. While satisfying the requirements for jurisdiction is an imperative, a decision concerning the admissibility of a case is discretionary. Thus, the International Criminal Court may have jurisdiction over a "situation" because the aforementioned conditions of *ratione materiae*, *ratione temporis*, *ratione loci*, and *ratione personae* have been satisfied, but it may declare the specific "case" inadmissible because it has already been taken up by a domestic criminal court of jurisdiction having primacy, or for any of the other reasons set out in the Statute [*footnote omitted*].

This is meant to ensure that the International Court's jurisdiction respects the effective exercise of a State's sovereignty. Nonetheless, the jurisdiction of the International Criminal Court also entails a limitation on the sovereignty of States [...].

According to the Rome Statute, the sovereignty of States is limited in various ways. First, it is the International Criminal Court, and not each State Party, that decides when a State is unwilling or has been unable to exercise its jurisdiction. Second, the analysis of the existence of grounds for a State's inability or unwillingness assumes that the Court will examine the conditions under which the State has exercised, or is exercising, its jurisdiction. Third, the exercise of the sovereign jurisdiction of States to define the criminal punishments and proceedings for serious human rights violations such as genocide, crimes against humanity, or war crimes must be done in such a way that it is compatible with international human rights law, international humanitarian law, and the purposes of the struggle against impunity as underscored in the Rome

Statute. Fourth, when the International Criminal Court admits a matter, the domestic venue no longer has jurisdiction over it.

[T]he Court points out that the International Criminal Court does not have absolute autonomy to exercise its jurisdiction. The Statute not only provides that such exercise shall occur in the extraordinary circumstances enumerated in its Articles 17 and 20, but also provides that, should the Court decide to exercise its jurisdiction, the States may challenge such exercise (Article 18) if the decision of the International Criminal Court does not fall within the authorized circumstances set out in Articles 17 and 20, and they may lodge an appeal before the Pre-Trial Chamber involving any decisions on the exercise of jurisdiction that may be taken by the Criminal Court or the Prosecutor.

The Rome Statute establishes the general principle of the autonomy and primacy of domestic jurisdictions in the prosecution of the crimes defined in Part II of that instrument, thereby reaffirming the sovereignty of States Parties to exercise legal jurisdictions in their territory. But it also authorizes the complementary exercise of the jurisdiction of the International Criminal Court for the investigation and trial of those crimes in the event that States are unable or unwilling to do so.

BOLIVIA, *Remedy of unconstitutionality (Article 138 of the Criminal Code) (List of Judgments 2.b)*, Whereas II.3.2:

The International Criminal Court, according to Article 1 of its Statute, is of a complementary nature with respect to national jurisdiction. Therefore, the matter to be judged on the international plane must not have been investigated and a criminal prosecution must not have been initiated. In sum, the State with jurisdiction over a particular person must have shown itself to be unwilling to pursue the matter. In this way, domestic jurisdiction is respected and, in turn, the domestic laws of the States that have ratified the Statute of the International Criminal Court are respected, as long as they contain the provisions set forth in the latter.

## ii. Extradition versus surrender of persons to the International Criminal Court

ECUADOR, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 6.a)*, Whereas 7:

Article 89(1) of the Statute provides that the International Criminal Court may transmit a request for the “arrest and surrender of a person [...] to any State on the territory of which that person may be found and shall request the cooperation of that State...” According to that same provision, the States Parties shall undertake to comply with this request in accordance with “the procedure under their national law” and taking into account the relevant provisions of the Statute, which envisage different situations, including some in which the State must consult with the Court.

The first point to consider is that the Statute does not use the term “extradition,” but rather the word “surrender,” which has a distinct semantic meaning. The latter is

explained in Article 102 (of the Statute), which states: “(a) *surrender means the delivering up of a person by a State to the Court, pursuant to this Statute; (b) extradition means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.*”

Indeed, extradition takes place between two States, while the case at hand is qualitatively different: it concerns the surrender of a person accused of a serious human rights crime to a high-level international judicial body that represents the community of nations and is vested with a mandate to try and punish, according to the rules of due process, which serve as a guarantee for the defendant.

*COLOMBIA, Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f), Whereas 4.17.11:*

During the drafting and debate of the Statute establishing the International Criminal Court, one of the most controversial issues was the possibility of using the legal definition of extradition to enable a State Party to bring a particular individual before the Court. The greatest concern was that this particular definition could easily be used to circumvent the obligation of full cooperation, given the level of discretionality acknowledged in this area in domestic procedures and in international law. This led to the decision to use a different legal term: surrender.

According to the provisions of the Rome Statute, the process of surrendering a person is applicable regardless of the person’s nationality and the place where he allegedly committed the crimes for which he will be investigated and tried. Moreover, the Statute stresses the distinction between surrender and extradition, and therefore States must take into account the special nature of the proceedings before the International Criminal Court when regulating the procedure and adopting a decision with respect to this request.

According to the Rome Statute, “surrender” means “the delivering up of a person by a State to the International Criminal Court,[”] while “extradition” means “the delivering up of a person by one State to another as provided by treaty, convention or national legislation.”

Additional substantive distinctions between surrender and extradition, however, can be inferred from the same Statute. First, the general rule regarding extradition is that it is a discretionary act, so that the State is under no obligation to extradite the person requested. The surrender of a person by a State Party to the International Criminal Court is always mandatory pursuant to Article 89(1) of the Statute.

Second, while extradition requires compliance with the principle of double criminality, that is, the conduct on which the extradition is based must be considered a crime in both States, the surrender of a person to the International Criminal Court requires only that the behavior that has given rise to the request be among those set out in the Rome Statute, regardless of whether it is defined as a crime in the domestic legislation of the State Party receiving the request.

Third, extradition is governed by the rule of specialty, pursuant to which the extradited person may only be prosecuted for the allegations set out in the request,

while in the case of surrender it has been established that “a person surrendered to the Court (...) shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered” (Article 102 [*sic*] RS). Additionally, Article 61(7)(c)(ii) allows the Pre-Trial Chamber to modify the charges prior to the trial based on the evidence [*footnote omitted*].

Fourth, extradition is based on the principle of reciprocity, while in the case of surrender, States may not request that a person in the custody of the Court be returned to them for trial in their jurisdiction, inasmuch as it refers to an act in which the Court is the one requesting this type of assistance and the States are the ones to carry out the request, and not the other way around (Articles 89 and 102(a) RS).

Fifth, a State may refuse to extradite its nationals [*footnote omitted*]. Likewise, factors such as the advanced age of the defendant or the belief that the person will be tried for discriminatory reasons such as ethnicity, race or religion, or political motives are grounds upon which States may refuse to extradite an individual, whereas none of these motives are admissible before the International Criminal Court, inasmuch as its jurisdiction is exercised *ratione materiae*, regardless of the defendant’s national origin, background, race, or beliefs.

Because of these distinctions between extradition and surrender, Article 91(2) provides that States Parties shall take into account the “distinct nature of the Court” in determining their internal requirements for surrender procedures. The Rome Statute sets out the minimum rules that States must follow to proceed with the surrender of a person, but it also provides that States may regulate this procedure and establish other requirements as long as they are not more burdensome than those applicable to extradition requests. In any case, should the State choose not to regulate the matter under its domestic law, the Rome Statute establishes sufficient procedures and requirements, in accordance with the international principle of good faith, for compliance with a request from the International Criminal Court.

### ***a. Surrender of a citizen to the International Criminal Court***

COSTA RICA, *Constitutional review of the bill to approve the Rome Statute of the International Criminal Court (List of Judgments 5.b)*, Whereas IX–XI:

[T]he case now brought before this Chamber deals with whether turning a Costa Rican over to an international criminal tribunal, specifically, to the International Criminal Court, for trial under the terms of the Rome Statute is a breach of Article 32 [which stipulates that “No Costa Rican may be compelled to abandon the national territory”]. In this regard, it is important to bear in mind that this is not a matter of extraditing a Costa Rican to the jurisdiction of a court of a foreign country. Furthermore, according to the Statute, the Court, whose jurisdiction shall be limited to the most serious crimes of concern to the international community as a whole (Article 5), “may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State,”

and not necessarily or exclusively at its headquarters in The Hague, the Netherlands, which is the host State (Article 3.1).

In order to resolve the issues raised hereinabove, it is also necessary to recall the notable evolution of the Political Constitution in the area of protection of fundamental rights, whether through the direct expansion of these rights (in other words, in the text itself) or through the recognition of the unique significance of the human rights instruments that have been incorporated into the legal system. The vision of a peaceful community respectful of human rights, which was incorporated into these normative systems based on a longstanding political conviction, has become a legal imperative that clearly reinforces guarantees such as the one set out in Article 32, but at the same time *delimits it, in this unfinished struggle for freedom and dignity of the human person, as a guarantee whose effective exercise may not be overextended to the point of becoming an impediment or obstacle to the achievement of the purposes of that struggle*. It defines and limits this right so that it is not an absolute guarantee in the terms mentioned earlier, but one that must coexist with other forms of protection of fundamental rights and must even cede its literal claim of unlimited extendibility when it comes to fulfilling the values and principles of justice that serve as its basis, because they are also the basis of the Constitution. [*Emphasis added*]

[...] In other words, the proper meaning of Article 32 is that of a limited guarantee rather than an absolute one. Its scope must be determined taking into account what is reasonable and proportionate to the purposes that this guarantee is meant to serve, and, in the spirit of the Constitution, its recognition must be compatible with the means or instruments for the protection of human rights, which are still new and are constantly evolving and improving.

ECUADOR, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 6.a)*, Whereas 7:

It is common knowledge that one of the reasons for not extraditing nationals is for their own protection, on the assumption that it is better for a national to be tried in his own country rather than in a foreign State. In the instant case, the International Criminal Court cannot be considered a foreign court, as it has an international jurisdiction—of a complementary nature, as mentioned—established in accordance with international law and with the collaboration and consent of the State Party.

In light of these considerations, the Constitutional Court is able to conclude that the surrender of persons accused of genocide, crimes against humanity, war crimes, and the crime of aggression cannot be equated with the legal definition of extradition. Accordingly, this provision of the Statute does not contradict the Constitution of Ecuador where it states, in Article 25, that the extradition of an Ecuadorian shall not be granted.



HONDURAS, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 9.a)*:

Article 89(1) of the Statute provides that “the Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State.” And Article 102 of our Magna Carta provides that “No Honduran may be expatriated or surrendered by the authorities to a foreign State.” The question is: Would not the surrender of a Honduran to the International Criminal Court constitute a violation of the constitutional article cited herein? Our response is negative, because it is not a matter of surrender to another State, but rather to a supranational tribunal to whose jurisdiction our State is subject, once the Statute has been ratified. Extradition is another matter and the surrender of a national to the Court cannot be regarded as covered under its definition.

## 8. RIGHTS OF THE VICTIMS IN CRIMINAL PROCEEDINGS INVOLVING CRIMES UNDER INTERNATIONAL LAW

While not directly a matter of jurisdiction, the rights of victims of international crimes have taken center stage in debates concerning criminal proceedings before domestic and international judicial organs. In recent years, the United Nations General Assembly and the former UN Commission on Human Rights approved, respectively, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>66</sup> and the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.<sup>67</sup>

The products of an extensive consultation and consensus-building process, these instruments express the general sense of the international community with respect to the rights of

66 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by United Nations General Assembly, Resolution 60/147, December 16, 2005 (hereinafter “Basic Principles on Victims’ Rights”).

67 See *supra* note 61.

victims of crimes under international law. They affirm a number of rights, including (i) the right to truth,<sup>68</sup> (ii) access to an effective legal remedy,<sup>69</sup> and (iii) the right to obtain reparations.<sup>70</sup>

Similarly, the Inter-American Court of Human Rights has stressed that within the right to access to justice in relation to the general obligations of the State, victims of such crimes have the right, *inter alia*, to learn the truth about what happened, to have access to and participate in effective criminal proceedings conducted with due diligence and in a reasonable time frame, and to obtain adequate reparations.<sup>71</sup>

Moreover, in the rules and practice associated with international criminal proceedings, the Rome Statute of the International Criminal Court has recognized three basic rights of victims: (i) the right to obtain protection measures, (ii) the right to participate in proceedings before the Court, and (iii) the right to obtain reparations.<sup>72</sup>

Similarly, Latin American jurisprudence has vigorously asserted that victims of international crimes have rights that must be recognized, upheld, and satisfied in the framework of criminal proceedings. The first section transcribes some of the most relevant decisions in this regard that refer generally to all of the rights identified above.<sup>73</sup> The second section presents jurisprudence focusing specifically on the rights of victims and their relatives to know the truth.

68 The Set of Principles to Combat Impunity particularly recognized the individual and collective dimensions of the right to truth, characterizing it as an inalienable and imprescriptible right. This instrument also indicates a series of mechanisms to guarantee this right independently of any judicial proceedings that might be instituted in relation to these crimes. These measures include commissions of inquiry (usually in the form of truth commissions) and the recovery of, preservation of, and access to historical archives. See Principles 2 to 18 of the Set of Principles to Combat Impunity.

69 In particular, the Basic Principles on Victims' Rights (*supra* note 66) recognize, in Principle VII, the obligation of States to (i) "disseminate, through public and private mechanisms, information about all available remedies [...]"; (ii) take the necessary measures to ensure the privacy of the victims and their representatives and protect them from intimidation or pressure; (iii) make legal assistance available to the victims; and (iv) make available all diplomatic and other means to ensure access to justice for the victims.

70 In terms of access to reparations, the two instruments mentioned provide that States should establish all of the mechanisms necessary, including legal remedies or administrative programs, to guarantee this right of the victims. Similarly, both documents enumerate as the principal means of reparation the following: restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition. See Principle IX of the Basic Principles on Victims' Rights, *supra* note 53, as well as Principles 31 to 36 of the Set of Principles to Combat Impunity, *supra* note 61.

71 See, for instance, IACourtHR, *Case of Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment of March 1, 2005, Series C, No. 120; IACourtHR, *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of September 15, 2005, Series C, No. 134; IACourtHR, *Case of Gómez-Palomino v. Peru*, Merits, Reparations and Costs, Judgment of November 22, 2005, Series C, No. 136; IACourtHR, *Case of the Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2006, Series C, No. 148; IACourtHR, *Case of Goiburú et al. v. Paraguay*, *supra* note 43; IACourtHR, *Case of La Cantuta v. Peru*, *supra* note 25; IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, *supra* note 29; IACourtHR, *Case of the Rochela Massacre v. Colombia*, *supra* note 28; IACourtHR, *Case of Cantoral-Huamani and García-Santa Cruz v. Peru*, *supra* note 28; IACourtHR, *Case Heliodoro Portugal v. Panama*, *supra* note 28; IACourtHR, *Case of Ticona-Estrada et al. v. Bolivia*, Merits, Reparations and Costs, Judgment of November 27, 2008, Series C, No. 191.

72 See, in particular, Articles 68 and 75 of the Rome Statute of the International Criminal Court.

73 It should be noted that this section omits a considerable number of recent decisions that have solidly upheld victims' rights in the framework of Latin American criminal justice reform. The methodology used to select the judgments to be included prioritized decisions adopted in the framework of a criminal proceeding, or a remedy within a criminal proceeding, for the commission of crimes that the courts themselves

COLOMBIA, *Constitutional remedy (acción de tutela) submitted by Nory Giraldo de Jaramillo (Case Mapiripán) (List of Judgments 4.e)*, Whereas 3:

[T]he victims of the crimes have not only a vested interest, but also the right to recognition of the right to know the truth and have justice done. The right to know the truth involves the right to have established the nature of the events, and the conditions and way in which the events transpired, and to identify those responsible for such acts. The right to have justice done, or the right to justice, entails the State's obligation to investigate what happened, prosecute the perpetrators, and, should they be found responsible, convict them.

COLOMBIA, *Remedy of unconstitutionality (Article 220 of Law 200-2000, Code of Criminal Procedures) (List of Judgments 4.g)*, Whereas 14-15 and 17:

Over the past two years, and mainly taking into account the evolution of international law on the issue, the Court has modified its doctrine concerning the rights of victims in criminal proceedings.

According to the most authoritative international human rights doctrine and jurisprudence, victims' rights extend beyond issues of compensation to include the right to truth and the right to have justice done in the specific case. The Inter-American Court of Human Rights judgment of March 14, 2001, in the *Barrios Altos* case (*Chumbipuma Aguirre et al. v. Peru*), is particularly relevant in this regard. The tribunal held that the Peruvian amnesty laws contravened the American Convention and that the State was responsible for violating the right of the victims to know the truth about what happened and to obtain justice in each case, notwithstanding that the State in question had acknowledged its responsibility and had decided to grant material reparation to the victims.

This Court has held that "*crime victims have a right to truth and justice that goes beyond the sphere of reparations, as clearly pointed out in international human rights doctrine, which is relevant in interpreting the scope of constitutional rights (PC, Article 93)*" [footnote omitted]. This Court has, therefore, synthesized its doctrine in the following terms:

*"[T]he victim and those harmed by a crime have interests beyond mere monetary reparations. Some of their interests have been protected under the 1991 Constitution and translate into three rights that are relevant to the examination of the disputed norm in the instant case:*

*1. The right to truth, that is, the possibility of knowing what happened and seeking a correlation between the procedural and the actual truth. This right is particularly important when it comes to gross violations of human rights (see, inter alia, the Inter-American Court of Human Rights cases of Velásquez Rodríguez [paragraph 166], Judgment of July 29, 1988, and Barrios Altos [paragraph 43],*

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characterized as international crimes or that could be characterized as such given the historical context in which they were committed. It also includes judgments derived from review processes or unconstitutionality actions involving norms directly related to domestic law on international crimes.

*Judgment of March 14, 2001, in which the Court emphasizes that instruments created by States Parties that deny victims their right to truth and to justice violate the Inter-American Convention).*

2. *The right to have justice done in the specific case, in other words, that there will be no impunity.*

3. *The right to reparation for the harm caused in the form of financial compensation, which is the traditional way of compensating the victim of a crime* [footnote omitted].

Obviously, the rights of victims give rise to certain obligations on the part of the State. If the victims have the right not only to receive reparations but also to know what happened and to have justice done, then the State has a corresponding duty to seriously investigate the crimes. This State obligation is intensified in proportion to the degree of social harm caused by the crime. And for this reason, the State's duty is particularly strong in cases of human rights abuses. The Inter-American Court has therefore indicated, based on principles espoused by this Constitutional Court, that persons affected by human rights abuses are entitled to State action to investigate the acts, punish those responsible, and to the extent possible, restore the rights of the victims.

COLOMBIA, *Appeal motion (Manuel Enrique Torregrosa Castro) (List of Judgments 4.k)*, Whereas 25 and 26:

The Colombian State has undertaken to prosecute crime at the domestic level as well as before the international community, and a corollary to this obligation is the effective protection of the rights of the victims, who may not be left unprotected under any circumstances. There is consensus, therefore, around the need to obtain truth, justice, and reparations for them.

This requirement is of paramount importance when it comes to crimes against humanity, which is the situation of the demobilized individuals who have applied for the benefits of the Justice and Peace Law, inasmuch as their obligation consists of providing full statements in which they must confess, truthfully and completely, the crimes committed.

[I]t is important to bear in mind that the victims [footnote omitted] have fundamental rights [footnote omitted], including the rights to (i) effective **reparation** for the injury suffered, (ii) the State's obligation to make known the **truth** about what happened, and (iii) expedited access to **justice**, as stipulated by the Political Constitution, the criminal law in effect, and the international treaties that form part of the bloc of constitutionality [footnote omitted].

This victim-centered perspective can only be understood when it is accepted, as it should be, that victims are covered by

“a system of guarantees based on the principle of effective judicial protection [footnote omitted], which enjoys broad international recognition [footnote omitted] and is clearly substantiated in the Constitution, pursuant to Articles 229, 29, and 93. This principle establishes a system of bilateral

guarantees, meaning that guarantees such as access to justice (Article 229), equality before the law (Article 13), the right to a defense (Article 29), the impartiality and independence of the courts [*footnote omitted*], and the effectiveness of rights (Articles 2 and 228), are valid for the accused as well as for the victim. The Court has recognized this bilateral character when it has pointed out that the complex of due process, which includes the principle of legality, due process *in sensu stricto*, the right to a defense and its guarantees, and the natural judge, is equally valid for the victim and for those adversely affected” [*footnote omitted*].

When it comes to human rights violations, the State must ensure that the victims have an effective remedy available to them that offers adequate results or responses [*footnote omitted*], which means, no more and no less, that a travesty of justice is not the same as ensuring that justice is done. In other words: justice is only done, and an effective remedy obtained, when those who have experienced a violation of human rights—those who have been victims of crimes committed by paramilitary groups—or their next of kin, obtain truth, justice, and reparations.

## A. Right to truth

Naomi Roht-Arriaza offers a particularly lucid explanation of why the struggle for truth about the commission of international crimes is so important in Latin America:

[In this region] the rationale [for seeking the truth] was tied to the nature of the repression. For the most part, the military governments did not openly kill their opponents. Rather, large numbers of people were disappeared, picked up by official or unofficial security forces that then refused to acknowledge the detention. Almost all were killed, often after extended torture, and in many cases the bodies were never found. Unofficial death squads wore civilian clothes and provided a measure of deniability. The families of those who disappeared were ostracized as a climate of generalized terror set in.<sup>74</sup>

In Latin America, the demands for truth that accompanied and influenced the process of recognizing truth as a right also informed the gradual development of the right to truth in international instruments and domestic and international legal judgments. Although to date no treaty refers explicitly to this right, it has been derived from several conventional provisions. For example, the Inter-American Court of Human Rights has stated that the right to truth, while not an autonomous right, “[...] is included in the right of the victim or of the victim’s next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution.”<sup>75</sup> More specifically, this Court has pointed out that

74 Naomi Roht-Arriaza, “The New Landscape of Transitional Justice,” in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (New York: Cambridge University Press, 2006), at 3.

75 IACourtHR, *Case of Blanco-Romero et al. v. Venezuela*, Merits, Reparations and Costs, Judgment of November 28, 2005, Series C, No. 138, para. 62.

[...] the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory. The Court emphasizes that the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities. Moreover, the investigation must be undertaken by the State as its own legal obligation, and not as a superficial administration of private interests, which depends upon the procedural initiative of the victims or their next of kin, or upon the production of evidence by private parties [footnote omitted].<sup>76</sup>

Independently of such judicial proceedings, the Set of Principles to Combat Impunity describes the right to truth as an inalienable and imprescriptible right of persons and societies.<sup>77</sup> This instrument goes on to point out that in addition to proceedings to assign responsibility, States have the duty to take all adequate measures—including the establishment of commissions of inquiry and the preservation and declassification of archives—aimed at “preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”<sup>78</sup>

The sections that follow offer excerpts from the most relevant Latin American rulings on the right to truth of the victims, their relatives, and society as a whole. Despite the clear influence of the Inter-American Court of Human Rights, these decisions are grounded in constitutional norms and international law, as well as in the ethical demands of a democratic society. Significantly, Peruvian jurisprudence has recognized the right to truth as an autonomous right implicit in the text of the Peruvian Constitution. Moreover, in keeping with the Set of Principles to Combat Impunity, Latin American jurisprudence recognizes the importance of nonjudicial mechanisms such as truth commissions.

These same rulings also have affirmed categorically that criminal proceedings are an appropriate mechanism to ensure this right and fulfill the corresponding obligation of States. Moreover, according to the Latin American jurisprudence, while other domestic or international processes to discover the truth may occur in a complementary manner, they can never be considered a substitute for criminal proceedings.

76 IACourtHR, *Case of the Rochela Massacre v. Colombia*, *supra* note 28, para. 195.

77 “Principle 2. Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.” “Principle 4. Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.” Set of Principles to Combat Impunity, *supra* note 61.

78 Principle 3 of the Set of Principles to Combat Impunity, *supra* note 61.

PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Wre-  
reas 8, 9, and 13–20:

The Nation has the right to know the truth about unjust and painful facts and incidents brought about by the myriad forms of State and non-State violence. This right entails the possibility of ascertaining the circumstances of time, method, and place under which they occurred and the motives behind the perpetrators' actions. The right to truth is, in this sense, an inalienable collective legal interest.

In addition to the collective dimension, the right to truth has an individual dimension, which corresponds to the victims and their relatives and friends. Knowledge of the circumstances in which human rights violations were committed and, in the case of death or disappearance, the fate of the victim is inherently not subject to any statute of limitations [prescription]. Individuals who have been directly or indirectly affected by a crime of such magnitude always have the right to know—even if a considerable amount of time has passed since the crime occurred—inter alia, the identity of the perpetrator, the date and place of the crime, how it occurred, why it was committed, and where the mortal remains are located. The right to truth is derived not only from the Peruvian State's international obligations but also from the Political Constitution itself, which [...] sets forth the obligation of the State to safeguard all rights, and especially those that affect human dignity, since it is a historical circumstance which, if not duly clarified, could affect the very life of the institutions.

[W]hile the **right to truth** is not explicitly set out in our constitutional language, **it is a fully protected right** derived, in the first instance, from the State's obligation to safeguard fundamental rights and to provide judicial protection. Nonetheless, the Constitutional Court takes the view that, to the extent reasonably possible, and in the most recent special cases, implicit constitutional rights must be developed to enhance respect and protection for human rights, since this will help strengthen democracy and the State, as mandated by the current Constitution.

The Constitutional Court believes that while the right to truth encompasses other fundamental rights such as, inter alia, life, liberty, or personal security, it also has an autonomous character in its own right, a unique quality that distinguishes it from other related rights, owing both to the protected interest and to the *telos* sought through its recognition.

Without detriment to the constitutionally protected content of the right to truth, the latter also enjoys constitutional rank as a concrete expression of the constitutional principles of human dignity, the democratic and social rule of law, and the republican form of government.

This right is derived directly from the principle of human dignity, since the harm inflicted upon the victims not only constitutes a breach of such important legal interests as life, liberty, and personal integrity, but also creates a situation of ignorance about what really happened to the victims of the crimes committed. Not knowing where the mortal remains of a loved one are located or what happened to him is perhaps one of the most perversely subtle, yet no less violent ways of damaging the psyche and dignity of human beings.

In its collective dimension, moreover, the right to truth is a direct manifestation of the principles of the democratic and social rule of law and the republican form of government, since, through the exercise of this right, we can all come to understand the levels of degeneration to which we are capable of sinking, whether through the wielding of public force or through the actions of criminal terrorist groups. We share a common demand that what happened be made known, but also that the crimes that have been committed not go unpunished. If the defense of the human person and respect for his dignity is a characteristic of a State governed by the democratic and social rule of law, then clearly the violation of the right to truth affects not only the victims and their relatives, but also the Peruvian people. We have, in effect, the right, but also the duty, to know what has taken place in our country, if we are to change our path and strengthen the minimum necessary conditions for an authentically democratic society, premised on the effective enjoyment of fundamental rights. Underlying these demands for access and investigation of human rights violations are not only the demands for justice of the victims and their family members, but also the demand of the State and civil society for adoption of the necessary measures to prevent a recurrence of such acts in the future.

Similarly, the Constitutional Court takes the view that the right to truth is rooted in a requirement derived from the principle of the republican form of government. In effect, information about how the fight against subversion was waged in this country, and the way in which the criminal actions of the terrorists came about, is an authentic public and collective interest and one that contributes to the full realization of the principles of publicity and transparency upon which the republican system is based. It is necessary not only to find out about these painful events but also to strengthen the institutional and social controls that must serve as the basis for punishment of those who, through their criminal actions, have harmed the victims, as well as society and the State in general.

In this regard, the State has a specific obligation to investigate and to inform, which not only entails facilitating the access of relatives to documents in the possession of the State, but also means investigating and corroborating the events that have been reported.

For this Deliberative Body, then, while the right to truth is not explicitly recognized, it does form part of the catalog of fundamental constitutional guarantees. Ultimately, it deserves full protection pursuant to the constitutional rights to liberty, but also through ordinary rights in our legal system, since it is premised on human dignity and on the State's concomitant obligation to protect fundamental rights, the exemplary expression of which is the right to effective protection under the law.

ARGENTINA, *Case of "Circuito Camps" and others (Miguel Osvaldo Etchecolatz)* (*List of Judgments 1.d*), Whereas IV.b:

[T]he allusions frequently heard in cases—such as the one on trial here—concerning the need for “reconciliation” or for “looking ahead,” and the futility of “stirring up the past,” are diametrically opposed to the [concept] of law as a “producer of truth,” [...]



[and as] the only means upon which memory can be validly constructed, which in turn is an essential first step toward making some kind of reparation and, above all, preventing future exterminations.

Having developed the main grounds for the assertion in the ruling that the offenses of which Etchecolatz was convicted were crimes against humanity committed in the context of the genocide that took place in our country between 1976 and 1983, it is appropriate to refer briefly to our understanding of the meaning and utility of those assertions.

By considering the instant cases in this way—as genocide—and under that overarching legal umbrella, in my opinion, we are able to situate the acts under investigation in their appropriate context, thereby complying with the obligation set out in the famous *Velásquez Rodríguez* judgment to undertake investigation seriously and not as a mere formality.

All of this is also part of reconstructing the collective memory, and will make it possible to build a future based on knowing the truth, which is a keystone for the prevention of future massacres.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 3:

The shield of silence erected by the military suspects and witnesses, with their basic three-pronged [defense]—“I had no knowledge of it,” “I was administrative staff,” and “the perpetrator is dead”—gives way before the right/duty to know. This right does not pertain to individuals, not even to the families that were directly affected, but rather to society as a whole. It is not exclusively a matter of a right to know, to seek the truth, as a human activity, but rather the duty of everyone to recall what happened, as an ethical obligation.

In this sense, the Inter-American Court of Human Rights addressed “the right to know” for the first time in its November 3, 1997, judgment (Castillo Páez case) and revisited it in its November 25, 2000, judgment (Bamaca Velázquez case), including a discussion of the issue in three reasoned concurring opinions, including, significantly, those of judges Antônio Cançado Trindade and Sergio García Ramírez [...].

In the 2000 judgment (in the Bamaca Velázquez case), the second occasion on which the Inter-American Court addressed the issue of the right to truth, the Court [developed] a conceptual argument about this right. In this regard, the Court stated, “Nevertheless, in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the [American] Convention [*footnote omitted*].

[Moreover, Judge Antônio Cançado Trindade pointed out in his separate concurrence that] “[t]he right to truth indeed requires investigation by the State of the wrongful facts, and its prevalence constitutes, moreover, as already observed, the pre-

requisite for the effective *access* itself to justice—at the national and international levels—on the part of relatives of the disappeared person (judicial guarantees and protection under Articles 8 and 25 of the American Convention). As the State has a duty to cease the violations of human rights, the prevalence of the right to truth is essential to the struggle against impunity, and it is ineluctably linked to the very *realization* of justice and to the guarantee of nonrepetition of those violations” [*footnote omitted*].

[For his part,] Judge Hernán Salgado Pesantes stated the following in his opinion: “The *right to the truth* has been shaped in a historical context where the State’s abuse of power has caused serious conflicts, particularly when the forced disappearance of persons has been used by State agents. In these circumstances, the community demands the *right to the truth* as a means of permitting reconciliation and overcoming friction between the State and society.”

[Judge Salgado went on to say:] “From the foregoing, it is clear that the *right to the truth*—at least up until now—has a collective and general nature, a type of extended right whose effectiveness should benefit society as a whole. However, under certain circumstances, such as those of forced disappearance, this extended nature should not prevent a person or a family from claiming the right to obtain the truth. [...] [Parallel to this,] as regards freedom of thought and expression, specifically the right to information, society requires that this should be truthful, which makes us think that there also are elements of the *right to the truth* in this area.”

[Finally, in the words of Judge García Ramírez, the right to truth] would have, as the Court has summarized, both “a collective nature, which includes the right of society to ‘have access to essential information for the development of democratic systems,’ and a particular nature, as the right of the victims’ next of kin to know what has happened to their loved ones, which permits a form of reparation.” [...] “In its first acceptance, the so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information, and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the right to know the reality of what has happened constitutes an [individual] human right [of the victim or his heirs] [...]”

**i. Mechanisms to know the truth are crucial but cannot substitute for, or depend on, criminal procedures<sup>79</sup>**

PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Whereas 7:

The Government, in accordance with its duty to take the most appropriate measures to ensure the full enjoyment of human rights, issued Supreme Decree No. 065-2001-PCM, establishing the Truth Commission. Its purpose was not to supplant, replace, or superimpose itself on the Judiciary; rather, one of its primary objectives was to determine the facts and responsibilities concerning human rights violations, striving wherever possible to confirm their existence and veracity and, concurrently, to prevent the disappearance of evidence associated with those facts. Its investigations, which merit praise for their thoroughness, have shed light on the events that occurred in our country in recent decades and contribute to the imperative to comply with the international and constitutional obligation to prevent impunity and to make reparations for the rights violated for the good of social peace and national reconciliation.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 9:

[T]he duty to prosecute and punish the perpetrators of human rights violations is closely linked to the duty to investigate the facts. Nonetheless, as Juan Méndez stated, “The State may not choose which of these duties it will comply with.” Even if it is possible to comply with them separately, that does not mean that the State no longer has the duty to comply with each and every one of these duties. The auto-

79 Without citing the jurisprudence of the Inter-American Court at greater length, a brief look at a recent Court decision on the issue of true-telling mechanisms vis-à-vis criminal justice proceedings provides an interesting backdrop to the discussion: “Once more, the Court wishes to highlight the important role played by the different Chilean Commissions (*supra* paras. 82(26) to 82(30)) in trying to collectively build the truth of the events which occurred between 1973 and 1990. Likewise, the Court appreciates that the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) includes Mr. Almonacid-Arellano’s name and a brief summary of the circumstances of his execution.” The Court continues, “Notwithstanding the foregoing, the Court considers it relevant to remark that the ‘historical truth’ included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano’s death, attribute responsibilities, and punish all those who turn out to be participants. Indeed, the Report of the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission) concludes that: ‘From the standpoint of prevention alone, this Commission believes that for the sake of achieving national reconciliation and preventing the recurrence of such events it is absolutely necessary that the government fully exercise its power to mete out punishment. Full protection of human rights is conceivable only within a state that is truly subject to the rule of law. The rule of law means that all citizens are subject to the law and to the courts, and hence that the sanctions contemplated in criminal law, which should be applied to all alike, should thereby be applied to those who infringe the laws which safeguard human rights.’” IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, *supra* note 29, paras. 149 and 150.

mous nature of each one of the duties that constitute the duty to guarantee has been reiterated by the Inter-American Court of Human Rights [...] [and, specifically, the] Inter-American Commission on Human Rights has repeatedly stated that [...] the establishment of “Truth Commissions” does not in any case exonerate the State from its duty to prosecute and punish the perpetrators of human rights violations.

[...] In the case of El Salvador, the Commission recalled that despite the importance of the Truth Commission in establishing the facts related to the most egregious violations and in promoting national reconciliation, these commissions “do not substitute for the non-delegable obligation of the State to investigate the violations committed subject to its jurisdiction, identify the persons responsible, impose sanctions on them, and ensure adequate reparation for the victim, all within the imperative need to combat impunity.”

In contrast, see *GUATEMALA, Appeal on constitutional remedy (amparo) submitted by Ángel Aníbal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas VI:

It would seem as if there would be no objection to the rationality of negotiating peace inasmuch as it is a civilized and humanitarian option. More difficult to comprehend, however, are the conditions and factors that, in particular moments and circumstances, have influenced the outcomes achieved. It may be that, given the evenhandedness that must characterize such agreements, conciliation processes, and transactions, in which the parties frequently make reciprocal concessions, there is no one position that will absolutely satisfy all observers regarding the terms of a negotiation.

It should be noted that the Esquipulas II Agreement not only was intended to achieve peace (silence the weapons) but also assigned equal value to the notion of “reconciliation.” This objective could be attained through a mutual peace-making process, but never through the *debellatio*<sup>80</sup> that, as the history of similar events has demonstrated, results from hate, revenge, and the humiliation of the losing side in the contest.

The objective of ending a cruel and destructive war was so important, and perhaps so forceful, that the Parties agreed that the Historical Memory document would have the power to disclose, but not to serve as a legal instrument. This is consistent with the perspective of Kenneth Roth, executive director of Human Rights Watch, on similar social and political issues. In his essay “The Case for Universal Jurisdiction,” Roth states, “Mandela agreed to grant abusers immunity from prosecution if they gave detailed testimony about their crimes. In an appropriate exercise of prosecutorial discretion, no prosecutor has challenged this arrangement, and no government would likely countenance such a challenge” [footnote omitted].

In the prevailing context of concern over the intensity and severity of the armed conflict in several Central American countries, the risk of expansion, and, of course, the motivations of the populations affected by armed conflict, negotiations commenced to reach the objectives set out in the Esquipulas II Agreement. Rather than

80 Editors’ note: *Debellatio*, or *debellation*, is the complete destruction, dissolution, and sometimes annexation of a state defeated in warfare.

relying on hindsight, interpretations of the legal dimensions of the process should take into account the geopolitical circumstances that led up to the final signing of the Agreement on a Firm and Lasting Peace [...].

[A]rticle III of the Operational section of the *Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer* [...] clearly stipulated that it “**shall not attribute responsibility to any individual** in its work, recommendations and report, **nor shall these have any judicial aim or effect.**”

Pursuant to a decision handed down by the Constitutional Court of Guatemala, this limitation would also preclude prosecutions by other States, in particular the Kingdom of Spain. See GUA-TEMALA, *Appeal on constitutional remedy (amparo) submitted by Ángel Anibal Guevara Rodríguez, et al. (List of Judgments 8.a)*, Whereas VI:

Such is the case that, by failing to take into account the limitations set forth in the Agreement cited in this section, the Judicial Branch of the Kingdom of Spain violated the provisions of Article 97 of the Spanish Constitution, which vests that country’s government with the authority to conduct foreign policy, since up to now there has been no evidence to suggest that it does not recognize the validity of the Agreement on a Firm and Lasting Peace, which was signed [...] in the presence of the President of the Government and which previously during the negotiations had enjoyed the consistent, friendly accompaniment of Spain.

This Court has issued this opinion with respect for domestic policy [of Spain], while making it clear that, given [the] events leading up to [the peace agreements,] which are unlike those of other cases in which universal jurisdiction has been invoked, the aims of the Spanish judiciary in this matter exceed the natural boundaries of international law.



CHAPTER VI  
STATE DECISIONS THAT HINDER INVESTIGATION,  
PROSECUTION, AND, AS THE CASE MAY BE, PUNISHMENT OF  
CRIMES UNDER INTERNATIONAL LAW

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The struggle against impunity is intimately linked to the rights of victims and the obligations of States, and it is, per se, an international obligation of States. The *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* defines impunity as “[...] the *de jure* or *de facto* impossibility of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”<sup>1</sup>

Like several other regions of the world, Latin America over the past several decades has had to deal with transitions<sup>2</sup> from armed conflicts and dictatorial or arbitrary regimes to de-

- 1 *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Commission on Human Rights, United Nations, Sixty-first session, E/CN.4/2005/102/Add.1, February 8, 2005 (hereinafter “Set of Principles to Combat Impunity”). The Inter-American Court of Human Rights has proposed another definition of the concept of “impunity,” as follows: “The overall lack of investigation, pursuit, capture, trial and conviction of those responsible for violations of rights protected under the American Convention, as the State has the obligation to combat said situation by all legal means within its power, as impunity fosters chronic recidivism of human rights violations and total defenselessness of the victims and of their next of kin.” IACourtHR, *Case of Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment of September 18, 2003, Series C, No. 100, para. 120, and IACourtHR, *Case of Las Palmeras v. Colombia*, Merits, Judgment of December 6, 2001, Series C, No. 90, para. 53, and others.
- 2 These transitional processes come within the framework of what has been called “transitional justice.” The United Nations Secretary General has stated that the latter “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616, August 23, 2004, para. 8. From the perspective of international organizations, the International Center for Transitional Justice has defined transitional justice as “a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.” International Center for Transitional Justice, “What Is Transitional Justice?” (2008), <http://www.ictj.org/en/tj/>.

mocratic States.<sup>3</sup> These transition processes have been marked by the inherent tension between the desire for social and political stability, on the one hand, and the demands for justice set forth by the victims and their relatives as well as by broad swaths of national and international civil society, on the other.<sup>4</sup> In such contexts, Latin American governments—whether in a bid for self-protection or bowing to pressures brought to bear by certain powerful sectors—have taken measures to ensure the *de jure* or *de facto* immunity<sup>5</sup> of certain individuals in response to proceedings to establish their responsibility for past crimes. These measures relied on State decisions that *used and distorted* domestic legal institutions such as amnesty laws, pardons, statutes of limitations, or a dismissal (*sobreseimiento*)<sup>6</sup> of criminal proceedings.<sup>7</sup>

While some voices insist that such measures are the only way to ensure much-desired social peace and stability,<sup>8</sup> others argue that a stable and lasting peace can only be achieved by res-

- 3 See, for example, Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 2 (Washington, DC: U.S. Institute of Peace Press, 1995); Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (New York: Cambridge University Press, 2006); Due Process of Law Foundation, ed., *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, DC: DPLF, 2007); Kai Ambos, Ezequiel Malarino, and Gisela Elsner, eds., *Justicia de Transición: Informes de América Latina, Alemania, Italia y España* (Montevideo: Fundación Konrad Adenauer and Georg-August-Universität-Göttingen, 2009). The literature on transitional processes in Latin America is so extensive that a study could be dedicated solely to identifying and referencing it. The limited examples given here are not intended as a significant sample of the literature on this topic.
- 4 With respect to the tension between peace processes and criminal prosecution, see, for example, Kai Ambos, Ezequiel Malarino, and Gisela Elsner, eds., *Justicia de Transición*, *supra* note 3; Michael P. Scharf and Paul R. Williams, “The Functions of Justice and Anti-Justice in the Peace-Building Process,” *35 Case Western Reserve Journal of International Law* 162 (2003); M. Cherif Bassiouni, “Justice and Peace: The Importance of Choosing Accountability over Realpolitik,” keynote address to the War Crimes Research Symposium: The Role of Justice in Building Peace, *35 Case Western Reserve Journal of International Law* 191 (2003); Ivan Simonovic, “Dealing with the Legacy of Past War Crimes and Human Rights Abuses: Experiences and Trends,” in *2 Journal of International Criminal Justice* 701 (2004).
- 5 In this context the term “immunity” is not used in the restrictive sense, but to mean “any exemption from a duty, liability, or state of process” (*Black’s Law Dictionary*, 9<sup>th</sup> ed., 2009).
- 6 The Spanish term for a dismissal of proceedings, *sobreseimiento*, which is used in the original version of the judgments, comes from the Latin *supersedere*, which means to cease or desist. In many Latin American legal systems, a dismissal of proceedings “[i]s the judicial ruling that declares that a legal or factual obstacle exists that would preclude a decision on the merits of the dispute.” A dismissal of proceedings can be temporary or definitive, depending on the regulations of each country. In criminal matters, a definitive dismissal (*sobreseimiento definitivo*) is equivalent to, or has the effects of, a final and non-appealable judgment “with the authority of *res judicata*.” See Héctor Fix-Zamudio, “Sobreseimiento,” in *Diccionario Jurídico Mexicano*, vol. 8 (Mexico City: Instituto de Investigaciones Jurídicas, UNAM, 1983), at 145–48.
- 7 As noted several times in this chapter, every one of these legal institutions is legitimate and necessary in legal systems. They are established as guarantees for the protection of the individual against the possible arbitrary or excessive use of the punitive power of the State, or as basic tools to express social pardon. As asserted in the Set of Principles to Combat Impunity, the problem lies not in these institutions themselves, but rather in “any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.” Principle 22, Set of Principles to Combat Impunity, *supra* note 1 [*emphasis added*].
- 8 See, for example, Raúl Alfonsín, “‘Never Again’ in Argentina,” in *4 Journal of Democracy* 15 (1993), as well as *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*,



pecting and upholding the right to truth, justice, and reparations during transition processes.<sup>9</sup> According to Kai Ambos, “the argument of jeopardizing the transition definitely blackmails a ‘new’ State and its judiciary [footnote omitted], and this can be a bad start for the establishment of a genuine democracy and the rule of law [footnote omitted].”<sup>10</sup> Whatever the case, transitions conditioned or dominated by groups or powers interested in maintaining impunity was the prevailing reality in our region for decades.

However, as Juan Méndez observes, Latin American transition processes are far from over. Indeed, they are very much alive and continue to generate important standards and precedents that should be heeded in this and other regions.<sup>11</sup> Forty years, thirty, twenty, ten, or even one year after the crimes were committed, Latin America is swept up in a vigorous debate over its own concept of justice,<sup>12</sup> respect for the rights of victims,<sup>13</sup> and the obligations of States<sup>14</sup>—and, more broadly, over the path that we as societies should take. According to Méndez:

Experience has also demonstrated that the principles of transitional justice, especially the obligations that legacies of abuse impose on states, are not limited to the moment of transition or to the struggling newly elected government that is trying to deal honestly with the past. These are permanent obligations of the state, applicable both to governments that are in power at the time the violations are committed and to all successor governments. It is useless, therefore, to imagine policies of “forgive and forget” under the guise of “national reconciliation.” The demands for justice will simply not go away.<sup>15</sup>

Civil society has been at the forefront of these demands in Latin America in a tireless quest and struggle for truth and justice.<sup>16</sup> At the same time, as discussed in previous chapters, demands

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Judgment 17/96, Constitutional Court, South Africa, July 25, 1996.

- 9 See, for example, M. Cherif Bassiouni, “Justice and Peace,” *supra* note 4, as well as Michael Scharf and Paul R. Williams, “The Functions of Justice and Anti-Justice in the Peace Building Process,” *supra* note 4.
- 10 Kai Ambos, “El marco jurídico de la justicia de transición,” in *Justicia de Transición*, ed. Kai Ambos, Ezequiel Malarino, and Gisela Elsner, *supra* note 3, at 32.
- 11 Juan Méndez, “Lessons Learned,” in Due Process of Law Foundation, *Victims Unsilenced*, *supra* note 3.
- 12 Kai Ambos has observed that “[t]he justice element in transitional justice must be conceived broadly. Justice, therefore, is ‘an idea of responsibility and fairness in the protection and vindication of rights and the prevention and punishment of infractions. Justice entails taking into account the rights of the accused, the interests of the victims and the long-term welfare of society. It is a concept rooted in all national cultures and traditions and, while its administration usually requires formal legal mechanisms, traditional forms of conflict resolution are equally relevant’ [footnote omitted]. Hence, in transitional justice situations, Justice implies much more than retributive criminal justice—indeed there is an assumption that criminal justice cannot be completely administered—[footnote omitted] and encompasses restorative justice insofar as it is meant to restore or even to reconstruct the community (in the sense of ‘creative’ justice) [footnote omitted]. Ultimately, transitional justice is an exceptional justice that aspires to transform the conflict or post-conflict situation ‘from a worse to a better state’ [footnote omitted].” Kai Ambos, “El marco jurídico de la justicia de transición,” *supra* note 10, at 28. [Unofficial translation]
- 13 With respect to victims’ rights, Ambos has asserted that “Justice in transitional justice is, first and foremost, justice for the victims” (*ibid.*, at 41). A general discussion of victims’ rights and some of the relevant jurisprudence is presented in Chapter V of this digest.
- 14 For a more in-depth discussion of State obligations in the area of criminal prosecution of the perpetrators of international crimes, see Chapter V of this digest.
- 15 Juan Méndez, “Lessons Learned,” *supra* note 11, at 256.
- 16 *Ibid.*

for justice have been addressed by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in particular.<sup>17</sup> Both of these elements, that is, the work of civil society and of the two main bodies of the inter-American human rights system, have informed the development of Latin American jurisprudence. This jurisprudence has, defiantly and creatively, gradually articulated a more decisive challenge to the roadblocks that had been erected in violation of the rights of victims and in breach of State obligations. It has done so despite the myriad legal and actual adversities inherent in these systems.

This chapter focuses on some of the most relevant legal decisions on this subject. They are particularly significant because they represent the voices of the same States that are bound to eradicate impunity, and because, working through the courts, these types of judgments have gradually reversed patterns of impunity, thereby making it possible to establish responsibility for the perpetration of international crimes. Simply put, without the jurisprudential development that limited or annulled the effects of State decisions blocking investigations and criminal prosecutions, the intensive legal activity illustrated in the preceding chapters would never have even begun.

The chapter is organized in such a way as to reinforce the relevance of the governmental powers and principles of law discussed herein, when they are applied in ways that are compatible with the basic rights of persons and the attendant obligations of States. Most of the sections begin by generally reaffirming the nature and importance of the criminal law institutions under study in the context of a functional and effective legal system. An example is the importance of statutory limitations and *ne bis in idem* to ensure adequate controls over the punitive power of States.

Different from the above are those *State decisions*—whether legislative, executive, or judicial—that derive from the erroneous application of principles and powers in violation of the rights of persons and the obligations of the State. The term “State decisions” has been chosen to underscore that State authorities make a conscious and deliberate choice to misuse legal institutions in a way that shows disregard for the international order and the obligations of States and fosters impunity. The problem lies not in the intrinsic nature of the system or its legal institutions, but rather in the way in which they are frequently employed as a tool for making political concessions. Such decisions may be taken by the executive, legislative, or judicial branches of government. Examples of this might be a legislative action to enact an amnesty law, the granting of an executive pardon, or judicial decisions in specific cases, in which principles such as the statute of limitations are applied in contravention of the international regime governing crimes of this type. Ultimately, this reaffirms the clear principle that international responsibility for the violation of the rights of victims, the failure to fulfill State obligations, and the perpetuation of patterns of impunity can derive from any branch of government.<sup>18</sup>

17 The edited volume *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, *supra* note 3, has underscored as have few other works the enormous influence this system has had on the Latin American transitions. While we do not wish to come to facile conclusions, a simple comparative analysis of these processes in our region relative to those in other regions—particularly Asia, Africa, and Eastern Europe—offers sufficient basis to at least consider that the Latin American transitions, and in particular the development of domestic jurisprudence, might have been very different had they not occurred in the context of a continuous and increasing dialogue with the inter-American human rights system.

18 See, for instance, United Nations International Law Commission, *Draft Articles on Responsibility of States*

## 1. STATES HAVE THE OBLIGATION TO COMBAT IMPUNITY

PERU, *Habeas corpus submitted by María Emilia Villegas Namuche (List of Judgments 13.b)*, Wheelers 6, 7, and 23:

Extrajudicial execution, forced disappearance, and torture are atrocious and cruel acts and gross violations of human rights, and as such, they must not go unpunished. In other words, the direct perpetrators of, and accessories to, the acts constituting a violation of human rights may not elude the legal consequences of their actions. Impunity may be normative in nature, when the language of a law allows human rights violators to escape punishment. It may also be *de facto* in nature, when despite the laws in place to punish the guilty, the latter escape the relevant punishment by means of threats or by perpetrating additional acts of violence.

According to the United Nations, impunity is “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.” Today, therefore, impunity is regarded as:

1. A situation that runs counter to the community sense of justice and has negative repercussions for society as a whole: feelings of discouragement and desperation that affect people’s lives at the cultural, political, and economic levels.

2. A violation of a set of international law principles and norms for the promotion and protection of human rights.

3. A factor that contributes to the commission of further egregious crimes, because the failure to adequately prosecute and punish those responsible for perpetrating crimes against basic rights (e.g., life, personal integrity, individual liberty, and security) weakens the collective conviction as to the unlawfulness of such acts, undermines the laws designed to protect those legally protected values, and reinforces the commission of such reprehensible behaviors.

4. A factor that tends to generate more violence, because in addition to fueling criminal recidivism, it creates conditions in which victims might attempt to take justice into their own hands.

5. An obstacle to peace, because by protecting the guilty, it sows serious doubts about the fairness and sincerity of the process pursued to obtain justice [*footnote omitted*].

[I]t falls to the State to prosecute the perpetrators of crimes against humanity and, where necessary, to adopt restrictive norms so as to avoid, for example, imposing a statute of limitations on crimes that constitute serious human rights violations. The application of such norms is conducive to an effective judicial system and is justified by the overarching interests of the struggle against impunity. The objective, clearly, is to prevent certain criminal law mechanisms from being applied for the repulsive

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*for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission 2001*, vol. 2, part 2 (New York: United Nations, 2007).

purpose of achieving impunity, which must always be prevented and avoided, since it encourages criminals to repeat their acts, fuels the flames of revenge, and erodes two of the pillars of a democratic society: truth and justice.

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 25:

[N]ational States are bound to avoid impunity. The Inter-American Court has defined impunity as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention [on Human Rights],” and it has stated that “the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations and the total defenselessness of victims and their relatives.”

### **A. State decisions that perpetuate impunity are incompatible with state obligations**

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 34–36:

[I]t being understood, then, that at the time they were committed, the acts under investigation were considered crimes against humanity under international human rights law binding on the Argentine State, the logical consequence is the inexorability of their prosecution [...].

[T]he Inter-American Court of Human Rights maintained this position when it asserted that “This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary, or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law. [...] [T]he said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention [on Human Rights] have been violated [...]” [*footnote omitted*].

See also ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 23 (containing the same citation from the jurisprudence of the Inter-American Court of Human Rights).

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 35:

By signing and ratifying the aforementioned [Geneva] Conventions, the State of Chile undertook to guarantee the security of persons who might be involved in armed conflicts within its territory, especially were they to be arrested, *and any measures to shield the wrongs committed against certain people or to obtain impunity for their perpetrators are prohibited*, especially bearing in mind that international agreements must be fulfilled in good faith. And insofar as the aim of the [International] Covenant [on Civil and Political Rights] is to guarantee the essential rights derived from the nature of the human person, it has preeminent application. This Supreme Court has recognized in numerous judgments that the domestic sovereignty of the State of Chile acknowledges its limits in relation to the rights inherent to the human person, since these values are superior to any norm that may be issued by the authorities of the State, including the Constituent Power, and therefore may not be disregarded. [*Emphasis added*]

PERU, *Constitutional remedy (amparo) submitted by Julio Rolando Salazar Monroe (List of Judgments 13.h)*, Whereas 25 and 26:

[The Constitutional Court underscores that, in the course of the admission of responsibility by the] agent of the Peruvian State [in the framework of the process in the Barrios Altos case, the latter] stated:

“(...) ... The formula of annulling the measures adopted in the context of impunity in this case is, in our opinion, sufficient to *promote a serious and responsible procedure to remove all the procedural obstacles linked to the facts; above all, it is the formula that permits, and this is our interest, recovery of procedural and judicial options to respond to the mechanisms of impunity that were implemented in Peru in the recent past*, and opening up the possibility ... of bringing about a decision under domestic law, officially approved by the Supreme Court, that allows the efforts that ... are being made to expedite ... these cases, to be brought to a successful conclusion [...]”

The impetus to conduct a serious and balanced procedure that would lead to the punishment of those responsible for human rights violations arose after it was recognized that the Peruvian State had “(...) failed to conduct a thorough investigation of the facts and had not duly punished those responsible for the crimes against the above-mentioned persons (...)”

See also PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 33 (containing the same citation from the jurisprudence of the Inter-American Court of Human Rights).

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 23, 26–27, and 37:

[The Inter-American Court has asserted that] States shall not take any legislative or other measures that may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity. (Case of Almonacid Arellano et al. I-A C[court] of HR - Series C, No. 154, Judgment of September 26, 2006).

The Committee against Torture has also spoken out against the Argentine impunity measures (Communications 1/1988, 2/1988, and 3/1988), and, in recent precedents, has recalled its jurisprudence to the effect that States Parties have the obligation to punish persons deemed responsible for the commission of acts of torture and that meting out less severe penalties and granting pardons are incompatible with the obligation to impose the appropriate punishments [*footnote omitted*].

[T]he Human Rights Committee established under the International Covenant on Civil and Political Rights, referring specifically to the Argentine case, stated that the Full Stop and Due Obedience laws, and the presidential pardons of high-level military officers, are contrary to the requirements of the Covenant because they deny an effective remedy to victims of human rights violations under the authoritarian government, in violation of Articles 2 and 9 of the Covenant (Human Rights Committee Concluding Observations: Argentina, April 5, 1995, CCPR/C/79/Add. 46; A/50/ 40, para. 144–165). The Committee has also pointed out that despite “positive measures taken recently to overcome past injustices, including the repeal in 1998 of the Law of Due Obedience and the Punto Final Law, ... Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice” (Concluding Observations of the Human Rights Committee: Argentina. November 3, 2000, CCPR/CO/ 70/ARG).

[T]herefore, the principles that are habitually used at the domestic level to justify invoking such precepts as *res judicata* and *ne bis in idem* are not applicable to this type of crimes against humanity, since “the international instruments that establish this category of crimes, and the attendant duty of States to individualize and prosecute the perpetrators, do not envisage and ultimately do not accept that this obligation may cease due to the passage of time, amnesties or any other type of measure that would eliminate the possibility of censure [...]” [*footnote omitted*].

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 5, 8, and 9:

As the notion of “crimes against humanity” evolved, it consolidated essential legal principles for their prosecution: the perpetrators do not qualify for refuge or asylum, the crimes are not subject to any statute of limitations, and States are prohibited from adopting measures that might preclude their prosecution.

The statute of limitations, *res judicata*, and the non-retroactivity of criminal law have frequently contributed to impunity for serious human rights violations and crimes under international law [*sic*]. The statute of limitations, *res judicata*, and the non-retroactivity of criminal law are well known constructs in criminal law and in international human rights law.

[Nonetheless], [t]heir content and scope is often distorted and abused to conceal impunity behind a veneer of “legality.”

The State has the legal duty to reasonably prevent human rights abuses and to seriously investigate, with the means available to it, any violations committed in its jurisdiction in order to identify those responsible, impose the appropriate punishment, and ensure that adequate reparations are made to the victim. The updated *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* describes impunity as “a failure by States to meet their obligations” to investigate violations, to try and convict the perpetrators, to make reparations to the victims, and to guarantee the victims’ right to the truth.

The Security Council has said that it is incumbent on States to put an end to impunity pursuant to their international law obligations. The Inter-American Court of Human Rights has repeatedly stated that States have the legal duty to prevent and combat impunity. The United Nations Human Rights Committee has likewise reiterated that impunity for gross violations of human rights is incompatible with the obligations of States under the International Covenant on Civil and Political Rights. Similarly, the African Commission on Human and Peoples’ Rights has taken the view that impunity entails a violation by the State of its obligation to protect and uphold the human rights of citizens. Put in other terms—and as inferred from the positions taken by the various international and regional bodies for the protection of human rights—impunity, insofar as it constitutes a breach of international obligations, is an antijudicial phenomenon.

See also VENEZUELA, *Review motion (Case Marco Antonio Monasterios Pérez) (Casimiro José Yáñez) (List of Judgments 15.b)*, Whereas IV.1:

[I]t should be noted that a systematic or generalized practice against the population constitutes a crime against humanity, according to the language of the Rome Statute of the International Criminal Court [...], and therefore, in such a situation, the criminal prosecution of such crimes is not subject to any statute of limitations, nor can any benefit be decreed that might give rise to impunity for them [...]. In other words, this is not just any criminal offense, but rather one that has occasioned profound concern and anguish in different parts of the world [...] making it incumbent upon States to pay close attention so as to avoid impunity for such crimes.

## i. Peruvian case

PERU, *Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori Fujimori) (List of Judgments 13.j)*, Whereas 622–625:

It is clear from the preceding paragraphs that the Armed Forces, through one of its organs, namely, the Supreme Council of Military Justice [Consejo Supremo de Justicia Militar], succeeded, with the concerted support and involvement of the constituted government—the Congress, the Executive, and even the Judiciary—in asserting its jurisdiction over the acts perpetrated on July 18, 1992, in La Cantuta University. The initial finding of guilt was confined to the direct perpetrators, and any charges, or the potential to bring charges, against high-level commanders and other State entities were refused or curtailed. The prosecution in question, led by the SIN [National Intelligence Service], clearly sought to keep the proceedings secret—to the point of prohibiting parties to the case from giving testimony in any other parliamentary or judicial venue—and exhibited a pattern of covering up the entire group of criminal participants in such egregious human rights violations.

Documents were prepared to respond, with some vehemence, to the various institutions and the press, in regard to public information and the discoveries that were constantly surfacing. Internal investigations were nonexistent and parliamentary inquiries failed dramatically in both cases. There was, then, no institutional will to shed light seriously, profoundly, and transparently on the two human rights crimes.

Similarly, the role of the military justice system in the Barrios Altos case was one of unfortunate and obvious concealment. Prior to that, the role of the Ministers of the Interior and Defense focused absolutely on denying that the events had ever happened and warding off any objective, uncompromising investigation. Finally, those who stood trial before the military court in the La Cantuta case were protected institutionally and politically instead of being punished according to the law and the dictates of legal reason—the lawful imposition and enforcement of the punishment. They were given cash while in prison and ultimately were granted amnesty pursuant to the agreement made during the proceeding [...]. The other case was simply dismissed without any coherent arguments, in the course of a virtually nonexistent investigation.

What was ultimately achieved was impunity, and it emanated from the highest level of the State—the Office of the Presidency of the Republic. It was accompanied by mechanisms to persecute the complainants and obstruct all individual and collective efforts to clarify the facts, prosecute the perpetrators, and punish those responsible. Such a complex, extensive, intensive, and persistent mechanism to ensure impunity obviously could not have been the autonomous work of the military establishment or of one sector of the State intelligence apparatus or secret service. It had to be—indeed must have been—part of a plan organized by the person serving as Head of State. The involvement of all of the branches of government, as well as of the State investigatory and prosecutorial entities, can only be explained by the involvement of the President of the Republic.



The Constitutional Court, citing the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, defined impunity as “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative, or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried, and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims” [footnote omitted]. This is what really happened in Peru, in light of the information presented in this chapter. Physical mechanisms were used, and several laws were enacted, to impede and obstruct clarification and, when the time came, to make sure that the punishment handed down would never be fully carried out. And, as has already been established, such a comprehensive plan of action, consistent over time, can only be explained by the involvement of the person holding the reins of the country.

[I]nternational experience, particularly in Latin America, has shown that “*State institutions characteristically function through surreptition and concealment of their criminal ways when they engage in a dirty war. We have seen how the Argentine courts drew attention to the schizophrenic behavior of the State during the Argentine military dictatorship. Even as some of its institutions had begun to engage in criminal behavior, conducting a dirty war against the political opposition, the rest continued to behave normally and lawfully. The same was true of Chile during the military dictatorship*” [footnote omitted; emphasis added].

## **B. International state responsibility for decisions that perpetuate impunity**

CHILE, *Case of the detained-disappeared in La Moneda (Fernando Burgos, et al.)* (*List of Judgments 3.b*), Whereas 21:

[W]ithout detriment to the decisions contained in the final judgment, it is possible to contend that the instant case involves a crime against humanity and, as such, a crime that is not subject to any statute of limitations or amnesty. For this reason, it is not possible at this procedural moment to declare the case definitively dismissed in response to the objection of a previous and special ruling entered by the defense, since doing so would entail the application of domestic law alone, which conflicts with international law, thereby giving rise to an unlawful act that could give rise to the international responsibility of the State. The latter may not evade its international obligations by disregarding the general principles of international criminal law pursuant to the effect that crimes against humanity are not subject to any statute of limitations or amnesty. These principles would be breached by the failure to abide by the provisions explicitly set out in Article 27 of the 1969 Vienna Convention on the Law of Treaties, to which our country is party.

In addition, regarding in particular the application of the statute of limitations to crimes under international law, see ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 36 and 38; PANAMA, *Appeal motion (Case Gerardo Olivares) (List of Judgments 11.b)*, Whereas; and MEXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c)*, Whereas Seven, in “*State Responsibility for the application of statute of limitations to international crimes*,” in this same chapter.

## C. Judicial control over state decisions that perpetuate impunity

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 21:

[T]he Inter-American Court has stated that it “is aware that domestic judges and courts are subject to the rule of law and, therefore, are obligated to apply the provisions in force in the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to that treaty. This makes it incumbent upon judges to ensure that the effects of the Convention’s provisions are not undermined by the application of laws that are incompatible with its object and purpose, and that, from the outset, lack legal effects.” In other words, the Judiciary must exercise a “control of conventionality” between the domestic laws applicable to specific cases and the American Convention on Human Rights. In this task, the Judiciary must take into account not only the treaty, but also its interpretation by the Inter-American Court, the ultimate interpreter of the American Convention.

### i. Judicial control does not violate separation of powers

EL SALVADOR, *Remedy of unconstitutionality (Articles 1 and 4 of the Legislative Decree No. 486, General Amnesty for the Consolidation of Peace) (List of Judgments 7.a)*, Whereas:

[In previous decisions, this Court] has said that the power to grant clemency is an expression of sovereignty and, as a result, [the amnesty] was an eminently political act; and as the Court responsible for constitutional oversight, this Chamber could not take up purely political matters. Such a situation would exceed its constitutional sphere of jurisdiction by too great a margin and would interfere in matters corresponding to other branches of government.

It is necessary, however, to examine whether the legal bases set out in those rulings are compatible, at the present time, with the requirements of what should be an authentic system of oversight of the superiority of the Constitution with respect to statutory provisions and State actions. Such a system must include certain basic elements, such as a Constitution that is totally or partially rigid; an independent oversight body with decision-making authority; ample opportunities to challenge legal

decisions; and a State normative apparatus that is subject as a whole to constitutional oversight, since if a particular sector of the judiciary or of State activity is not subject to constitutional review, then the country does not have a complete system for oversight of constitutionality.

With respect to the last of these basic elements, the procedure to determine unconstitutionality consists of evaluating the contested norm in light of the constitutional language in order to declare legally null any rule that is found to be incompatible with the Constitution when it contains a provision that conflicts with the constitutional rule proposed as the point of reference for oversight. Thus it is evident that amnesty, as an exercise of the jurisdiction vested by the Constitution in the Legislature, may not be regarded as an expression of sovereignty and may indeed be subject to a judicial review of its constitutionality for the purpose of ascertaining its compatibility with the Supreme Law. Therefore, this Court may issue a ruling on the merits as to whether or not it is constitutional.

Similarly, it is important to reiterate—as observed in the rulings handed down in the cases of Inc. 14-87 and 11-93—that it does not fall to this Court to examine the reasons of expediency, in expediency, or advisability that led the Legislative Assembly, in the exercise of its powers, to decree the amnesty. This Court may not interfere in the business of other branches of government when it comes to matters under their purview and discretion. This Court may not, then, take up the expediency or advisability with which the political authorities exercise their exclusive prerogatives. Rather, its role is limited to a review of compatibility with the Supreme Law, in which case it is acting within the confines of its jurisdiction, without infringing on the principle of the separation and independence of powers.

Based on the foregoing, this Court takes the view that it must depart from the jurisprudence established in the previously mentioned unconstitutionality cases—because to do otherwise would be to exclude the constitutional oversight of certain provisions or bodies of law from its sphere of jurisdiction—and that it is therefore entitled to take up the claims set out in the cumulative cases under study.

## 2. AMNESTY LAWS

States frequently have enacted blanket amnesty laws to block or impede the domestic criminal prosecution of international crimes. Many voices call for the enactment of such laws as part of a social reconciliation process, whether in the course of transitions, where concessions to groups that wielded *de jure* or *de facto* power during the previous regime are deemed necessary, or during peace processes to resolve international or internal armed conflicts. This position derives from what many regard as the inherent purpose of an amnesty: to foster social peace or stability during the transition from one regime to another.<sup>19</sup>

19 The earliest historical records reflect attempts to apply amnesty laws in the framework of pacification or transition processes in the aftermath of armed conflicts between peoples or within a society. As one study has observed, “[t]he word ‘amnesty’ has its origin in the Greek *amnestia* meaning oblivion. In 404 BC, after the Spartans had defeated the Athenians in the Peloponnesian War, they established an oligarchic

Clearly then, the debate over amnesty laws revolves around an apparent tension in which peace and social stability are pitted against justice (particularly criminal justice) and the obligations of the State.<sup>20</sup> In this context, Latin American courts have begun to find their own voice in the past decade and have become perhaps the most solid and consistent source of judicial interpretation on this issue in a single region.

A brief discussion of the concept of amnesty laws is useful to enhance understanding of Latin American jurisprudence. Faustin Z. Ntoubandi has defined such laws as “an act of sovereign power designed to apply the principle of *tabula rasa* to past offences, usually committed against the State, in order to end proceedings already initiated or that are to be initiated, or verdicts that have already been pronounced.”<sup>21</sup> These laws may be general in nature, covering all of the

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provisional government in Athens [footnote omitted]. It consisted of thirty men who came to be known as the ‘Thirty Tyrants’ owing to the oppressive nature of their rule. Within eight months approximately, they executed 1,500 and banished 5,000 [footnote omitted]. A revolt led by Thrasybulus led to the defeat of the ‘Thirty’. After the civil war Athens had been on the brink of chaos owing to resulting divisions. An agreement was brokered, the principles of which included the prosecution of criminal acts such as murder, and amnesty for all other acts associated with the war. Following a proposal by Thrasybulus to the Athenians, an amnesty law was passed. According to Cicero, this was called the law of forgetfulness. It stated that no one should be accused or punished after oblivion had been decreed of wrongs and offences committed on either side [footnote omitted]. According to Robinson ‘the Thirty and their worst agents were excepted.’ [footnote omitted] The citizens of Athens were all made to take an oath to respect the amnesty and the first man to violate the terms of the amnesty was executed” [footnote omitted]. Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002), at 5–6. These millenary roots of amnesties do not mean, however, that their use has declined in recent decades. To the contrary, recent studies have concluded that “over 420 amnesty processes have been introduced during this period, with many of them occurring since the establishment of ad hoc tribunals. Indeed, over 66 amnesties were introduced between January 2001 and December 2005 [...]. This shows that amnesties have continued to be a political reality despite international efforts to combat impunity.” Louise Mallinder, “Can Amnesties and International Justice be Reconciled?” *1 International Journal of Transitional Justice* 208, at 209–10 (2007). For more information on amnesty laws adopted during different historical periods, see Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (cited in this note), as well as Faustin Z. Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Dordrecht, Netherlands: Martinus Nijhoff, 2007).

20 “The arguments in favor of amnesty in transitional states usually contend that peace could never be achieved without some form of amnesty, as combatants would be unlikely to surrender their weapons and dictators would be unwilling to transfer power to democrats. Furthermore, academics have argued that if, after a war, the victors impose conditions that ‘involve crushing the dignity of the vanquished, the peace will not last,’ perhaps because, [...] ‘strict punishment of all violators may serve to maintain rather than reconcile the differing recollections and attitudes of the various communal or political groups from which the conflict arose.’” Louise Mallinder, “Can Amnesties and International Justice be Reconciled?” *supra* note 19, at 208–9. These political arguments must, of course, be examined in light of legal and political arguments concerning the non-applicability of amnesty laws to international crimes, arguments made clearly in the Latin American jurisprudence presented in this study.

21 Faustin Z. Ntoubandi, *Amnesty for Crimes against Humanity under International Law*, *supra* note 19, at 9. “Tabula rasa is the Latin term for a cleaned tablet, one that has been erased and is ready for new marks. Academic debate borrows the term from empiricist philosophers who hold that, prior to sense perception, the mind is as blank as a tabula rasa. There are no innate ideas.” Aaron Bunch, “Beyond Tabula Rasa,” *30 Argumentation and Advocacy* (1994).

offenses committed by all actors during a particular time frame, or they may apply specifically to a particular category of acts or crimes, a specific group of people, or some combination thereof.<sup>22</sup>

The adoption of amnesty laws is clearly a sovereign power of States, and when used properly, such laws can contribute enormously to the consolidation of social or political processes in a country. The problem arises when they are applied indiscriminately to international crimes in such a way as to block or hamper the investigation, prosecution, and, as the case may be, punishment of the perpetrators.

The sections that follow present the jurisprudence from several Latin American countries rejecting the application of amnesty laws in breach of State obligations. This particular point will be analyzed in greater detail in subsequent sections. However, it is pertinent to underline some of the other general criteria established in Latin American jurisprudence regarding amnesty laws, including the affirmations that (i) the evolution of international law imposes clear obligations on States, meaning that currently, a law that contravenes them cannot be considered valid or have legal effect; (ii) the prohibition against adopting amnesty laws that are incompatible with international obligations applies to transition governments as well as to the regimes allegedly responsible for the crimes; (iii) the repeal of these laws does not violate the principle of non-retroactivity of the law;<sup>23</sup> (iv) any other State is not bound by, and need not observe, an amnesty law in contravention of international obligations to prevent and punish international crimes;<sup>24</sup> and (v) an amnesty law can be instituted in such a way that it is compatible with the international obligations of States and, therefore, has legal effect.<sup>25</sup> These criteria clearly reflect the influence of the Inter-American system of human rights, and in particular of the Inter-American Court, in the work and interpretation of national courts around the region.<sup>26</sup>

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22 Faustin Z. Ntoubandi, *Amnesty for Crimes against Humanity under International Law*, *supra* note 19, at 12.

23 For more information on the way Latin American courts have interpreted the principle of non-retroactivity and international crimes, see “*Lege praevia: Non-retroactivity of the law and the principle of legality*,” section IV.2.C of this digest.

24 See also the summary of the conclusions from international jurisprudence and doctrine on the incompatibility of amnesties for international crimes with the obligations of third-party States to prosecute these crimes, in section 2.B in this chapter, “*Amnesty law cannot cover crimes under international law*.”

25 For an analysis of the doctrine on this subject, see, for example, Santiago Corcuera Cabezut, “Las leyes de amnistía en el derecho internacional de los derechos humanos,” in *Jurídica: Anuario del Departamento de Derecho de la Universidad Iberoamericana*, No. 29 (Mexico City: Universidad Iberoamericana, 1999), at 23–38.

26 According to Louise Mallinder, at the international level, “[t]he courts that hold individuals accountable—namely the ad hoc and hybrid tribunals—and the International Criminal Court (ICC) consider whether perpetrators are entitled to use amnesties to shield themselves from prosecution. In contrast, the regional and universal human rights mechanisms that hold states accountable consider whether states have violated their obligations under international law by introducing amnesties, which is possible even where amnesties are valid under national law.” Louise Mallinder, “Can Amnesties and International Justice Be Reconciled?” *supra* note 19, at 210. At the national level, the domestic legal system potential must determine, pursuant to its own procedures, both the applicability of an amnesty law to a particular case and, in an abstract sense, the compatibility of the law with the whole of the legal system, including the international law norms in force in the country.

## A. Overview

EL SALVADOR, *Remedy of unconstitutionality (Articles 1 and 4 of Legislative Decree No. 486, General Amnesty for the Consolidation of Peace) (List of Judgments 7.a)*, Whereas:

[Previous rulings by this Court] [...] [h]ave established that the legal definition of amnesty has two dimensions: first, as an expression or act of clemency, and second, as a legislative power or a form of legislated derogation, the effects of which are retroactive and temporary. With respect to the first dimension, amnesty was described as a sovereign act of clemency, a collective clemency intended to ensure social and political peace. It is the legal expression of a political act meant to foster a democratic process and national consensus, for the primary purpose of neutralizing an internal crisis situation—a non-international armed conflict—or consolidating the conclusion of an international armed conflict. The foregoing indicates that amnesty derives from sovereignty, inasmuch as it is a sovereign prerogative to grant clemency.

With respect to the second dimension of amnesty, the Court said that rather than a legal prerogative of clemency exceptional in the legal system, and as a corrective legal instrument, amnesty constitutes a temporary derogation of certain laws with retroactive effect. As such, it could be likened to the retroactive application of criminal laws where they are favorable to the offender in a crime.

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 30:

[A]rticle 93, No. 3, of the [Chilean] Criminal Code [...] prohibits establishing any time limit on criminal responsibility: (3) through amnesty, which completely extinguishes the sentence and all of its effects. Despite its general nature, the doctrine has been consistent in that the scope of the amnesty is broader than that which is derived from the legal text itself, even to the extent of declaring that it nullifies the laws, thereby casting a veil of eternal forgetfulness over certain crimes that damage the fundamental order, security, and institutions of the State [*footnote omitted*].

PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 20 and 25:

According to Article 102(6) of the Constitution, one of the powers vested in the Congress of the Republic is the authority to enact amnesty laws. Through such laws, the legislative organ stipulates that certain acts originally considered unlawful were no longer considered as such. As a consequence of overlooking criminal responsibility, the State relinquishes the pursuit of criminal prosecution (extinction) or sentence enforcement. The entry into force of the amnesty law, therefore, precludes opening a criminal proceeding, suspends a proceeding regardless of its status, and, where a conviction has already been handed down, annuls all of its criminal effects, except those of a civil nature.

In contrast to a [pardon], an amnesty law may not cover a particular individual or group of individuals while excluding others who are in the same circumstances that gave rise to its enactment. The amnesty also may not be substantiated on grounds that are incompatible with the Constitution. The Founding Law is broad enough that it allows the legislative body to choose among different policy options for criminal prosecution.

## B. Amnesty law cannot cover crimes under international law

To achieve a better understanding of the issue in question, it is important to look at the different criteria developed by international jurisprudence and doctrine with regard to the non-applicability of amnesties to international crimes. This analysis provides an interesting backdrop for the Latin American jurisprudence on the subject.

As a first reference point, the Special Court for Sierra Leone<sup>27</sup> has established that in light of the existence of the principle of universal jurisdiction over international crimes, a State cannot decide to “forget” these crimes in such a way as to circumvent the power of other States to exercise their jurisdiction. Furthermore, the Special Court has reiterated that “the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.”<sup>28</sup> As an extension of this argument, the Special Court has asserted that there is no rule of international law that actually prohibits a State from adopting an amnesty law. Therefore, according to this line of interpretation, the non-applicability of these laws to cases of international crimes derives from the right and duty of any other States, and of international tribunals, to exercise their jurisdiction, rather than directly from the obligations of the State where the crimes were committed.<sup>29</sup>

27 The Special Court for Sierra Leone was established by the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone*, signed on January 16, 2002.

28 SCSL, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Cases No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, Decision on challenge to jurisdiction: Lomé Accord Amnesty, March 13, 2004, para. 71. More specifically, in this same decision, paras. 67 and 68, the Special Court states: “A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember. A crime against international law has been defined as ‘an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act would probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state.’ In *re List and Others*, the US Military Tribunal at Nuremberg defined an international crime as: ‘such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.’”

29 On this point, the Special Court for Sierra Leone has adopted the conclusions proposed by Antonio Cassese in one of his academic studies: “There is not yet any general obligation for States to refrain from amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless, if a court of another State having in custody persons accused of international crimes decides to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.” *Ibid.*, para. 71, citing Antonio Cassese, *International Criminal Law*

Limits on the sovereign power to adopt amnesties have also been approached from the standpoint of victims' rights. As discussed in the preceding chapter, victims of international crimes have specific rights, including the right to know the truth and to obtain reparations.<sup>30</sup> Therefore, according to some legal decisions and doctrinal studies, an amnesty law will be valid to the extent that it respects and ensures victims' rights, even when it effectively blocks the criminal prosecution and punishment of the perpetrators of international crimes.<sup>31</sup>

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(New York: Oxford University Press, 2003), at 315. In a similar but more emphatic argument, commenting on the validity of the amnesty contained in the Promotion of National Unity and Reconciliation Act 34 of 1995 (known as the Truth and Reconciliation Law), the Constitutional Court of South Africa asserted that "there is no obligation on the part of a contracting state [in whose territory crimes were committed] to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. [...] It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself." *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*, *supra* note 8, paras. 30–31. Significantly, various analysts regard the amnesty laws adopted in South Africa as compatible with international law insofar as they ensure the victims' right to truth and reparations, among other rights. The paragraph quoted here is only intended to highlight the Constitutional Court's position on the international obligations of States relating to investigation and punishment.

- 30 On this subject, see "Rights of the victims in criminal proceedings involving crimes under international law," section V.8 of this digest.
- 31 In an appeal concerning the constitutionality of its country's amnesty laws, the Constitutional Court of South Africa stated, "The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past." In the same ruling, the Constitutional Court underscored that "[t]he alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief [...]. The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new." *Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa and others*, *supra* note 8, paras. 18, 21, and 32. For some academic analyses of limitations on amnesties on grounds of victims' rights, see, *inter alia*, Louise Mallinder, "Can Amnesties and International justice Be Reconciled?" *supra* note 19; Ronald C. Slye, "The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?" 43 *Virginia Journal of International Law* 173 (2002–3); Ben Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (Upper Saddle River, NJ: Pearson Education, 2002). In addition, for an analysis of transition processes involving amnesty laws from the standpoint of the theoretical development of restitutive justice, which seeks to place the victims and their rights at



Latin American jurisprudence—in consonance with inter-American jurisprudence<sup>32</sup>—has approached amnesty laws *primarily* from the standpoint of the obligations to investigate, prosecute, and, as the case may be, punish the commission of international crimes. Such obligations are analyzed in conjunction with the rights of victims, their relatives, and society as a whole.<sup>33</sup> In other words, in contrast to other arguments, Latin American jurisprudence has determined the non-applicability or nullity of amnesty laws based on the obligations of the States where such crimes have been committed, in light of the nature and gravity of international crimes, and bearing in mind the rights of the victims.

EL SALVADOR, *Remedy of unconstitutionality (Articles 1 and 4 of the Legislative Decree No. 486, General Amnesty for the Consolidation of Peace) (List of Judgments 7.a)*, Whereas VI.2:

[I]n all of its institutions and at all levels of jurisdiction—and, it must be added, regardless of the subject of the provision that serves as the legal basis for the claim—[the adjudicatory process] is the instrument by means of which the State fulfills its duty to protect all persons in the preservation and defense of their rights. Therefore, it is important to understand that a criminal proceeding—like all adjudicatory processes—is, in principle, a kind of safeguard for the preservation and defense of the rights of persons.

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the center of the debate, see, for example, Charles Villa-Vicencio, “Restorative Justice: Ambiguities and Limitations of a Theory,” in *The Provocations of Amnesty: Memory, Justice and Impunity*, ed. Charles Villa-Vicencio and Erik Doxtade (Trenton, NJ: Africa World Press, 2003).

- 32 In a general sense, the Inter-American Court has developed three main arguments concerning the prohibition on adopting amnesty laws. First, the Court has asserted that States have an ineludible obligation to investigate and, where appropriate, prosecute and punish international crimes, and therefore an amnesty law that precludes the fulfillment of those obligations will lack legal effect. Second, the Court has also asserted that the mere enactment of a law of this nature means that “the State breached its obligation to adjust its domestic law to the Convention pursuant to Article 2 thereof, in relation with Articles 4, 5, 7, 8.1, 25 and 1(1) of the Convention, to the detriment of the victims’ relatives.” IACourtHR, *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of November 29, 2006, Series C, No. 162, para. 189. The Court has further pointed out that the adoption of an amnesty law violates the right of victims of international crimes to know the truth about what happened. See, for example, IACourtHR, *Case of Barrios Altos v. Peru*, Merits, Judgment of March 14, 2001, Series C, No. 75; IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006, Series C, No. 154; IACourtHR, *Case of La Cantuta v. Peru*, *ibid.* For a more in-depth analysis of the decisions handed down by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, see, for example, Santiago A. Canton, “Amnesty Laws,” in Due Process of Law Foundation, *Victims Unsilenced*, *supra* note 3, at 167–90.
- 33 The Inter-American Court has found, for example, that amnesty laws have kept victims from exercising their right to access to justice, which includes, *inter alia*, the right to be heard by a judge, to participate in proceedings to establish the responsibility of the accused, and to obtain reparations. With respect to the right to truth, in some cases related to the application of amnesty laws to international crimes, the Court has concluded that “in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.” IACourtHR, *Case of Barrios Altos v. Peru*, *supra* note 32, para. 48. See also “Rights of the victims in criminal proceedings involving crimes under international law,” section V.8 of this digest.

From this perspective, it is clear that [constitutional] Article 2(1)—which is a basic provision in the context of the Constitution in that it *lays the groundwork for the effective enjoyment of fundamental rights—also constitutes a restriction on the powers conferred on the Legislative Assembly* pursuant to [constitutional] Article 131(26), insofar as any interpretation of the latter must be consistent with those restrictions. *This means that the Legislative Assembly may grant amnesty for political crimes or for common crimes related to them, or for common crimes committed by a number of persons that shall not be fewer than 20, as long as that amnesty does not get in the way of safeguards to preserve and defend—through criminal prosecution—the fundamental rights of the human person.* [*Emphasis added*]

ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 16, 23, 26, and 27:

[W]hile it is true that Article 75(20) of the National Constitution empowers the Legislative Branch to issue general amnesties, the scope of this power has been restricted significantly. In principle, amnesty laws have been used historically as tools of social pacification, for the explicit purpose of resolving residual conflicts in the aftermath of civil struggles. In an analogous sense, Laws 23.492 and 23.521 attempted to leave behind clashes between “civilians and the military.” Just as with all amnesties, however, insofar as they are oriented toward “forgetting” gross human rights violations, they contravene the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights and are, therefore, constitutionally intolerable (Argentine National Constitution, Article 75(22)).

[The Inter-American Court, in the same judgment in the Barrios Altos case,] also stated, “The Court considers that it should be emphasized that, in light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse (...). Consequently, States Parties to the Convention that adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention” [*footnote omitted*]. Consequently, in view of “the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, *the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible*” [*footnote omitted*].

[T]he “Barrios Altos” case imposed strict limitations on the powers of the Congress to grant amnesty, pursuant to which it is barred from including circumstances such as those covered under the Full Stop and Due Obedience laws. In the same way, any domestic law provision that, for reasons of “pacification,” grants any form of amnesty leading to impunity for gross human rights violations perpetrated by the

regime that stands to benefit from the provision, is contrary to clear and obligatory international law provisions and must be effectively suppressed.

[O]n this point it is pertinent to recall the concurring vote of Judge García Ramírez in the Barrios Altos case, which recognized that, under certain circumstances, the granting of amnesty may be an appropriate means to restore peace and open up new constructive stages within the framework of “a peace process that has democratic support and a reasonable scope that precludes prosecution of acts or conduct of members of rival factions [...].” However, “such forgive and forget provisions cannot be permitted to cover up the most severe human rights violations, violations that demonstrate an utter disregard for the dignity of the human being and are repugnant to the conscience of humanity.”

*PERU, Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g),* Whereas 28–31, 52–53, 58, and 59:

Amnesty laws also may not be enacted in contravention of the international obligations derived from the international human rights treaties and conventions ratified by the Peruvian State. The capacity of human rights treaties to impose substantive limitations on amnesty laws is found in Article 55 and in the 4<sup>th</sup> Final and Transitory Provision of the Constitution. In accordance with the former, once the treaties have been ratified, they form part of domestic law and are therefore binding on the public authorities. In accordance with the latter, treaties serve to demarcate the constitutionally guaranteed sphere of fundamental rights.

Based on treaty law, but also on international human rights jurisprudence, it is possible to distinguish basic inalienable rights from those that might be compromised by the promulgation of an amnesty law (e.g., the right to judicial protection of rights and the right to truth).

The obligations acquired by the Peruvian State when it ratified human rights treaties include the duty to guarantee those rights that are non-derogable under international law and with respect to which the Peruvian State has undertaken internationally to punish any infringement. It is in keeping with the mandate set forth in Article V of the Preliminary Title of the Code of Constitutional Procedure to invoke treaties that have spelled out the absolute prohibition against wrongful acts that may not be amnestied under international law, because to do so would contravene the minimum standards of protection of the dignity of the human person.

Such wrongful acts include the crimes of genocide and crimes against humanity set out in Articles 6, 7, and 8 of the Rome Statute of the International Criminal Court, which include the following acts: the crimes of extrajudicial execution; murder; extermination; enslavement; forced deportation or transfer of population; imprisonment or any other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that is universally recog-

nized as impermissible under international law; forced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character that intentionally cause great suffering or serious injury to body or to mental or physical health.

[T]he promulgation of amnesty laws is a constitutionally mandated power of the Congress of the Republic, and therefore any judicial ruling issued in the application of constitutionally legitimate amnesty laws gives rise to a situation of *constitutional res judicata*. Oversight of amnesty laws, however, is premised on the assumption that the legislative organ responsible for criminal legislation intended to act within the framework of the Constitution and respect for fundamental rights.

That assumption does not apply, therefore, when it is proved that the legislature used its authority to enact amnesty laws in order to cover up the commission of crimes against humanity. Nor does it apply when such power is used to “guarantee” impunity for gross human rights violations. This was the situation surrounding the criminal activities of the so-called “Colina Group,” to which the appellant belonged. The Peruvian State has acknowledged this through its designated agent in the La Cantuta case before the Inter-American Court of Human Rights.

That being the case, it should be noted that while the Legislative Branch is empowered to grant amnesty—in other words, to overlook the crime committed by certain persons, thereby giving rise to the effects of *res judicata* under Articles 102(6) and 139(13) of the Constitution—this is not to say that the Congress may enact amnesty laws to shelter crimes against humanity such as kidnapping, torture, and the summary execution of persons, for example. This is the case since the legitimacy of the Constitution lies in the defense of the human person and respect for his dignity as the ultimate purpose of society and the State, according to Article 1 of the Constitution.

This principle-law constitutes a binding legal norm, which is observed through the individual enjoyment of fundamental rights—the right to life (Article 2(1) of the Constitution) or the right to justice (Article 139 of the Constitution)—as well as through the fulfillment of State functions. Precisely for this reason, the legislative powers of the Congress are not unlimited, since the exercise of the powers legally vested in it may not violate constitutional principles and values—such as, *inter alia*, the dignity of the human person, justice, and truth—based upon which the legally constituted authority operates.

For an interpretation based on domestic law, but also related to the duty to ensure the fundamental rights of persons through, *inter alia*, the investigation of crimes against those rights, see PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 21, 22, 24, and 26:

Insofar as the enactment of amnesty laws entails the exercise of juridical-constitutional powers, it is subject to constitutional limits. It is a power constitutionally vested in the authority responsible for the criminal law enforcement policy of the State, and as such, it must be exercised in the framework of the Political Constitution of the State.

Article 102(6) of the Constitution does not explicitly set out the parameters for the enactment of amnesty laws. This does not mean that they do not exist, however, since the legitimacy of the exercise of State power, and, ultimately, that of its constitutional organs, is not justified in and of itself, but rather is premised on full respect for the principle-right of human dignity and faithful adherence to constitutional principles and fundamental rights.

An amnesty law is subject to formal and substantive limits. With respect to the former, it should be noted that an amnesty law may only enter into force pursuant to ordinary law. Therefore, in addition to observing the constitutional principles that inform the legislative process, it must adhere to the criteria of generality and abstraction as stipulated in Article 103 of the Constitution. Amnesty laws must also respect the principle-right of juridical equality, which, once the scope of the amnesty law has been established, precludes the legislative body from conferring any differential treatment that does not satisfy the requirements of the principle of proportionality [*footnote omitted*].

[W]hatever the constitutional jurisdiction involved, it must be exercised in such a way as to guarantee and protect fundamental rights as expressions of the principle-right of human dignity (Article 1 of the Constitution) and to fulfill the obligations under Article 44 of the Founding Law to ensure the full effectiveness of human rights. This duty is not the same as the duty to respect. The latter entails the obligation not to harm those rights and is based on the specific recognition of each one of them.

In this same line of interpretation, see EL SALVADOR, *Remedy of unconstitutionality (Articles 1 and 4 of the Legislative Decree No. 486, General Amnesty for the Consolidation of Peace) (List of Judgments 7.a)*, Whereas VI.2:

This Court observes that Article 1 of the General Amnesty Law for the Consolidation of Peace textually quotes the general rule set out in Article 131(26) Cn. Therefore, since, as previously stated, that general rule is subject to the restrictions imposed by Article 2(1) Cn., Article 1 of the aforementioned law is also affected by that restriction. Consequently, Article 1 of the General Amnesty Law must be interpreted in light of Article 2(1) Cn., and the amnesty contained therein must be understood as applicable only in cases in which the aforementioned clemency petition does not interfere with safeguards for the preservation and defense of the rights of persons, in other words, when it is a matter of crimes the investigation of which is not seeking to redress a fundamental right.<sup>34</sup>

34 Note added to the original: In this judgment, the Supreme Court of Justice recognized the importance of international treaties, their ranking above secondary Salvadoran laws, and the State's duty to comply with the obligations it has undertaken by virtue of those treaties. Despite these clear jurisprudential principles, the Court asserts that those treaties do not form part of the Salvadoran "bloc of constitutionality" and that ultimately they cannot be used as a point of reference to determine the unconstitutionality of certain provisions of the General Amnesty Law through an unconstitutionality proceeding.

From the perspective of comparative law, combined with elements of international law, with respect to the validity of amnesty laws and crimes under international law, see EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascochea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

[T]he Hungarian Constitutional Court, when taking up the Draft Law to punish those responsible for serious violations of fundamental rights committed during the repression of the 1956 Revolution, in judgment number 53 of 1993, recognized that “there is a general rule that consists of the international obligation to punish crimes against humanity. It would take precedence over any amnesty.”

As a result, there is an obligation of “universal suppression” as far as crimes against humanity are concerned: in other words, the general obligation of all States to punish its nationals or foreigners responsible for a crime of this nature.

### C. Evolution of the prohibition against certain amnesty laws

ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 12, 13, and 14:

[I]n regard to the intention of the accused to seek protection under the “Due Obedience law,” it should be noted that in enacting the law (23.521), the National Congress chose to ratify the Executive Branch’s political decision to declare the impunity of military personnel, in the terms of Article 1 of that law, for crimes committed “from March 24, 1976 to September 26, 1983, in operations undertaken for the alleged purpose of repressing terrorism” (Article 10(1) of Law 23.049). With this objective, the aforementioned law was based on an assumption that it was necessary to consider “*ipso jure* that the persons mentioned were operating in a state of coercion, subordinate to the superior authority and under orders, without the power or possibility of oversight, opposition, or resistance to them with regard to their propriety and legitimacy” (Article 1, Law 23.521, *in fine*).

[In previous decisions] it has been established that the legislative procedures followed for Law 23.521 contained [...] deficiencies. [Nonetheless, it was determined that] the *ratio legis* was clear: to amnesty the egregious criminal acts committed during the former military regime, with the understanding that, in view of the severe conflict of interests that Argentina was facing at that time, amnesty seemed to be the only possible way to preserve social peace. The legislative organ regarded the preservation of social and political harmony as a legally protected value that was worth considerably more than the criminal prosecution of the law’s beneficiaries. This law was judged, therefore, to be the end result of an evaluation of the serious interests at stake—a prerogative of the political authority—and as such, it was admitted by this Court.

*[F]rom that time [when those rulings were handed down] to the present, Argentine law has undergone significant changes that require a review of the decisions made on that*

*occasion. In this regard, the progressive evolution of international human rights law—which enjoys the rank set out under Article 75(22) of the National Constitution—means the State is no longer authorized to make decisions based on the type of arguments employed before, which led to the decision to refrain from criminally prosecuting crimes against humanity in pursuit of a peaceful social coexistence based on overlooking such occurrences. [Emphasis added]*

[T]he scope of that obligation, moreover, has been recently examined by the UN Human Rights Committee, which stated, “where public officials or State agents have committed violations of the Covenant rights (...), the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties [...].”<sup>35</sup>

PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 32:

The prohibition against amnesties for crimes [such as genocide and crimes against humanity] is also found in the jurisprudence of international human rights organs and tribunals. An example is this statement from the United Nations Human Rights Committee:

“Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, the States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).<sup>36</sup>

“Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties [see General Comment 20] and prior legal immunities and indemnities. Furthermore, no official status justifies persons

35 Note in the original: “General Comment No. 31, General comments adopted by the Human Rights Committee on the Nature of the General Legal Obligation Imposed, 80<sup>th</sup> regular session (2004), [paras.] 17 and [thereafter].”

36 Note in the original: “Human Rights Committee, General Comment No. 31, General Comments adopted by the Human Rights Committee on the Nature of the General Legal Obligation Imposed, 80<sup>th</sup> regular session, UN Doc. HRI/GEN/1/ Rev.7 at 225 (2004), para. 18.”

who may be accused of responsibility for such violations being held immune from legal responsibility.”

In the sphere of the regional human rights protection system, the Inter-American Court has stated that

“(...) all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law” [*footnote omitted*].

### **i. Argentine case**

ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 20–24 and 33:

[I]n the particular case of the Argentine State, the Full Stop and Due Obedience laws and attendant pardons were examined by the Inter-American Commission on Human Rights in report 28/923 [*footnote omitted*]. On that occasion, the Commission stated that the fact that criminal proceedings for human rights violations—disappearances, summary executions, torture, kidnapping—committed by members of the Armed Forces had been cancelled, encumbered, or obstructed by laws 23.492 (Full Stop) and 23.521 (Due Obedience) and by decree 1002/89 constituted a violation of the rights enshrined by the Convention. [The Commission concluded] that such provisions are incompatible with Article XVIII (Right to Justice) of the American Declaration of the Rights and Duties of Man and Articles 1, 8, and 25 of the American Convention on Human Rights. It recommended to the Argentine Government “that it adopt the measures necessary to clarify the facts and identify those responsible for human rights violations that occurred during the past military dictatorship” [*footnote omitted*].

[A]nd so it was established, from that moment forward, that in the view of the Inter-American Commission on Human Rights, the fact that the laws in question had been issued by democratic organs based on the compelling need for national reconciliation and consolidation of the democratic system (as the Argentine government had contended) [*footnote omitted*] was virtually irrelevant for the purposes of determining a breach of the rights set forth in Articles 8.1 and 25.1 of the American Convention on Human Rights.

[N]onetheless, the specific scope of the Commission’s recommendation in the aforementioned report remained to be determined, in particular with respect to the nature of “the measures necessary to clarify the facts and identify those responsible for human rights violations.” This was the case inasmuch as, from the tenor of the recommendation that the Commission issued to Argentina in relation to the incompatibility of the Full Stop and Due Obedience laws, it was not possible to infer on



that basis alone whether the mere “clarification” of the circumstances was sufficient, in terms of the so-called “truth trials,” or whether the duties (and powers!) of the Argentine State in this regard also required completely canceling the effects of the laws and decree in question. Such a conclusion would entail a severe restriction on *res judicata* and on the principle of legality, which precludes the retroactive extension of statutory limitations [*prescripción*] on criminal prosecutions, which in many cases had already expired.

[S]uch questions with respect to the specific scope of the duty of the Argentine State in relation to the Full Stop and Due Obedience laws have been clarified by the Inter-American Court in its judgment in the Barrios Altos case [*footnote omitted*].<sup>37</sup> [...] The Inter-American Court found that Peru had incurred international responsibility not only for the violation of the right to life and personal integrity derived from the massacre, but also for the promulgation of the two amnesty laws, which constituted a violation of the right to a fair trial and the right to judicial protection and of the obligation to respect rights and to adopt such domestic legislative measures as may be necessary to give effect to those rights.

[I]t is imperative to apply the Inter-American Court’s conclusions in “Barrios Altos” to the Argentine case if the decisions of that international tribunal are to be interpreted in good faith as jurisprudential guideposts. Of course, while one could find various arguments to distinguish one case from the other, such distinctions would be purely anecdotal. For example, the situation created by the language of the Peruvian laws is not, of course, “exactly” the same as those arising from the Full Stop and Due Obedience laws. However, that is not the relevant issue when determining the compatibility of those laws with international human rights law. What is critical here, rather, is that the Full Stop and Due Obedience laws contain the same defects that led the Inter-American Court to reject the Peruvian “self-amnesty” laws. In equal measure, both are *ad hoc* laws intended to prevent the prosecution of serious human rights abuses.

In the same sense, and particularly in regard to our country, the [UN Human Rights] Committee’s concluding observations for Argentina likewise establish the inadmissibility of the situation created by laws 23.492 and 23.521 under the International Covenant on Civil and Political Rights, as well as the insufficiency of merely derogating those laws: “Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice” [*footnote omitted*]. The same body has previously stated as follows: “The Committee notes that the compromises made by the State Party with respect to its authoritarian past, especially the Law of Due Obedience and the Law of *Punto Final* and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant” [*footnote omitted*]. On that occasion, it also expressed its concern that both laws “deny effec-

37 Note added to the original: For the facts of the Barrios Altos case, see the complete text of Whereas 24 of this ruling, in *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, of the Supreme Court of Justice of Argentina, or the Judgment on the Merits of the Inter-American Court for Human Rights, Case of *Barrios Altos v. Peru*, March 14, 2001, Series C, No. 75.

tive remedy to victims of human rights violations [during the period of authoritarian rule], in violation of articles 2 (2,3) and 9 (5) of the [International Covenant on Civil and Political Rights]. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children” [footnote omitted].

## ii. Peruvian case

PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 41–43:

[In the Interpretive Judgment in the Barrios Altos case], the [Inter-American] Court [of Human Rights] stated:

“Enactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is per se a violation of the Convention for which the State incurs international responsibility. *The Court therefore considers that given the nature of the violation that amnesty laws No. 26479 and No. 26492 constitute, the effects of the decision in the judgment on the merits of the Barrios Altos Cases are general in nature, and the question put to the Court in the Commission’s request for interpretation must be so answered.*”

The same opinion was expressed in the recent ruling by the Inter-American Court in the *La Cantuta v. Peru* case, which again recalled that

“(…) the Court has already examined the content and scope of amnesty laws Nos. 26479 and 26492 in the case of *Barrios Altos v. Peru*. In the judgment on the merits (...) it held that the laws are ‘incompatible with the American Convention [...] and, consequently, lack legal effect.’ The Court interpreted the judgment on the merits in this case, stating that (...) the decision (...) has general effects” [footnote omitted].

It can be inferred from the foregoing that the Inter-American Court of Human Rights has declared that the aforementioned amnesty laws lack legal effect and that the judgment, therefore, has general effects. That being the case, the aforementioned ruling is applicable not only to the facts as they transpired in the Barrios Altos case, but also to cases in which the application of such laws precluded the prosecution and punishment of gross violations of rights recognized in the American Convention [of Human Rights], such as the *La Cantuta* case.

## **D. Prohibition against certain amnesties extends to those adopted by previous and subsequent governments, and not only self-amnesties**

ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 24:

In this sense, it should be noted that what led [the Inter-American Court in the Barrios Altos case judgment] to reject those laws was not so much that the regime had attempted to benefit directly from impunity for crimes it had committed (as occurred in our country with *de facto* law 22.924). The fatal flaw lay not so much in whether the pardon was issued by the offending party, or whether or not it was a *de facto* government that issued it. Rather, such laws must be rescinded on substantive grounds. It is clear, therefore, that this must extend to laws issued by subsequent regimes that grant impunity to perpetrators from the preceding regime, in breach of the duty to criminally prosecute human rights violations.

## **E. Amnesty laws and principle of non-retroactivity of criminal law**

URUGUAY, *Case "Condor Plan" in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 8:

Occasionally, States argue that the derogation or annulment of an amnesty law for the perpetrators of serious human rights violations violates the principle of non-retroactivity. The Inter-American Commission on Human Rights has stated its position on this subject in a decision on the amnesty law in Chile. In the course of the international proceeding, the Chilean State contended that the derogation of the amnesty decree-law would have no effect on the perpetrators of the violations under the principle of non-retroactivity of criminal law set out in Article 9 of the American Convention on Human Rights and Article 19 of the Constitution of Chile. In this respect, the Inter-American Commission explained that "the principle of non-retroactive application of the law, under which no one can be convicted retroactively for actions or omissions that were not considered criminal under applicable law at the time they were committed, cannot be invoked with respect to those granted amnesty because at the time the acts in question were committed they were classified and punishable under Chilean law then in force."

The Inter-American Court of Human Rights, for its part, has concluded that the State cannot argue the non-retroactivity of its criminal law as an excuse to escape its duty to investigate and punish those responsible for crimes which, at the time of their commission, constituted a crime under international law. The Human Rights Committee, in its "Concluding Observations" to Argentina in 2000, reminded the Argentine State that "serious violations of civil and political rights during the mili-

tary dictatorship must be prosecutable over whatever time is necessary and with all necessary retroactivity to achieve the conviction of those responsible.”

## F. Consequences of the determination of incompatibility of an amnesty law with state obligations

ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 28 and 31:

[I]t is clear from the decision in the aforementioned case in relation to the effects of the so-called “self-amnesty laws” that the “symbolic” suppression of laws of this nature would not be sufficient. Hence, the Inter-American Court did not merely declare the incompatibility of these laws with the Convention; it also ruled that the Peruvian laws lacked legal effect and enjoined the Peruvian State to set aside the matter of *res judicata*. Viewed through this lens, it can be concluded in the Argentine case that the mere derogation of the laws in question, when not accompanied by a prohibition against invoking the retroactive application of the most benign criminal law, would not satisfy the standard set by the Inter-American Court.

[F]rom this standpoint, *in order to comply with international human rights treaties, the suppression of the Full Stop and Due Obedience laws cannot be postponed, and it must be done in such a way that it does not pose any normative obstacle whatsoever to the prosecution of acts such as those at issue in the instant case.* This means that those who benefited from such laws may not invoke the prohibition against the retroactivity of the more severe criminal law or *res judicata*. In light of the Inter-American Court’s rulings in the cases cited herein, those principles may not be used as an obstacle to the annulment of the aforementioned laws or to the prosecution of the cases that were terminated because of them or of any others that should have been opened and never were. In other words, because it is subject to inter-American jurisdiction, the Argentine State may not invoke the principle of the “non-retroactivity” of criminal law in order to sidestep its obligations to prosecute gross human rights violations.

In application of this judicial interpretation, see ARGENTINA, *Motion submitted by Ragnar Erland Hagelin (List of Judgments 1.g)*.

As complement to these decisions, see PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 16 and 50, in “*Decisions based on a void law: Relationship between the ne bis in idem principle and amnesty laws,*” in this chapter.

## G. Amnesty laws adopted by a given state incompatible with its international obligation do not impose obligations on other states

*MEXICO, Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a), Whereas Fourteen:*

[T]he District Judge explained that [...] a State's decision not to exercise its jurisdiction to prosecute crimes of an international nature did not prevent any other State in the global arena from asserting its jurisdiction, since international treaties applicable to the specific case recognized the jurisdiction of any State party to them to prosecute, try, and punish such crimes pursuant to its domestic law and to the treaties themselves. The purpose of this is to avoid impunity for such crimes when the State having initial jurisdiction—whether by virtue of the place where the crimes were committed, the nationality of the offender, or any other connection—refrains from asserting it, whether by means of domestic measures or even in compliance with international obligations of a conventional or customary nature. Therefore, Argentine laws cannot be binding on another State or legally deprive the latter of a jurisdiction that it may exercise under its domestic law or under the international treaties to which it is party[.] [...] [I]nternal decisions to prevent the prosecution of a person cannot be binding on the courts of other countries.

[I]n addition to the foregoing, [the District Judge decided that] it was a fact that such laws were incompatible with the Conventions setting out the principles intended to ensure the prosecution and punishment of perpetrators of war crimes and crimes against humanity, which included genocide and terrorism. For this reason, such laws were not obligatory for other States in the global arena, such as Mexico and Spain, which could assert extraterritorial jurisdiction on behalf of the international community, since compliance with international legal requirements was more an obligation than a power vested in them. In this regard, the District Judge invoked the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention to Prevent and Punish Torture, and the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion, which, he explained, set out the international prohibitions against granting immunity or amnesty to any person for the crimes of genocide and terrorism. Therefore, if a State were to enact laws within its legal framework in breach of those international regimes, such laws would not apply to other States that have the obligation to prosecute and punish those responsible for international crimes. And, since the Full Stop and Due Obedience laws were incompatible with internationally recognized provisions, they could not be recognized and accepted by the Mexican State.

Moreover, the District Judge stated, aside from the foregoing, according to the documentary evidence forwarded by the requesting judge, the laws had been derogated and therefore offered no benefit to the petitioner.<sup>38</sup>

38 Note added to the original: Although the Supreme Court of Justice of Mexico does not restate the District Judge's arguments in his judgment on the *amparo* writ (appealed to that High Court), given the context

## H. Amnesty laws compatible with international law

EL SALVADOR, *Remedy of unconstitutionality (Articles 1 and 4 of the Legislative Decree No. 486, General Amnesty for the Consolidation of Peace) (List of Judgments 7.a)*, Whereas VI.2 and VII:

Nevertheless, it is necessary here to determine in which cases amnesty does not get in the way of safeguards for the preservation and defense of the rights of persons. Generally speaking, amnesty is permissible for political crimes, for common crimes related to political crimes, and for common crimes committed by 20 or more people. As far as political crimes, clearly not all such crimes entail a violation of fundamental rights. There are, for example, political crimes in which it is the State that is directly affected, and therefore such crimes do not violate fundamental rights. In such cases, it is impossible to argue that the purpose of investigating such crimes is to seek redress of a fundamental right, and, therefore, the individuals prosecuted for such crimes could benefit from an amnesty. As a result, amnesty would be considered admissible for common crimes related to political ones *as long as the related political crime is subject to amnesty*.<sup>39</sup> [*Emphasis added*]

In relation to common crimes committed by no fewer than 20 people, it is necessary to point out that not all of the legally protected values impaired by a particular crime constitute fundamental rights. In such cases, then, it also cannot be argued that the purpose of investigating such crimes is to seek redress of a fundamental right, and, therefore, these crimes may also be subject to amnesty.

[In view of the foregoing,] [i]n relation to Article 1 of the [Law on General Amnesty for the Consolidation of Peace] and [Articles] 2 and 244 of the Constitution, this Court concludes that the provision being challenged is broader in its scope of application than the constitutional provision with which it has been compared, and therefore the exception found in the Constitution could be applicable in some but not all of the cases set out in the Law on General Amnesty for the Consolidation of Peace. This means that the deciding body must, on a case by case basis, determine when the exception is applicable through an interpretation consistent with the Constitution.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.3:

[This] Court underscores that amnesties issued to consolidate peace have been regarded as instruments compatible with respect for international humanitarian law.

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of the ruling and its rejection of the appellant's arguments, it can be concluded that the Supreme Court allowed and concurred with the arguments put forth by the District Judge.

39 Note added to the original: A proper reading of this paragraph requires an examination of the arguments previously outlined by the Supreme Court of Justice of El Salvador in the same judgment, where it states that "amnesty can be considered for political crimes or related common crimes or for common crimes committed by 20 or more individuals, *as long as that amnesty does not get in the way of safeguards for the preservation and defense—through criminal prosecution—of the fundamental rights of the human person*" [*emphasis added*]. See "*Amnesty law cannot cover crimes under international law*," section 2.B in this chapter.

This is pointed out, for example, in Article 6.5 of Protocol II Additional to the Geneva Conventions of 1949: “Article 6. Penal prosecutions. (...) 5. At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

Despite the foregoing, *and in order to ensure that peace is compatible with the enjoyment of human rights and respect for international humanitarian law, international law has taken the view that the domestic instruments employed by States to achieve reconciliation must guarantee access to justice for the victims and for others who have been harmed by criminal behavior, so that they may learn the truth about what has occurred and obtain effective judicial protection.* [Emphasis added]

Measures such as the Full Stop laws that obstruct access to justice, blanket amnesties for any crime, self-amnesties (meaning the benefits, under criminal law, that the legitimate or illegitimate authorities grant to themselves and to their aiders in the crimes committed), or any other method intended to keep victims from obtaining an effective legal remedy to assert their rights have been deemed a breach of the international obligation of States to provide legal remedies for the protection of human rights, which is embodied in [various international] instruments.

MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Fourteen:

The District Judge explained that even though the aforementioned Full Stop and Due Obedience laws were amnesty laws, several international law criteria should have been taken into account in order to consider whether the effects of such a law should be recognized at the national and international levels. These include, for example, the United Nations Subcommission on Human Rights [*sic*] report on the Impunity of Perpetrators of Violations of Human Rights [*sic*] of 1996, pursuant to Resolution 1995/35 of the Subcommission on Prevention of Discrimination and Protection of Minorities, 48th Session, Geneva, 1996, which sets out the criteria for determining when the matter involves an actual amnesty law and the characteristics that such a law must have if it is to be effective, including reparations to the victims and knowledge of the truth about what happened. Another example is the Barrios Altos case judgment of March 14, 2001, handed down by the Inter-American Court of Human Rights, which concluded that amnesty provisions intended to prevent the punishment of those responsible for serious human rights violations were inadmissible.<sup>40</sup>

<sup>40</sup> Note added to the original: Although the Supreme Court of Justice of Mexico does not restate the District Judge’s arguments in his judgment on the *amparo* writ (appealed to that High Court), given the context of the ruling and its rejection of the appellant’s arguments, it can be concluded that the Supreme Court allowed and concurred with the arguments put forth by the District Judge.

PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 34:

[A]n amnesty decreed in accordance with the various applicable limitations confers the condition of *constitutional res judicata* on any legal ruling handed down pursuant to it, and it entitles its beneficiaries to the fundamental right set forth in Article 139(13) of the Constitution. It is now time to examine whether amnesty laws No. 26479 and No. 26492 are compatible with international human rights treaties and with the Constitution.

### **i. Amnesty law for political offenses**

VENEZUELA, *Decision on the extradition of José María Ballestas Tirado (List of Judgments 15.a)*, Whereas:

A political crime is one that has a political motive, in other words, one in which political fervor gave rise to the wrongdoing. And if it is a rebellion, the offense emblematic of political crimes and the one of which citizen BALLESTAS is accused, it is, in the first place, a matter of whether the action triumphed or failed, since that is what determines whether the protagonists are considered heroes or villains. In criminal law, therefore, those who take up arms should not be termed criminals, or their conduct a crime, inasmuch as the laws of war are applicable to them and they must be treated as prisoners of war. The crime of rebellion consists of disobedience toward a legitimate government. The complication arises from the controversial nature of the notion of legitimacy, which varies according to ideology and the reality. The notion of “*jus rebelium*,” or the right to rebellion, clearly exists, but it is subject to several conditions, one being whether there are well-founded possibilities for success and proportionality between the damage that the insurrectional action will cause and the presumed benefits that it will achieve. *There is also a position in criminal law to the effect that once the rebellion has been quashed and the danger has passed, amnesty is an absolute necessity, in the understanding that the actions were born of ideas.* In theory, then, a political crime has altruistic motives: the agent chooses to sacrifice him or herself for the good of the fatherland and society and should not be treated as a common criminal. In light of the foregoing, this crime would not imply immorality or represent (except when it is committed) a danger, and the same would hold true of whoever commits it.

## **3. PARDONS**

As pardons frequently have been confused or equated with amnesties, certain conceptual differences must be elucidated in order to understand the implications of **pardons** for the criminal prosecution of international crimes.



In contrast to amnesties, pardons usually are the result of an executive act by the Head of State or Government intended to grant clemency or forgiveness to a specific individual who has been found liable for a particular crime and is already serving a sentence.<sup>41</sup> In exceptional cases, pardons have also been granted before the conclusion of a criminal proceeding, meaning before a final and non-appealable judgment has been issued.

According to Ronald C. Slye, there are at least four theoretical bases that might justify the granting of a pardon: as “an expression of the official grace and wisdom of a leader or government; an expression of societal forgiveness for a transgression; a recognition of rehabilitation; and as a contribution towards social stability.”<sup>42</sup> The third of these justifications is perhaps the one that most clearly distinguishes a pardon from an amnesty.<sup>43</sup> In any event, like amnesties, pardons are an important tool in a country’s legal system when applied lawfully and in a manner appropriate to all of the circumstances and the nature of the crime. The question, then, is whether or not pardons are applicable to cases of international crimes.

While international jurisprudence has had little, if anything, to say on the matter,<sup>44</sup> the Supreme Court of the Argentine Nation has established three basic criteria in relation to the non-applicability of pardons to this type of crime: (i) given the nature of these crimes, pardon cannot be left up to the discretionary powers of a single individual;<sup>45</sup> (ii) a pardon granted before the

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41 See, for example, Ronald C. Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law,” *supra* note 31, as well as Faustin Z. Ntoubandi, *Amnesty for Crimes against Humanity under International Law*, *supra* note 19.

42 Ronald C. Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law,” *supra* note 31, at 236.

43 *Ibid.*

44 The jurisprudence of the Inter-American Court has not yet directly addressed the application of pardons to acts amounting to international crimes, in relation to the rights and obligations set out in international instruments. In its judgment in the *Barrios Altos v. Peru* case, the Court only states that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations [...]” IACourtHR, *Case of Barrios Altos v. Peru*, *supra* note 32, para. 41, as well as IACourtHR, *Case of La Cantuta v. Peru*, *supra* note 32, para. 152. While it can be argued that a pardon granted before a prosecution has been completed could, in practice, amount to a form of excluding responsibility and could therefore be situated in the jurisprudential current of the Inter-American Court, as discussed later on, the main problem arises when the pardon is granted after the accused has been convicted and, even more so, once he or she has served part of the sentence. Similarly, the Inter-American Commission has focused on amnesty provisions, without referring explicitly to the matter of pardons. See, for example, the reports on the human rights situation in El Salvador, Argentina, and Uruguay, in the annual report of the Inter-American Commission on Human Rights, Doc. OEA/Ser.L/V/II.82, 1992.

45 This argument is in a sense related to the objections to pardons (or the corresponding legal institution that existed at that period of time) raised by classic treaty experts. According to Ronald C. Slye, “while pardons in general are not nearly as controversial today as amnesties (although specific pardons can still generate a good deal of controversy), this was not always the case. Kant, Bentham, and Hegel, among others, were critical of the use of pardons by the monarchs and leaders of their time. In fact, the legitimacy of pardons became more problematic as nations moved from monarchies to democracies. The logic of a kingly pardon was tied to the fiction that a criminal act was an offense against the person of the king; thus, it was the king’s prerogative to decide whether to pardon an offense for which he was the victim. In a democracy a criminal act is considered an offense against ‘the people,’ and thus it is the people who have the authority to pardon. Montesquieu and Blackstone felt strongly that while pardons in principle might be defended, they had no place in a republic because a pardon would negate the will of the people as reflected in the

criminal proceedings in a case have been concluded would violate the rights of the victims and the obligation to investigate, prosecute, and punish;<sup>46</sup> and (iii) a pardon granted after a sentence has been imposed could, depending on the facts of the particular case, constitute a violation of the proportionality of the punishment in relation to the gravity of international crimes.<sup>47</sup>

As in many other areas, these criteria proposed by Argentine jurisprudence could serve as an important yardstick for the development of international law and, in particular, the jurisprudence of the International Criminal Court. In light of the still heated academic debates surrounding the criteria used to determine the “unwillingness [of the State] in a particular case,”<sup>48</sup>

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criminal law. Of course the concerns of Montesquieu and Blackstone are more easily satisfied in a representative democracy where an elected executive exercises the pardon power and where a law authorizing a pardon is drafted by an elected legislature.” Ronald C. Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law,” *supra* note 31, at 236. Despite the implications of representative democracy for the discussion of pardons, if we apply these historical-philosophical positions to the power to grant pardons for international crimes—in which the individual person and the international community as a whole are the victims—it would reinforce the argument traced by the Supreme Court of the Argentine Nation concerning the impossibility of one person, a Head of State or Government, granting “forgiveness” or a pardon for these crimes. The factual and legal circumstances surrounding this Supreme Court ruling exemplify the conflict between pardons as an executive power and international crimes. General Santiago Omar Riveros, one of the appellants and one-time beneficiary of a pardon, had been requested by the German courts to face trial for the disappearance of a citizen of that State. During the protracted legal proceedings, the German government constantly sought to attack the validity of a pardon for this type of crime by pointing out the universal vocation of justice.

- 46 In cases where a pardon is granted before the legal proceedings have run their course, then national and international jurisprudence concerning the State’s failure to fulfill its obligations could be applicable, in conjunction with the violation of the rights of the victims as discussed in the preceding sections. Alberto L. Zuppi, “Swinging Back and Forth between Impunity and Impeachment: The Struggle for Justice in Latin America and the International Criminal Court,” *19 Pace International Law Review* 195 (2007).
- 47 With respect to the principle of the proportionality of the penalty and its importance in terms of international crimes and the State’s compliance with its duties, the Inter-American Court has stated that “[i]n order for the State to satisfy its duty to adequately guarantee the range of rights protected by the Convention, including the right to judicial recourse, and the right to know and access the truth, the State must fulfill its duty to investigate, try, and, when appropriate, punish and provide redress for grave violations of human rights. To achieve this objective, the State should observe due process and guarantee the principles of expeditious justice, adversarial defense, effective recourse, implementation of the judgment, and the *proportionality of punishment*, among other principles. [...] With regard to the principle of proportionality of the punishment, the Court deems it appropriate to emphasize 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. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined.” IACourtHR, *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of May 11, 2007, Series C, No. 163, paras. 193 and 196. [*Emphasis added*]
- 48 Article 17 of the Rome Statute of the International Criminal Court. According to William Schabas, “The issue of willingness will arise where a national justice system is ‘going through the motions’ in order to make it look as if investigation and prosecution are underway although it may lack the resolve to see them through or may even be indulging in a sham trial held so that in any subsequent proceedings an accused can argue that he or she had already been tried and convicted and that any new trial is blocked by application of the rule against double jeopardy.” William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (New York: Cambridge University Press, 2007), at 184. If pardons are not granted based on genuine and valid grounds—and it would be difficult to imagine a scenario where such grounds are

this international court will still have to deal with the thorny question of whether a presidential pardon could amount to a situation in which “the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”<sup>49</sup> There is no doubt that domestic court interpretations developed in consonance with domestic principles and international standards will be invaluable to the work of the International Criminal Court as it deals with this and other complex questions.

## A. Overview

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 30:

In its origins, rationale, and historical and doctrinal evolution, a pardon entails leniency, clemency, mercy, and social forgiveness, which the organ of the chief of State confers on individuals with respect to whom the criminal laws, as they have been applied in specific cases, have been unexpectedly and disproportionately severe. It is a last resort to rectify the inevitable errors on the part of judges and to mitigate the punishments. In many cases, the Judiciary would notify the Executive Branch of cases involving situations that warranted consideration of a pardon [*footnote omitted*].

The Records of Verdicts of this Court reveal a historical jurisprudential debate—which also occurred at the level of doctrine—over whether the power to pardon may

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actually present in the case of international crimes—this institution can become one of the more refined attempts to defraud universal justice. In this scenario, the trial is conducted in its entirety and the punishment is imposed. The accused might even begin to serve his/her punishment before the pardon is granted. In these circumstances, the pardon will indeed have the immediate result of creating a situation governed by the principles of *ne bis in idem* and *res judicata*. Latin American jurisprudence has addressed both of these issues, which will be discussed later on in this chapter.

49 The issue of pardons was duly taken up by academic accounts of the Rome Conference for an International Criminal Court, which also discussed the possible implications for the judicial practice of that court. According to John T. Holmes, “[t]here is one lacunae in the Statute which could allow for abuse by States. If apparently genuine proceedings are conducted and a person is convicted for conduct covered by the Rome Statute, there would appear to be no way for the Court to assume jurisdiction should the person later be pardoned, paroled, or otherwise freed after a brief or non-existent period of incarceration. A proposal to remedy this gap was made at the Preparatory Committee and was considered at the Rome Conference, but was ultimately not included due to opposition from many States over their concerns with the possibility of the Court’s interference in administrative or executive decision-making [*footnote omitted*]. The inclusion of such a provision would clearly have been desirable to avoid a situation where a person sought by the Court is convicted and immediately pardoned at the national level, thus apparently precluding the admissibility of the case. In some, perhaps most instances the Prosecutor may still present to the Court the view that the pardon or parole was conclusive evidence of the lack of genuineness from the outset. The onus will be higher on the Prosecutor because the national proceedings will have occurred and the principle of *ne bis in idem* will be relevant. However, the possibility exists and the Court may look favorably on the Prosecutor’s request, especially if the actions taken by the State are significantly different from the usual national practice for similar conduct.” John T. Holmes, “Complementarity: National Courts v. the ICC,” in *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (New York: Oxford University Press, 2002), at 678–79.

only be applied to persons who have already been convicted or whether it may also cover defendants who have not been convicted [*footnote omitted*].

## **B. Pardons cannot be granted in cases of crimes under international law**

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 29, 31, and 32:

[I]t falls to this Court to declare the constitutional impossibility of pardoning the perpetrators and participants in such crimes, since this governmental act inevitably entails a disregard for the truth, the investigation, the corroboration of the facts, and the identification of the perpetrators, and leads to the breakdown of effective means and resources to prevent impunity.

*[C]rimes involving a violation of the most elemental principles of civilized human coexistence are immune to discretionary decisions by any branch of government that dilute the effective remedies that the State must have at its disposal in order to ensure punishment.*

Therefore, since the *sub lite* involves the investigation of this category of crimes, regardless of how broadly the concept of pardon is conceived, this power may not be invoked in this type of process, insofar as *any pardon granted to defendants implicated in the commission of crimes against humanity would constitute a breach of the State's international obligation to investigate and determine responsibilities and punishment. Similarly, pardons granted to convicted individuals also constitute a breach of the State's duty to apply punishments in keeping with the nature of such crimes.*

[A]t the time decree 1002/89 was issued, two sets of prohibitions with authoritative institutional content existed that rejected any notion of impunity with respect to National States: first, a peremptory international system recognized by all civilized nations, and second, an international human rights protection system comprising, inter alia, the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

The decision to set aside the criminal proceedings, therefore, constituted a breach of the international obligations designed to establish the alleged crimes, identify their perpetrators, accomplices, and accessories, and impose the relevant punishments, as well as a breach of the right of the victims to an effective remedy for that very purpose.

## **4. NON-APPLICABILITY OF STATUTE OF LIMITATIONS TO INTERNATIONAL CRIMES**

The non-applicability of statutory limitations to international crimes is a principle of general international law that was articulated for the first time in the *Principles of International Law*

Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>50</sup> and re-affirmed in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.<sup>51</sup>

A detailed discussion of the history of this principle is beyond the scope of this study. It should be noted, however, that it has been clearly upheld and recognized by these and other instruments,<sup>52</sup> and by international custom.<sup>53</sup> This means that every State, in accordance with its legal system, must ensure that statutes of limitations are not applied to core crimes under international law, since to do so would amount to a breach of its obligations under this norm and its general obligations to investigate, prosecute, and punish core international crimes.<sup>54</sup>

50 *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, adopted by the United Nations International Law Commission, in *Yearbook of the International Law Commission 1950*, vol. 1 (New York: United Nations, 1958).

51 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted November 26, 1968, and entered into force November 11, 1970.

52 See, for example, the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes*, adopted January 25, 1974, and entered into force June 23, 2003.

53 In addition to the Latin American jurisprudence included in this section, see for example, the International Committee of the Red Cross study on the customary rules of international humanitarian law, Rule 160: “Statutes of limitation may not apply to war crimes.” According to this study, “State practice establishes this rule as a norm of customary international law applicable in relation to war crimes committed in both international and non-international armed conflicts. [...] The non-applicability of statutory limitations to war crimes and crimes against humanity is provided by the 1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity [...]. In the discussions leading to the adoption of the UN Convention, some States considered the prohibition of statutes of limitation for war crimes to be a new rule [footnote omitted] while other States considered that it was already established [footnote omitted]. The main objection of the States which considered it a new rule was that the Convention would apply retroactively and thus violate the principle of non-retroactivity of criminal law and that statutory limitation was a general principle of their domestic criminal law at that time [footnote omitted]. But many States argued that war crimes were of an exceptional character and should not, therefore, be subject to the ordinary regime of criminal law and to the operation of statutes of limitation and/or that they had already implemented the principle of non-applicability of statutory limitations to war crimes [footnote omitted]. [...] The principle that statutes of limitation do not apply to war crimes is set forth in the many military manuals and in the legislation of many States, including those of States not party to the UN [...] Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity [footnote omitted].” Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, *Rules* (New York: Cambridge University Press, 2005), at 614–16. See also Principle 23 of the Set of Principles to Combat Impunity, *supra* note 1: “Prescription shall not apply to crimes under international law that are by their nature imprescriptible.” Principle IV of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*: “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitation shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. [...] Domestic statutes of limitation for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.” *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by United Nations General Assembly, Resolution 60/147, December 16, 2005 (hereinafter “Basic Principles on Victims’ Rights”).

54 M. Cherif Bassiouni, “Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: *Jus Cogens* and Obligation *Erga Omnes*,” 59 *Law & Contemporary*

Despite the clarity of these principles, Latin American courts have vigorously debated the applicability of statutes of limitations to acts that could be characterized as international crimes, and they frequently have handed down decisions that run counter to international law and perpetuate impunity for such acts. This pattern has gradually begun to shift in recent years as the region's courts have developed new lines of interpretation. The sections that follow present excerpts from the most relevant decisions on this subject.

Before introducing these decisions, it is worth mentioning a few brief points that illuminate the discussion. As Ruth A. Kok observes in her comparative study of this issue, countries that follow the neo-Roman tradition, including Latin American countries, generally establish statutes of limitations for all crimes.<sup>55</sup> As a result, a crime would only be excluded from the statute of limitations pursuant to an applicable legal rule providing for such exclusion.<sup>56</sup> Due to poor or even nonexistent implementation processes, however, most Latin American countries have yet to adopt rules in their domestic systems that explicitly provide for the non-applicability of statutory limitations to international crimes.

For decades, this gap—compounded by the failure to ratify certain international treaties and a tendency to adhere to a positivist traditional interpretation of domestic law—has led Latin American courts to apply statutory limitations to aberrant acts that should be excluded from such treatment in accordance with international law.

In recent years, these patterns have gradually begun to change as Latin American courts have attempted to use various formulas to address this issue. First, in the specific case of permanent crimes, particularly forced disappearance of persons, the courts have emphatically stated that the time period of the statute of limitations cannot begin to be counted until the victim's whereabouts have been determined.<sup>57</sup> Second, they have also asserted that the time period cannot be calculated “while the possibilities of judicial recourse are inoperative.”<sup>58</sup> While it is

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*Problems* 63 (1996). The section on amnesty laws includes a more in-depth analysis of the duty to investigate, prosecute, and punish crimes under international law, in relation to the rights of the victims. Chapter V of this digest also includes a discussion of this subject in relation to the exercise of domestic jurisdiction and state obligations.

55 Ruth A. Kok, *Statutory Limitation in International Criminal Law* (The Hague: TMC Asser Press, 2007).

56 *Ibid.*

57 See “*Statute of limitations and permanent crimes*,” section 4.B in this chapter, in particular the Mexican cases.

58 Naomi Roht-Arriaza, “Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders,” in *Impunity and Human Rights in International Law and Practice*, ed. Naomi Roht-Arriaza, *supra* note 3, at 64. Additionally, see Principle 23 of the Set of Principles to Combat Impunity, *supra* note 1: “Prescription—of prosecution or penalty—in criminal cases shall not run for such period as no effective remedy is available.” A legal remedy can be considered inoperative for the purpose of suspending calculation of the statutory limitation if, for example, the judiciary lacks the required independence and impartiality; there is a situation of widespread fear among attorneys and judges; access to evidence is denied, and so forth. See, for instance, IACourtHR, *Enforceability of the Right to Reply or Correction* (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/86 of August 29, 1986, Series A, No. 7; IACourtHR, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8. See also Article 17 of the Rome Statute of the International Criminal Court. Although this article refers to the rules of admissibility, it can also serve as a guide in determining the type of situations in which a State's legal remedies are unable to resolve a particular case. This argument has also been used in practice in cases in which a person enjoyed immunities that would have precluded his prosecution under

true that these formulas allow the criminal prosecution of at least some offenses, they cannot be considered ideal, since, practically speaking, they ultimately reinforce the principle of a statute of limitations for such crimes in contravention of international norms.

A third line of jurisprudence has evolved on the issue of statutory limitations. Drawing from constitutional norms governing the reception of international law, some Latin American States have established the principle of non-applicability of statutory limitations as a rule of customary law that precedes the commission of the crimes,<sup>59</sup> thereby circumventing the argument of retroactive application of the law.<sup>60</sup> In this way, the international norm is applied directly to the case in question through a process of subsumption.<sup>61</sup> For all its potential benefits, this formula is contingent upon a domestic integration system in which international human rights and criminal law norms, or at least those regarded as *jus cogens*, are accorded primacy over domestic norms. For this reason, it has not been applied by all Latin American jurisdictions.

Lastly, the most conservative interpretations still contend that in light of the principle of non-retroactivity of criminal law, the principle of non-applicability of statutory limitations is not valid for crimes committed before the relevant international norms have been formally incorporated into the domestic system, whether through ratification of a treaty or through implementation of criminal codes. Significantly, even these jurisdictions, including Mexico, have recognized that this means assigning domestic norms primacy over rules of international law, which gives rise to the international responsibility of the State.

The excerpts from Latin American jurisprudence presented below illustrate the formulas discussed here. They trace Latin American legal systems' recognition of the principle of statutory limitations as a point of departure. From there, the selection focuses on the non-applicability of statutory limitations to international crimes and the responsibility that could be incurred when domestic statutes of limitations are applied in such cases.

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domestic law for as long as he occupied his official position. With regard to the evolution of international law concerning official and person immunities and the prosecution of international crimes, see "*Immunities*," section III.5 of this digest.

- 59 A detailed analysis, or even a complete mention of all of the norms and interpretations developed in Latin America on the integration of international law, is beyond the scope of this study. As a general frame of reference, however, see Ruth A. Kok, *Statutory Limitation in International Criminal Law*, *supra* note 55, specifically on the issue of statutes of limitation. In general, on the Latin American processes and the reception of international law in certain States, see, for instance, Kai Ambos, Ezequiel Malarino, and Gisela Elsner, eds., *Jurisprudencia latinoamericana sobre Derecho Penal Internacional* (Montevideo: Fundación Konrad Adenauer and Georg-August-Universität-Göttingen, 2008).
- 60 In addition to the jurisprudence presented in this section, with respect to international law as a previous norm and the principle of legality, see "*International law constitutes lege praevia*" and "*Customary international law constitutes lege praevia*," sections IV.2.C.1 and IV.2.C.1.a, respectively, in this digest.
- 61 For a detailed study of this process in Argentine jurisprudence, which has pioneered this theory, see Pablo Parenti, "Argentina," in *Jurisprudencia latinoamericana sobre Derecho Penal Internacional*, ed. Kai Ambos, Ezequiel Malarino, and Gisela Elsner, *supra* note 59, at 21–66. In general, on subsumption in international law norms, see "*Subsumption of conduct under international law*," "*Legal consequences of the subsumption of national crimes under international law*," and "*Subsumption of national crimes under international law and rights of the accused*," sections IV.3.A, IV.3.B, and IV.3.C, respectively, in this digest.

## A. Overview of statute of limitations

MEXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) (List of Judgments 10.b)*, Whereas Eight:

[T]he causes for extinction of criminal liability are specific circumstances that arise after the infraction has been committed and that annul the criminal proceeding or sentence enforcement.

In such cases, the right of the State to impose a punishment, carry it out, or continue to enforce it is terminated so that the subject is no longer obliged to undergo the punishment.

The statute of limitations in the sphere of criminal law entails the extinction of the State's right to impose a punishment or to enforce a punishment that has already been imposed, due to the passage of time.

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 9, 19, and 20:

[T]he statute of limitations on criminal prosecution is a matter of public order and the failure to take it into consideration [by a domestic court of jurisdiction] could give rise to the responsibility of the Argentine State before the inter-American legal system.

[T]he rule of statutory limitations is unquestionably compatible with the concept of "criminal law," since the latter comprises not only the precept, the sanction, and the notion of crime and culpability, but also the entire gamut of provisions pursuant to which the State's power to seek punitive action is extinguished [*footnote omitted*].

[T]he statute of limitations on criminal action is closely linked to the principle of legality and therefore would not be subject to the application of an *ex post facto* law that altered its effectiveness to the detriment of the accused.

[T]he common basis for statutory limitations, regardless of the subject to which it refers—the cause of action or the punishment—is the pointlessness of the punishment in the particular case where, because of the time that has transpired between the act and the trial, or between the sentence and its enforcement, the accused is no longer the same person, just as the act subject to jurisdiction loses its currency as a social conflict and becomes merely a historical-anecdotal event. It has definitively transcended the experience of its protagonists and the aggrieved parties.

PERU, *Habeas corpus submitted by Máximo Humberto Cáceda Pedemonte (List of Judgments 13.d)*, Whereas 6–9:

Generally speaking, the statute of limitations is the legal principle pursuant to which a person acquires rights or is freed from obligations due to the passage of time. From the criminal law perspective, it is grounds for extinction of criminal liability based on the influence of time on human events or for a State's waiver of *ius puniendi* on



the grounds that the time elapsed has erased the effects of the offense, there being scarcely any social memory of it.

In other words, the statute of limitations limits the punitive power of the State, since it extinguishes the possibility of investigating the crime and, in turn, the responsibility of the alleged perpetrator or perpetrators.

In other words, in a basic norm derived from the principle of *pro homine*, material criminal law accords criminal proceedings a preventive and resocializing role in which the State limits its own punitive powers in view of the need to eliminate juridical uncertainty after a certain period of time has elapsed and in view of the difficulty of punishing someone who has lived honorably for long time, thereby upholding the principle of juridical security. The Criminal Code recognizes statutory limitations as one of the grounds for extinction of criminal proceedings.

The law, then, envisages several reasons for which criminal proceedings may be extinguished, by virtue of which the State limits its own punitive powers: these may be natural causes (the death of the wrongdoer), matters of social peace or conflict resolution premised on juridical security (*res judicata* or statute of limitations), or sociopolitical or State reasons (amnesty).

MÉXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c)*, Whereas Seven:

The word “prescription” [*prescripción*] is derived from the Latin term *prescribere*, which means to acquire a property right [*ius in re*] or to extinguish a right or action of any kind due to the passage of time under the conditions set out in the law [*footnote omitted*].

In criminal law, the statute of limitations means that, simply on account of the passage of time, the State, which has a monopoly on *jus puniendi*, no longer has the power to investigate the commission of acts considered to be crimes, prosecute their perpetrators, or even enforce the sanctions imposed on the individual declared responsible for a crime.

The statute of limitations on prosecution must be distinguished from the statute of limitations on punishment. The statute of limitations on prosecution involves non-action on the part of the Public Ministry or the court of jurisdiction over the entire period legally established as sufficient to give rise to extinction due to the failure to exercise their power to prosecute or to impose sentences, respectively. In contrast, the statute of limitations on punishment means that the sentence is never carried out [*footnote omitted*].

This definition has been developed based on several rationales, including the following: with the passage of time after commission of a crime, the memory of it fades and the desire to punish the perpetrator for his wrongful actions weakens and is even extinguished; moreover, with the passage of time, legal procedures become more complicated, as it is difficult to compile the necessary evidence to prove the existence of the crime and the identity of the perpetrator. Alternatively, a third argument holds that the statute of limitations is based on the principle of juridical security, since it

is not legally acceptable for a human being to harbor indefinitely the anxiety that he may be prosecuted at the whim of the authorities. Rather, the failure of the State to exercise its power to investigate the crime and prosecute the criminal, or enforce the punishments imposed on the subject within the lawfully established time period, gives rise to a right of individuals vis-à-vis the authorities (statute of limitations).

If, in general, the statute of limitations has the effect of extinction, in criminal law it specifically determines the extinction of criminal liability stemming from the commission of a crime, along with the attendant punishment. The statute of limitations, when it is invoked, is not intended as an affirmation that there was no crime. Its influence, rather, is on the criminal liability of the accused, which is erased or lost, and on the imposition of the punishment, which is also extinguished.

[T]he statute of limitations effects the termination of the State's punitive powers after a certain period of time has transpired in order to confer security on the governed with respect to the repressive power of the State.

It is only through a statute of limitations that a society can have the certainty and confidence that the prosecution and punishment of crimes will not go on indefinitely, and it is the only way to limit the unease, suffering, and harm [that prosecution and punishment] may cause. It should not be considered possible for a person to be subjected indefinitely to the anxiety associated with the knowledge that he could be punished at any time.

If the State has the legal power to invade the sphere of individual freedom, it follows logically that this power must also be subject to certain limits for the protection of citizens under the law governing the activity of the State. This is to say that the laws regulating the statute of limitations, besides curtailing the power of the State, also create a sphere of rights benefiting individuals, who shall always have an individual right to counteract the State's general right to punish whoever falls into the applicable category. This right, as has been indicated, is, precisely, his juridical security.

## **B. Statute of limitations and permanent crimes**

*MÉXICO, Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) (List of Judgments 10.b)*, Whereas Eight:

The concept of a permanent crime is extremely significant because the law often draws on it for specific purposes, such as, inter alia, issues concerning the statute of limitations on prosecutions.

The foregoing is perfectly understandable if we take into consideration that the statute of limitations (prescription) is directly related to the passage of time, and an inherent feature of permanent crimes, as previously noted, is the prolongation, for shorter or longer periods of time, of the actionable conduct. For this reason, it is imperative to have an accurate concept of permanent or continuous crimes in order to ascertain exactly when the time period for calculating the statute of limitations begins.

The prolongation over time of the consummative moment is particularly important when it comes to the statute of limitations on the prosecution of permanent crimes. Taking into account that, according to Article 102 of the Federal Criminal Code, the time period is counted from the moment the continuous or permanent criminal behavior has ceased, it is clear that the beginning of the unlawful act is irrelevant for the purposes of the statute of limitations, since the basis for beginning to calculate the period of the statute of limitations is the cessation of the unlawful curtailment of the legally protected value in question.

In conclusion, when it comes to the crime of unlawful deprivation of liberty, the statute of limitations on the State's right to prosecute cannot be calculated beginning with the day on which the perpetrator deprives the victim of his freedom; rather it begins on the day on which the criminal restores the latter's freedom, because it is a matter of a permanent crime.

CHILE, *Case of Miguel Ángel Sandoval (Juan Miguel Contreras Sepulveda, et al.) (List of Judgments 3.a)*, Whereas 37 and 38:

[O]ne of the relevant practical characteristics of continuous crimes is that the statutory limitation on criminal action cannot be set in motion until the duration of its consummative state has ended.

[I]n the instant case, should the convicted individuals state where the victim is located, the statute of limitations would be counted in their favor starting from that moment. If she is dead, the date of death would have to be confirmed in order to determine, first of all, whether it occurred within the time period covered by the amnesty, and if it did not, to begin to count the statutory period. But these rules can in no way be applied when the state of criminality that the kidnappers incurred has not ended, insofar as the wrongdoing is continuous.

### **i. Mexican case**

MEXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Jesús Piedra Ibarra) (Luis de la Barreda Moreno, et al.) (List of Judgments 10.b)*, Whereas Eight:

[I]n the case at hand, [it should be taken] into account that the consummation of the crime of illegal deprivation of liberty was prolonged over time, since there is no evidence to show that the consummation of said crime against JESUS PIEDRA IBARRA has ceased and that the criminal conduct has been terminated either by his release or by his transfer to the competent authorities. Instead, there is only evidence to the effect that JESUS PIEDRA IBARRA was detained on April 18, 1975, by agents of the now defunct Federal Security Directorate [Dirección Federal de Seguridad] and "commissioned" agents of the Judicial Police of the State of Nuevo León, and that on April 19 of that year, the safe house where JESUS PIEDRA IBARRA was living was "raided," and on April 20 of that year, JESUS PIEDRA IBARRA was interrogated personally by then Federal Security Director CAPT. LUIS DE LA

BARREDA MORENO, according to the contents of reports signed by him, which were cited in the investigation leading to the opening of criminal case 62/2003. In view of the foregoing, it is clear that the time period for calculating the statute of limitations has not yet begun.

### C. Statute of limitations does not apply to crimes under international law

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 21:

[T]he exception to [the] rule [of statutory limitations on criminal prosecution or punishment] is intended for acts that constitute crimes against humanity, as situations which, in light of their magnitude and significance, have not faded from the experience of society as a whole. This means that they remain current not only for national societies, but for the international community as well.

In this sense, it has been said that “crimes against humanity,” and what have traditionally been referred to as “war crimes,” are *jus gentium* offenses that the world community has undertaken to eradicate.

[Th]e basis for the non-applicability of statutory limitations to such actions lies primarily in the fact that crimes against humanity are generally perpetrated by the selfsame agencies of punitive power operating outside the bounds of criminal law, in other words, free from all juridical control and restraint. Forced disappearances of persons in our country were committed by the security forces or armed forces, acting in a judicial capacity; the worst crimes under the Nazis were committed by the Gestapo (Geheiminis Staatspolizei or State secret police); the Stalinist KGB was a police force. It is not very reasonable to seek to legitimize a genocidal power through a limited exercise of that same power with an ostensibly preventive effect.

In crimes of this nature, it cannot reasonably be argued that it is necessary to guarantee the extinction of criminal prosecution due to the passage of time.

In application of this judicial interpretation, see ARGENTINA, *Case Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*, Whereas.

CHILE, *Case Molco of Choshuenco (Paulino Flores Rivas, et al.) (List of Judgments 3.d)*, Whereas 2 and 3:

[O]ne of the consequences of this state of internal war is that it gives rise to the applicability of international humanitarian law, mainly as set out in the Geneva Conventions of 1949, ratified by Chile pursuant to Supreme Decree No. 732 (Foreign Affairs) and published in the Official Gazette [*Diario Oficial*] on April 17, 18, 19, and 20, which has formed part of our domestic law since that time.

Common Article 3 to the Conventions prohibits—in the event of an “armed conflict not of an international character,” which was the situation in Chile at the time the crimes under investigation in the instant case were committed—“at any time and in any place [...] violence to life and person, in particular murder of all kinds,” considered to be a “grave breach” of the treaty under Article 147, and the high contracting parties are barred from absolving themselves or other contracting parties of liability caused by such breaches.

[T]he jurisprudence of courts exercising supranational jurisdiction and, in particular, of the Inter-American Court of Human Rights, includes among such self-absolving measures the application of statutory limitations insofar as they could give rise to impunity for crimes such as those described in the context of the preceding discussion.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 8:

[T]he non-applicability of the statute of limitations is not advocated for all international crimes, inasmuch as imprescriptibility is not inherent to all international criminal offenses but only to certain categories of them, such as war crimes, crimes against humanity, genocide, and apartheid.

Hence, it has traditionally been assumed that torture and forced disappearance, even though they are international crimes, are not exempt per se from the statute of limitations unless they are committed as part of a widespread or systematic practice, in which case they are legally considered to be in a different category, namely, that of crimes against humanity. Likewise, the statute of limitations does not apply when such crimes are committed in an armed conflict, as they can then be defined as war crimes. It is important to point out, however, that there is an emergent trend in jurisprudence and in international standards to extend the prohibition against applying statutes of limitations to gross human rights violations, or to make them qualify for the non-applicability of the statute of limitations.<sup>62</sup>

For a more detailed discussion of the current development of international law relating to the principle of non-applicability of statutes of limitations to serious human rights violations, and to torture in particular, see the rest of Whereas 8 in this same judgment.

62 Note added to the original: It is interesting to note that, after analyzing the international norms regarding the non-applicability of statutory limitations to crimes against humanity and war crimes, and after concluding that the acts under prosecution are not subject to statutory limitations pursuant to those norms, the court proceeds to articulate another interpretation on the statute of limitations for those crimes under domestic law. The court begins the section by pointing out that “it should be recalled that even if the laws set out in the domestic Criminal Code were to be applied exclusively, the conclusion must be exactly the same, in other words, that there is no statute of limitations in effect for the crimes imputed to the defendants [...]”

As an extension of this line of interpretation, see COSTA RICA, *Constitutional review of the bill to approve the Inter-American Convention on Forced Disappearance of Persons (List of Judgments 5.a)*, Whereas II.B:

[I]t must be recalled that [the matter at hand is] considered a crime “against humanity,” which is to say that it affects not only individual interests but rather those of all of humanity, as a species. Such crimes involve the most perverse planning and implementation process, in which the State apparatus, or some powerful sector thereof, is usually directly or indirectly involved in the disappearance of persons and has every opportunity to act with impunity. For this very reason, the prosecution of such crimes transcends the interest of any single State or country, and for all of these circumstances, warrants this special treatment (Article VII). The characteristics of the perpetrators, the means used, and the severity of the crime itself, as recent experiences in Latin America have shown, go beyond the individual harm caused, which is in itself unimaginable, to constitute a tragedy for the whole of society in those countries. Moreover, regarding the non-applicability of the statute of limitations to the punishment, what would a conviction be worth if the individuals convicted could count on a protection network that ensured they would never serve the sentence? Therefore, it is the majority view of the Court [...] that the non-applicability of the statute of limitations is not an unreasonable legal response to this category of crimes.

As complement to the previous decisions, see EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascoechea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

International Human Rights Law establishes three legal concepts pertaining to crimes against humanity that alter three classic principles of criminal law. They are (a) *the non-applicability of statutory limitations to crimes against humanity*. As the 1968 United Nations Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity] points out, the concept of the statute of limitations, together with legal certainty, yields before the gravity and transcendence of crimes against humanity. Such crimes are not subject to statutory limitations, and courts, therefore, may not use the passage of time as an excuse not to take up or resolve them [...].

In contrast, see MEXICO, *Appeal on constitutional remedy (amparo en revisión) submitted by the defense of Ricardo Miguel Cavallo (List of Judgments 10.a)*, Whereas Thirteen.<sup>63</sup>

63 Although the Supreme Court of Justice of the Mexican Nation declared that the statute of limitations had not expired for the crimes of genocide and terrorism, its ruling was not based on the principle of non-applicability of statutory limitations to international crimes (genocide), but rather on domestic law to the effect that the statute of limitations had not expired. Applying this same reasoning to the crime of torture, the Court concluded that the statute of limitations had expired even though it had argued during the extradition proceedings that the act had been committed in a systematic and widespread manner. See “Non-applicability of statute of limitations as an international convention and customary rule,” in this chapter.

[G]iven the nature of the acts attributed to the complainant, the temporal scope of their validity, the forms of commission, and the plurality of perpetrators and victims involved in the criminal events, such acts are continuing in nature, because they were perpetrated by means of diverse behaviors carried out at different times and targeted a group of citizens and their relatives who were considered dissidents opposing the military regime in power during the period of the Argentine dictatorship. In these conditions, therefore, [...] it is irrelevant to establish exactly when each particular act constituting the crimes of genocide and terrorism that have been attributed to him actually occurred [...]. [...] [I]n order to establish whether or not the statute of limitations on prosecution has expired, it is sufficient to point out that the unlawful acts attributed to him occurred under the Argentine dictatorship in power from March 24, 1976 to December 10, 1983.

[Hence], according to the narrative of the facts, the statute of limitations [...] is counted beginning on December 10, 1983—when the Argentine dictatorship ended and the last criminal act was committed—and ending in March 1996, when the complaint was submitted to the courts of the requesting State for the investigation of the crimes imputed to the accused. This constitutes a lapse of only 12 years and three months. Similarly, counting from the first date indicated above up to July 7, 1998, when the complainant was actually indicted as a suspect in the incidents included in the complaint, only 16 years and eight months had elapsed, as opposed to the 20-year statute of limitations stipulated in the Spanish law in force at the time the incidents occurred. This time period remains legally in effect today for the crime of terrorism, while genocide is no longer subject to any statute of limitations. Therefore, even in the latter instance, the statute of limitations for prosecuting such crimes had not expired.

[I]t is clear that the statute of limitations for the crimes of genocide and terrorism under Mexican law also has not expired, since the required 30 and 21 years respectively have not elapsed.

#### **D. Non-applicability of statute of limitations as an international conventional and customary rule**

*BOLIVIA, Case of Leaders of the Left Revolutionary Movement (Luis García Meza Tejada) (List of Judgments 2.a), Section VI, Whereas:*

[T]he conclusion of the trials of responsibility is critical for the institutional strengthening of the Republic, and public opinion demands it as a means of controlling forces that emerge outside the Constitution and the laws.

[...] As a member State of the United Nations, Bolivia became a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on October 6, 1983. This document establishes the non-applicability of the statute of limitations regardless of the date on which such crimes have been committed, in time of war and in time of peace, according to the defini-

tions set out in the Statute of the Nuremberg International Military Tribunal and confirmed in United Nations General Assembly resolutions, which place emphasis on the crime of genocide as it is defined in the 1948 Convention [on the Prevention and Punishment of the Crime of Genocide], with a view toward the prevention and punishment of that crime even when such acts do not violate the domestic law of the country in which they were committed.

PARAGUAY, *Remedy of unconstitutionality submitted by Modesto Napoleón Ortigoza (List of Judgments 12.a)*, Whereas 2:

According to Article 1 of the United Nations Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity] (Resolution No. 2391) approved on November 26, 1968, crimes against humanity are not subject to statutory limitations. The Convention defines as one such crime the “grave breaches” enumerated in the Geneva Conventions of August 12, 1949, whose Article 50 provides that “Grave breaches to which the preceding article relates shall be those involving any of the following acts [...]: willful killing, torture or inhuman treatment [...].”

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 26–29 and 31–33:

[A]ccording to the Preamble to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, one of the reasons for establishing the rule of non-applicability of statutory limitations was that the application of domestic statutes of limitations designed for ordinary crimes to war crimes and crimes against humanity is a matter of “serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes.” Furthermore, according to the text of Article IV, States Parties “undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished.” While such formulations may not be categorical with respect to the retroactivity of the Convention, they do point to the need for a differential examination of the issue, based on whether or not a crime against humanity is involved.

[T]he aforementioned Convention is the product of a protracted process that began in the early 1960s, when statutory limitations were threatening to become a source of impunity for the crimes perpetrated during World War II, as the 20-year anniversary of the commission of those crimes drew near.

[T]he Convention does nothing more than affirm the non-applicability of statutory limitations, which entails the recognition of an existing norm (*jus cogens*) under customary public international law. In this way, rather than dwelling on the prohibition associated with the non-retroactivity of criminal law, it reaffirms an existing



international customary principle, which was already in force at the time the acts were committed.

[S]trictly speaking, it is not so much a matter of the retroactive force of the international conventional rule, since it was already a rule of *jus cogens* under customary international law prior to the ratification of the 1968 Convention, whose primary function “is to protect States from agreements that run counter to certain common values and interests of the international community of States as a whole, so as to ensure respect for those general rules of law whose infringement may affect the very essence of the legal system” [...]. From this standpoint, just as it is possible to affirm that, prior to the Convention, international custom had already determined that statutory limitations did not apply to crimes against humanity, this custom was a matter of common concern in international law before the Convention was incorporated into domestic law.

[A]t the time of the events, the Argentine State had already contributed to the development of international custom in favor of the non-applicability of statutory limitations to crimes against humanity [...].

[I]n accordance with the foregoing, and in the framework of this evolution of international human rights law, it can be argued that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity merely crystallized principles that were already in force for our national State as part of the international community.

[C]onsequently, the acts of which Arancibia Clavel was convicted were already not subject to any statute of limitations under international law at the time they were committed; thus *there is no retroactive application of the Convention*, as the latter was already a rule of customary international law in force since the 1960s, to which the Argentine State was a party.

In application of this judicial interpretation, see ARGENTINA, *Case Poblete-Hlaczik (Julio Héctor Simón) (List of Judgments 1.e)*.

CHILE, *Case Molco of Choshuenco (Paulino Flores Rivas, et al.) (List of Judgments 3.d)*, Whereas 4, 5, and 8:

[I]nternational law has established the non-applicability of statutory limitations to certain categories of heinous crimes, including the “grave breaches” enumerated in Article 1 of the Geneva Conventions. This declaration is expressly set out in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which was adopted by the United Nations General Assembly in 1968 and entered into force in 1970, although it has not been ratified by Chile.

[W]hile this international instrument has not been formally incorporated into our internal law, it reflects a *universally accepted principle that has simply been articulated in the aforementioned Convention as a formal expression of preexisting customary law norms in this area. The rule of non-applicability of statutory limitations as envisaged,*

*therefore, has international effect, regardless of whether the text setting out this norm has entered into force or not and even with respect to States that are not party to the treaty [...].*  
[*Emphasis added*]

[The fact that war crimes and crimes against humanity were punishable under peremptory norms of international law] leads to the rejection of the plea on grounds of a statute of limitations on the sentence, as entered by the defense team for defendants Flores and Rodríguez, pursuant to Articles 93(6) and 94 of the Criminal Code, since its content conflicts with the international law norms and principles discussed in this ruling, which take precedence.

PANAMA, *Appeal motion (Case Cruz Mojica Flores) (List of Judgments 11.c)*, Whereas:

The concept of non-applicability of the statute of limitations to criminal prosecution has emerged as a result of the different situations of massive violations of human rights around the world. In this sense, the statute of limitations on criminal prosecution is unsustainable in view of the failure or refusal to investigate on the part of the perpetrators of the wrongdoing themselves, in a climate of juridical insecurity.

Argentina has reiterated these international concepts beginning in May 2001, when it declared that there is no time limit on trying crimes against humanity (Division II of the Federal Chamber of the Capital). This statement was repeated in the ruling in case 35.543 Riveros, Santiago re/statute of limitations:

“With regard to this offense, just as this Chamber asserted in Case 30.514 of 9/9/99, reg. 742, the evolution of the law has been substantively changed by the incorporation of international law into the conclusions taken under the domestic law of each nation. In light of this, crimes against humanity unquestionably are not subject to statutory limitations.

“Furthermore, it cannot be denied that the very notion of crimes against humanity is inextricably linked to a need for prosecution that transcends any temporal barrier, and that what could be termed an ‘international custom’ has developed in this respect, which embodies the many ways in which international law has been expressed and developed in the direction considered herein.”

As a corollary to this study, it is important to clarify that pursuant to the national laws in force that set out norms relating to crimes against humanity, which have become part of our legal system pursuant to Article 4 of the Political Constitution, it is obligatory to declare the non-applicability of statutory limitations to criminal prosecution for this type of crimes.

This opinion from the Supreme Court of Panama supersedes the one developed by the same Court in PANAMA, *Appeal motion (Case Gerardo Olivares) (List of Judgments 11.b)*, Whereas:

[The development of criminal law] recognizes the validity of a protective current of human rights that has developed in response to the international conflagrations of the last century and to the more recent ethnic wars in Africa and Eastern Europe, as

well as the bloody periods of *de facto* governments, mainly in Latin America. During this time, a series of international instruments of regional and international scope have been adopted, including the Inter-American Convention on Forced Disappearance of Persons ratified by Panama by means of Law 32 of 1995, which the appellant cites in his appeal as grounds for the non-applicability of the statute of limitations to the crime under investigation.

What is at issue in the instant case, however, is whether the aforementioned convention is applicable temporally and objectively to the acts that took the life of Mr. Gerardo Olivares V on July 17, 1977. [...] [B]asically, one cannot disregard the fact that this body of law is in force as of the date of its promulgation. There is no legal or constitutional law authorizing its retroactive application to acts that occurred prior to its entry into force. Moreover, even though Article 7 of the aforementioned Convention begins by stipulating the non-applicability of statutory limitations to the criminal prosecution of crimes of forced disappearance, it recognizes that in countries where this is not possible for reasons of constitutional supremacy, the period of statutory limitation shall be that in effect for the most serious crime. Although this is not the case in Panama, since the statute of limitations is not regulated at the constitutional level, but rather by statutory law, recognition of the supreme rank of the Constitution leads inexorably to the conclusion that the Convention may not be applied in contravention of another basic norm of our magna carta, which is contained in the principle prohibiting the retroactive application of the law in criminal matters, unless it is the more favorable (Article 46).

To summarize, the fact that crimes against humanity were recognized midway through the twentieth century does not necessarily lead to the conclusion that the statute of limitations is not applicable to them under Panamanian law, since, in the case of forced disappearances, this only became the case following the ratification of the [Inter-American] Convention [on Forced Disappearance of Persons], and with effects toward the future.

URUGUAY, *Case “Condor Plan” in Uruguay (José Nino Gavazzo Pereira, et al.) (List of Judgments 14.a)*, Whereas 8:

Customary international law provides that certain types of international crimes are not subject to any statute of limitations: war crimes, crimes against humanity, genocide, and apartheid. Domestic courts have, on numerous occasions, reiterated this principle of the non-applicability of statutory limitations to certain crimes under international law. The International Committee of the Red Cross has held that the non-applicability of statutory limitations to war crimes, crimes against humanity, and genocide constitutes a rule of customary international law.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity is considered to be a source of customary law.

In effect, as Special Rapporteur Mr. Doudou Thiam of the United Nations International Law Commission has stated, this Convention “is simply declaratory in character. Because the offences involved are crimes by their very nature, statutory

limitations are not applicable to them, regardless of when they were committed.” Similarly, the Inter-American Court of Human Rights has repeatedly stated that “the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law, which is not created by said Convention, but is acknowledged by it.” In the past, some States have argued that the non-applicability of statutory limitations to war crimes and crimes against humanity would contravene the principle of non-retroactivity of criminal law. There is broad consensus concerning the Convention’s retroactive character when it comes to the non-applicability of statutory limitations to war crimes and crimes against humanity, to the effect that it is applicable to such crimes even when they were committed prior to the entry into force of the Convention. It is hardly even necessary to point out that the Convention refers to war crimes and crimes against humanity “irrespective of the date of their commission,” and directs States Parties to abolish statutes of limitations for such crimes where they exist in their national legislation (Article IV). In its ruling in the Touvier matter, the criminal Chamber of the French Court of Cassation found that there was no right to a statute of limitations under the European Convention on Human Rights and ruled to vacate the ruling from the first instance court that had set aside the proceedings on grounds of the statute of limitations and the non-retroactivity of criminal law. In its decision, the Chamber referred to the scope of the principle of non-retroactivity of criminal law set out in Article 15 of the International Covenant on Civil and Political Rights and Article 7 of the European Convention on Human Rights, according to which the principle of non-retroactivity is in no way an obstacle to the trial and conviction of a person for acts or omissions that, at the moment of their commission, were crimes under general principles of law recognized by the international community. Under customary international law, the authorities of a State, whether or not it is party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, may not decree a statute of limitations on crimes against humanity and must institute legal proceedings against the perpetrators and other participants in such crimes.

See also EL SALVADOR, *Constitutional remedy (amparo) submitted by Juan Antonio Ellacuría Beascoechea, et al., Dissenting vote of Magistrate Victoria Marina Velásquez de Avilés (List of Judgments 7.c)*, Whereas III:

From a doctrinal standpoint, in the compilation titled *Crimen internacional y jurisdicción universal*, Diego López Garrido, referring to the 1995 decision of the French Court of Cassation in the case of Klaus Barbie, asserts that the court offers a definition of crimes against humanity that includes the prohibition against statutory limitations when it states: “[W]hat constitutes crimes imprescriptible against humanity (...) are the inhumane acts and persecutions which, in the name of a State practising a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also *against the adversaries of this [State] policy, whatever the form of their opposition (...)*.”

Similarly, according to this author,

“they are imprescriptable crimes [not subject to statutory limitations] because they are incompatible with forgetting. Prescription is not an act of goodwill like amnesty or pardon. It is an expression not of mankind’s forgiveness, but rather of forgetting over time, and it ensures impunity for crimes after a certain period of time has lapsed since the acts were committed (by barring criminal prosecution) (...), or since the sentence was handed down (statute of limitations on the punishment). When impunity curtails a proceeding, it hampers the formation of memory, the essential function of which is not to wallow in the past but rather to inform the present and prepare for the future.”

Similarly, in a July 10, 1997, decision finding Erick Priebke and Karol Hass responsible for the “Ardeatine Caves” murders committed by Nazi officials, including the accused, during World War II, the Military Tribunal of Rome referred to “the non-applicability of statutes of limitations to crimes against humanity as a general principle of international law.” The Court noted that its finding of the non-applicability of statutory limitations was not based on the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity approved by the United Nations General Assembly—to which El Salvador is not a party to date—because the convention is nothing more than a “formal acknowledgment of the universal principle of non-applicability of statutes of limitations to such crimes.” That is to say, the Convention did nothing more than articulate a principle that had already been established in customary international law.

In contrast to the arguments concerning the non-applicability of statutes of limitations to crimes against humanity and war crimes in light of the principle of the non-retroactivity of the law, as they have been developed by the aforementioned supreme courts, see *MEXICO, Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c)*, Whereas Seven:

[I]t is worth noting that [the traditional] notion of statutes of limitations has been augmented by the new philosophy espoused by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which is warranted for exceptional reasons and has been applicable in Mexico since the entry into force of said Convention [pursuant to Article 14 of the Constitution and the principle of the non-retroactivity of international treaties enshrined in the Vienna Convention on the Law of Treaties].

In opposition to this argument of the majority of judges of the Supreme Court of Justice of Mexico, see *MEXICO, Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c), Dissenting Vote of Justice Juan N. Silva Meza*:

The preamble to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity alludes to the issue of statutory limi-

tations when it provides that “...the period of limitation... prevents the prosecution and punishment of persons responsible for those crimes,” which interpreted *a contrario sensu* makes it possible to establish that the non-applicability of statutory limitations is the legal definition that does not rule out the prosecution and punishment of persons responsible for the crimes enumerated in that international instrument.

[It should be] noted that in no solemn declaration, instrument, or convention for the prosecution and punishment of war crimes and crimes against humanity, including genocide, have the States Parties provided for a period of limitation. It is also evident that the application of domestic laws regulating statutes of limitations for ordinary crimes to this category of crimes is of serious concern to international public opinion, inasmuch as it precludes the prosecution and punishment of the individuals responsible for such crimes. It was therefore deemed necessary and appropriate to affirm the principle of non-applicability of statutes of limitations to war crimes and crimes against humanity by means of said Convention, and to ensure its universal application.

In keeping with the object and purpose of the aforementioned international instrument, under the provisions of its Article IV, States Parties undertake to adopt, in accordance with their respective constitutional processes, any legislative **or other measures** necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to [...]. Inasmuch as the international instrument under examination here accepts measures other than statutory as a means to preclude any limitations on the criminal prosecution or punishment of such crimes, this may be interpreted as referring to the norms envisaged in the Political Constitution of the United Mexican States, as well as those set out in secondary laws.

Based on an interpretation that is both progressive (meaning that constitutional language is brought into line with the dynamics of the international community in this regard) and systematic, it should be noted that [...] [t]he recognition of the fundamental rights of the individual in the Political Constitution of the United Mexican States also implies acknowledgment of the fundamental rights of society as a whole and as an integral part of humankind. From this standpoint, the principle of non-retroactivity envisages an equilibrium between the fundamental rights of the individual accused of committing a crime and the fundamental rights of society and of humankind.

The principle of non-retroactivity enshrined in constitutional Article 14, regardless of the nature of its relation to the legal definition of the statute of limitations, is not applicable to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, in the way in which it traditionally has been applied to domestic laws.

These arguments are corroborated by Article 28 of the Vienna Convention on the Law of Treaties, [...] [which] states that international treaties may not be applied retroactively, but creates exceptions to that principle by adding “unless a different intention appears from the treaty or is otherwise established” [...].

With respect to the persistent concern [of the majority] about applying the constitutional principle of non-retroactivity of the law, this line of reasoning completely

overlooked the fact that the Constitution and international law not only protect legal security, but also protect the right to life, the right to the physical integrity of persons, the right to freedom, the right to equality, and the democratic principle.

To expand on this, the final judgment fails to mention Article 15 of the International Covenant on Civil and Political Rights, which sets out the principle of non-retroactivity of the law, specifying that said principle shall not preclude prosecutions and convictions for acts that, at the time they were committed, were crimes under internationally recognized principles. All of these silences amount to nothing more than a failure to apply the Constitution and International Law, since nothing at all has been said about the right to protection of life, which has been recognized since 1971.

### **i. Argentine case**

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 13:

[I]f what is [...] at issue [is] the non-applicability of statutory limitations to illicit association to commit crimes [under international law], then the normative instrument that should have informed the interpretation was the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (conf. Law 24.584 and Decree 579/2003), which acquired the rank of constitutional law pursuant to Law 25.778.

As a complement to the above decision, following is an example of the arguments submitted by some defenses regarding the statute of limitations and the principle of legality. See ARGENTINA, *Motion submitted by the defense of Julio Héctor Simón (List of Judgments 1.c)*, Whereas 6:

[I]n the extraordinary remedy, the appellant [...] also claims the impairment of the right to the most benign criminal law, to *nullum crimen, nulla poena sine lege*, and to the prohibition against *ex post facto* application of the law. The appellant argues that a criminal norm was applied retroactively, namely, the Inter-American Convention on Forced Disappearance of Persons—approved by Law 24.556 and, with regard to its constitutional rank, by Law 24.820—and that the result was to eliminate the benefits of statutory limitations to the right of action and punishment. The appellant adds that the unalterable validity of the guarantees enshrined in Article 18 of the National Constitution may not be disregarded in favor of the principles generally recognized by the international community (Article 4 of Law 23.313).

## E. State responsibility for the application of statute of limitations under domestic law, in cases of crimes under international law

ARGENTINA, *Motion submitted by the private accusation in representation of the Government of Chile (Enrique Lautaro Arancibia Clavel) (List of Judgments 1.b)*, Whereas 36 and 38:

[T]he application of domestic statutory limitations constitutes a violation of the State's duty to prosecute and punish and, as such, gives rise to international responsibility (see IACHR, "Barrios Altos" case, Judgment of March 14, 2001, para. 41, Series C, No. 75; "Trujillo Oroza v. Bolivia" case, Reparations, judgment of February 27, 2002, para. 106, Series C, No. 92; "Benavides Cevallos" case, Resolution on Compliance with the Judgment of September 9, 2003, Whereas 6 and 7).

[I]n such circumstances, even though the established time period has elapsed [in domestic law], it is fitting to declare that the right of criminal action has not been extinguished with respect to Enrique Lautaro Arancibia Clavel [for the perpetration of the crime of illicit association, which in this case qualifies as a crime against humanity], inasmuch as the statute of limitations on criminal action set forth in domestic law is superseded by international customary law and by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

For a perspective based not on the primacy of international rules, but rather on an examination of the potential liability incurred by a State for the application of domestic laws on statutory limitations, in light of the obligation to adopt legislative measures, on the one hand, and to investigate and prosecute crimes under international law and human rights violations, on the other, see PANAMA, *Appeal motion (Case Gerardo Olivares) (List of Judgments 11.b)*, Whereas:

Inevitably, as the Truth Commission aptly observes in the report titled "La Tutela Judicial del Derecho a la Vida durante el Régimen Militar 1968–1989," any evaluation of the administration of justice based exclusively on domestic law would be incomplete without an examination of international standards of judicial protection, which are binding on the Panamanian State as part of the community of nations and as a voluntary signatory to human rights declarations and conventions. These international levels of protection, however, are precisely the ones demanding legal certainty and security in the judicial protection inherent to a State governed by the democratic rule of law. This means that the political commitment undertaken by the State upon ratifying international instruments of human rights protection must be complemented by internal legislative measures that make it effective. Otherwise, as has occurred in the instant case, the Court finds itself unable to rule on the acts for which we are called to do so, unless, in strict accordance with the law, other citizens' rights and protections specifically set out in the law and constitution have also been violated. We can be certain of one thing: in both circumstances, whether the impunity results from the failure of public institutions to act in a timely manner or from



the subsequent exercise of punitive power at any cost and at any time, the State will be equally liable for the harm visited upon its citizens.

From 1990 until the statute of limitations went into effect, the Panamanian State, through its administration of justice institutions, had the opportunity and the historic responsibility to rule on acts that resulted in the loss of life of many people in the 1970s. However, legal proceedings to shed light on those events were never pursued in a timely manner, so that the process of doing so now contravenes the very criminal law principles inherent to the rule of law.

With this decision, the Criminal Chamber is aware that justice for the relatives of the victims will perhaps only be delayed and moved to international venues, since the opportunity to resolve the matter at the domestic level was not pursued in a timely fashion.<sup>64</sup>

See also MEXICO, *Appeal motion (recurso de apelación extraordinaria) (Case Massacre of Corpus Christi) (Luis Echeverría Álvarez, et al.) (List of Judgments 10.c)*, Whereas Seven:

It can be argued, as the designated prosecutor [Office of the Prosecutor of the Nation] has done, that the Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity] is intended to apply even to acts perpetrated prior to its entry into force in domestic law. This could be inferred from the text of the Convention itself, which literally states: “*ARTICLE I. No statutory limitation shall apply to the following crimes, irrespective of the date of their commission [...].*”

In this case, the intention of the Convention would be to apply to all of the crimes committed, regardless of the date on which they occurred. Therefore, the interpretive declaration articulated by the Mexican State would, in fact, be modifying the temporal scope of the Convention and would therefore have to be characterized as a reservation. Such a characterization would, in principle, compel the court to evaluate the reservation in relation to the object and purpose of the treaty, in accordance with Article 19(c) of the Vienna Convention.

However, while it is true that in the specific case, we would be dealing with a reservation, it is likewise true that the latter has a bearing on the provisions of Article 14 of the Political Constitution of the United Mexican States. It is clear, therefore, that even in this case, it could not be declared null and void or not applicable in the specific case on grounds that it is contrary to the “object and purpose of the treaty,” since in an indirect way we would be failing to apply Article 14 of the Federal Constitution.

The interpretive declaration formulated is therefore relevant for averting a probable situation involving the international liability of the Mexican State. The interpretive declaration confers legal security on the Mexican State by expressing a

64 Note added to the original: This principle seems to have been modified by the Supreme Court of Justice of Panama itself, in the decision *Appeal Motion (Case Cruz Mojica Flores) (List of Judgments 11.c)*, Whereas. See, in this chapter, “Non-applicability of statute of limitations as an international conventional and customary rule.”

limitation found in its domestic law, so as to avoid incurring liability in the context of any one of the human rights protection systems and, in particular, to determine the scope of temporal jurisdiction (*ratione temporis*) of the organs responsible for supervising compliance with the obligations under the Convention. From this standpoint, therefore, the only function of the declaration examined is to reaffirm the general principle of general international law relating to the non-retroactivity of treaties, for which it does not modify, alter, or exclude the legal scope of any of the provisions contained in the instrument examined.

As a result of the foregoing, the interpretative declaration must not be examined in light of its divergence from the standard of the “object and purpose” of the treaty, even when it is understood as involving a reservation. Rather, the organs responsible for supervising compliance with the international obligations of States, where necessary, must determine its scope, taking into account the international law in force, the nature of the international obligation in question, and the existing jurisprudence of those same organs responsible for the application of the Convention under study.

## 5. PRINCIPLE OF *NE BIS IN IDEM*

The principle of *ne bis in idem* (or *non bis in idem*) is also at the heart of the Latin American debate over State decisions that perpetuate impunity for international crimes. People accused of international crimes have invoked this principle time and again to avoid actions initiated against them during the past decade. This has occurred not only in relation to acquittals arising from potentially questionable proceedings but also in relation to outcomes when statutory limitations, amnesty laws, pardons, and definitive dismissals of criminal proceedings [*sobreseimiento definitivo*] have been applied. Here again, Latin American jurisprudence has begun to make its own voice heard, and its positions can be framed in the following points.

Studies have shown that while all States include some version of the principle of *ne bis in idem*, the considerable variation among systems makes it hard to generalize or even to speak of a general principle recognized by all of the countries in the international community.<sup>65</sup> In an abstract sense, however, this principle can be defined as the prohibition against trying or punishing the same person “more than once for the same conduct or crime.”<sup>66</sup> In several articles on the subject, Christine Van den Wyngaert has identified at least two justifications for this principle. From a human rights perspective, it serves to protect people from the indiscriminate use of the punitive power of the State. From a more pragmatic standpoint, it prevents double jeopardy in criminal proceedings, which can lead to conflicting verdicts, besides being an inefficient use of resources allocated to the administration of justice.<sup>67</sup>

65 See, for instance, Christine Van den Wyngaert and Guy Stessens, “The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions,” *48 International and Comparative Law Quarterly* 779 (1999); Christine Van den Wyngaert and Tom Ongena, “*Ne Bis In Idem* Principle, Including the Issue of Amnesty,” in *The Rome Statute of the International Criminal Court*, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, (New York: Oxford University Press, 2002), at 705–29.

66 Christine Van den Wyngaert and Tom Ongena, “*Ne Bis In Idem* Principle, Including the Issue of Amnesty,” *supra* note 65, at 705–6.

67 *Ibid.*

While the *ne bis in idem* principle has an important role to play in preserving order and certainty in a particular legal system, it must also be seen through the lens of the struggle against impunity. Latin American jurisprudence envisions at least two hypothetical situations in which new proceedings may be brought against the same individual: (i) when they deal with a different set of facts and therefore do not amount to a violation of the principle, and (ii) when they deal with the same set of facts, but the principle is not applicable.

While the first assertion appears to be self-evident, it is particularly relevant, for example, in relation to crimes against humanity. In accordance with Latin American jurisprudence, prosecuting someone for certain acts that are part of a single plan or policy, or even for participating in that plan or policy, would not preclude trying them for other acts committed within the same [plan or policy].

In the second scenario, acting in consonance with the inter-American jurisprudence on the subject, Latin American courts have concluded that in the specific case of international crimes, a second trial can be conducted when (i) the previous ruling was the result of a sham trial or fraudulent proceeding that did not provide due process guarantees including the independence, impartiality, and competence of the court, and (ii) when, following an acquittal, new evidence comes to light that could point to the individual's guilt.<sup>68</sup> In either of these two scenarios, some courts have found that a competent organ, which could include international human rights bodies, must rule on the fraudulent nature of the first proceeding or on the importance of the evidence obtained after acquittal.

Finally, some rulings refer to the potential application of the principle of *ne bis in idem* derived not from a ruling but from other national decisions such as amnesty laws. In such case, it is important to bear in mind that these decisions, as already noted, could have been adopted in breach of the State's international obligations and could be incompatible with the fight against impunity. Peruvian jurisprudence in particular has affirmed that the principle of *ne bis in idem* cannot be invoked based on legal decisions handed down pursuant to invalid norms such as general amnesty laws, inasmuch as they are incompatible with the State's constitutional and international obligations.

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68 As noted earlier, these jurisprudential lines were developed in conjunction with the interpretation of the Inter-American Court of Human Rights, which has stated that “the principle of *res judicata* provides protection from another judgment only when this judgment is reached with due respect for the guarantees of due process, in conformity with the Tribunal's jurisprudence on this subject. On the other hand, if new facts or evidence are discovered which make it possible to ascertain the identity of those responsible for grave human rights violations, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment.” IACourtHR, *Case of the Rochela Massacre v. Colombia*, *supra* note 47, para. 197, and IACourtHR, *Case of Almonacid-Arellano et al. v. Chile*, *supra* note 32, para. 131, among other cases of the Inter-American Court. See also Principle 26.b in the Set of Principles to Combat Impunity, *supra* note 1: “The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

## A. Overview

ARGENTINA, *Motion submitted by the defense of Jorge Rafael Videla (List of Judgments 1.a)*, Whereas 8 and 9:

[T]he principle of *non bis in idem* emerged as a safeguard of the individual security inherent to the Rule of Law. According to the Fifth Amendment of the United States Constitution, “nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb” [*footnote omitted*]. With the elimination of corporal punishment, the Fifth Amendment is interpreted today in the sense of a second potential deprivation of liberty. While our Constitution did not explicitly include this safeguard, it has traditionally been recognized as among those not enumerated, according to Article 33 of the National Constitution [which reads: “The declarations, rights and guarantees which the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated, but rising from the principle of sovereignty of the people and from the republican form of government”] [*footnote omitted*]. In addition, it has been incorporated, in a substantially analogous form, in Article 14(7) of the International Covenant on Civil and Political Rights and the American Convention on Human Rights (Pact of San José, Costa Rica, Article 8(4)). European doctrine has likewise stated that *procedural non bis in idem* is ultimately premised on the Rule of Law principle known as ‘*Rechtstaatsprinzip*’ [*footnote omitted*].

At the domestic level, this guarantee can be understood as precluding multiple criminal prosecutions, whether simultaneous or consecutive, for the same event. As already mentioned, it is not limited exclusively to a person’s being convicted twice for the same event. Rather, subjecting that person to the *risk* of being convicted—through a second trial—suffices to bring about a violation of this guarantee.

PERU, *Salazar Monroe, Julio Rolando*, March 5, 2007, Whereas 9 and 15–16:

The Constitutional Court reiterates that the right to respect for a ruling that has acquired the authority of *res judicata* means that all defendants are guaranteed the right, first, that a final judgment in a legal action may not be appealed, whether because the deadline for such an appeal has expired or because the appeals process has been exhausted; and second, that the content of a judgment that has acquired such status may not be vacated or modified, whether through the actions of other branches of government, of third parties, or even of members of the same tribunal that originally ruled in the case in question.

This negative validity of decisions considered *res judicata*, in turn, constitutes what is known in our jurisprudence as the right not to be tried twice on the same set of facts (*ne bis in idem*).

[In previous judgments] this Court pointed out that the constitutionally protected content of *ne bis in idem* must be identified in function of its two dimensions (formal and substantive). In this sense, we asserted that in its substantive or material

aspect, *ne bis in idem* guarantees the right not to be punished two or more times for a breach of the same legally protected value. In its procedural or formal dimension, the same principle ensures that a person is not tried two or more times for the same set of circumstances.

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*,  
Whereas 33 and 34:

[T]his Court has stated, in reference to the guarantee [of *ne bis in idem*], that “the stability of court decisions is a requirement for public order insofar as it constitutes an essential element of judicial security, and respect for *res judicata* is one of the main pillars upon which our constitutional system is based.”

It is also important to bear in mind that the aim of *res judicata* is to ensure the full effectiveness of the prohibition against being tried twice for the same set of facts in criminal matters [*footnote omitted*]. The two guarantees, then, are closely connected as far as their aim and purpose.

[I]n regard to the prohibition against being tried twice for the same set of facts in criminal matters, the jurisprudence of the Court has been guided by that of its North American counterpart [*footnote omitted*]. This was even the case when the latter [established that] “the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.”

## **B. Elements of the principle of *ne bis in idem***

PERU, *Salazar Monroe, Julio Rolando*, March 5, 2007, Whereas 36–38:

In light of the jurisprudential doctrine established by this Court, it is possible to identify the elements of the procedural dimension of *ne bis in idem* as follows: (a) the defendant must have been convicted or acquitted; (b) the conviction or acquittal must be based on a non-appealable judgment; (c) the new criminal case must be based on a breach of the same legally protected value that led to the initial acquittal or conviction [*footnote omitted*].

The Inter-American Commission on Human Rights shares this view; in interpreting the scope of Article 8.4 of the American Convention on Human Rights, it has pointed out that (...) the elements that constitute the principle, under the Convention, are:

1. the accused must have been acquitted;
2. the acquittal must be a final judgment; and
3. the new trial must be based on the same cause that prompted the original trial.

Therefore, if the prohibition against the double prosecution of a breach of the same legally protected value is to be used to challenge a second criminal trial, a threefold

identity must be established beyond any doubt: (a) identity of the physical person; (b) identity of the subject, and (c) identity of the cause of prosecution.

### C. Cases of non-violation of the principle of *ne bis in idem*

ARGENTINA, *Motion submitted by the defense of Jorge Rafael Videla (List of Judgments 1.a)*, Whereas 9:

[A] violation [of the *ne bis in idem* principle] must be understood to have occurred when, as already indicated, the three classic identities are present: *eadem persona* (identity of the parties prosecuted), *eadem res* (identity of the object of the prosecution) and *eadem causa petendi* (identity of the cause of the prosecution).

[I]t should be noted that this identity of object occurs if the basic idea is present in both cases [*footnote omitted*], even when additional elements or circumstances surrounding this core conduct appear the second time. It must have to do with the same event [*footnote omitted*], regardless of whether or not the potential investigation of the event was exhausted. Moreover, this point is completely unrelated to the potential prosecution of different past conducts that could be subsumed in the same offense.

#### i. Procedures for “other facts” do not violate the principle of *ne bis in idem*

COLOMBIA, *Remedy of unconstitutionality (Article 220 of Law 200-2000, Code of Criminal Procedures) (List of Judgments 4.g)*, Whereas 11:

[W]hen Article 29, in keeping with human rights treaties, bars trying a person two or more times for the same “set of facts” [*hecho*], it is attempting to protect the security of citizens and to prevent excessive harshness on the part of the State in the exercise of its punitive powers by ruling out the possibility that the same individual might be tried twice for the same crime. This means that if person X was investigated for allegedly murdering person Y and subsequently acquitted, then the authorities may not retry X for that murder, even if the legal characterization of the charge is modified. Therefore, in the *Loayza Tamayo* case, the Inter-American Court took the view that Peru had disregarded the rule of *non bis in idem* by trying a person in a civilian criminal court for the crime of terrorism after a military court had acquitted the same person of the crime of national treason, given that the charges of terrorism and treason were essentially joined by the same set of facts [*footnote omitted*]. As explained in the preceding point, the notion of a “new set of facts” [*hecho nuevo*] included in the grounds for review has a different meaning, inasmuch as it refers to factual information that was not known at the time of the trial but is related to the crime originally investigated. It obviously does not, however, have to do with a different crime. Therefore, if X is allowed to be retried for the murder of Y, because a new fact came to light in that murder that could prove X’s responsibility, it is obvious that X will be tried twice for the same set of facts, namely, the death of Y.

ARGENTINA, *Motion submitted by the defense of Jorge Rafael Videla (List of Judgments 1.a)*, Whereas 10:

[I]t is important to bear in mind that the object is identical when it refers to the same behavior, attributed to the same person. This is intended to prevent a specific accusation, as an attribution of a certain behavior established in the past, from being repeated, regardless of the legal significance attached to it on either occasion, in other words, the particular *nomen iuris* used to characterize the accusation or categorize the event. The event is viewed as *a real situation that occurs at a particular place and time*.

[C]ase 13/84 [in the trial of the Argentine military juntas] had to do with—for the purposes of what is relevant to the instant case—the abduction of *other* children specified there [...]. What was on trial was not the generic conduct of the defendant, since “the object of the proceedings never constitutes his entire life ... (t)o the contrary, every proceeding refers to just one specific occurrence in his life: to a ‘specific event’” [*footnote omitted*]. Hence, in Case 13, there was no investigation into whether the accused had committed crimes during a particular period in his life or whether he had committed the crime of abduction of children “generically” speaking, but rather, whether the specific events could be imputed to him as crimes [...]. And this is the case because an accusation that respects due process guarantees cannot be an abstraction. It must include a clear, precise, and detailed allegation of a specific and singular event in the life of a person, which is imputed to have actually occurred.

**ii. Criminal procedures for other facts within the same plan or policy do not violate the principle of *ne bis in idem***

ARGENTINA, *Motion submitted by the defense of Jorge Rafael Videla (List of Judgments 1.a)*, Whereas 13:

[In examining *non bis in idem* it is important not to] confuse two clearly distinct aspects: the first relates to the facts that may be subsumed under the crime of abduction of children, and the other to the existence of a systematic plan for the commission of that and other crimes. This is true inasmuch as the examination of the conduct that gives rise to a potential situation of *ne bis in idem* looks not at the plan, but rather at the abduction of *each and every one of the children*.

**D. Cases of non-applicability of the principle of *ne bis in idem***

COLOMBIA, *Remedy of unconstitutionality (Article 220 of Law 200–2000, Code of Criminal Procedures) (List of Judgments 4.g)*, Whereas 13, 23–24, and 27–36:

It is possible [...] to establish limits on the right to *non bis in idem* intended to develop other constitutional values and rights that have acquired greater relevance. The rights of crime victims and the State’s corresponding duty to investigate and punish crimes

in order to ensure that justice is done and to achieve a just order [...] clearly are the constitutional values that could conflict with that of *non bis in idem*, and they could therefore authorize or even require a limitation on this constitutional safeguard afforded the defendant. In effect, in cases where a person is acquitted of a crime, but new facts or evidence subsequently emerge that suggest his possible guilt, a clear normative tension arises between the defendant's right not to be tried again, on the one hand, and the victims' rights and the State's duty to investigate crimes and punish those responsible in order to achieve a just order, on the other. Thus, the normative force of *non bis in idem* would indicate that the person who has been acquitted should not be retried, despite the new evidence and facts. At the same time, however, the State's duty to investigate the crimes and protect the right of the victims in order to achieve a just order would seem to suggest that the person should be retried, particularly in cases of crimes that constitute violations of human rights.

[The principle of *non bis in idem* and the legal institution of *res judicata*] [...] appear as a necessary mechanism to protect legal security and safeguard an individual's constitutional right not to be tried twice for the same set of facts. What remains, then, is to evaluate what could be referred to as the proportionality *in sensu stricto* of such a restriction on the victims' rights [*footnote omitted*]. It falls to the Court to examine whether or not that limitation on the petition for review on behalf of the convicted felon would sacrifice constitutional values and principles that are more relevant than those protected by the measure in favor of *non bis in idem*. And this means, specifically, that this Court must analyze whether the restriction that the aforementioned norms place on the rights of the victims and the State's duty to investigate the crimes in order to achieve a just order is justified by the way, and the degree to which, it ensures respect for legal security and *non bis in idem*.

In order to answer this question, the Court must distinguish between crimes in general, on the one hand, and human rights violations and grave breaches of international humanitarian law, on the other.

This distinction is not arbitrary, but rather is based on the following obvious finding, which was mentioned earlier in this judgment: the importance accorded the rights of victims is directly proportional to the severity of the crime. The more social harm caused by the crime, the greater the consideration given the rights of those who fell victim to, or were harmed by, that conduct.

Likewise, the State's duty to investigate crimes is also directly proportional to the way in which the crime could have affected fundamental legally protected values. The more serious the crime, the greater must be the State's commitment to investigate it and punish those responsible, so as to achieve a just order [...]. Human rights violations and grave breaches of international humanitarian law are acts that display the utmost disregard for the dignity of persons and cause the most pain to the victims and others harmed by them. The rights of the victims and others harmed by such abuses merit the strongest protection, and the duty of the State to investigate and punish such behaviors becomes all the more important.

[In view of the foregoing] [...] the distinction between crimes in general, on the one hand, and violations of human rights and international humanitarian law, on the



other, is relevant to the examination of the proportionality of the language challenged in this appeal. This means that impunity for such violations is much more egregious and unacceptable, not only because of the magnitude of the harm to human dignity inherent in such behaviors, but also because the international community, by virtue of the principle of complementarity, is bound to punish such conducts.

[Based on these arguments], [t]he Court takes the view that the regulation is proportional as far as crimes in general, since in exercising its power to define this sphere, the Congress can limit the lawfulness of reviewing convictions in order to safeguard the right to *non bis in idem* and protect legal security.

Conversely, the constitutionality of the wording challenged through the constitutional remedy becomes problematic in relation to human rights abuses and grave breaches of international humanitarian law. This is so primarily because of the way in which such behaviors disregard human dignity and affect the basic conditions of social coexistence that are necessary for a just order to exist. Therefore, a situation of impunity for such crimes amounts to a profound disregard for the rights of the victims and other harmed by them and jeopardizes the realization of a just order.

Second, the harm is even more severe when the impunity stems from the State's failure to adequately investigate and punish these crimes, since on account of their particular gravity, the State's obligation is especially important.

Finally, impunity in these cases also implies a breach of the Colombian State's international commitment to cooperate in ensuring the full enjoyment of human rights and, therefore, to punish acts that undermine these supreme values of the international system, which our country has recognized as basic elements of international relations.

The Court concludes, then, that the failure to punish serious violations of human rights or international humanitarian law has a particularly forceful impact on the rights of the victims [...] that poses a serious obstacle to the existence of a just order [...]. This impunity becomes more serious still if it can be attributed to the failure of the Colombian State to fulfill its duty to investigate, in a serious and impartial manner, those violations of human rights and international humanitarian law so as to punish those responsible.

In such conditions, in keeping with the normative force of the constitutional rights of the victims and the constitutional requirement that the authorities maintain a just order [...] in cases of human rights violations or gross violations of international humanitarian law, should new facts or evidence emerge that make it possible to identify those responsible for such atrocious acts, then the investigations may be reopened, even where there has been a non-appealable judgment giving rise to *res judicata*. The reason for this is that an absolute prohibition against reopening such investigations impedes the achievement of a just order and constitutes an extremely onerous sacrifice of victims' rights. Hence, in cases of impunity for violations of human rights and international humanitarian law, the search for a just order and the rights of the victims supersedes the protection of legal security and the guarantee of *non bis in idem*, and, therefore, the existence of a non-appealable judgment giving rise to *res judicata* must not preclude a reopening of the investigation into such acts when

new facts or evidence emerge that were not known during the proceedings. Indeed, legal security in a democratic society based on human dignity cannot be erected on a foundation of silencing the pain and the demands for justice of the victims of the most atrocious acts, such as human rights violations and grave breaches of international humanitarian law.

The Court concludes, then, that the restriction imposed by the wording challenged through the constitutional remedy is disproportionate in relation to the rights of the victims, when it comes to impunity for human rights violations and grave breaches of international humanitarian law. In such situations, the rights of the victims not only authorize but demand a limitation on *non bis in idem* that would allow a reopening of these investigations if new facts or evidence emerge that were not known during the proceedings. It was therefore necessary for the law to envisage such a scenario by regulating the grounds for review, and the Court, therefore, must condition the scope of the wording challenged through this remedy.

As explained hereinabove, impunity for violations of human rights and international humanitarian law is more egregious when the State has blatantly failed to fulfill its duty to seriously investigate and punish such crimes. In such situations, the primacy of victims' rights and the attainment of a just order over legal security and *non bis in idem* is even more striking for two reasons. First, the situation becomes even more intolerable for the victims and others harmed by a human rights violation, since their human dignity is, in a sense, doubly violated; these people not only were harmed by the atrocious act but must also bear the indifference of the State, which blatantly fails to fulfill its duty to clarify such acts, punish those responsible, and make reparations to the affected parties.

Second, a potential review of proceedings in which the State blatantly disregarded its duty to seriously investigate these human rights violations has little impact on legal security for the simple reason that the authorities never really conducted a serious and impartial investigation of the crimes during those proceedings. And ultimately, precisely because of the State's failure to seriously investigate, the person who has been acquitted was never in fact seriously prosecuted or tried. Therefore, a reopening of the investigation does not have a strong impact on the right of *non bis in idem*. This might occur, for example, when the investigation was so negligent as to be only for the sake of appearance, and the goal was not really to clarify what happened but rather to absolve the accused. Or it might occur in situations in which legal officials lacked the necessary independence and impartiality to call the proceeding a genuine prosecution.

In such situations, even if no new facts or evidence have emerged, the rights of the victims still demand a limitation on *non bis in idem* that would allow a reopening of the investigations, since the right to *res judicata* allegedly enjoyed by the acquitted individual was not actually valid inasmuch as the individual in question was never subject to an authentic proceeding due to blatant omissions on the part of the State [...].

In this context, the Court takes the view that in cases of blatant negligence by the State with respect to justice for the victims of violations of human rights and

international humanitarian law, a competent organ must issue a declaration verifying that the State blatantly disregarded its obligation to seriously investigate the violation in question in order for review to be justified in the absence of new facts or evidence that were not known at the time of the proceeding. In order to ensure the adequate protection of the person who has been acquitted, this official verification of an omission by the authorities must be issued by an impartial and independent body. At the domestic level, therefore, such a declaration may only be issued by a judicial authority.

[T]he Court takes the view that decisions made by international human rights bodies formally accepted by our country that verify a blatant disregard for the Colombian State's obligations to seriously and impartially investigate human rights violations and grave breaches of international humanitarian law also allow for a review of non-appealable decisions that have formally given rise to *res judicata*.

These precautions are also essential in cases where the potential reopening of a proceeding with a non-appealable judgment that had acquired the status of *res judicata* is based on the emergence of new facts or evidence that were not known at the time of the proceedings [...].

PERU, *Salazar Monroe, Julio Rolando*, March 5, 2007, Whereas 40–42 and 44:

[T]he Constitutional Court takes the view that if the aim of *ne bis in idem* is to prevent the *arbitrary exercise of jus puniendi* by the State, then not every double prosecution that the State might pursue against an individual would automatically be prohibited.

What would fall outside that sphere of protection, therefore, would include circumstances in which the double prosecution is incompatible with legally protected core values, whether because it is extraneous or unrelated to what these core values seek to protect; because it is part of the constitutionally protected content of another fundamental right; or because that is the result of its interpretation in conjunction with other constitutional provisions containing constitutionally relevant aims. In this sense, and for the purposes of the instant case, the Constitutional Court takes the view that challenging a ruling or judgment (of acquittal) handed down in an earlier criminal proceeding that turns out to be manifestly null and void does not fall within the nature of law, that is, the legally protected value of the procedural dimension of *ne bis in idem*.

Since the primary, basic requirement of the procedural dimension of *ne bis in idem* is to prevent the State from arbitrarily pursuing criminal prosecution of a person more than once, the Court considers that such arbitrary behavior cannot be attributed to cases in which a criminal prosecution is initiated and conducted after the first trial has been declared invalid pursuant to a determination that it was heard by a court that lacked competence *ratione materiae* to take up a particular offense. Indeed, the value at stake in this constitutionally protected right is not safeguarded by opposing the *fact* of an earlier proceeding; rather, the latter must have been legally valid [*footnote omitted*].

The determination as to whether the first trial of the appellant (and the attendant judgments) is legally valid must be made in accordance with the criteria set forth in this judgment: in other words, after *examining whether, in the specific case, the first criminal trial was (or was not) conducted for the purpose of releasing the appellant from any criminal responsibility, or was not conducted by a court of justice that respects guarantees of independence, competence, and impartiality.* [Emphasis added]

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*, Whereas 33:

[T]he principle [*ne bis in idem*] has been subject to certain exceptions. Among other reasons, the Court has taken the view that damage to “[...] the juridical security inherent in definitive judgments ... shall not supersede the dictates of justice” [*footnote omitted*], and that it is a well-known principle that fraudulent judgments or those handed down as a result of bribery, violence, or other machinations are subject to revision. Furthermore, this guarantee may not be invoked when “[...] there has not been an authentic and true legal process, nor is it acceptable that, the principle of *res judicata* having been established to protect legitimately acquired rights, it should also cover situations in [which] the proceeding is recognized to have been nothing more than a travesty of justice [...]” [*footnote omitted*].

[A]ll of these principles have been upheld by the [I]nter-American [Court], which has stated:

“With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention [on Human Rights], it is not an absolute right, and therefore, is not applicable where (i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law was intended to shield the accused party from criminal responsibility; (ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees; or (iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an ‘apparent’ or ‘fraudulent’ *res judicata* case. On the other hand, the Court believes that if new facts or evidence appear that make it possible to ascertain the identity of those responsible for human rights violations or crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of victims, and the spirit and wording of the American Convention supersede the protection of the *ne bis in idem* principle.”

In application of this judicial interpretation, see ARGENTINA, *Remedy submitted by Ragnar Erland Hagelin (List of Judgments 1.g)*.

**i. Decisions based on a void law: Relationship between the principle of *ne bis in idem* and an amnesty law**

PERU, *Constitutional remedy (amparo) submitted by Santiago Enrique Martín Rivas (List of Judgments 13.g)*, Whereas 16 and 50:

It is clear from Article 139(13) of the Constitution that judicial rulings handed down pursuant to an amnesty law may also give rise to the right of *res judicata*. For that to occur, however, the amnesty law must be both valid and constitutionally legitimate. A law may be valid but not necessary legitimate from the standpoint of the Constitution. Therefore, the first issue to address is an examination of the constitutional legitimacy of an amnesty law pursuant to which a court ruling has been issued.

Based on [the incompatibility of the aforementioned laws with constitutional principles and international treaties], the Court takes the view that amnesty laws No. 26479 and No. 26492 are null and void and lack, *ab initio*, legal effect. Therefore, any court rulings handed down for the purpose of ensuring impunity for human rights violations committed by members of the Colina Group are likewise null and void. As judicial rulings without legal effect, they do not give rise to *res judicata* under Article 102(6) and Article 139(13) of the Constitution insofar as they are incompatible with the objective system of values, constitutional principles, and fundamental rights embodied in the Constitution.

For a discussion of the compatibility of amnesty laws with constitutional principles and international treaties, see “*Amnesty law cannot cover crimes under international law*,” section VI.2.B in this digest.

**E. Principle of *ne bis in idem* in international criminal law**

Another issue relating to the principle of *ne bis in idem* and international crimes stems from the inherent characteristics of the applicable global justice system. As noted in the preceding chapter, unlike common crimes, international crimes may be prosecuted by the domestic courts of other States based on extraterritorial principles, particularly that of universal jurisdiction. In

addition, the International Criminal Court may exercise jurisdiction over events that occurred in, or were perpetrated by, citizens of certain Latin American States.<sup>69</sup>

Specifically, in regard to the relationship between the proceedings carried out by courts of two or more States, at present there is no general rule as to whether a trial for the same acts held under the jurisdiction of a third State would constitute a violation of the principle of *ne bis in idem*.<sup>70</sup> This affirmation, of course, takes into account some of the relevant international instruments and judgments. The principle of *ne bis in idem* only has effect with respect to attempts to initiate other proceedings within the same jurisdiction.<sup>71</sup>

There is, in contrast, a specific rule governing the relationship between domestic jurisdictions and the International Criminal Court. Despite the many political and legal criticisms of Article 20 of the Rome Statute (which embodies the *ne bis in idem* principle), as illustrated by the jurisprudence presented below, the normative hypotheses set forth in this article are, indeed, comparable and identifiable with the criteria established by Latin American jurisprudence. This means that rather than introducing a norm that potentially infringes on individual rights, the Statute instead clarifies the relationship between jurisdictions and ensures the protection of the individual and the certainty of decisions based on criteria that have been accepted in the jurisprudence of the region's courts and of the Inter-American Court of Human Rights.

ECUADOR, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 6.a)*, Whereas 5:

Article 24(16) of the Ecuadorian Constitution provides that “*No one shall be tried more than once for the same cause,*” thus establishing the legal principle of *ne bis in idem*.

69 This reference has been limited to the International Criminal Court, since, given the restricted jurisdiction of the *ad hoc* international criminal tribunals, they could never have taken up a crime perpetrated in a Latin American country, and it would be virtually impossible that someone from those countries could fall within the personal jurisdiction of either of those tribunals. Even more importantly, the jurisprudence developed by those tribunals appears to be non-applicable based on the difference between the principles governing the relationship between the *ad hoc* tribunals and States, on the one hand, and the International Criminal Court and domestic jurisdictions on the other. With respect to the first scenario, certain scholars have referred to a “vertical perspective” and have pointed out that “such [*ad hoc*] tribunals are considered to be hierarchically superior to national courts, and that therefore decisions of such tribunals have priority over decisions rendered by national courts. If the principle of verticality would be fully applied, judgments of an international criminal court would have a ‘downward’ *ne bis in idem* effect, which would prevent States from repeating, starting, or even continuing prosecutions of crimes that came within the jurisdiction of the court. National judgments, on the contrary, would have no ‘upward’ *ne bis in idem* effect and would not prevent the international criminal court from reopening a case that was already judged by a national court.” Christine Van den Wyngaert and Tom Ongena, “*Ne Bis In Idem* Principle, Including the Issue of Amnesty,” *supra* note 65, at 709.

70 According to these specialized studies of the issue, there are only a few specific references in treaties on extradition and cooperation in criminal matters. *Ibid.*

71 See, for instance, Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted November 22, 1980, and entered into force November 1, 1998; and Article 14 of the International Covenant on Civil and Political Rights adopted December 16, 1966, and entered into force March 23, 1976. In terms of international decisions, see ECourtHR, *Taliadorou and Another v. Cyprus*, App. No. 39627/05 and 39631/05, 2008, para. 67, as well as Human Rights Committee, *A.P. v. Italy*, Communication No. 204/1986, CCPR/C/31/D/204/1986, November 2, 1987, para. 7.3.

Article 20 of the Statute generally envisages the principle that no one may be tried for crimes of which he has already been convicted or acquitted by the same Court or by another Court. Nonetheless, Article 20(3) of the Statute sets out the exception that the International Criminal Court may retry a person when the proceedings before the other tribunal “(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

These three hypotheses create the possibility of a second trial against the person for facts that were aired in a prior proceeding. The aim is to prevent impunity, which, as stated, is the inherent purpose for which the International Criminal Court was established. Furthermore, such a situation is truly exceptional and could not occur in a democratic State governed by the rule of law, where the judiciary acts independently and impartially and observes basic due process guarantees.

These exceptions are activated when a State attempts to shield the defendant from criminal liability, when it fails to conduct the proceedings independently and impartially, or when, in the circumstances of the case, the trial is inconsistent with the intent of bringing the accused to justice. Such cases of rigged trials can only occur under an authoritarian or dictatorial regime to prevent the punishment of persons whom they are attempting to benefit.

Consequently, an examination of the provision contained in Article 20(3), in light of numbers (1) and (2) of the same article, leads to the conclusion that the International Criminal Court will generally be guided by the principle of respect for *res judicata*, in the sense that if a person has already been tried under the rules of due process, he shall not be tried a second time. Only by means of exception will a second trial be permitted, in the circumstances set out hereinabove.

COLOMBIA, *Constitutional review of the Rome Statute of the International Criminal Court (List of Judgments 4.f)*, Whereas 2.3:

Under the provisions of Article 20 of the Rome Statute, the decisions of the International Criminal Court pertaining to a conviction or an acquittal for any of the crimes under its jurisdiction give rise to *res judicata*, and therefore no one may be tried again for the same crimes that formed the basis for such a judgment, neither by the International Criminal Court nor by any other judge (Article 20, numbers 1 and 2, RS). Article 20(3), however, sets out an exception to this rule of inadmissibility.

In effect, when a situation of *res judicata* exists in the domestic jurisdiction [of a State] with respect to the matter brought before the International Criminal Court, *but that situation resulted from an intent to shield the perpetrator from the jurisdiction of the Court (Article 17(1)(c), under Article 20(3), RS) through a sham proceeding or through a domestic proceeding conducted by a court that did not fulfill the requirements of impartiality and independence and that, “in the circumstances,” acted in a manner inconsistent with the duty to bring the person concerned to justice,* the International Criminal

Court may exercise its jurisdiction over the matter and declare the case admissible. [*Emphasis added*]

The Court finds that *the events set out in Article 20(3) of the Statute entail*, first, *a violation of the international duty to punish* genocide, crimes against humanity, and war crimes; second, *a proceeding contrary to the constitutional duty of protection that is incumbent upon domestic authorities* (Article 2, PC); and third, *a disregard for international commitments in the area of human rights and international humanitarian law* (Article 9, PC). Therefore, *the duty of protection incumbent upon States entails the establishment of the necessary mechanisms to ensure that circumstances such as those set out in Article 20 do not prevent the truth from being known and justice from being achieved.* [*Emphasis added*]

ARGENTINA, *Motion submitted by the defense of Santiago Omar Riveros (List of Judgments 1.f)*,  
Whereas 35:

[B]eyond what may be the specific parameters of the prohibition against being tried twice for the same set of facts [double jeopardy] for common crimes, in international humanitarian law the principles of axiological interpretation enjoy absolute primacy in defining the guarantees of *ne bis in idem* and *res judicata*.

This is the case because the statutes of the international criminal tribunals and the basic principles of universal jurisdiction have as their purpose to ensure that aberrant acts will not go unpunished. As a result, notwithstanding the precedence accorded national authorities to undertake prosecutions, should such local proceedings turn out to be subterfuges prompted by impunity, then the subsidiary jurisdiction of international criminal law comes into play with a new proceeding.

Indeed, the Statute of the International Criminal Court limits the nature of *res judicata* for this very reason. Article 20 provides that the international court shall also take up such aberrant crimes when the purpose of the proceeding carried out in the local jurisdiction was to shield the accused party from responsibility, or when the process was not impartial or independent or was carried out in such a way as to make clear that there was never any intention to bring the accused party to justice.

Similarly, according to the Statute of the International Tribunal for the former Yugoslavia, a person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be tried subsequently by the international tribunal if the acts for which he was tried were characterized as an ordinary crime, if the national court proceedings were not impartial or independent and were designed to shield the accused from international criminal responsibility, or if the investigation was not diligent [*footnote omitted*]. The same language is found in Article 9 of the Statute of the International Tribunal for Rwanda.

The Princeton Principles on Universal Jurisdiction use similar language when regulating the scope of the prohibition against multiple prosecutions in the case of crimes against humanity (Article 9).



## 6. RES JUDICATA

COLOMBIA, *Remedy of unconstitutionality (Article 220 of Law 200–2000, Code of Criminal Procedures) (List of Judgments 4.g)*, Whereas 5, 6, and 7:

One of the purposes of legal proceedings is to pacify social conflicts; they are intended, therefore, to put an end to disputes. This is why one of the features of legal decisions is that they acquire permanence and give rise to *res judicata*, so that the decision handed down by the judge is definitive and the matter that has been decided is not subject to further discussion.

In order to achieve this pacifying role, to the benefit of legal security, *res judicata* ensures that judgments, once they are final, are considered immutable, binding, and non-appealable, as the only way to ensure that the administration of justice fulfills its purpose of putting an end to the dispute. This means, then, just as this Court has pointed out, that *res judicata* has the negative function of barring the legal authorities from taking up, processing, and deciding on a matter that has already been resolved, as well as a positive function of conferring security on legal relations and the legal system [footnote omitted].

[*R*]es judicata plays an even more forceful role in the criminal sphere and in punitive law, not only because of the interests at stake, such as the fundamental right to liberty, but also because it avoids what some doctrinaires have referred to as excessive harshness in the State's exercise of its punitive powers. The latter refers to the possibility that the State will continue to act indefinitely in its attempt to obtain a conviction of someone for a particular act, reviving the charges even after the person has been acquitted in the proceeding.

### A. *Res judicata* and its relationships with the principle of *ne bis in idem*

COLOMBIA, *Remedy of unconstitutionality (Article 220 of Law 200–2000, Code of Criminal Procedures) (List of Judgments 4.g)*, Whereas 7:

[H]uman rights treaties and the Constitution reinforce, one might argue, the force of *res judicata* in punitive matters through prohibitions against double jeopardy, or the principle of *non bis in idem*, according to which a person may not be tried twice for the same set of facts (PC Article 29). Therefore, this Court has emphasized that this “principle amounts to a limit on the disproportionate and unreasonable exercise of the State's punitive powers” [footnote omitted]. This Court likewise has stressed the deep-rooted relationship between the prohibition against double jeopardy and *res judicata* when it stated that “to conceive of ‘res judicata’ without simultaneously considering non bis in idem is virtually meaningless; therefore, when Article 29 of the Constitution bars the State from trying a person twice for the same set of facts, it is referring to both principles”

[*footnote omitted*]. And on another occasion, the Court emphasized this conceptual link as follows:

*“It can be argued that the principle of non bis in idem amounts to the application of the most general principle of res judicata to the sphere of jus puniendi, that is, to the sphere of criminal and administrative penalties. Surely the prohibition is derived from the principle of res judicata, pursuant to which judges may not pursue or issue rulings in legal proceedings having the same object or grounds as identical trials previously conducted by another legal official, which is equivalent, in disciplinary terms, to the prohibition against trying a person twice for the same set of facts, regardless of whether that person was convicted or acquitted”* [*footnote omitted*].

ARGENTINA, *Motion submitted by the defense of Jorge Rafael Videla (List of Judgments 1.a)*, *Whereas 7*:

[I]n view of the possibility that someone who has already been tried for a specific set of facts could be made to stand trial again for the same facts, procedural law incorporates a remedy in the form of the exception known as *res judicata* (*exceptio rei judicatae*), although the latter is not the only remedy for safeguarding the right of *ne bis in idem*. This rule has the effect of declaring that a prior criminal prosecution has been permanently exhausted, which would render inadmissible any new proceeding *in eadem re* that could result in another punishment.

## 7. DEFINITIVE DISMISSAL OF CRIMINAL PROCEDURES

### A. Definitive dismissal and its relationship with the principle of *ne bis in idem*

PERU, *Salazar Monroe, Julio Rolando*, March 5, 2007, *Whereas 12, 13, and 15*:

In accordance with basic rights provisions, this Court responds affirmatively to the decision as to whether a ruling that does not constitute a final judgment (but that has put an end to the criminal proceeding) is also protected by this right. [It does so] not only because the language of those provisions avoids restricting the scope of protection exclusively to final judgments, so as to cover court decisions that put an end to a proceeding (by referring, for example to rulings that amount to a dismissal of proceedings), but also because this is the way human rights organs in our region have interpreted a provision that is apparently more restrictive in its scope of protection, as may be the case with Article 8.4 of the American Convention on Human Rights, which stipulates that “An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.”

With respect to the scope of the concept of “non-appealable judgment” used in the aforementioned provision of the American Convention on Human Rights, the Inter-American Commission on Human Rights has stated:

“(...) the expression ‘non-appealable judgment’ in subparagraph 4 of Article 8 of the Convention should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of States. In this context, ‘judgment’ must be interpreted as any procedural act that is fundamentally jurisdictional in nature, and ‘non-appealable judgment’ as expressing the exercise of jurisdiction that acquires the immutability and incontestability of *res judicata*” (Inter-American Commission on Human Rights, Report No. 1/95, Case 11.006, Alan García Pérez c/Peru).

Therefore, considering that a ruling of definitive dismissal of proceedings may give rise to *res judicata*, it is important to reiterate here that in the criminal law venue, one of the effects of having attained the status of *res judicata* is the prohibition against subjecting the same person to a new trial for the same cause.

## **B. Cases of non-applicability of definitive dismissal of criminal procedures**

PERU, *Salazar Monroe, Julio Rolando*, March 5, 2007, Whereas 21 and 30–32:

The Constitutional Court considers that it must respond affirmatively to the matter of whether the order to investigate and punish contained in the resolute part of the judgment handed down by the Inter-American Court of Human Rights in the Barrios Altos case covers rulings to dismiss handed down by military courts, including those in which amnesty laws No. 26479 and No. 26492 have not been applied.

The Constitutional Court takes the view that the obligation to investigate and punish those responsible for human rights violations pursuant to the Barrios Altos case, as set out in number 5 of the resolute part of that judgment, is not confined, as the appellant has interpreted it, to the normative hypotheses set out in numbers 3 and 4 of that ruling; in other words, in relation to judicial rulings handed down pursuant to the amnesty laws that were declared without legal effect. It also includes number 2, in all of its aspects: that is, the declaration that the Peruvian State violated the right to life, the right to personal integrity, and the right to a fair trial and judicial protection of the victims and their relatives.

As stated in the judgment of September 3, 2001, on the “Interpretation of the Judgment on the Merits,” according to the jurisprudence of the Inter-American Court of Human Rights,

“[...] the general obligation of the State, established in Article 2 of the Convention, includes the adoption of measures to suppress laws and **practices of any kind** that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.”

By virtue of the foregoing, the Constitutional Court takes the view that the obligation of the State to investigate the facts and punish those responsible for the human rights violations set out in the Judgment of the Inter-American Court of Human

Rights encompasses not only the nullity of proceedings in which amnesty laws No. 26479 and No. 26492 were applied, after those laws were found to be without legal effect, but also any practice intended to impede the investigation and punishment of violations of the right to life and personal integrity, which includes rulings of dismissal of proceedings such as those handed down in favor of the appellant.

In contrast, see PANAMA, *Appeal motion (Case Gerardo Olivares) (List of Judgments 11.b)*, *Whereas*:

According to our criminal procedural law, the reopening of an investigation that has been closed with a judgment to dismiss is only viable when the dismissal is provisional (Article 2210 of the Judicial Code), or when a final and impersonal ruling of definitive dismissal has been handed down (Article 2206 of the Judicial Code), but in the latter case only to incriminate other individuals who did not benefit from its final nature.

In the instant case, the records show that those allegedly responsible for the death of Mr. Gerardo Olivares V., or at least those mentioned in the initial investigations, benefited from a definitive dismissal, which bars a reopening of the process with respect to them. At the same time, however, the Trial Court dismissed the preliminary proceedings in an impersonal way. Under Article 2206 of the Judicial Code, this means that investigations may be reopened with respect to other individuals not mentioned in the ruling of dismissal, dated January 23, 1978 [...] [even when, in accordance with the arguments of the prosecutor, “it was not an offense of homicide between ‘common persons’ but rather the acts inherent to a *de facto* regime under which forced disappearances of persons were occurring, and such actions should not remain unpunished in light of the human rights commitments undertaken by Panama.”]<sup>72</sup>

72 Note added to the original: The text transcribed in brackets is the literal transcription of the arguments presented by the Office of the Chief Prosecutor of the Second Judicial District of Panama, just as they were reproduced in this decision.

## EPILOGUE

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This impressive and useful publication reveals the great richness of discussion and application of international law in Latin American criminal proceedings in recent times. There are hundreds, possibly thousands more cases such as these in the pipeline in countries throughout Latin America. Where is this positive trend leading and what can we expect in the coming years? What might these decisions and legal developments mean for international criminal law, for Latin American transitions from conflict and authoritarianism, and for accountability efforts globally?

Recently, attention has focused on the implications of the increasing diversification and expansion of international law through an ever more complex tapestry of specialized treaties, legal regimes, and institutions. Even within the field of international criminal law itself there are different treaties operating, each overlapping to some degree with customary norms and with the specialist body of international humanitarian law. In addition, institutional diversification is growing, with a plethora of international and national bodies now working to identify and apply international criminal law norms in a variety of consistent, diverging, or contradictory ways. National systems are participants in this diversification and expansion of international law, as are the regional human rights bodies, including the Inter-American Court of Human Rights, which on occasion refer to and interpret instruments and norms of international criminal and humanitarian law. International law has never been and never will be a monolithic or homogeneous body of rules, and diversification and expansion can bring positive developments, making international law dynamic and relevant to a changing world. Nevertheless, there are implications to be considered by any national system engaged in prosecuting crimes such as genocide, crimes against humanity, war crimes, and torture.

The United Nations International Law Commission (ILC) has looked at this tendency toward diversification and the resulting “fragmentation” of international law. Its 2006 report focused on the substantive aspects of fragmentation, providing useful guidelines on how norms from different bodies of law and treaty regimes might relate to each other, and how and when hierarchies operate so that these norms can be applied in a coherent manner. The issue of institutional diversification was not dealt with, however. The ILC indicated that this matter should be left to the institutions themselves. Meanwhile, national jurisdictions, such as those whose rulings are compiled in this digest, will continue to look to the case law of international and internationalized tribunals for guidance when treaties, custom, and general principles provide insufficient clarity on the content and scope of international criminal law norms. It is therefore important that investigation on this issue be carried out in the short to medium term in order to guide states, practitioners, and scholars. This effort should highlight the consistency, divergence, and contradiction between the statutes and jurisprudence of tribunals such as the inter-

national criminal tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the International Criminal Court, the International Court of Justice, national courts, and regional human rights bodies in their application of international criminal law.

The case law referred to in this digest usefully signposts some of the areas where analysis may focus in future, inquiring, for example, into whether there is a shared or varying understanding in national jurisdictions of those instruments and norms applicable only in international armed conflicts; how those conflicts are defined in international law; the definition of “protected persons” in international humanitarian law;<sup>1</sup> the definition of crimes against humanity in international law compared to definitions in national codes; the legal consequences of categorizing an act as “a crime under international law”; the obligations of third States in relation to offenses and offenders; and the distinction between optional and mandatory exercise of jurisdiction (including universal jurisdiction) for crimes under international law. References to peremptory or *jus cogens* norms occur frequently, not in the context of resolving conflicts between competing international norms but in the context of overruling inconsistent national norms. The purpose of a norm’s peremptory status, as opposed to merely international status, would also be of interest to explore in future jurisprudence.

Another tendency in some of the cases and domestic legislation of Latin America, which is likely to continue, is deliberate deviation from international law definitions. The expansion of the protected groups in the crime of genocide is one key example. These deviations occur not because the state considers its interpretation to be part of international law but because it considers its own interpretation better suited to national factual or legal circumstances. Divergence can function well within a given national system but may not be recognized outside it. This can have implications for state-to-state cooperation, including extradition, as well as for the political support of states and international organs that may not share the same view about the definition of the crime or the jurisdictional duties of third states.

Future development of case law will also increase the familiarity that national justice operators have with the sources of international law and their relationship to national law. A preference for or even a constitutional rule favoring positive expressions of international law in treaties is logical in legal systems of a historically civil tradition, but there are indications that the future may bring increased reference to customary international law, for example on the issue of *nullum crimen sine lege* as well as on defenses, excuses, and the subjective element. General international law should continue to have a role, including on the issue of immunities. National variations to limit immunities and to expand the reach of extraterritorial jurisdiction may represent an ideal of international law as it should be, *lex ferenda*, and the future indeed may bring the creation of new norms of customary international law on this issue. For now, the positive efforts of national and international jurisdictions in these areas will continue to coexist with existing international law. (Notably, the Rome Statute does not opt for a universal jurisdiction approach beyond Security Council referrals, and in relation to immunities its provisions are subject to prevailing international law norms, as seen in Article 98.)

References to the Rome Statute of the International Criminal Court abound in the case extracts, and at the time of writing 25 of the 35 countries of the Americas have ratified the

1 In those Latin American countries where non-international armed conflict formed the context of the crimes being prosecuted, international humanitarian law is the *lex specialis* in relation to international human rights law.

Rome Statute.<sup>2</sup> Will this lead to a more homogeneous view of international criminal law in the national legal systems of the Americas and to more harmony between national law definitions and concepts and those in international law? The Rome Statute, of course, cannot be treated in its entirety as an expression of customary international law. Articles 6–8 largely express customary international law but not entirely, as Article 10 makes clear. The definition of crimes against humanity requires a course of conduct involving multiple commission of the same acts listed in Article 7, the proof of policy, and a link between these two. This does not, as yet, reflect customary international law. The same can be said of the link the Statute requires between an act of persecution and either another constituent act under the chapeau of crimes against humanity or any act qualifying as a crime under the Rome Statute. Definitions of some of the constituent acts of crimes against humanity, such as forced pregnancy, do not reflect existing customary international law but are useful to build clarity for the future. The modes of liability exemplify the compromise at the heart of the Rome Statute project. International law in this area, with the exception of responsibility of military commanders, was derived from national systems in any event, and suitable domestic law concepts of criminal responsibility are already well developed. The coming years may bring developments in evidentiary matters in domestic trials of international crimes, sparked by developing international practice. This might lead, for example, to the removal of the requirement of medical evidence and presumptions of lack of consent in cases of rape, or to elimination of the need for positive identification of any deceased persons where rape or killing are charged as genocide, crimes against humanity, or war crimes.

The Rome Statute is much more than a legal document, however. The repeated references to it in the cases discussed here reflect the hope of populations across the region that the type of atrocities it outlawed will not occur again. Indeed, preventing future crimes is explicitly mentioned in the preamble to the Rome Statute as the ultimate purpose of its task of ending impunity. It may be thought quite a low minimum to expect of states and armed groups: that they not commit genocide, crimes against humanity, and war crimes in future. But complacency would be a risky strategy. Processes of democratization, or human progress generally, are not necessarily irreversible and Latin America is no exception, as one can see from the coup in Honduras in 2009. In many parts of the region, democratically elected bodies have yet to establish adequate power over their military and security forces, or independence from interest groups and organized crime.

As many democracies in Latin America are fragile, so societies also need constant attention to the glue that holds them together. The conflicts of the past in this region, whether or not they had overtones of ideology, ethnicity, politics, or race, were almost invariably linked to resources. The future may bring new, even global, conflicts over natural resources. National legal systems should once again apply national and international law in combination, as they have done in these cases, to prevent and respond to the suffering caused by attacks on life and integrity and by discrimination and marginalization resulting from abuse of economic, social, and cultural rights. In this way the law can help prevent a resurgence of the causes of the conflicts and repressions of the last century. A leading role for international human rights law in particular, firmly established in the American regional and national systems, is therefore vital for the future. Many of the human rights violations in Latin America—past and present, civil and political,

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2 Those that have not yet ratified include the Bahamas, Cuba, El Salvador, French Guiana, Grenada, Guatemala, Haiti, Nicaragua, St. Lucia, and the United States.

economic, social, and cultural—do not fall into the restricted categories of international crimes, but the protection of these rights is crucial to avoiding a repeat of the conditions that can lead to massive and systematic abuse. While the Rome Statute may provide a certain normative guidance and a belief in prevention of the most heinous international crimes, the protection of the human rights of the populations of Latin America on a daily basis is the principal means to that end.

At the same time, these legal systems will face increasing demands to combat transnational crime, once again using combinations of national and international norms and techniques to respond to human trafficking, drug and contraband trafficking, and “white-collar” crime such as money laundering, corruption, tax evasion, and fraud, all of which impede the social and economic development of peoples across the region.

The role of the national justice systems is not, however, merely to apply legal rules to determined sets of facts. Cases like those highlighted in this digest have created both legal and political momentum. Judges across the region have applied national and international criminal law, and in some cases humanitarian law, to crimes committed during dictatorships and armed conflict. They have often done so in the face of inaction or active obstruction from governments and legislatures. Some States have created criminal policy and legislative tools in this area, but it has been left to judges to try to make these work in practice. This is not judicial activism but a natural and necessary development.

Although modified to a greater or lesser degree in the various countries of Latin America today, the modern incarnation of the civil law tradition underpins their legal systems and is also a factor in how these cases link to many processes of democratic consolidation under way in the region. The post-revolutionary civil law tradition had a strict view of the separation of powers in order to protect citizens from the arbitrary exercise of power by monarchs and their chosen representatives. It rejected the idea of judges making law and the doctrine of *stare decisis*—judges basing decisions on their own or other judges’ earlier cases. The people’s elected representatives would promulgate clear laws, ideally in plain language that the public could understand, that covered any factual situation that might arise. The judges would merely apply it. In the context of military or civilian dictatorships, such as were common across Latin America, this model broke down. Laws were written or usurped by dictatorships, and both the law and the legal profession were often put directly in the service of those committing heinous crimes against their own populations. In addition, while subsequent democratic legislators in some states have attempted to translate international criminal law into national codes, the law often does not foresee the particular factual circumstances of massive criminality and complex forms of participation. These two realities have required judges to play a proactive role not only in filling the normative gap but in rebalancing the powers of state and rights of citizens.

These cases analyzed here are therefore also part of a push toward healthy democratic and civil and military relations, and toward political accountability, beginning with the first and most important step: demonstrating that no one is outside the law. The Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the Organization of American States have a regional influence on standard setting and norm development that continues to offer crucial international legitimacy, creating the conditions for judges to take up this vital role at the national level. Domestic law enforcement agencies, prosecutors, and judges can, by their actions in cases such as these, continue to help build trust between states



and citizens in those countries where it has collapsed, so that in the future populations of those countries may believe and trust that their State institutions can protect their most fundamental rights. This is a cornerstone of any social contract and is also fundamental to sustaining support for democracy as the preferred form of government in the region.

The achievements reflected in these pages have come at an unacceptable cost to many people, in terms of delay and anxiety and the lives and livelihoods lost by those who have sought accountability for themselves or a loved one and those who have administered justice over the years. Many more attempts failed or were never started at all because of these same risks. Given these circumstances, the thoughtfulness and quality of many these decisions is particularly compelling. In too many countries of Latin America, taking part in any criminal proceeding, whether as a witness, victim, prosecutor, or judge, remains a potentially life-threatening experience, all the more so when it means challenging the power of state authorities, vested interests, or criminal gangs. Accused persons face persistent risks of illegal detention, mistreatment in custody, and miscarriage of justice. Judges and participants in criminal proceedings therefore need continued support from both inside and outside Latin America so they can fulfill their roles safely, efficiently, and without pressure.

Finally, as to the global impact of these cases and the trend they represent: on the legal side, it is perhaps unlikely that domestic efforts to expand the elements of international crimes will have an impact outside their immediate circumstances. The jurisprudence discussed here should, however, make a positive contribution globally in relation to the law on individual criminal responsibility, particularly perpetration-by-means and co-perpetration, which are included in the Rome Statute. Decisions of the International Criminal Court have already referenced Latin American developments in this sphere to aid interpretation of the Rome Statute. The current and predicted volume of case law in the national systems of Latin America, as compared to the international tribunals, may lead to a richer jurisprudence at the national level in the coming years, benefiting international jurisdictions. New international customary norms may, in time, be shaped or bolstered by the practice and legal views of Latin American states and the writings of their academic publicists.

On a procedural level, the key role that victims and their representatives have played in criminal proceedings in many Latin American jurisdictions may have an impact beyond the region. Elsewhere, even in common law systems, options are being considered for expanding or strengthening victims' and families' standing and other participation in criminal proceedings.

In a wider sense too, these cases continue the exportation of valuable experience from Latin America. The region provided the earliest examples of commissions of enquiry into forced disappearance and related crimes, particularly in Bolivia, Uruguay, Argentina, and Chile. It then produced, through the innovative El Salvador and Guatemala truth commissions, the practice of wider, richer historical documentation of conflicts, examining their causes and consequences. Latin America is now demonstrating successful legal arguments against the illegal use of amnesties, and application of procedural laws so as to allow for accountability while protecting the due process rights of the accused. Crucial concepts are being litigated in national courts in Latin America at the same time, or even before, they come before international criminal tribunals: an example is permissible exceptions to the principle of *non bis in idem* in international criminal law, in cases where sham investigations and prosecutions are intended to shield the accused from criminal responsibility. Many of the region's states are grappling with challenges of case

volume, selection, and prioritization that are greater than those faced by any international institution, and with fewer legal and economic resources at their disposal.

These are but some of the reasons why it is so important that this volume has been translated from Spanish and why it should be widely read outside the region. The American continent and the world have much to learn from the failures, struggles, and triumphs of Latin American justice systems and the sacrifices of those who never gave up trying to make these systems respond to victims and survivors of terrible crimes.



The **Due Process of Law Foundation (DPLF)** is a regional non-profit, non-governmental organization that promotes institutional reforms within national judicial systems in Latin America to make them more transparent, accountable, accessible, and therefore more capable of protecting fundamental rights, especially for those most vulnerable in those societies. DPLF was founded by Professor Thomas Buergenthal, former judge at the International Court of Justice (The Hague), and his colleagues from the United Nations Truth Commission for El Salvador, which was commissioned following the civil war in that country. The organization carries out its work through three Program Areas: (1) Judicial Accountability and Transparency, (2) Equal Access to Justice, and (3) International Justice.

DPLF considers the incorporation of nations into an international community that adheres to basic human rights principles a fundamental step towards global democratization. The work carried out by DPLF under its **International Justice Program** is rooted in this understanding and promotes the use of international norms, institutions, and mechanisms to press for changes that would bring national judicial systems into compliance with international human rights standards. This perspective is an integral part of all DPLF projects and activities.

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