Volume 5 | Issue 1 Article 4

2015

Death Penalty, Amnesty Laws, and Forced Disappearances: Three Main Topics of the Inter-American Corpus Juris in Criminal Law

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Death Penalty, Amnesty Laws, and Forced Disappearances: Three Main Topics of the Inter-American Corpus Juris in Criminal Law[†]

ARTICLE

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[†] The topics addressed in this article were presented at the University of Notre Dame Law School in a series of short seminars that took place from September 21 to October 3, 2014. These seminars were part of the activities of Judge Eduardo Ferrer Mac-Gregor, who was invited to the Notre Dame Law School as the Clynes Visiting Chair in Judicial Ethics.

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Judge Ferrer Mac-Gregor wants to thank Pablo Gonález Domínguez—the coauthor of this article—for his collaboration in the preparation of the materials that were presented during the seminars at Notre Dame.

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Abstract

In this Article, Judge Eduardo Ferrer Mac-Gregor of the Inter-American Court of Human Rights and International Human Rights Researcher Pablo González Domínguez explore three of the richest and most contentious areas of the jurisprudence of the Inter-American Court of Human Rights: death penalty cases, amnesty law, and cased regarding forced disappearance. These topics encompass some of the most pressing human rights issues in the Inter-American System. For each topic, Ferrer Mac-Gregor and González

Domínguez provide a succinct but comprehensive view of the Inter-American Court's jurisprudence, discuss the ways in which the core principles of this jurisprudence have been applied in more recent cases and developed into a corpus juris, and provide concluding remarks about the continuous challenges facing both the Court and American states going forward.

I Introduction

The jurisprudence of the Inter-American Court of Human Rights (hereinafter "Inter-American Court" or "Court") in criminal justice is rich and abundant. Around eighty percent of all the cases decided by the Court in the exercise of its contentious jurisdiction (140 out of 172) involve torture and other cruel, inhuman, or degrading treatment (89 cases, 51%), extrajudicial executions (42 cases, 24%), forced disappearance of persons (35 cases, 20%), exercise of military jurisdiction (19 cases, 11%), amnesty laws (14 cases, 8%), criminal liability in the exercise of freedom of expression (8 cases, 4%) and death penalty (5 cases, 2%).[1] Other cases involve important questions related to criminal law: the principle of legality and non-retroactivity, the right to be presumed innocent until proven guilty, the right to an adequate defense at trial, the right to an appeal in court, and the right not to be tried twice for the same crime, among others (eighteen cases, ten percent).

In this Article we will refer to three topics from this list: the death penalty, amnesty laws, and forced disappearance. These topics have a substantive and historical relevance for the Inter-American Human Rights System (hereinafter "Inter-American System"), and the standards recognized in treaty law and the jurisprudence of the Court are still relevant for solving pressing human rights questions in Latin America.

The first topic is relevant because, although there are constant efforts to achieve the complete abolition of the death penalty, as the recent international conference on The Universal Abolition of Death Penalty established,[2] this punishment is not per se prohibited as a matter of international law. For this reason, the Court has developed standards that restrict the imposition of the death penalty to a limited number of cases, and has required maximum respect be given to judicial guarantees. These standards are based on the strong protection that Article 4 of the American Convention on Human Rights (hereinafter "American Convention" or "Convention") recognizes to the right to life, and on the clear tendency among states to restrict the scope of the death penalty, both in

[1] Statistical information compiled by the Authors. This statistical information is current as of January 2014. The percentages shown regarding each category are related to the total number of cases that involve criminal questions (140) and not the total number of cases decided by the Court in the exercise of its contentious jurisdiction (172). Some cases involve more than one subject (i.e., some cases deal with torture and forced disappearance) and for that reason the number sum of all the cases referred exceeds 140.

[2] *See generally* Int'l Inst. on Hum. Rts., *International Conference on The Abolition of Death Penalty*, Vimeo (Oct. 2014), `http://vimeo.com/album/3078892` (Conference held in San José, Costa Rica, from October 9 to 11, 2014, organized by the International Institute on Human Rights, the Permanent Representation of France to the Council of Europe, and the Inter-American Court).

its imposition and in its application. It is thus necessary to insist on compliance with these standards in those states that still consider the death penalty a legal punishment, hoping for its complete abolition in the near future.

The jurisprudence on amnesty laws reflects a constant effort by the Inter-American Court to fight against impunity for serious human rights violations produced by the enactment of laws that extinguished criminal liability for perpetrators of certain types of crimes (i.e., forced disappearances, extrajudicial killings, tortures). In these matters, the court has made an effort to protect the rights of the victims and their relatives to access justice, truth, and reparation. The leading case on this subject, *Barrios Altos v. Peru*, decided in 2001, is one of the most important cases decided by the Court, because it set the precedent that amnesty laws that allow impunity for serious human rights violations are null ab initio. This position was quite innovative, as Professor Antonio Cassese has noted,[3] and has been maintained in subsequent cases. But the discussion about the legality of amnesty laws is certainly not finished, since the American Convention does not per se prohibit these laws, and under certain circumstances they could be used as a tool for agreement in the context of transitional justice. The recent negotiations between the government of Colombia and the FARC (*Fuerzas Armadas Revolucionarias de Colombia*) are a good example of the fact that amnesty laws are still seen as an element of negotiation among political factions, a condition that potentially opens the door for new discussion on the limits of amnesty laws in the context of the Inter-American System.

The jurisprudence on forced disappearance of persons started with the first cases decided by the Inter-American Court in the exercise of its contentious jurisdiction. These cases dealt with the perverse technique used by some governments of disappearing political opponents who were considered dangerous to the stability of the state. Starting with *Velásquez-Rodríguez v. Honduras*, in 1988, the Court defined its attitude as pro-victim and set the tone for further decisions that involved serious human rights violations.[4] It is true that the forced disappearance of political opponents is no longer a common practice among most states in the region, but new challenges have arisen with respect to topic, since some states must prevent private actors—with or without the acquiescence and participation of state agents—from disappearing persons in order to achieve political or commercial benefits.

This Article is divided into five Parts: I. Introduction, II. Death Penalty, III. Amnesty Laws, IV. Forced Disappearance, and V. General Conclusion. Each of the substantive Parts (II–IV) is divided into four Sections. They start with an introduction that presents what we consider to be the most relevant questions on the subject, and that introduces the most important provisions of treaty law and the cases decided by the Court on the subject. The second Section evaluates in detail the most important elements of the leading case on the subject, and explores other cases where other standards were developed. The third Sec-

[3] CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES [INTERNATIONAL CRIMES AND INTERNATIONAL JURISDICTIONS] 13, 16 (Antonio Casses & Mireille Delmas-Marty eds., 2002).

[4] Velásquez-Rodríguez v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 4 (July 29, 1988).

tion systematizes the most important elements of the Inter-American corpus juris on the subject. Finally, the fourth Section presents concluding remarks for each topic.

It is important to keep in mind that the exposition and the analysis here presented do not pretend to be exhaustive. It offers a panorama of the most important standards of the Inter-American System on these selected areas, seeking to open the door for further studies and reflections on how some of these standards may constitute a *Ius Constitutionale Commune* for the region.[5]

II Death Penalty

The cases concerning the imposition of the death penalty that the Inter-American Court of Human Rights has decided in the exercise of its contentious jurisdiction are of particular importance in the development of the Inter-American corpus juris on the protection of the right to life. It is true that in the history of the Inter-American System most of the violations that involve the right to life have been related to extrajudicial executions or massacres committed directly by state agents, or in collaboration with the perpetrators. For this reason, many standards that involve the protection of the right to life have been developed in such cases. But this does not mean at all that the jurisprudence on the death penalty is not relevant for the Inter-American System. The American Convention faces an internal contradiction in Article 4: On the one hand it strongly protects the right to life, but on the other hand the Convention does not prohibits the death penalty.[6] Paradoxically the death penalty is accepted as a legal exception to the protection of the right to life.[7]

This paradox has the effect that the death penalty is understood as an exceptional regime whose limits are essentially connected with the protection to the right to life, which means that the death penalty is subject to severe limitations that come both from international law as well as from domestic law. The text of the Pact of San José lets us see this paradox, since four out of five paragraphs of

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[5] On the discussion about the concept of *Ius Constitutionale Commune*, see generally *Ius Constitutionale Commune* en América Latina [*Ius Constitutionale Commune* in Latin America] (Armin von Bogdandy et al. eds., 2014); *Ius constitutionale commune* en derechos Humanos en América Latina [*Ius Constitutionale Commune* in Human Rights in Latin America] (Armin von Bogdandy et al. eds., 2013); Construcción y papel de los derechos sociales fundamentales: Hacia un *Ius Constitutionale Commune* en América Latina [The Construction and Role of Fundamental Social Rights: Towards a *Ius Constitucionale Commune* in Latin America] (Armin von Bogdandy et al. eds., 2011); *see also* La justicia constitucional y su internacionalización: ¿Hacia un *Ius Constitutionale Commune* en América Latina? [Constitutional Justice and its Internationalization: Towards a *Ius Constitutionale Commune* in Latin America?] (Armin Von Bogdandy et al. eds., 2010); Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global* Ius Commune *of Human Rights*, 81 Tex. L. Rev. 1031, (2003); Juan Pablo Pampillo Baliño, *The Legal Integration of the American Continent: An Invitation to Legal Science to Build a New Ius Commune*, 17 ILSA J. Int'l & Comp. L. 517 (2011).

[6] *See* DaCosta Cadogan v. Barbados, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 47 (Sept. 24, 2009).

[7] *See* Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, The Inter-American Court of Human Rights: Case Law and Commentary 275 (Rosalind Greenstein trans., 2011).

Article 4 (right to life) impose restrictions on the execution of the death penalty,[8] the preparatory works of the Convention show that most delegations considered desirable the total eradication of the death penalty when the Pact of San José was signed,[9] and in 1990 several states adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, where the signatories agreed not to apply this punishment to any person subject to their jurisdiction (Protocol, Article 1).[10]

[8] American Convention on Human Rights, art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978).

> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
> 3. The death penalty shall not be reestablished in states that have abolished it.
> 4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
> 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
> 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Id.

[9] Inter-American Specialized Conference on Human Rights, *Actas y documentos* [*Records and Documents*], 467, O.A.S. Doc. OEA/Ser.K./XVI/1.2 (1969), `http://www.oas.org/es/cidh/docs/enlaces/Conferencia%20Interamericana.pdf`

[10] Protocol to the American Convention on Human Rights to Abolish Death the Penalty, arts. 1–2, June 8, 1990, O.A.S.T.S. No. 73.

> Article 1
>
> The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.
>
> Article 2
>
> 1. No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.
> 2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.
> 3. Said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.

Id.

In light of the above-mentioned sources of law, it is possible to identify the existence of two normative realities regarding the death penalty in the Inter-American System. The first reality is that the death penalty is prohibited and its implementation would be a clear violation of the American Convention in states where this penalty was abolished at the time of signature of the American Convention, where it was abolished after the signing of the Pact of San José, or in states that are parties to the Protocol of 1990. But in those states where the death penalty was legal under domestic law at the time of the adoption of the American Convention, where it was never abolished, that have not signed the 1990 Protocol, or that signed the Protocol of 1990 but established a reservation to apply the death penalty in wartime, this criminal sanction does not violate the American Convention per se, although it is subject to the sophisticated restrictions set forth in Article 4, and it is also subjected to those procedural and substantive restrictions that were later developed by the Inter-American Court in its jurisprudence.

In order to contextualize the "jurisprudential line" on death penalty, it is relevant to mention that the Inter-American Court has addressed the imposition of the death penalty in violation of Article 4 of the American Convention in-depth in five cases. This represents around three percent of all cases that the Court has addressed in the exercise of its contentious jurisdiction. These are indeed few cases, but, as mentioned above, they are significant in the jurisprudence of the right to life. The first time the death penalty was addressed by the Inter-American Court was in *Advisory Opinion OC-3/83*;[11] the first case where the Inter-American Court addressed the death penalty in the exercise of its contentious jurisdiction was *Hilaire v. Trinidad and Tobago* (2002), and the most recent ruling occurred in *DaCosta Cadogan v. Bardados* (2009).[12] For this type of case, three states have been condemned: Guatemala (twice),[13] Barbados (twice),[14] and Trinidad and Tobago (once).[15]

In the following paragraphs, we discuss the jurisprudential standards applicable to those states where the death penalty is not per se prohibited by the American Convention, because it is clear that for all the other States the death penalty is absolutely prohibited as a matter of international law. In order to address the limits of the death penalty, we begin by presenting the core elements of *Advisory Opinion OC-3/83* and *Hilaire*, where the Inter-American Court developed important standards in this area. Next we analyze the standards derived from the American Convention and those derived from the Inter-American Court's

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[11] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 8 (Sept. 8, 1983).

[12] DaCosta Cadogan v. Barbados, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204 (Sept. 24, 2009).

[13] Fermín Ramírez v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 126, (June 20, 2005); Raxcacó-Reyes v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133 (Sept. 15, 2005).

[14] Boyce v. Barbados, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007); *DaCosta Cadogan*, Inter-Am. Ct. H.R. (ser. C) No. 204.

[15] Hilaire v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002).

jurisprudence. In the last section we will make some comments regarding the judgment of the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v. United States)* decided in 2004, and we make some general conclusions.

A STANDARDS DEVELOPED IN *Advisory Opinion OC-3/83* ON RESTRICTIONS TO THE DEATH PENALTY

In 1983, the Inter-American Commission on Human Rights submitted to the Inter-American Court a request for an advisory opinion on the interpretation of the end of the second paragraph of Article 4 of the American Convention. The Commission raised two questions:

> 1) May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?
>
> 2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?[16]

The Inter-American Court found that, before starting to answer these questions, it was important to address more general questions. First, it was necessary to establish within what context there is the possibility of enforcing the death penalty, in other words to address the interpretation of Article 4 of the Convention as a whole. Second, to define the general criteria that must guide the interpretation of a reservation intended to restrict or weaken the system of protection established by Article 4. Only after addressing, the Court determined, it was possible to answer the question presented by the Inter-American Commission.[17] In this way, the Court interpreted the scope of Article 4, Paragraphs 2 and 4 of the Convention, and from this interpretation the important standards regarding the limits of the death penalty were developed.

While making this interpretation, the Court noted that there exists a "clear tendency to restrict the scope of [the death penalty], either in its imposition, or in its application," since Article 4 has the purpose of protecting life.[18] Consequently, the Court considered, restrictions on the death penalty are dominated by a substantive principle expressed in the first paragraph of Article 4, by which "everyone has the right to have his life respected" and a procedural principle that "no one shall be arbitrarily deprived of his life."[19] Hence, it is understood

16 *Advisory Opinion OC-3/83*, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 8.
17 *Id.* ¶ 47.
18 *Id.* ¶ 52.
19 *Id.* ¶ 53.

that in those countries that have not abolished the death penalty, this punishment can only be imposed pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of crime.[20]

The Court also noted another group of limitations to the imposition of the death penalty. These limitations concerned the types of crimes that could carry this punishment. On the one hand, Article 4 provides that the death penalty may be imposed only for the most "serious" offenses—Article 4(2)—and on the other it absolutely precluded its application for political offenses or related common crimes—Article 4(4). For the Court, the fact that the Convention limits the possible scope of application of the death penalty to the most serious common crimes reveals the purpose behind considering such a penalty applicable in only truly exceptional circumstances.[21]

Thus, in *Advisory Opinion OC-3/83*, the Court identified three types of limitations to the death penalty in countries that have not abolished this punishment. First, the imposition or the application of this penalty is subject to certain procedural requirements, compliance with which must be monitored and strictly required. Second, its scope must be limited to the most serious common crimes unrelated to political crimes. Finally, the specific characteristics of the defendant as an individual must be considered when the death penalty is imposed.[22] The necessity of considering the individual characteristics of the defendant could bar the imposition or application of the death penalty to those persons under eighteen years or older than seventy, or to pregnant women.

However, the Court found that the tendency to restrict the application of the death penalty appears more decisive in another instance as well: The text of Article 4(2) states, "The application of such punishment shall not be extended to crimes to which it does not presently apply" and, according to Article 4(3) "The death penalty shall not be reestablished in States that have abolished it." Thus, the text of the Convention itself shows that, in determinate circumstances, it is not just about surrounding the death penalty with strict conditions for its application, but to put a definite limit, through "a progressive and irreversible process" to abolish the death penalty in those countries that have not yet resolved to abolish it altogether as well as to those countries that have done so.[23] It is in this spirit that the Court stated the following:

> On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.[24]

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20 *Id.*
21 *Id.* ¶ 54.
22 *Id.* ¶ 55.
23 *Id.* ¶ 56.
24 *Id.* ¶ 57.

On this basis, the Court answered the questions raised by the Commission by ruling that there is no doubt as to the absolute prohibition contained in Article 4, according to which no state shall apply the death penalty with respect to offenses for which it was not previously provided in its domestic law. Regarding the second question, the Court conducted an evaluation of the reservation established by the government of Guatemala, and decided that if the reservation is interpreted under the ordinary meaning of its terms, it is possible to conclude that, by formulating the reservation, Guatemala indicated that it was not willing to commit to more than what is already established by its constitution and therefore the reservation must be strictly interpreted.[25] The reservation, therefore, was considered valid, but it was understood that this criterion did not imply the possibility that a state party to the Convention might adopt subsequent legislation to extend the application of the death penalty to crimes for which it was not previously provided.

As noted above, and as discussed below, the jurisprudence of the Inter-American Court on death penalty was largely influenced by the interpretation that the Court held in *Advisory Opinion OC-3/83*. This influence was clearly reflected in the first case where the Court decided, in the exercise of its contentious jurisdiction, a case that involved the imposition of the death penalty: *Hilaire*, which we analyze below.

B STANDARDS DEVELOPED IN *Hilaire v. Trinidad and Tobago* (2002)

1 THE FACTS OF THE CASE

All of the defendants of the *Hilaire* case (thirty-two in total) were found guilty of intentional murder in Trinidad and Tobago and sentenced to death; the judicial determination of the applicable punishment for the defendants was taken in accordance with the Offences Against the Person Act, in force in Trinidad and Tobago since April 3, 1925. This statutory law prescribed the death penalty as the only possible sanction for the crime of intentional murder. Consequently, the death penalty constituted a mandatory sanction for those types of cases in Trinidad and Tobago. Section 3 of the Offences Against the Person Act adopts the English common law definition of intentional murder, not allowing the judge or the jury to consider the circumstances of the offense or of the offender, once found guilty of murder, for purposes of determining the appropriate penalty. Furthermore, Article 6 of the Constitution of the Republic of Trinidad and Tobago prohibited challenging the constitutionality of any law or act in force before 1976, which was the year the constitution came into force.[26]

2 THE COURT'S CRITERION

The Court decided that, although the American Convention does not expressly prohibit the application of the death penalty, Article 4 must be interpreted in the

[25] *Id.* ¶¶ 74–75.

[26] Hilaire v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 84 (June 21, 2002).

sense of "imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance."[27] The Court reiterated its view of *Advisory Opinion OC-3/83* in relation to the scope of Article 4, establishing that there are three types of limitations to the death penalty in countries that have not abolished it:

> First, the imposition or application of this penalty is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.[28]

The Court used these standards as a basis for its judgment.

The Court stated that it was "aware of the pain and suffering inflicted upon the direct victims and their next of kin by the perpetrators in murder cases," and recalled the "State's duty to protect potential victims of . . . these types of crimes," but the Court also noted that "the State's struggle against murder should be carried out with the utmost respect for the human rights of the persons under their jurisdiction, and in compliance with the applicable human rights treaties."[29] Thus:

> The intentional and illicit deprivation of another's life (intentional or premeditated murder, in the broad sense) can and must be recognised and addressed in criminal law under various categories (criminal classes) . . . taking into account the different facets that can come into play: a special relationship between the offender and the victim, motives for the behaviour, the circumstances under which the crime is committed, the means employed by the offender, etc.[30]

Therefore, there must be a graduated scale establishing the seriousness of the facts, which shall determine levels of severity of the penalty.[31]

Likewise, the Court found that the law of Trinidad and Tobago prevented the imposition of the death penalty from being modified through judicial review.[32] Thus, the Inter-American Court decided that, by considering that all those responsible for the crime of intentional murder deserved the death penalty, those

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[27] *Id.* ¶ 99 (quoting *Advisory Opinion OC-3/83*, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 57).
[28] *Id.* ¶ 100 (quoting *Advisory Opinion OC-3/83*, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 55).
[29] *Id.* ¶ 101.
[30] *Id.* ¶ 102.
[31] *Id.*
[32] *Id.* ¶¶ 103–04.

accused of this offense are being treated "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty."[33] For this reason, the Court concluded that, since the effect of the Offences Against the Person Act consisted of submitting those accused of murder to a judicial process that does not consider the individual circumstances of the accused or the particularities of the offense, the enforcement of that Act violated the prohibition of arbitrary deprivation of life in a manner that was contrary to Articles 4(1) and 4(2) of the American Convention.[34]

Finally, the Court adopted the criterion of the European Court of Human Rights regarding the categorization of the "death row phenomenon" as a cruel, inhuman, and degrading treatment, since the person who has been sentenced to the death penalty suffers mental anguish and other conditions to which the accused is exposed and that include:

> The way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; the detention conditions while awaiting execution; delays in the appeal process or in reviewing the death sentence during which time the individual experiences extreme psychological tension and trauma; the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail.[35]

Consequently, the state was responsible for the violation of Article 5 of the Convention due to the conditions of the victims who were awaiting the imposition

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[33] *Id.* ¶ 105 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

[34] *See generally id.* Consequently, the international responsibility of the State and the duty to repair was established in the following terms:

> 8. . . . the State should abstain from applying the Offences Against the Person Act of 1925 and within a reasonable period of time should modify said Act to comply with international norms of human rights protection . . . ;
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> . . . .
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> 9. . . . the State should order a retrial in which the new criminal legislation resulting from the reforms to the Offences Against the Person Act of 1925 will be applied, for the reasons stated in paragraph 214 of the present Judgment, in the criminal proceedings in relation to the crimes imputed . . . ;
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> . . . .
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> 10. . . . the State should submit before the competent authority and by means of the Advisory Committee on the Power of Pardon . . . the review of the cases . . . ;
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> . . . .
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> 11. on grounds of equity, . . . the State should abstain from executing, in all cases, regardless of the results of the new trials, for the reasons stated in paragraph 215 of the present Judgment, [the victims] . . . ;

Id. ¶ 223.

[35] *Id.* ¶ 167.

of the death penalty.

C The Most Important Elements in the American Convention and the Court's Jurisprudence Regarding the Death Penalty

1 The Death Penalty as a Restricted Regime

The roots of the complex system of restrictions on the death penalty recognized by Article 4 can be found in the preparatory works of the Convention, where fourteen of the nineteen states participating in the 1969 Inter-American Specialized Conference on Human Rights left an explicit statement of the desire to abolish the death penalty through a future additional protocol to the Convention.[36] The importance of these manifestations is that the formal and material constraints that the Court has established for the death penalty in its jurisprudence find echo, not only in the text of the American Convention and the object and purpose of the treaty, but also in the will of the majority of the signatory states of the Convention. This position was also reflected in the Court's criterion in *Advisory Opinion OC-3/83*:

> On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order *to reduce the application of the penalty to bring about its gradual disappearance*.[37]

On this basis—which serves as a point of departure—it is possible to understand the formal and substantive restrictions to the death penalty that arise from the Convention and the Court's jurisprudence.

2 Formal and Substantive Restrictions to the Death Penalty Established in the American Convention and the Jurisprudence of the Inter-American Court

The first formal restriction on the death penalty is that this type of sanction must be imposed only for the "most serious" offenses—Article 4(2). The language used by the American Convention clearly shows a restrictive and exceptional trend that seeks to use this sanction only in a very limited number of cases (not only "serious" crimes, but the "most serious" crimes), which also must not include political offenses. The former President of the Inter-American Court, Sergio García Ramírez, points out that the most serious crimes are those that violate in the most severe manner, according to its nature and characteristics,

[36] Sergio García Ramírez, *La pena de muerte en la Convención Americana sobre Derechos Humanos y en la jurisprudencia de la Corte Interamericana* [*The Death Penalty in the American Convention on Human Rights and in the Jurisprudence of the Inter-American Court*], 2005 Boletín Mexicano de Der. Comparado 1021, 1042 (citing Inter-American Specialized Conference on Human Rights, *supra* note 9, at 467).

[37] *Advisory Opinion OC-3/83*, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 57 (emphasis added).

and taking into account the perpetrator's level of guilt and the major interests of the legal system.[38] On this basis, the Court has developed the view that the death penalty requires a correct assessment of the circumstances surrounding the crime in a manner that makes it possible to distinguish among different levels of guilt of an accused and an evaluation of the legal interests that were affected.[39]

Thus, for instance, as it was mentioned above, in the *Hilaire* case, the Inter-American Court ruled that the Offenses Against the Persons Act violated Article 4 of the American Convention since the law "automatically and generically mandates the application of the death penalty for murder . . . . [T]his Act prevent[ed] the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence . . . ."[40] Similarly, in the *Raxcacó-Reyes* case, the Court declared the responsibility of the State of Guatemala for the implementation of the mandatory death penalty for those accused of the crime of kidnapping since

> the specific circumstances of the crime and of the accused are never considered, such as the criminal record of the accused and of the victim, the motive, the extent and severity of the harm caused, and the possible attenuating or aggravating circumstances, among other considerations concerning the perpetrator and the crime.[41]

The Court ruled in the same manner in the cases of *Boyce v. Barbados* (2007)[42] and *DaCosta Cadogan v. Barbados* (2009),[43] both concerning the automatic application of the death penalty for the crime of murder.

In *Boyce*, the Court found that application of the mandatory death penalty was per se contrary to the provisions of the American Convention, explaining that the right not to be deprived of life "arbitrarily" in Article 4(1), and the mandate to apply the death penalty only in the case of the "most serious" offenses in Article 4(2), made the mandatory character of the death penalty incompatible with the American Convention because "the same penalty is imposed for conduct that can be vastly different, and where it is not restricted to the most serious crimes."[44] In this sense, the Court established that the articles connected to the protection of the right to life enshrined in the Convention should be inter-

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[38] *See* García Ramírez, *supra* note 36, at 1045–46.

[39] CECILIA MEDINA QUIROGA, LA CONVENCIÓN AMERICANA: TEORÍA Y JURISPRUDENCIA. VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL [THE AMERICAN CONVENTION: THEORY AND JURISPRUDENCE: LIFE, PERSONAL INTEGRITY, PEROSNAL LIBERTY, DUE PROCESS, AND JUDICIAL RECOURSE] 83 (2003).

[40] *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 103.

[41] Raxcacó-Reyes v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 81 (Sept. 15, 2005).

[42] Boyce v. Barbados, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 62 (Nov. 20, 2007).

[43] DaCosta Cadogan v. Barbados, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶¶ 57–58 (Sept. 24, 2009).

[44] *Boyce v. Barbados*, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 51 (citing *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 103, 106, 108; *Raxcacó-Reyes v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶¶ 81–82).

preted in accordance with the principle of *pro persona*, in order to progressively limit the application and scope of the death penalty, so that this punishment is reduced until its final disappearance.[45]

It is in this spirit that the Inter-American Court has understood the phrase: "No one shall be arbitrarily deprived of his life"—Article 4(1). The mandate applies not only as a prohibition of those executions that have been committed outside the law (as it happens with extra-judicial killings or with massacres), but also to those that occur even when the state acts within the limits of the law, since it is an obligation of the state to distinguish through the law between the "most serious" crimes and other offenses, even if domestic law does not make such distinctions. In other words, it is not enough that the principle of the rule of law is fulfilled in the imposition of the death penalty; the law should allow for differentiating between different degrees of culpability of the accused in order not to consider that the execution was "arbitrary."[46] The failure to make these distinctions "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subject to the blind infliction of the death penalty."[47]

It is worth mentioning that the Inter-American Court has also ruled on the consequences of the existence of domestic laws that permit the automatic imposition of the death penalty. In *Boyce*, the Court established that, since the basis for the imposition of the death penalty was Article 2 of the Offences Against the Person Act of 1868 (a statutory law), this law prevents the exercise of the right not to be arbitrarily deprived of life and, thus, is per se contrary to the American Convention, so the state has the duty to suppress or eliminate this provision in accordance with Article 2 of the Pact of San José.[48] Accordingly, the Court has also referred to the duty of all state authorities to exercise a "conventionality control" on laws that allow the imposition of the automatic death penalty, so that domestic authorities accede to their inapplicability in order to avoid the arbitrary imposition of this punishment. In the words of the Court:

> the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions . . . and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[49]

The second formal restriction to the death penalty comes from the conceptual relationship that the Court has created between the right to due process and the right to an effective remedy, on the one hand, and the protection of the right to

[45] *Id.* ¶ 52.
[46] *Id.* ¶ 57.
[47] *Id.* ¶ 58 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).
[48] *Id.* ¶¶ 72, 74.
[49] *Id.* ¶ 78 (quoting Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 124 (Sept. 26, 2006)) (omission in original).

life in the context of the death penalty, on the other hand. On this issue, Sergio García Ramírez explains that there is a dual system of guarantees in relation to the death penalty: The ordinary guarantees, applicable to all scenarios for prosecution, and the specific guarantees aimed to respect the substantive issue of non-retroactivity of the law as regards the prosecution.[50] In the *Hilaire* case, citing *Advisory Opinion OC-16/99*, the Court stated: "Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake."[51] Consequently, in the specific case of the death penalty, its application against the standards of due process, protected by various articles of the Convention (beginning with Articles 4(2) and 4(6), but also by the protections set out by Articles 8 and 25) imply a violation of due process per se, and a violation of Article 4 of the Convention.[52]

This criterion was established for the first time in the advisory opinion *OC-16/99*, where the Inter-American Court concluded that international practice reflects the existence of the principle which states that the most rigorous control for observance of judicial guarantees should be applied by states that still maintain the death penalty. Consequently, the breach of a right that affects due process implies a violation of the right not to be deprived of life "arbitrarily" in the terms of the relevant provisions.[53]

In this spirit, the Court has also determined that the American Convention is violated when there is a constitutional provision that does not allow judicial review of statutory laws that consider the death penalty as the only punishment for those guilty of murder. The Court decided this point in *Boyce*, where it found that Article 26 of the Constitution of Barbados, which established a "saving clause" that denied the defendants in the case the right to demand judicial protection against the enforcement of Article 2 of the Offences Against the Person Act, provides that "any person convicted of murder shall be sentenced to, and suffer, death." Since Article 2 of the aforementioned Act was in violation of Article 4 of the Convention, the Court found that the State breached its duty under Article 2 of the Convention in relation to Articles 1(1), 4(1), 4(2), and 25(1) of the Pact of San José. By enforcing Article 26 of the Constitution, it denied to the defendants the right to a "prompt recourse to a competent court or tribunal against acts that violate his fundamental rights recognized by the Constitution."[54]

Other formal restrictions set forth in Article 4 of the Convention include the principle of non-retroactivity, specifically for death penalty cases, which is re-

[50] García Ramírez, *supra* note 36, at 1058.

[51] Hilaire v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 148 (June 21, 2002) (citing The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999)).

[52] García Ramírez, *supra* note 36, at 1058; MEDINA QUIROGA, *supra* note 39, at 88.

[53] *Advisory Opinion OC-16/99*, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 133–37.

[54] *Boyce v. Barbados*, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶¶ 75–80, n.63.

inforced by the general rule in Article 9 of the American Convention. Article 9 states, "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." Article 4(2) of the Convention also states that the death penalty may be imposed only "pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." The same paragraph states, "the application of such punishment shall not be extended to crimes to which it does not presently apply"—a condition that brings the "freezing" of the death penalty within its current boundaries in a clear abolitionist attitude.[55] In this regard, the Court stated that Article 4(2) "imposes a definite prohibition on the death penalty for all categories of offenses as far as the future is concerned."[56]

In the same vein, Paragraph 3 of Article 4 shows a clear "abolitionist bias" (*un sesgo abolicionista*),[57] as it was called by the former President of the Inter-American Court, Judge Cecilia Medina Quiroga. Because the American Convention establishes that "the death penalty shall not be reestablished in states that have abolished it," the regulation of the death penalty is "no longer a question of surrounding with strict conditions the exceptional imposition or implementation or application of the death penalty, but [aims] to put a definite limit, through a progressive and irreversible process, in countries that have not yet resolved to abolish it." In this way, the decision of a state "to abolish the death penalty, whenever made, becomes, *ipso jure*, a final and irrevocable decision."[58]

Paragraphs 4 and 5 of Article 4 provide, respectively, the substantive prohibition against imposing the death penalty "for political offenses or related common crimes," and the prohibition against imposing the death penalty "upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." Finally, Paragraph 6 of Article 4, although it does not establish per se a restriction to the death penalty, does recognize the right of everyone sentenced to death to "apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases." The last paragraph of Article 4 provides an additional guarantee of one last opportunity for the offender to have their situation reconsidered, and for this reason the Inter-American Court has established that individual requests for clemency must be exercised through fair and adequate procedures in accordance with Article 4(6) and Article 8 of the American Convention.[59] This means that the processing of this petition must comply with the rules of due process.

Regarding this last point, Sergio García Ramírez explains that it is important to remember that a pardon, amnesty, or commutation must be interpreted

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[55] García Ramírez, *supra* note 36, at 1059–60.

[56] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 68 (Sept. 8, 1983).

[57] Medina Quiroga, *supra* note 39, at 80.

[58] *Advisory Opinion OC-3/83*, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 56.

[59] Hilaire v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 186 (June 21, 2002).

according to the ordinary use of the terms—which means according to their nature as independent and legal institutions—and must be also effective for the applicant, in the sense that they must be granted in all cases without obstacles that deprive the petitioner of this benefit.[60] In this sense, in *Hilaire*, the Court established that individual requests for mercy must be exercised through fair and adequate procedures in accordance with Article 4(6) of the American Convention, in conjunction with the relevant provisions of the Convention about the guarantees of due process laid down in Article 8.[61] In other words, this right is not only about formally issuing a decision, but also substantiating the petition in accordance with the applicable rules of due process.

Accordingly, Article 4(6), read in conjunction with Articles 8 and 1(1), assigns the state the obligation to ensure that a petitioner's right to apply for amnesty, pardon, or commutation of cases can be exercised effectively by a person condemned to capital punishment. The state thus has the obligation to implement a procedure of this nature that is characterized by being fair and transparent, in which the person condemned to the death penalty has the chance to present all the evidence deemed relevant in order to be favored by the act of clemency.[62]

Finally, the importance of the protection to the right to life and personal integrity in the context of the imposition of the death penalty has impacted the granting of provisional measures. In the provisional measures of March 31, 2014 in *Wong Ho Wing*, the Court ordered the State of Peru to stop the extradition of Wong Ho Wing to the People's Republic of China. The Court found that the requirements of extreme gravity, urgency, and the necessity to avoid irreparable harm (that are necessary to grant provisional measures) were satisfied due to the fact that, if the alleged perpetrator was extradited, he would be outside the scope of protection of the Inter-American System and would be prosecuted for a crime which could carry the death penalty.[63] In the same spirit, the court has ordered provisional measures against states connected with the death penalty in the cases of *DaCosta Cadogan* (Barbados),[64] *Boyce* (Barbados),[65] and *James* (Trinidad and Tobago)[66] among others.

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[60] García Ramírez, *supra* note 36, at 1070.

[61] *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 186.

[62] *Id.* ¶ 188.

[63] Wong Ho Wing Regarding Peru, Provisional Measures, Order of the Court, "Considering," ¶¶ 11–12 (Inter-Am. Ct. H.R. Mar. 31, 2014), http://www.corteidh.or.cr/docs/medidas/wong_se_14_ing.pdf.

[64] DaCosta Cadogan v. Barbados, Provisional Measures, Order of the President of the Court, "Having Seen," ¶ 1 (Inter-Am. Ct. H.R. Nov. 4, 2008), http://www.corteidh.or.cr/docs/medidas/tyrone_se_01_ing.pdf.

[65] Boyce v. Barbados, Provisional Measures, Order of the Court, "Having Seen" ¶ 9 (Inter-Am. Ct. H.R. Nov. 25, 2004), http://www.corteidh.or.cr/docs/medidas/boyce_se_01_ing1.pdf.

[66] James Regarding Trinidad and Tobago, Provisional Measures, Order of the Court, "Considering," ¶ 9 (Inter-Am. Ct. H.R. Feb. 28, 2005), http://www.corteidh.or.cr/docs/medidas/james_se_17_ing.pdf; *see also* James Regarding Trinidad and Tobago, Provisional Measures, Order of the President of the Court, "Having Seen," ¶ 1 (Inter-Am. Ct. H.R. May. 27, 1998), http://www.corteidh.or.cr/docs/medidas/james_se_01_ing.pdf.

D The Jurisprudential Dialogue between the Inter-American Court and the International Court of Justice: *Avena and Other Mexican Nationals (Mexico v. United States)*

The need to respect the due process of law in cases of the application of the death penalty has been a topic addressed by other international tribunals. In 2004, the International Court of Justice (ICJ) ruled in *Avena and Other Mexican Nationals (Mexico v. United States)* on the violation of the rights of consular information and notification regarding Mexican nationals facing the death penalty in the United States, as well as the consequences of these violations as a matter of international law.

The ICJ apparently took into account the serious consequences of the death penalty when it established that a proper remedy in cases where there is a violation of due process is that the convictions at the domestic level have to be subject to "review and reconsideration" by domestic courts.[67] The ICJ ruled in *Avena* that the review should actually be performed according to the methods of choice that the United States authorities determined, but that it should be effective and should take into consideration the rights protected by the Vienna Convention on Consular Relations.[68] Specifically, the controversy in *Avena* focused on whether the United States violated Article 36(1)(a) and (c) of the Convention.[69]

For the purposes of this article, the relevance of the decision of the ICJ is not the analysis about the legality of the death penalty under international law or the Vienna Convention, since the Mexican State did not seek to question the institution of capital punishment in the United States, nor did the ICJ enter into that analysis. Instead, this case shows how important it is that, for the government of Mexico and for the ICJ, procedural rights be respected in cases where

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[67] Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, 2004 I.C.J. 12, ¶ 121 (Mar. 30).

[68] *Id.* ¶ 122.

[69] *See* Vienna Convention on Consular Relations, art. 36, Apr. 24, 1967, T.I.A.S. No. 6820, 596 U.N.T.S. 292.

> Communication and contact with nationals of the sending State
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> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> . . . .
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> *Id.*

the death penalty is imposed, because life is the affected good for these types of enforcement.

Juan Manuel Gómez Robledo, a former agent of the Mexican State when *Avena* was litigated, explained that the ICJ, by establishing the reparations in the case, considered that, in order for the "review and reconsideration" to be effective, the United States authorities had to take into account the violation of the rights under the Vienna Convention, the damage that would result from that violation, and that this exercise should cover both the verdict and the sanction imposed, which meant that the review should be conducted by a judicial body that satisfied the standard set by the ICJ in its decision. It seems reasonable to think that the ICJ was not indifferent to the fact that the results of the violation of the procedural rights of the Mexican nationals were precisely the destruction of their life.[70] As mentioned above, the jurisprudence of the Inter-American Court follows a similar logic: The protection of due process is particularly important in cases where the consequence of the violation of this right would result in the violation of the right to life. In this sense, it is good to remember the criteria set forth by the Inter-American Court in the advisory opinion, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, decided in 1999. On that occasion, the court mentioned:

> [T]he Court concludes that nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties ([e.g.,] the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, that is, those pertaining to the international responsibility of the State and the duty to make reparations.[71]

E CONCLUSION

Despite the controversial nature of the death penalty as a criminal sanction from a moral and a legal perspective, this sanction is not illegal per se in the Inter-American System. However, the imposition of the death penalty is subject to severe restrictions imposed by Article 4 of the American Convention, by the 1990 Protocol, and by the jurisprudence of the Inter-American Court. These

[70] Juan Manuel Gómez-Robledo V, *El caso Avena y otros nacionales mexicanos (México c. Estados Unidos de América) ante la Corte Internacional de Justicia* [*The Case of* Avena and Other Mexican Nationals (Mexico v. United States of America) *before the International Court of Justice*], *in* 5 ANUARIO MEXICANO DE DERECHO INTERNACIONAL [MEXICAN Y.B. INT'L L.] (Instituto de Investigaciones Jurídicas) 216 (2005).

[71] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am Ct. H.R. (ser. A) No. 16, ¶ 137 (Oct. 1, 1999).

normative elements show that the spirit of the American Convention, the position of the majority of the member states, and the Inter-American Court have a clear abolitionist trend. This trend is also a reality outside the limits of the Inter-American System, as it was recently made clear by Minister of Foreign Affairs of twelve countries in the twelfth World Day Against the Death Penalty.[72]

It is true that an absolute ban on death penalty as a matter of international law, at least in the Inter-American System, would not be possible unless there is an amendment to the American Convention. It is thus in the hands of states to take the affirmative steps, both internationally and domestically, to eradicate the death penalty, which in our opinion constitutes a punishment that is per se a cruel and inhuman treatment, and in some cases it also constitutes a discriminatory treatment and a violation to the prohibition of torture.

In any case, as we have shown from the cases decided by the Inter-American Court on this matter, and from the example that we used from the ICJ, what is essential is that in death penalty cases the judicial authorities take special care to ensure that due process is respected. It is worth mentioning that the Court continues to address these types of cases as it recently did in the situation of Mr. Wong Ho Wing, who obtained provisional measures in order to prevent his extradition from Peru to China since he could face the imposition of death penalty. The Court held the hearings of the *Wong Ho Wing v. Peru Case*, in the city of Asunción, Paraguay on September 3, 2014.[73] The merits of the case will be decided in 2015.

III Amnesty Laws

The case law on amnesty laws has been of great importance in the Inter-American System since the iconic judgment in *Barrios Altos v. Peru*, decided by the Inter-American Court in 2001. In this case, the Court addressed challenges of some states faced in investigating and punishing public officials who committed serious human rights violations in the context of dictatorships (most of them military dictatorships) that proliferated in Central and South America during the decades of the 1970s, 1980s and 1990s, but who enjoyed the benefit of laws that extinguished criminal liability for the perpetrators of certain types of crimes. Some of these laws were enacted by the same military regimes that committed human rights violations, which created an environment of impunity.

After the falling of these regimes, different courts, commissions, and governments at a national and international level had to determine how to deal with the existence of these amnesty laws. Some international institutions took moderate positions on this question, deciding that the adoption of these laws was an internal affair of the states and therefore that international organizations should

[72] *Dialogue Should Make Death Penalty "A Sentence of the Past"—Foreign Ministers*, World Coal. Against the Death Penalty (Oct. 9, 2014), http://www.worldcoalition.org/foreign-ministers-declaration-world-day-against-death-penalty.html.

[73] Press Release, Inter-American Court of Human Rights, 51 período extraordinario de sesiones en el Paraguay [51st Period of Extraordinary Sessions in Paraguay] (Sept. 4, 2014), http://www.corteidh.or.cr/docs/comunicados/cp_18_14.pdf.

stay away. By contrast, the response of the Inter-American Court regarding the existence of amnesty laws was categorical: Regardless of their legality under domestic law, or the political legitimacy that these laws may have enjoyed under relevant political forces within a particular state, the creation of amnesty laws that allowed impunity for serious human rights violations was unacceptable according to international law, because these laws violated the right of access to justice, the right to the truth, and the right to reparation.

On this basis, the Inter-American Court has decided fourteen cases about the adoption and enforcement of amnesty laws, which represents almost ten percent of all cases heard by the Court in the exercise of its contentious jurisdiction, and that are connected with criminal matters. As was previously mentioned, the first case in which this issue was discussed in depth was the leading case of *Barrios Altos v. Peru*, decided in 2001, and the most recent decision on the topic was the judgment in *Osorio Rivera v. Peru*, decided in 2013. For the adoption and enforcement of these types of laws seven countries have been declared internationally responsible: Peru (four) Guatemala (three), El Salvador (two), Chile (two) Brazil (one) Suriname (one), and Uruguay (one).

Before we start with a substantive analysis of this topic, it is important to clarify that the Court's position on this matter was a jurisprudential development, because the American Convention does not explicitly prohibit the adoption of amnesty laws. Consequently in the next paragraphs we will refer to the arguments on which the Inter-American Court based its position on this matter. The analysis begins with a presentation of the basic features of the *Barrios Altos* case, where the court ruled for the first time the nullity ab initio of an amnesty law, and then it will show the contributions that followed in other decisions of the Court. In the third section, the most important components of the Court's case law, and how its approach has increased the jurisprudential dialogue with other national and international courts, is analytically described. In the final part we conclude with a general reflection on the future of this topic.

A Emergence of the Court's Jurisprudence on Amnesty Laws in *Barrios Altos v. Peru* (2001)

1 The Facts of the Case

The events that led to the decision in *Barrios Altos* began on November 3, 1991. On that day, six heavily armed individuals broke into a building located in the Barrios Altos neighborhood of Lima, Peru. When the outbreak occurred, a *pollada* was taking place (a *pollada* is a party to raise funds in order to make repairs to a building). The individuals who broke into the party obliged the victims of the case to lie on the ground, and once they were on the ground, the attackers shot at them indiscriminately for a period of approximately two minutes, killing fifteen people and seriously injuring four others. Later, the attackers escaped in two vehicles.[74]

[74] Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 2(a)–(b) (Mar. 14, 2001).

Judicial investigations and media reports revealed that the individuals involved in the massacre worked for the military intelligence service, and that they were members of the Peruvian Army operating in the "death squadron" called "Colina Group." The Court found that actions taken by the perpetrators of the massacre were made in retaliation against suspected members of the Shining Path (*sender luminoso*), a political group of Leninist or Maoist ideological bent that sought to replace Peruvian political institutions with a "new democracy" (a proletariat dictatorship). Notwithstanding the brutality of the acts committed by the army, the massacre at Barrios Altos could not be investigated because, before any investigation was completed in a judicial setting, the Peruvian Congress enacted Law No. 26479, which exonerated the members of the military and police forces, and the civilians that had committed or participated in human rights violations between 1980 and 1995.[75]

Law No. 26479 granted amnesty to all members of the security forces and civilians who were the subject of complaints, investigations, prosecutions, or convictions, or who were serving prison sentences for human rights violations. The few convictions of members of the security forces for human rights violations that occurred before the adoption of the amnesty law were immediately annulled. Consequently, eight men responsible for the human rights violations in the case known as the "La Cantuta Massacre" were released. The Peruvian Congress approved a second amnesty law: Law No. 26492, which declared that the amnesty was not "reviewable" in judicial instances and was mandatory for all judicial authorities.[76]

2 The Court's Criterion

During the hearings before the Inter-American Court, the delegates of the Peruvian State recognized the responsibility of the state for the events giving rise to *Barrios Altos* (mainly the extrajudicial killings and the failure to investigate the facts), which constituted violations of Articles 4 (right to life), 5 (personal integrity), 8 (fair trial), 25 (judicial protection), 1(1) (obligation to respect rights), and 2 (domestic legal effects). However, in a public hearing before the Court, the Peruvian State representatives referred to the obstacle represented by the existence of the amnesty laws at the domestic level in order to ensure the right to the truth, the right of access to justice, and the right to reparation. Due to the acquiescence of the Peruvian State, the Court found that there was no longer a dispute between the Peruvian State and the Commission before the Court, but ruled on the legal consequences of the existence of such amnesty laws.[77]

Thus, the Inter-American Court, using powers inherent in its judicial function and jurisdiction,[78] declared in the judgment that laws No. 26479 and No. 26492

[75] *Id.* ¶¶ 2(d)–(f).
[76] *Id.* ¶¶ 2(g)–(n).
[77] *Id.* ¶¶ 38–40.
[78] *Id.* ¶ 2 (Cançado Trindade, J., concurring).

> Given the high relevance of the legal questions dealt with in the present Judgment, I feel obliged to express, under the always merciless pressure of time, my personal

were inadmissible under the American Convention regime, as these laws prevented the relatives of the victims to be heard by a judge in accordance with Article 8(1) of the Convention, to have access to judicial protection in accordance with Article 25 of the Convention, and to acknowledge the truth of the facts that surrounded the massacre. Furthermore, these provisions prevented the fulfillment of the duty of the Peruvian State to investigate human rights violations under Article 1(1) and constituted a violation of the duty of the state to adapt its domestic law to the Convention in accordance with Article 2 of the same treaty.[79]

The Inter-American Court established that self-amnesty laws lead to the defenselessness of the victims and perpetuated impunity by obstructing the investigation of serious human rights violations such as torture; extrajudicial, summary, or arbitrary executions; and forced disappearance; all of which are prohibited because they violate non-derogable rights such as the right of access to justice, the right of the relatives of the victims to know the truth, and the right to receive appropriate reparation.[80] Consequently, the Court considered, amnesty laws are manifestly incompatible with the letter and spirit of the American Convention, and thus established that

> 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, 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 have been violated.[81]

The concurring opinions of Judges Cançado Trindade and García Ramírez in *Barrios Altos* are particularly important to understand the Court's reasoning, since they let us see that the invalidity of self-amnesty laws is based on the logic that not everything that is legal in the domestic legal system is legal in the international legal order, and that, in certain circumstances, that incompatibility may result in the invalidity of the domestic law. These opinions, although they are of course not binding as a matter of international law, are an excellent guide to know the foundations of this important development of the Court's jurisprudence.

> thoughts on the matter. The Court, in any circumstances, including in cases of *allanamiento*, as from the recognition on the part of the respondent State of its international responsibility for acts in violation of the protected rights, has the full faculty to determine *motu proprio* the legal consequences of such wrongful acts, such determination no being conditioned by the terms of the *allanamiento*. By acting in that way, the Court is making use of the powers which are *inherent* to its judicial function. As I have always sustained within the Court, in any circumstances *the Court is master of its jurisdiction*.

Id. (footnotes omitted).

79 *Id.* ¶¶ 40–41 (majority opinion).

80 *Id.* ¶¶ 41, 43.

81 *Id.* ¶ 44.

Judge Cançado Trindade, who was the President of the Court when *Barrios Altos* was decided, started his analysis of the reasons that explain the nullity of the amnesty law by pointing out the necessity of overcoming an obstacle that the international organs of supervision of human rights have not yet succeeded in surpassing: The impunity and the resulting erosion of the confidence that the population has in public institutions.[82] The legal argument for Judge Cançado Trinidade is a clear one. Self-amnesty laws are:

> an inadmissible offence against the right to truth and the right to justice . . . . They are manifestly incompatible with the general—indissociable—obligations of the States Parties to the American Convention to respect and to ensure respect for the human rights protected by it, . . . as well as to harmonize their domestic law with the international norms of protection . . . . Moreover, they affect the rights protected by the Convention, in particular the rights to judicial guarantees (Article 8) and to judicial protection (Article 25).[83]

Judge Cançado Trindade, however, goes one step further regarding the consequences of the existence of a law that violates in such manner the right to access justice, truth, and reparation. In this sense, he explains that the *corpus juris* of international human rights law "makes it clear that not everything that is lawful in the domestic legal order is so in the international legal order, and even more forcefully when superior values (such as truth and justice) are at stake."[84] In this manner, an amnesty law, which may be a valid legal norm under domestic standards, is not a "law" seen from the perspective of international human rights law. In this spirit, Judge Cançado Trindade formulated a rhetorical question that is fair in the cases of amnesty laws and that shows the monist approach taken by the Court to justify the invalidity of amnesty laws: Who would dare to suggest that a "law" of self-amnesty satisfies all the requirements of a law in *stricto senso* (this means a legal norm of a general character, oriented towards the general welfare, formulated according to a valid constitutional procedure)?

Judge García Ramírez, on the other hand, and in a position based more on considerations of policy and of the minimum requirements to combat impunity, expressed his awareness of the convenience of encouraging civil harmony through amnesty laws that contribute to re-establishing peace after periods of grave social stress and conflict. However, he also expressed that the provisions of forgetfulness and forgiveness cannot be permitted to cover the most severe human rights violations, such as extrajudicial executions, forced disappearances, genocide, torture, and crimes against humanity, as these acts "constitute an utter disregard for the dignity of the human being and are repugnant to conscience of humanity."[85] This position is based on the principle that the impunity of

[82] *Id.* ¶ 4 (Cançado Trindade, J., concurring).
[83] *Id.* ¶ 5 (footnote omitted).
[84] *Id.* ¶ 6.
[85] *Id.* ¶ 11 (García Ramírez, J., concurring) (quoting *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 7 (majority opinion)).

conduct that most gravely violates the essential legal rights protected by international law cannot be permitted.[86] Therefore, the codification of the most severe human rights violations as punishable conduct at the domestic level, and the prosecution and punishment of the perpetrators and other participants, is an obligation of the state that cannot be avoided through amnesty dispositions. Serious human rights violations must be punished, and any amnesty law that does not allow for the compliance of the international commitments of the state implies the incompatibility of the law with the American Convention and, thus, produces the nullity of that domestic law.[87]

B Further Developments in the Court's Amnesty Law Jurisprudence

The judgment in the *Barrios Altos* case constituted a milestone in the fight against impunity in Peru, since the Court nullified a domestic law that was manifestly contrary to the American Convention. As Casesse explains, this decision was the first time that an international tribunal acted as some sort of constitutional court, since it not only declared the international responsibility of the state for the enactment of an unconventional law, but it also nullified that law.[88] This view was strengthened with the interpretation of the ruling in the *Barrios Altos* case, where the Inter-American Court stated that the enactment of a law that manifestly violates the Convention is per se a violation of the treaty that has as a consequence the international responsibility of the state. Consequently, the Court established 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."[89]

The Inter-American Court followed the precedent of *Barrios Altos* in the cases of *Myrna Mack Chang v. Guatemala* (2003), *Carpio Nicolle v. Guatemala* (2004), *Moiwana Community v. Suriname* (2005), *La Cantuta v. Peru* (2006), and *Almonacid Arellano v. Chile* (2006) with no major substantive changes concerning the analysis of the amnesty laws. However, it is important to notice that in *Almonacid Arellano*, the Court developed what Professor Laurence Burgorgue-Larsen called "the high point of the position taken by the Court in matters of amnesty laws,"[90] by establishing that when the legislative power fails to set aside laws that are contrary to the object and purpose of the Convention

[86] *Id.* ¶ 13.

[87] *Id.* ¶ 15.

[88] *See* Antonio Cassese, *Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?* [*Is there an Insurmountable Conflict between State Sovereignty and International Criminal Law?*], *in* CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES, *supra* note 3, at 16 ("It is the first time that an international court determines that national laws are devoid of legal effects within the State system where they have been adopted and consequently obliges the State to act as if these laws have never been enacted.").

[89] Barrios Altos v. Peru, Interpretation of the Judgment on Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 18 (Sept. 3, 2001) (the original language reflects in a better manner the sense of this phrase: "En consecuencia, la Corte considera que, dada la naturaleza de la violación constituida por las leyes de amnistía No. 26479 y No. 26492, lo resuelto por la sentencia de fondo en el caso Barrios Altos tiene efectos generales.").

[90] *See* BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 7, at 260.

and are void ab initio, as it was the Amnesty Law 2.191 issued by the government of Augusto Pinochet, the judiciary remains linked to the duties listed in Article 1(1) of the Convention, and consequently domestic judges must refrain from enforcing those type of laws.[91]

In this manner, the Inter-American Court established that the duty to guarantee the rights protected by the Convention in accordance with Article 1(1) meant that Chilean judges had to exert a kind of "conventionality control" between the domestic legal provisions that apply in specific cases and the American Convention because the judiciary, as part of the State, is obligated to ensure that the effects of the provisions of the Convention are not adversely affected by the enforcement of laws that are contrary to its object and purpose, and that lack legal effects since their inception.[92] After *Almonacid Arellano*, the Court decided similar cases against Peru, Brazil, Uruguay, El Salvador, and Chile, both regarding the criterion of the nullity of amnesty laws and regarding the existence of the duty of domestic judges to exercise conventionality control.

However, the Inter-American Court continued to develop some specific topics of its position regarding the existence of amnesty laws after the *Almonacid* case. In the decision of *Gomes Lund ("Guerrilha do Araguaia") v. Brazil* (2010), the Court added two new elements to its jurisprudence on the subject. First, that the incompatibility between amnesty laws and the American Convention not only comprehends "self-amnesty laws" (for example those created by the regime that committed the violations, and that was still in power when the law was adopted), but the prohibition extends to amnesty laws that were the result of a public debate that was "considered by many as an important step in the national reconciliation process."[93] The Court dismissed the position of the representatives of Brazil in their defense before the Court, who argued that the existence of political agreement was a relevant factor to sustain the validity of the law as a matter of international law.[94]

The Court was emphatic in the fact that the non-compatibility of amnesty laws with the Convention is not limited to those that are denominated "self amnesties."[95] On the contrary, what is important is not the "process and the authority" that issued the amnesty law, but "its *ratio legis*: to leave unpunished serious violations in international law committed by the military regime."[96] Therefore, the Court considered that:

> The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the mate-

[91] Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 123 (Sept. 26, 2006).

[92] *Id.* ¶ 124.

[93] Gomes Lund ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 130 (Nov. 24, 2010) (internal quotation marks omitted).

[94] *Id.* ¶ 175.

[95] *Id.*

[96] *Id.* (citing *Almonacid Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 120).

> rial aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.[97]

The same view was reiterated in *Gelman v. Uruguay*, where the Court ruled that, for purposes of determining the invalidity of an amnesty law, factors such as the name of the law, the authority that issued the law, the individuals covered by it, and its adoption process are all irrelevant. The crucial element is the underlying purpose of the amnesty law: If the law was created with the purpose of allowing the impunity for those individuals who are responsible for serious violations of international law, its adoption and enforcement will be contrary to the American Convention. In this case, the Court reflected on how, even when the Expiry Law (*Ley de Caducidad*) had been approved in a democratic regime and supported by the public through an act of congress (the adoption of the law) and then via referendum, this fact does not automatically or by itself grant legitimacy or validity under international law.[98]

On the contrary, the Court stated in *Gelman*, the existence of a democratic regime does not guarantee per se the fulfillment of the state's international obligations, so the democratic legitimacy of certain acts in a particular society is limited by the framework of protection of human rights recognized in the American Convention.[99] In the Court's analysis, a truly democratic regime finds in international law a formal and substantive limit to its capacity to make decisions on what can be possibly be decided by the majorities in a democratic instance.[100] In this regard, the Court made clear that the adoption of amnesty laws that allow impunity for serious human rights violations are outside of the limits of democratic deliberation, and in this sense, the judiciary should also exercise a "conventionality control" regarding the application of those laws in concrete cases.[101]

However, in *Massacres of El Mozote and Nearby Places v. El Salvador*, the Inter-American Court faced a particularly interesting situation that it had not faced in previous cases. The "Law of General Amnesty for the Consolidation of Peace" (*Ley de Amnistía General para la Consolidación de la Paz*) enacted by the Legislative Assembly of the Republic of El Salvador in 1993, had to be evaluated in relation to the serious breaches of international humanitarian law committed during the internal armed conflict that lasted from 1980 until 1991.[102] This meant that the Court had to take into consideration the specific circumstances that surrounded the enactment of this law in El Salvador; that the country was coming out of an armed conflict and therefore the case had to be decided considering the applicable dispositions of international humanitarian law.[103]

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[97] *Id.*
[98] *Id.* ¶ 238.
[99] *Id.* ¶ 239.
[100] *Id.*
[101] *Id.*
[102] Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 265 (Oct. 25, 2012).
[103] *Id.*

Two facts were particularly relevant in *El Mozote*. First, the Court was "deal[ing] with a general amnesty law that relat[ed] to acts committed in the context of an internal armed conflict," which meant that the amnesty law had to be analyzed not just in light of the American Convention, but also in light of the Protocol II Additional to the 1949 Geneva Conventions.[104] Second, the law was agreed to in the context of a previous political agreement in order to end hostilities in El Salvador, "in particular, of Chapter I ('Armed Forces'), Section 5 ('End of Impunity'), of the Peace Accord of January 16, 1992."[105] For the Court, the content of Article 6(5) of Protocol II Additional to the Geneva Convention, which establishes that, "At the end of hostilities, the authorities in power shall endeavour 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," was particularly relevant for its analysis.[106]

In this context, the Court accepted the possibility of amnesties as a means to ensure the cessation of hostilities in armed conflicts not of an international character, but the Court also made clear that the above-mentioned article is not absolute because, under international humanitarian law, states also have an obligation to investigate and prosecute war crimes. Consequently, broad amnesty laws that can be created to benefit those who participated in an armed conflict, or that are deprived of their liberty for reasons related to an armed conflict, can only be benefited by an amnesty law if their acts cannot be considered to be war crimes or to be crimes against humanity.[107] In other words, the Court expressly opened the door for the adoption of an amnesty law as part of a peace process as a way to end hostilities in the context of an armed conflict, but it also asserted limits to the existence of these types of laws.

In the particular case of *El Mozote*, the Court found that the Law of General Amnesty for the Consolidation of Peace had resulted in the perpetuation of a situation of impunity for perpetrators of serious human rights violations, since it had not allowed the investigation, pursuit, capture, prosecution, and punishment of those responsible for the massacres involved in the case, thus failing to comply with the obligations of the state in terms of Articles 1(1), 2, 8(1), and 25 of the American Convention.[108] Therefore, due to the evident incompatibility with the American Convention, the Court decided that

> the provisions of the Law of General Amnesty for the Consolidation of Peace that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects and, consequently, cannot continue to represent an obstacle

[104] *Id.* ¶ 284.
[105] *Id.*
[106] *Id.* ¶ 285 (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609).
[107] *Id.* ¶¶ 286–87.
[108] *Id.* ¶ 295.

> to the investigation of the facts of this case and the identification, prosecution and punishment of those responsible[] . . . .[109]

It is important to emphasize that in *El Mozote* the Inter-American Court did not nullify the amnesty law of El Salvador solely for its incompatibility with the American Convention, but also because its provisions were contrary to the Peace Accord and the relevant provisions of the Geneva Convention.[110] This slight change on the Court's jurisprudence can be explained by looking at the position of the former President of the Inter-American Court, Judge Diego García Sayán, who stated in his reasoned concurring opinion in *El Mozote* that, regardless of the decisions in previous cases regarding the existence of amnesty laws, it is necessary to make an appropriate balance in contexts in which tensions could arise between "the demands of justice and the requirements of a negotiated peace in the framework of a non-international armed conflict."[111]

What seems clear, however, is that the American Convention—through the interpretations of the Inter-American Court—establishes a clear limit to political deliberation: War crimes and crimes against humanity cannot go unpunished in any circumstance.

C THE MOST IMPORTANT ELEMENTS IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT REGARDING AMNESTY LAWS

1 AMNESTY LAWS VIOLATE ARTICLES 1(1) AND 2 OF THE AMERICAN CONVENTION, AND THE RIGHTS OF ACCESS TO JUSTICE, TRUTH AND REPARATION

Article 1(1) of the American Convention states the following:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[112]

In the Inter-American Court's jurisprudence, starting with *Velásquez-Rodríguez* in 1989, it has always been sustained that the obligation "to ensure" established in Article 1(1) creates the obligation "to organize the governmental apparatus and, in general, all the structures through which the exercise of public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[113] The Court also established in *Velásquez-Rodríguez* that "[a]s a consequence of this obligation, the States must prevent,

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109 *Id.* ¶ 296.
110 *Id.* ¶¶ 283–97.
111 *Id.* ¶ 4 (García Sayán J., concurring).
112 American Convention on Human Rights, *supra* note 8, art. 1(1).
113 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[114] The notion that the obligation to "ensure" implies positive actions by state authorities has been present since the beginning of the Court's jurisprudence.

It is true that the duty to investigate human rights violations is an obligation of means and not of results, which must be assumed as an independent legal duty and not as a mere formality. But Article 1(1) requires that, once the authorities become aware of an act that constitutes a human rights violation, this act must be investigated, ex officio, seriously, effectively, and impartially, removing all obstacles de facto and de jure that allow the maintenance of impunity.[115] The authorities must also use all means available to guarantee and expedite investigation and prosecution. Consequently, the Court has considered that the application of amnesty laws violates Article 1(1) of the American Convention, since it allows serious human rights violations to remain unpunished, which constitutes a breach of the duty to investigate and punish those state agents responsible for these acts. In this sense, the Court has identified that

> amnesties or similar mechanisms have been one of the obstacles cited by States in order not to comply with their obligations to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations. . . . Consequently . . . the Court [has] reiterate[d] the inadmissibility of "amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations such as torture, summary, extrajudicial or arbitrary execution, and forced disappearance, all of which are prohibited because they violate non-derogable rights recognized by international human rights law."[116]

Article 2 is violated when an amnesty law is adopted, when it is not removed from the legal system, or when it is enforced by domestic authorities in a manner that prevents the fulfillment of State's obligations under Article 1(1) of the Convention. Article 2 establishes the following:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.[117]

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[114] *Id.*

[115] Gomes Lund ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 138 (Nov. 24, 2010).

[116] *El Mozote*, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 283 (majority opinion) (footnotes omitted) (quoting Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 225 (Feb. 24, 2011)).

[117] American Convention on Human Rights, *supra* note 8, art. 2.

The Court has understood that the violation of Article 2 occurs because once the American Convention is ratified, the state must take all the necessary steps to expel the laws that may contravene its provisions, such as those laws that prevent the investigation of serious human rights violations, that lead to the lack of access to justice of the victims, that perpetuated the impunity of those responsible for those violations, and that prevented the victims and their relatives from discovering the truth.[118]

Additionally the Court has established that the enforcement of amnesty laws denies victims and their families the right "to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law," which is a right protected by Article 8(1) of the American Convention. In the same sense, the Court has considered that the consequences of enforcing these kinds of laws result in the lack of investigation, arrest, prosecution, and punishment of those responsible for human rights violations, which violate the right to

> simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[119]

The Court has considered the violation of Articles 8(1), 25, and 1(1) at the same time as a violation to the right to access to justice, in the sense that

> amnesty laws affect the international obligation of the State in regard to the investigation and punishment of serious human rights violations because they prevent the next of kin from being heard before a judge, pursuant to . . . Article 8(1) of the American Convention, thereby violating the right to judicial protection enshrined in Article 25 of the Convention precisely for the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, thereby failing to comply with Article 1(1) of the Convention.[120]

Furthermore, the Court has stated that the right to access to justice "is not limited to the formal institution of domestic proceedings, but it also involves the assurance within reasonable time of the right of alleged victims or their relatives to have every necessary step taken to *know the truth* and punish those responsible for the events."[121] Accordingly, the right to the truth is subsumed in the right of the victim or his relatives to obtain from the competent organs of the state clarification about the human rights violations and the punishment

[118] *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 173–74.
[119] *Id.* ¶ 3(a) n.416 (de Figueriedo Caldas, J. ad hoc, concurring).
[120] *Gelman v. Uruguay*, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 227.
[121] La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 149 (Nov. 29, 2006) (emphasis added).

of those who are responsible for those violations.[122] This right is violated at the moment that the surviving victims of human rights violations or the families of the deceased victims cannot learn the circumstances that surrounded the perpetration of crimes against their relatives. It is also a violation of this right when the relatives of a victim of forced disappearance do not know the whereabouts of the disappeared person.[123]

Finally, regarding this point, the Court has established that the enforcement of amnesty laws violate the right to reparation, because it closes the door for the investigation and further compensation of the victims and their relatives. The Court has constantly drawn lines between the obligation of the state to investigate crimes and the forms of reparation, so the obligation to investigate and punish those responsible for certain types of crimes always constitutes an important measure of reparation.[124] For instance, in *Goiburú v. Paraguay* (2006), the Court found: "When this right to the truth is recognized and exercised in a specific situation, it constitutes an important measure of reparation, and is a reasonable expectation of the victims that the State must satisfy."[125]

2 Amnesty laws are manifestly incompatible with the American Convention and are null ab initio

Taking the above-mentioned into consideration, it is possible to explain why, in the Court's position, the nullity of amnesty laws is generated. There are three fundamental reasons:

First, because no provision of domestic law—including amnesty laws and statutes of limitation—can serve as a justification for the failure of the state to fulfill its obligation to investigate, capture, and, where appropriate, prosecute and punish those responsible for serious human rights violations (like extrajudicial executions, massacres, torture, forced disappearance, war crimes, crimes against humanity, etc.). The existence of amnesty laws leads to the defenselessness of the victims and perpetuates impunity in flagrant violation of the obligation to enforce Article 1(1) of the Convention.

Second, these kinds of laws violate what the Court has considered to be nonderogable rights recognized by international human rights law (the right to access to justice, the right to the truth, and the right to reparation), which are protected by Articles 8, 25, and certain provisions of Article 13, in relation to Articles 1(1) and 2 of the American Convention. Regarding the right to the truth, it is noteworthy that this is the truth known in judicial instances, not only in truth

[122] Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶¶ 47–48 (Mar. 14, 2001); Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 298 (Oct 25, 2012).

[123] *See generally* Trujillo-Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶¶ 114–15 (Feb. 27, 2002).

[124] Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 399 (July 1, 2006).

[125] Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 164 (Sept. 22, 2006).

commissions, which are important but cannot replace the State's obligation to establish the truth through criminal procedures.[126]

Third, the obligations of Article 2 prohibit the adoption of laws that are contrary to the American Convention. They also prohibit, through the doctrine of conventionality control, the implementation of these laws when they impede the fulfillment of the obligations under Article 1(1). Finally, amnesty laws are manifestly incompatible with the American Convention, and constitute an internationally wrongful act; therefore, their validity in a particular legal system creates per se a situation that involves the international responsibility of the state by continuously affecting non-derogable rights.

D Influence of the Case Law of the Inter-American Court on Amnesty Laws in the Decisions of other National and International Courts

The criteria of the Inter-American Court have found an echo in the national courts of several Latin American countries that have faced the existence of amnesty laws or similar provisions. These courts have used the criteria created by the Inter-American Court as part of their arguments for declaring such laws unconstitutional as a matter of domestic law. It is not the purpose of this Article to refer extensively to the decisions of domestic courts, but two cases exemplify what we may call a "judicial dialogue" which is taking place regarding the validity of amnesty laws. The first is the July 13, 2007 decision of the Supreme Court of Argentina in *Mazzeo, Julio Lilo and others*, where a decree that ordered clemency to a defendant who had committed crimes against humanity was declared unconstitutional.[127] As part of its considerations, the Argentine Supreme Court referred extensively to the judgment of the Inter-American Court in *Barrios Altos* regarding the inadmissibility of amnesty laws. The Argentinian Court also referred to the duty of courts to make a conventionality control in accordance with the provisions of *Almonacid Arellano*.[128]

The second example is the decision of the Constitutional Court of Peru in its judgment in *Santiago Martín Rivas*. In that case, the Peruvian court stated that the state is obligated to investigate the facts and punish those responsible for the human rights violations that occurred in the *Barrios Altos* massacre, and therefore that the effects of the judgments of the Inter-American Court in Barrios Altos are not only the invalidity of those judicial procedures where the amnesty laws were enforced, but also that any practice intended to prevent the investigation and punishment for violations of the rights to life and personal integrity due to the enforcement of amnesty laws should be avoided. In the same sense, the

[126] Gomes Lund ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 297 (Nov. 24, 2010).

[127] *See* Corte Supremea de Jusicia de la Nación [CSJN] [National Supreme Court of Justice], 13/07/2007, "Mazzeo, Julio Lilo / recurso de casación e inconstitucionalidad," Fallos (2007-330-3248) (Arg.), `http://www.csjn.gov.ar/jurisp/jsp/fallos.do?usecase=mostrarDocumento&falloId=1951`.

[128] *Id.* ¶¶ 23, 29.

Peruvian Constitutional Court ruled that, even if the adoption of amnesty laws is a constitutional responsibility of Congress, the judicial review of those laws presupposes that Congress intended to act within the constitutional framework and the respect for human rights.[129]

The criteria of the Inter-American Court have been echoed in the reasoning of the European Court of Human Rights, which in *Marguš v. Croatia* (2014), widely used the case law of the Inter-American Court on the evaluation of amnesties. Specifically, the European Court referred to the decisions of the cases of *Barrios Altos v. Peru*, *Almonacid Arellano v. Chile*, *La Cantuta v. Peru*, *Anzualdo Castro v. Peru*, and *Gelman v. Uruguay* to support the position that the right not to be tried twice for the same offense was not violated in the case of *Marguš*, since the reason why the accusation against the petitioner had been removed in the first place was due to the enforcement of a general amnesty law.[130] The European Court held that, since the petitioner's acts were severe human rights violations, the Croatian government acted in accordance with Articles 2 and 3 of the European Convention by reopening the cases against him.[131]

E Conclusion

Since the adoption of the Inter-American Court's position in *Barrios Altos*, the legality of amnesty laws cannot be determined by simply looking at how convenient these laws may be for the restoration of peace. For the Court, there is an unconditional duty on the state to criminally punish those who commit serious human rights violations. Accordingly, the Court rejects alternatives to criminal sanctions—such as the creation of truth commissions—in order to ensure the right to truth and the right of access to justice and reparation. These commissions may be important to establishing the historical truth of the facts, but cannot replace criminal sanctions.

Similarly, the Inter-American Court has considered whether an amnesty law is adopted through democratic processes, the name acquired by the law, or if it is only directed to a particular group to be irrelevant. Amnesties are always prohibited if they prevent the investigation and punishment of those responsible for the most serious human rights violations. However, this fact does not necessarily mean that the American Convention theoretically prohibits all amnesties. As Judge García Ramírez established in his concurring opinion in *Barrios Altos*, these laws could be legitimate in certain circumstances. In the words of Judge García Ramírez:

> I am very much aware of the advisability of encouraging civic harmony through amnesty laws that contribute to re-establishing peace and opening new constructive stages in the life of a nation. However,

[129] Tribunal Constitucional [T.C.] [Constitutional Court], 2 marzo 2007, Expediente 679-2005-PA/TC ¶ 52 (Peru), `http://www.tc.gob.pe/jurisprudencia/2007/00679-2005-AA.html`.

[130] *See generally* Marguš v. Croatia, App. No. 4455/10, Eur. Ct. H.R., ¶¶ 139–41 (May 27, 2014), `http://hudoc.echr.coe.int/eng?i=001-144276`.

[131] *Id.*

> I stress—as does a growing sector of doctrine and also the Inter-American Court—that such forgive and forget provisions "cannot be permitted to cover up the most severe human rights violations, violations that constitute an utter disregard for the dignity of the human being and are repugnant to the conscience of humanity."[132]

Judge García Ramírez's criteria become even more relevant after the position of the Court in *El Mozote*, which certainly opened the possibility for a new phase of the jurisprudence regarding amnesty laws in those cases where amnesty is adopted in order to put an end to an armed conflict and where there is a legitimate peace process.[133] Certainly the social conflicts of the twenty-first century in some of our countries will continue to exist, although hopefully in a different fashion than the conflicts of the 1970s, 1980s and 1990s. Perhaps in this new context there might be certain cases where an amnesty is legal. Yet the current position of the Court is that there are certain types of crimes that cannot go unpunished since they constitute radical injustices for the victims of serious human rights violations and for their relatives.

IV FORCED DISAPPEARANCE

The decades of the 1970s and the 1980s were violent times in Latin America. It was a period of profound political instability that was reflected in the emergence of military dictatorships in several countries in the region: Argentina (1976–1983), Bolivia (1971–1978), Brazil (1964–1985), Chile (1973–1980), Paraguay (1954–1989), and Uruguay (1973–1976). Other regimes with strong authoritarian characteristics ruled countries like Mexico, Peru, and Honduras. These regimes—although with different intensities in different periods of time—fought frontally against their political opponents (especially those promoters of communism), often at the expense of the violation of basic human rights (life, humane treatment, personal liberty, and juridical personality) of those persons or groups of persons who were considered a threat to national security.[134]

The chronological proximity of the entry into operation of the Inter-American Court of Human Rights and the above-mentioned times of political crisis helps to explain why the first cases that were brought before the Inter-American Court included the phenomenon of "forced disappearances," a subject that was addressed for the first time in the "Honduran cases": *Velásquez-Rodríguez* (1988), *Fairén-Garbi* (1989), and *Godinez-Cruz* (1989). The central question in all these cases—which was the first question that needed to be answered by the Inter-American Court before it addressed the legal consequences of the state's actions—was whether forced disappearance of persons (this means the kidnapping, execution, and subsequent denial of the facts by the authorities), which

[132] Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 11 (Mar. 14, 2001) (García Ramírez, J., concurring) (quoting *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 7 (majority opinion)).

[133] The Court, however, has not made any pronouncement in this regard as of this article's writing.

[134] *See* BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 7, at 299–300.

was not expressly prohibited by any applicable treaty at the time that the cases where decided, could be considered a violation of the American Convention.

This problem was the core of the matter in the transcendent judgment on *Velásquez-Rodríguez*, where the Inter-American Court determined, for the first time, that forced disappearances constituted a violation of Articles 7 (right to personal liberty), 5 (right to humane treatment), and 4 (right to life) of the American Convention, when considered altogether. Later, with the entry into force of the Inter-American Convention on Forced Disappearance of Persons, on March 28, 1996, it was recognized by several states "that the forced disappearance of persons 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."[135] In addition, this Convention created a definition of the crime of forced disappearance, recognized by the agreement of states.[136]

The jurisprudential development opened by the judgments in the "Honduran Cases," and the adoption of the Inter-American Convention on Forced Disappearance of Persons, has led to thirty-five judgments of the Inter-American Court in cases of forced disappearance, which represents 20.34% of the Inter-American jurisprudence in criminal matters. The most recent decision on the matter is *Osorio Rivera v. Peru* (2013). Until 2014, fourteen States have been declared internationally responsible for committing the crime of forced disappearance of persons: Guatemala (eight), Peru (six), Honduras (three), Colombia (three), Bolivia (three), Argentina (two), El Salvador (two), Venezuela (two), Paraguay (one), Mexico (one), Panama (one), Dominican Republic (one), Uruguay (one), and Brazil (one). These data allow us to observe the generality of the phenomenon of forced disappearances in the region, and also allow us to observe that this is an issue that is still present today in some of the cases decided by the Court in the exercise of its contentious jurisdiction.

Considering the above, this Part is divided in three parts. First we will present the core elements of the leading cases on the subject, starting with *Velásquez-Rodríguez*. Next, we will systematically explain the core elements of the Inter-American corpus juris on the subject (both derived from the Court's jurisprudence and the law of treaties). Finally, we will make some general conclusions.

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[135] Inter-American Convention on Forced Disappearance of Persons, pmbl., June 9, 1994, 33 I.L.M. 1529 (entered into force Mar. 28, 1996).

[136] *Id.* art. 2.

> For the purposes of this Convention, forced disappearance is considered to be the act 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.

Id.

A EMERGENCE OF THE COURT'S JURISPRUDENCE ON FORCED DISAPPEARANCE OF PERSONS IN *VELÁSQUEZ-RODRÍGUEZ V. HONDURAS* (1988)

1 THE FACTS OF THE CASE

In Honduras, the practice of forced disappearances began when the civil conflict in Nicaragua spread to Honduras in the 1980s. Death squads—which were composed of members of the army or the police or by people under their orders—arrested suspects of subversive activities and then interrogated, tortured, and executed those who were believed to be political opponents. The remains of the victims were deposited in mass graves. It was estimated that between 1981 and 1984 around 100 and 150 persons were disappeared. The victims were usually teachers, students, union leaders, peasant leaders, and human rights defenders who were disappeared following a similar pattern: They were kidnapped in broad daylight and in public places by armed men in civilian clothes using vehicles with official identification.[137]

Angel Manfredo Velásquez Rodríguez was one of those victims. Mr. Velásquez Rodríguez disappeared on September 12, 1981 in downtown Tegucigalpa, under similar conditions as other victims. Heavily armed men took him to the station of the public security forces where he was interrogated and tortured. His body was never found. At the time of his arrest, the authorities considered that he conducted activities "dangerous" to the security of the state, but there was no evidence before the Inter-American Court on this point. Mr. Velásquez Rodríguez was a schoolteacher who received a Masters in economics, was the Secretary General of the Union of Students of the Autonomous University of Honduras, was thirty-five years old, and had a wife and three children.

The inability of the families of the victims to obtain justice at the domestic level allowed the Inter-American Commission on Human Rights to accept the case and refer it to the Inter-American Court. The Court accepted jurisdiction over the case in 1986 and decided on its merits on July 29, 1988. The Court considered that a practice of disappearance was carried out or tolerated by Honduran officials, that Mr. Velásquez Rodríguez disappeared at the hands of the government or with their acquiescence, and that the government failed to guarantee the rights infringed upon by that practice.

2 THE INTER-AMERICAN COURT'S CRITERIA

Specifically, regarding the elements of the crime of forced disappearances, the Inter-American Court stated, "[t]he phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion."[138] At the moment of Mr. Velásquez Rodríguez's disappearance, there was no treaty in force nor any domestic legislation to implement

[137] Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 150 (July 29, 1988); *see also* Claudio Grossman, *The Velasquez Rodríguez Case: The Development of the Inter-American System of Human Rights*, *in* INTERNATIONAL LAW STORIES 77, 77–96 (John E. Noyes et al. eds., 2007).

[138] *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 150.

the classification of "forced disappearance" as a unique offense, but the Court referred to doctrinal analysis and to the position of the General Assembly of the Organization of American States, which recognized this phenomenon as "an affront to the conscience of the hemisphere [which] constitutes a crime against humanity" and as a "cruel and inhuman" practice that "mocks the rule of law, and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety" in order to evaluate this phenomenon as a distinct human rights violation.[139]

On this basis the Inter-American Court held that "forced disappearance of human beings is a *multiple and continuous violation of many rights* under the Convention, that the States parties are obliged to respect and guarantee."[140] Thus, the Court found that forced disappearance constitutes a violation of Article 7 (right to personal liberty) of the American Convention, because it implies an arbitrary deprivation of liberty, which also includes a violation of the "detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest."[141]

The Court also ruled that Article 5 (personal integrity) is violated since "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being."[142] In reaching this conclusion, the Court verified the ruthless treatment of detainees who were subjected to harassment, torture, and other cruel treatment through testimonies of victims who had regained their freedom (after being "disappeared").[143]

Finally, the Court found that the forced disappearance violated Article 4 (right to life) of the Convention, as the practice of disappearances often involved execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible, which itself constitutes a brutal violation of the right to life.[144] On this point, the Court also referred to the radical rupture of legality and human rights involved in the forced disappearance of persons "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."[145]

It is relevant to mention that in *Velásquez-Rodríguez* the Court examined the conditions under which a particular act can be imputed to a state party. This led the Court to interpret Article 1(1) of the American Convention. The Court pointed out that the first obligation assumed by the states under Article 1(1) is "to respect the rights and freedoms" recognized by the Convention, which means

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139 *Id.* ¶ 153 (first quoting O.A.S. G.A. Res. 666 (XIII) (Nov. 18, 1983); then quoting O.A.S. G.A. Res. 742 (XIV) (Nov. 17, 1984)).
140 *Id.* ¶ 155 (emphasis added).
141 *Id.*
142 *Id.* ¶ 156.
143 *Id.*
144 *Id.* ¶ 157.
145 *Id.* ¶ 158.

that the exercise of public authority has certain limits that derive from the fact that "human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State."[146] The second obligation of the parties, the Court considered, is to "ensure" the full exercise of the rights recognized by the Convention to every person subject to its jurisdiction, which "implie[d] the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[147]

In this spirit, the Court considered that the obligation to "ensure" was not fulfilled by the mere existence of a legal system designed to make it possible to comply with this obligation, but that it also required the government to conduct itself so as to effectively ensure the free and full exercise of human rights, and to "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[148] These criteria, involving the notion that the duties of Article 1(1) of the Convention not only implied negative conducts, but also positive ones, in order to prevent and investigate human rights violations, inspired the jurisprudence of the Inter-American Court that evaluated forced disappearances, and, in general, inspired the decisions on death penalty and amnesty laws.

B FURTHER DEVELOPMENTS IN THE COURT'S FORCED DISAPPEARANCE JURISPRUDENCE

Further developments occurred after *Velásquez-Rodríguez* regarding the legal standards on forced disappearance. We will not address all the cases where these developments occurred. Instead, we will focus on *Goiburú v. Paraguay* (2006) and *Radilla-Pacheco v. Mexico* (2009) because these cases show the most sophisticated evaluation of the consequences of forced disappearance in the context of systematic human rights violations that occurred under military dictatorships (in the case of Paraguay), and of the continuing nature of the crime.

Goiburú had unique historical importance, since the facts that lead to the case "occurred in the context of systematic practice of arbitrary detention, torture, execution and disappearance perpetrated by the intelligence and security forces of the dictatorship of Alfredo Stroessner [in Paraguay] under 'Operation Condor.' "[149] This meant that the facts of the case were part of the "flagrant, massive and systematic repression to which the population was subjected on an inter-State scale because State security agencies were let loose against the people at a transborder level in a coordinated manner by the dictatorial governments concerned [mainly Argentina, Bolivia, Brazil, Chile, Paraguay, and

[146] *Id.* ¶ 165.
[147] *Id.* ¶ 166.
[148] *Id.* ¶¶ 166–67.
[149] Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 62 (Sept. 22, 2006).

Uruguay]."[150] This context permeated and conditioned the state's international responsibility in relation to its obligation to respect and ensure the rights embodied in Articles 4, 5, 7, 8, and 25 of the Convention.

The Court found that

> preparation and execution of the detention and subsequent torture and disappearance of the victims could not have been perpetrated without the superior orders of the chiefs of police and intelligence and the Head of State himself at the time, or without the collaboration, acquiescence and tolerance revealed by direct actions carried out in a coordinated and interrelated manner by members of the police forces, intelligence services and even diplomatic services of the States concerned.[151]

In this regard, the Court found that by disappearing the victims and failing to guarantee an appropriate investigation,

> State agents not only failed abysmally to fulfill their obligations to respect and protect the rights of the alleged victims, embodied in Article 1(1) of the American Convention, but used their official position and resources granted by the State to commit the violations. . . . In other words, the state became the principal factor in the grave crimes committed, constituting a clear situation of "State terrorism."[152]

In this manner, the Court found that "[t]he State's international responsibility is *increased* when the disappearance forms part of a systematic pattern or practice applied or tolerated by the State."[153] This condition meant that the Court qualified the forced disappearance as a crime against humanity "involving a gross rejection of the essential principles on which the Inter-American System is based."[154] This qualification of forced disappearance as a crime against humanity did not come only as an interpretation of the American Convention, since the Court drew on several instruments of international law, including Article 7(1)(i) of the Statute of the International Criminal Court; the preparatory works, the Preamble, and the provisions of the Inter-American Convention on Forced Disappearance of Persons; and from Articles 5 and 8(1)(b) of the United Nations International Convention for the Protection of All Persons from Forced Disappearance.[155] Consequently, the Court found that

> as may be deduced from the preamble to the aforesaid Inter-American Convention, faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced

[150] *Id.*
[151] *Id.* ¶ 66.
[152] *Id.*
[153] *Id.* ¶ 82 (emphasis added).
[154] *Id.*
[155] *Id.*

> disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.[156]

In this spirit, the Court concluded that the gravity of the torture and forced disappearance could not be separated from the context in which they occurred in order to establish the appropriate reparation, to preserve the historical memory, and for the imperative need to ensure that such facts are never repeated.[157] In this form, the Court went a step further in its jurisprudence by qualifying the prohibition of forced disappearance as a norm of *jus cogens* and by determining the legal consequences of the breach of this prohibition both in terms of the aggravated international responsibility of the state and in terms of the duty to repair.

Regarding the "continuous nature of the crime," since *Velásquez-Rodríguez* the Court has emphasized that "forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention."[158] The Inter-American Convention on Forced Disappearance of Persons states in Article 3, "This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." This position has not changed, but in *Radilla-Pacheco* the Court allows us to see its full effects.

Radilla-Pacheco involved the forced disappearance of Mr. Rosendo Radilla-Pacheco, which occurred on August 25, 1974 at the hands of members of the army in the State of Guerrero, Mexico. According to the Inter-American Commission, Mexico was internationally responsible since the disappearance of Mr. Radilla-Pacheco continued to exist up to the date of the presentation of the case before the Court. What is interesting for the purposes of this section is that the Commission presented the case before the Court notwithstanding the fact that Mexico had ratified the American Convention in 1981 (the disappearance occurred in 1974), even though the state had certainly not established the whereabouts of the Mr. Radilla-Pacheco, nor had it found his remains.[159]

In its response to the Commission's petition, Mexico indicated that the Court "[l]ack[ed] jurisdiction *ratione temporis* to hear the merits of the case . . . since . . . [it] signed its adherence instrument to the American Convention . . . on March 2, 1981."[160] In this regard, the state argued that, at the time the facts occurred in this case (1974), "there was no international obligation whatsoever over which [the] Court ha[d] jurisdiction."[161] The state added that, according to the American Convention, legal obligations could not be applied retroactively.[162] This

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156 *Id.* ¶ 84 (footnote omitted).
157 *Id.* ¶ 93.
158 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 155 (July 29, 1988).
159 Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 2 (Nov. 23, 2009).
160 *Id.* ¶ 15 (first and third through sixth alterations in original).
161 *Id.* (first alteration in original).
162 *Id.*

was, indeed, a simple but solid argument by Mexico that could have avoided the Court's exercise of jurisdiction.

Yet, the Court considered that the "continuous or permanent nature" of the crime of forced disappearance—up to the date when the case was addressed by the Court the victim had not been found, and that the investigations carried out by Mexican authorities had not produced any result whatsoever—meant that "the facts argued or the State's behavior that could imply its international responsibility continued to exist after the treaty had gone into force for Mexico and up to the present."[163] In this sense, the Court differentiated "between instantaneous acts and acts of a continuing or permanent nature."[164] In the second case, once the American Convention goes into force, those continuous or permanent acts that persist after that date may generate international obligations for the state party without violating the principle of non-retroactivity.[165] In the words of the Court:

> The forced disappearance of persons, whose continuous or permanent nature has been acknowledged repeatedly by International Human Rights Law, falls within this category of acts, in which the act of disappearance and its execution start with the deprivation of freedom of the person and the subsequent lack of information on their fate, and it continues until the whereabouts of the disappeared person are known and the facts are elucidated.[166]

Based on this position, the Court dismissed the preliminary objection presented by the Mexican delegation and entered into an analysis of the merits of the case. In doing so the Court reiterated its jurisprudence on the subject, beginning with *Velásquez-Rodríguez*, regarding the qualification of the crime of forced disappearance as a continuous violation of several human rights protected by the American Convention.[167] From this proposition, the Court "concluded that the acts that constitute a forced disappearance have a permanent nature and that their consequences imply multiple offenses to the rights of people while the whereabouts of the victim are not known or their remains have not being located."[168] The Court's position ultimately led to the declaration of the international responsibility of Mexico and the duty to repair.

C The Most Important Elements in the Jurisprudence and the Treaty-Based Norms on Forced Disappearances

1 Constituent Elements of the Forced Disappearance of Persons

It is possible to identify the following elements as constitutive of the crime of forced disappearance of persons: (a) the deprivation of liberty; (b) the direct

[163] *Id.* ¶ 18.
[164] *Id.* ¶ 22 (citing Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2236).
[165] *Id.*
[166] *Id.* ¶ 23 (footnote omitted).
[167] *Id.* ¶ 139.
[168] *Id.* ¶ 145.

involvement of state agents or their acquiescence; and (c) the refusal to acknowledge the detention and disclose the fate or whereabouts of the person concerned.[169] Each of these core elements is shared by the United Nations Working Groups on Enforced or Involuntary Disappearances, by the jurisprudence of the European Court of Human Rights (for example, in the 1997 case of *Kurt v. Turkey*), as well as the jurisprudence of several constitutional courts of the American states (for example, in *Marco Antonio Monasterios Pérez*, decided by the Supreme Court of the Bolivarian Republic of Venezuela in 1997).

The first element of our analysis is the deprivation of liberty. The Inter-American Court has established that the deprivation of liberty in the context of a forced disappearance should only "be understood as the beginning of the configuration of a complex violation that is prolonged in time until the situation and the whereabouts of the alleged victim are known."[170] The manner in which the deprivation of liberty occurs is not relevant for the purpose of the act constituting a forced disappearance. Any form of deprivation of freedom satisfies this first requirement, and it violates, among others, the right to "be brought promptly before a judge."[171] This means that once a person has been submitted to a kidnapping, detention, or any form of deprivation of freedom with the object of causing his or her forced disappearance, the first element of the definition is satisfied.

Furthermore, an illegal detention, which of course occurs in cases of forced disappearance, constitutes a violation of the right not to be deprived of physical liberty except for reasons and under conditions established beforehand by law, and the right not to be subject to arbitrary arrest or imprisonment.[172] In this sense, the Court remembered in *"Street Children" (Villagran-Morales) v. Guatemala* (1999) that, even in a case where the law authorized a forced disappearance, such a disappearance would constitute a violation of the Convention since:

> [Article 7] contains as specific guarantees, described in its subparagraphs 2 and 3, the prohibition of detention or unlawful or arbitrary arrest, respectively. According to the first of these regulatory provisions, no one shall be deprived of his physical liberty, except for the reasons, cases or circumstances specifically established by law (material aspect), but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that—although qualified as legal—may be considered incompatible with respect for the fundamental rights

[169] Gómez-Palomino v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 97 (Nov. 22, 2005).

[170] Chitay Nech v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 89 (May 25, 2010).

[171] American Convention on Human Rights, *supra* note 8, art. 7(5).

[172] *Id.* art. 7(2)–(3).

> of the individual because they are, among other matters, unreasonable, unforeseeable or out of proportion.[173]

The second element is the direct involvement of state agents or their acquiescence. The Court has held that, in order to establish that there has been a violation of the rights recognized in the Convention, it is not necessary that state responsibility is proved beyond a "reasonable doubt," or that the agents to whom the violations are attributed are individually identified. It is sufficient to prove that the acts or omissions that have allowed the perpetration of such violations are verified, or that the state failed to comply with its obligations.[174] This is because the Inter-American Court has held that the provisions of Article 4(1) of the Convention, in conjunction with Article 1(1) (obligation to respect rights), presuppose that no person shall be deprived of his life arbitrarily (which is a negative obligation). It also requires that the states take all the appropriate measures to protect and preserve the right to life (which is a positive obligation), pursuant to the obligation to guarantee the full and free exercise of the rights for all persons.[175]

The third element is the refusal to acknowledge the detention and disclose the fate or whereabouts of the person concerned. As we mentioned earlier, one of the essential characteristics of forced disappearance is the state's refusal to recognize that the victim is under its control and to provide information about his or her whereabouts.[176] For this reason, the forced disappearance of persons is a violation of different rights that continues by the will of the perpetrators, who, by refusing to provide information on the whereabouts of the victim, continue to violate the Convention at every moment until the fate and whereabouts of the victim are known.[177] The state, by denying access to information and documentation to the relatives of the victims, participates in maintaining the situation of uncertainty to the detriment of the relatives of the victims, removing it from the legal protection.

Consequently, the Court has held that, once a person has been deprived of his or her freedom, if the victim himself or herself cannot gain access to an effective remedy, it is fundamental that the next of kin or others close to him be able to gain access to a prompt and effective proceeding or judicial recourses as means to determine their whereabouts, state of health, or to identify the authority that ordered the deprivation of freedom.[178] The Court has also established that since

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[173] "Street Children" (Villagran-Morales) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 131 (Nov. 19, 1999) (alteration in original) (quoting Gangaram-Panday v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 16, ¶ 47 (Jan. 21, 1994)).

[174] Kawas-Fernández v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶ 73 (Apr. 3, 2009).

[175] *Id.* ¶ 74.

[176] Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 91 (Sept. 22, 2009).

[177] Heliodoro Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 112 (Aug. 12, 2008).

[178] Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 141 (Nov. 23, 2009).

the denial of the truth is one of the common characteristics to all the stages in a case of forced disappearance, one of the central elements for the prevention and elimination of this practice is the adoption of effective measures to prevent such obscurity in the information.[179] Hence, for instance, in *Anzualdo Castro v. Peru* (2009) the Court established that

> the deprivation of liberty in legally recognized centers and the existence of detainees' records constitute fundamental safeguards, *inter alia*, against forced disappearances. In the opposite sense, the implementation and maintenance of clandestine detention centers constitute *per se* a breach of the obligation to guarantee insofar as such situation directly affects the rights to personal liberty, humane integrity and life.[180]

2 Continuous or Permanent Nature of the Forced Disappearance of Persons

Starting with *Velásquez-Rodríguez*, the Court decided that one of the most important features of forced disappearance is that the crime constitutes a continuing violation of various rights of the American Convention. This condition has the legal effect of tolling the statute of limitations for criminal proceedings, until the person regains his freedom or his body is found. The continuous or permanent nature of forced disappearance was codified in Article III of the Inter-American Convention on Forced Disappearance of Persons, which states: "This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."[181] In this regard, the Court, in *Goiburú* reaffirmed the provisions of the above-mentioned Convention by stating that it must "consider integrally the offense of forced disappearance of an autonomous, continuing or permanent nature."[182] As we mentioned before, when referring to *Radilla-Pacheco*, one of the most important consequences of the continuous nature of the crime of forced disappearance is that it has opened the door for the Court to move away from the traditional understanding of the classic rules of international law in relation to the temporal jurisdiction and prohibition of retroactive application of treaties in cases of forced disappearance.[183]

3 Multiple Offenses of Forced Disappearance

Another important feature is the plurioffensive (*pluriofensiva*) nature of forced disappearance of persons. In order to develop this notion, the Court established that the analysis of a possible forced disappearance should not be understood

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[179] *Anzualdo Castro*, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 63.

[180] *Id.* (citing Veláquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988)).

[181] Inter-American Convention on Forced Disappearance of Persons, *supra* note 135, art. 3.

[182] Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 83 (Sept. 22, 2006).

[183] *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 24.

in isolation or divided and fragmented, considering only the detention of the victim, or his possible torture, or the risk of the lost of life. Rather, the focus should be on all the facts presented in the case brought to the Court.[184] This approach has allowed the Court in certain cases not only to declare violations of Articles 5 (right to humane treatment), 7 (right to personal liberty), and 4 (right to life), but also allowed the Court to declare the violation of the right to juridical personality.[185]

Article 5 is violated because it is reasonable to presume, based on the body of evidence, that the victims of forced disappearance have suffered treatment contrary to the dignity inherent in the human being while in the custody of the state. Since *Velásquez-Rodríguez*, the Court has held that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being."[186] Without any doubt, in these types of cases, the treatment of the detainee constitutes a violation of the right that every person has, in accordance with Article 5(1), to "have his physical, mental, and moral integrity respected," and, in accordance with Article 5(2), to "not . . . be subjected to torture or to cruel, inhuman, or degrading punishment."

Article 7 is violated because it implies an arbitrary deprivation of liberty, which also includes a violation of the detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest. In *Osorio Rivera* (2013), the Court established that under no conception of the Article can it be understood that a detainee is not to be brought before the competent authority in the terms established in Article 7 of the Convention, not even in those cases where the military conducts activities to ensure national security and maintain public order.[187] A detainee, as it is mandated by Article 7(5) of the Convention, "shall be brought promptly before a judge or other official authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings."[188]

The Court has found that forced disappearance violates Article 4 (right to life) of the Convention, as the practice of disappearing often involves execution without trial followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible, which constitutes a brutal violation of the right to life.[189] On this point, the Court has considered that, due to the nature of forced disappearance, the victim is in an aggravated situation of vulnerability, which gives rise to the risk that several

[184] Ticona Estrada v. Bolivia, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 56 (Nov. 27, 2008).

[185] *Anzualdo Castro*, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 90–101.

[186] Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 156 (July 29, 1988).

[187] Osorio Rivera v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 274, ¶ 167 (Nov. 26, 2013).

[188] American Convention on Human Rights, *supra* note 8, art. 7(5).

[189] *Osorio Rivera*, Inter-Am. Ct. H.R. (ser. C) No. 274, ¶ 157.

rights might be violated, including the right to life.[190] Obviously, an execution of the detainee constitutes a flagrant violation of the right that every person has "to have his life respected," and a violation of the maxim that "no one shall be arbitrarily deprived of his life," as Article 4(1) clearly states.

Finally, in some circumstances the "right to recognition as a person before the law"[191] might be violated in cases of forced disappearance. In *Anzualdo Castro*, the Court found that a forced disappearance is not only one of the most serious forms of subtraction of a person from the legal protection of public institutions, but it is also a denial of its existence, which creates a sort of "legal limbo" and uncertainty in society, the state, and even compromises the international responsibility of the state.[192] In reaching this conclusion, the Court referred to various international instruments that opened the possibility to link the denial of the legal personality of the individuals and the phenomenon of forced disappearance, such as the Rome Statute and the International Convention of All Persons from Enforced Disappearances.[193]

In a similar fashion, it is important to mention that a state's tolerance of these types of conduct, which ultimately prevents individuals from getting access to adequate domestic legal remedies to protect their rights, is a violation of the right to due process and judicial protection in terms of Articles 8 and 25 of the American Convention. On this point, the Court has consistently recognized in its jurisprudence that it is not enough that legal remedies exist formally in the legal system, but that they need to be appropriate (the function of these resources must be suited to the violation of the rights) and effective (able to produce the effect for which they were conceived).[194]

4 OBLIGATIONS OF STATES TO INVESTIGATE, PUNISH, AND PREVENT THE FORCED DISAPPEARANCE OF PERSONS

The prohibition of forced disappearance of persons implies that states must comply with a number of obligations under Articles 1 and 2 of the Convention. The first is the obligation to investigate the forced disappearance of persons. The Inter-American Court has determined that, at any time there is reasonable cause to suspect that a person has been subjected to forced disappearance, the state must initiate an investigation ex officio.[195] In cases of forced disappearance, in-

[190] *Id.* ¶ 169.

[191] American Convention on Human Rights, *supra* note 8, art. 3.

[192] Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 91 (Sept. 22, 2009).

[193] *Id.* ¶¶ 99–104.

[194] Manuel Eduardo Góngora Mena, *La Desaparición Forzada en la Jurisprudencia de la Corte Interamericana de Derechos Humanos* [*Forced Disappearances in the Jurisprudence of the Inter-American Court of Human Rights*], NÜRNBERGER MENSCHENRECHTSZENTRUM (Nov. 3, 2004), http://www.menschenrechte.org/lang/en/verstehen/desaparicion-forzada-cidh.

ternational law, and the general duty to guarantee the rights of the American Convention—Article 1(1)—impose a duty on states to investigate a case of this nature without delay, and in a serious, impartial, and effective manner.[196] Using the same pro-victim approach, the Court has established that, in any case where any authority receives news about acts pertaining to the forced disappearance of persons, he or she shall denounce them immediately.[197]

The second obligation is the duty to enact and enforce laws. In the case of forced disappearance of persons, the duty to pass domestic legislation in accordance with the provisions of the American Convention, which is set out in Article 2 of the Convention, is fundamental for the effective eradication of this practice. Thus, in response to the particularly serious nature of the forced disappearance of persons, the protection that can be given by the existing criminal laws for kidnapping or abduction, torture or killing, among others, is not enough to combat forced disappearance, which means that this offense shall be typified autonomously. This obligation also has a treaty basis, as Article III of the Inter-American Convention on the Forced Disappearance of Persons provides:

> The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.[198]

Finally, States have an obligation of prevention, which includes all legislative, administrative, political, and cultural means of promoting and protecting human rights.[199] This requirement, of course, is an obligation of means and not of results, so that the mere violation of rights is not sufficient to constitute a violation of this duty.[200] Thus, the deprivation of freedom in legally-recognized detention centers and the existence of records of detainees are fundamental safeguards, *inter alia*, against forced disappearance. *A contrario sensu*, the Court has established that the functioning and maintenance of secret detention centers constitute per se a breach of the obligation to ensure—Article 1(1)—because it directly infringes the rights to personal liberty, personal integrity, life and legal personality.[201]

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[195] Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 143 (Nov. 23, 2009).

[196] Pueblo Bello Massacre v. Colombia, Interpretation of the Judgment of Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 159, ¶ 145 (Nov. 25, 2006).

[197] *Anzualdo Castro*, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 65.

[198] Inter-American Convention on Forced Disappearance of Persons, *supra* note 135, art. 3.

[199] Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 175 (July 29, 1988).

[200] *See* Góngora Mena, *supra* note 194.

[201] *Anzualdo Castro*, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 63.

D CONCLUSION

The crime of forced disappearance is defined as

> the act 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.[202]

The Inter-American Court and the Inter-American Convention on Forced Disappearance of Persons consider this crime a differentiated phenomenon, characterized by multiple and continuous violation of several rights enshrined in the American Convention (Articles 5, 7, 4, and, in some cases, Article 3).[203] This crime not only produces an arbitrary deprivation of freedom, but also violates the integrity and personal security of the person and endangers the very life of the detainee, placing him or her in a state of complete helplessness, which opens the door for related crimes like torture or murder.

The American Convention does not expressly prohibit the forced disappearance of persons. Its prohibition is a development of the Inter-American corpus juris that is the result of the Inter-American Court's jurisprudence, which started in the *Velásquez-Rodríguez* case and was strengthened with the adoption of the Inter-American Convention on Forced Disappearance of Persons, which entered into force on March 28, 1996. Fourteen countries have ratified the Convention; Brazil and Nicaragua have signed but not ratified the Convention.[204]

There is no doubt that the jurisprudence and the treaty-based developments in this area have been important elements in the fight against the commission of this particularly heinous crime. In this context, the work of the Inter-American Court has focused on bringing justice to the victims and their relatives, and to promoting the adoption of laws and policies that help to eradicate this practice from the states that belong to the Inter-American System.

V GENERAL CONCLUSION

The topics that have been succinctly covered in this article are intimately connected with some of the most important rights and values protected by the American Convention: life, freedom, personal integrity, access to justice, truth, and reparation. The Inter-American Court has developed a creative jurisprudence with a pro-victim spirit in order to deal with actions of state agents that have had the effect of violating these rights and values, allowing the victims of serious human rights violations and their relatives to seek justice at the international

[202] Inter-American Convention on Forced Disappearance of Persons, *supra* note 135, art. 2.
[203] *Id.* arts. 3–5, 7.
[204] *See generally id.*

level. The standards developed in the Court's jurisprudence have also produced changes in the laws and practices of several states that are parties to the American Convention, constituting a minimum for the protection of human rights. In our view, these standards are a tool for domestic authorities in the process of protecting human rights, and must be enhanced by the creation of domestic laws and policies and the exercise of conventionality control.

It is important to keep in mind that the standards of human rights protection in the Inter-American System are not isolated from the developments that occur at the domestic level. It is true that most states still face challenges to guarantee the effectiveness of international human rights in their territories, but there have been important advances that are cemented in the creation of norms and policies. The efforts made by governments and the Inter-American Court to eradicate the death penalty is a good example of the type of cooperation and agreement that exists in certain areas of law that involve the protection of human rights. The development of international law and domestic law may together lead to the creation of a *Ius Constitutionale Commune* for Latin America.[205] We believe that some of the standards that are part of the Inter-American corpus juris, and those that were mentioned in this Article, certainly belong to this *Ius Constitutionale Commune* for the region.

[205] *See* sources cited *supra* note 5 (on the topic of *Ius Constitutionale Commune*).