



**DPLf**

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

**Volume II**

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*Editor* María Clara Galvis Patiño



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



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This publication is a sequel to the *Digest of Latin American Jurisprudence on International Crimes, Volume I*, published in Spanish in 2009 and in English in 2010. In order to ensure coherence between the two volumes, the table of contents from volume I appears below in its entirety. Headings of sections that are new or updated in this volume are indicated in bold type, along with the page numbers. The other topic headings refer the reader to the first digest, with the label "Vol. I."

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## PREFACE

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In January 2012, Guatemala was preparing for an unprecedented trial. A criminal court had charged former dictator Efraín Ríos Montt with the crime of genocide for acts committed in 1982 and 1983 during the internal armed conflict in that country. A year later, what would be the first trial for genocide against a former head of state in Latin America had only just begun. The proceedings were plagued by seemingly interminable delays as the defense team filed motion after motion, including arguments that the defendant was covered by the amnesty law. As this publication was in its final stages, the case was still awaiting a Constitutional Court ruling on the applicability of the amnesty law.

In South America a few months later, on July 5, 2012, an Argentine federal court sentenced former dictator Jorge Rafael Videla to 50 years in prison for crimes against humanity. Already facing a life sentence for torture and extrajudicial executions, Videla was convicted for his role in the systematic and widespread practice of kidnapping and hiding children. This was part of a broader plan of selective elimination of members of the civilian population, publicly justified by the need to put an end to “subversion” under the military regime that governed the country from 1976 to 1983.

Moving to the Andes, just a few days later, on July 20, 2012, the Criminal Chamber of the Supreme Court of Justice of Peru issued a declaration of nullity in favor of former members of the Colina Group, the paramilitary force responsible for extrajudicial murders and forced disappearances committed in 1991 and 1992 in the cases of Barrios Altos, El Santa, and Pedro Yauri. This controversial ruling reduced the sentences of those members of the Colina Group, issued in 2010, and held that the statute of limitations was applicable since the offenses did not amount to crimes against humanity. The families of the victims, national and international human rights organizations, legal scholars, and even sectors of the Peruvian government immediately condemned the ruling as having contravened domestic and international law and the state’s human rights obligations. Following a decision by the Inter-American Court of Human Rights, which in 2001 had issued a judgment in the case prolonging supervision of compliance, the Supreme Court of Justice vacated the disputed ruling. As this digest went to press, an *ad hoc* criminal chamber established for the case was expected to issue a new ruling.

Also in Peru, a public debate was underway in late 2012 over whether former president Alberto Fujimori should be granted a pardon. This was triggered by a petition his relatives submitted to the president of the Republic, the only authority vested with this power under Peruvian law. The final decision is still in his hands.

These cases stand out for their impact on the victims and on society as a whole, and as examples of the broader political context in which they occurred. A contextual reading of these cases reveals the peaks and valleys in the struggle against impunity on our continent. At the same time, they signal the emergence of a new paradigm that has been gaining ground in the region and that was the inspiration for the first *Digest of Latin American Jurisprudence on*

*International Crimes.* We are referring to a change of venue for airing and trying past crimes, which has shifted from the international arena, where the mechanisms par excellence were supranational bodies (special criminal tribunals, the International Criminal Court, human rights courts), to the domestic arena, where constitutional and criminal courts are playing an increasingly important role.

Several countries in the region, including Argentina, Chile, Peru, Uruguay, and to a lesser extent Guatemala, are prosecuting cases aimed at holding authoritarian governments accountable for serious and systematic human rights abuses. These domestic proceedings have looked to international law and jurisprudence for guidance in this process. Despite the evident inconsistencies and structural weaknesses of the national institutions involved, these cases are significant. They set an example for the world and particularly for countries that continue to grapple with issues of justice for crimes of the past.

In light of these important developments, and given the interest that the first volume of the digest generated among civil society actors and legal specialists worldwide, DPLF decided to undertake a second phase of the project. We are therefore pleased to present the *Digest of Latin American Jurisprudence on International Crimes, Volume II*. Like the earlier work, this second volume systematizes landmark rulings of domestic courts concerning the recognition and punishment of international crimes, as author Ximena Medellín aptly demonstrates in the introduction to this volume.

DPLF believes that, in addition to disseminating this information among regional stakeholders, publications such as this one enable us to share the experiences and lessons learned in Latin America with other regions of the world, and especially with countries that are facing postwar challenges or recovering from authoritarian or antidemocratic periods.

Now more than ever, DPLF is committed to the task we undertook five years ago: to publicize and disseminate Latin American jurisprudence on international crimes as a tool for those working to make the administration of justice possible in domestic courts and to address the myriad challenges still facing democracies.

Obviously, the value of the rulings included in both volumes of the digest lies in their potential to help individual victims obtain justice and uncover the truth about what happened during periods of state terrorism, notwithstanding the inevitable setbacks along the way. This is exemplified by the trial against the perpetrators of the Barrios Altos massacre and the petition to pardon former president Alberto Fujimori in Peru.

The latent risk that jurisprudential advances in prosecuting the crimes of the past could be reversed only reinforces the importance of this type of research. Indeed, international standards, the international obligations of states, and legal rulings concerning compliance with those obligations can only be replicated, rejected, or debated to the extent that judges, justice system operators, litigators, and social organizations in other countries and regions are familiar with their content.

Finally, DPLF wishes to recognize the vigilance and active participation of the victims and the international community in domestic proceedings aimed at obtaining justice for past crimes. They have played a key role in consolidating processes of truth, justice, and nonrepetition, with the attendant impact on national justice systems. We also wish to recognize the justices and judges associated with the rulings in this digest for their efforts to impart justice in ways that are consistent with international criminal law. In particular, we applaud those who have interpreted and applied the law in innovative ways that strengthen human rights protections in response

to the complex challenges posed by criminal law and by historical and political circumstances. At the same time, we especially acknowledge those judges who have issued rulings amid pressure and attacks aimed at undermining their independence. We are grateful for their many invaluable contributions, which have situated Latin America at the forefront of the quest for legal alternatives to repay the debt owed to the victims of human rights violations.

Ultimately, it is our hope that this publication will contribute to strengthening the rule of law, which is the central mission of DPLF.

**Katya Salazar**  
Executive Director  
Due Process of Law Foundation

**Leonor Arteaga**  
Program Officer  
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## INTRODUCTION

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The *Digest of Latin American Jurisprudence on International Crimes, Volume II* is the continuation of a project that began more than five years ago under the leadership of Eduardo Bertoni and Katya Salazar. In 2007, the Due Process of Law Foundation (DPLF) decided to study Latin American court rulings on issues traditionally dealt with in the jurisprudence of international courts. The project's aim was to produce a simple, user-friendly tool for practitioners and scholars to facilitate the understanding and use of evolving principles in Latin American litigation related to the criminal prosecution of conducts that could qualify as international crimes.

Toward this end, the project began to identify domestic rulings that had contributed significantly to the debate over the possibility of obtaining and imparting justice for crimes committed at horrific moments in the history of various countries in our region. With assistance from an Advisory Board consisting of Douglass Cassel, Naomi Roht-Arriaza, and Alejandro Garro, the project identified priority research areas and began to collect and systematize the rulings. This effort, which culminated in volume I of the *Digest of Latin American Jurisprudence on International Crimes*, was made possible by institutional support from the Center for Civil and Human Rights of the University of Notre Dame Law School and funding from the United States Institute of Peace.

The success of the initial project showed how important it is to equip those working on justice issues in Latin America and other regions with solid and innovative arguments that have been used and/or developed in domestic court cases. DPLF therefore arranged to continue the project, reconvening the entire team involved in producing volume I. The team decided that the second volume should follow the same thematic and methodological structure used for the first. One of the main selection criteria for rulings to be included was the ability to obtain the complete text of the ruling. In this way, the project would rely on the primary source of the legal argument rather than on academic research containing edited versions of the selected rulings.

In this second phase, however, the team could not ignore new developments in the administration of justice in Latin America. By the time the first volume went to press, the region's courts had already issued a significant number of judgments which, in contrast to the intense constitutional debates of previous years, dealt with the criminal responsibility of those involved in the commission of different categories of international crimes. So while volume I of the digest focused mainly on constitutional arguments relating to the validity of specific domestic laws, the compatibility of domestic and international law, and the scope of victims' rights, volume II concentrates on the most common issues taken up in the rulings in criminal cases.

In this second volume the reader will find, for example, a more in-depth discussion of the theories of imputation, particularly co-perpetration and perpetration-by-means, as well as more thorough discussions of the elements of the crimes. Moreover, as a sign of the times in Latin American criminal justice, the rulings examined raise important new issues, and they have

therefore been included as new sections in volume II. Some examples of this are rulings on the commission of sexual crimes, forced displacement, and the recruitment or enlistment of minors as conducts that amount to international crimes. The team also decided to include an additional chapter on some of the key procedural debates surrounding the criminal prosecution of such crimes.

With these considerations in mind, and to enable users to consult the two volumes of the digest together, the table of contents for this volume reproduces the entire structure of the first volume. Sections that contain new material presented in the second volume are highlighted in bold type, with page numbers included. The remaining sections of the table of contents simply refer the reader to volume I.

On a final note, since the purpose of this project is to present the Latin American rulings as faithfully as possible, they are reproduced in their original form. This means the reader may encounter inconsistencies in terminology, capitalization, and even grammar that may come across as awkward. Nonetheless, the editorial team believes that hewing closely to the original texts is necessary to preserve the integrity of the voice of national courts.

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# LIST OF JUDGMENTS

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Volume II of the *Digest of Latin American Jurisprudence on International Crimes* systematizes 18 rulings handed down by the courts of seven Latin American countries. As in volume I, we first present the identifying information for each ruling and a synthesis of the facts discussed. The identifying information includes (i) the country where the ruling was issued; (ii) the type of proceeding or remedy in which the ruling was issued; and (iii) the name of the victim and/or the accused, nominee, or convicted person. Each ruling has been assigned a unique reference number, consisting of a numeral and a letter, that is used every time the ruling is mentioned in the body of the digest. The numeral corresponds to the order in which the country appears in the list of judgments below (Argentina: 1, Colombia: 2, Guatemala: 3, etc.), and the letter indicates the order in which the ruling appears under each country.

## 1. ARGENTINA

- a. *Criminal cassation remedy (Gregorio Rafael Molina, convicted)* — Decisión de la Sala Cuarta de la Cámara Federal de Casación Penal, Causa No. 12821, “Molina, Gregorio Rafael s/ recurso de casación,” Registro No. 162/12, 17 de febrero de 2012.

Ruling handed down by Chamber IV of the Federal Criminal Court of Cassation on the appeal filed by the defense team of Gregorio Molina of the ruling issued by the Oral Federal Criminal Court of Mar del Plata. In this ruling, Molina is found criminally liable as a necessary participant in the crime of homicide aggravated by cruelty and treachery; as co-perpetrator of the crime of aggravated unlawful deprivation of liberty accompanied by the use of torture, aggravated by having been committed against politically persecuted individuals; and as perpetrator of repeated rapes.

The facts in the criminal case against Gregorio Rafael Molina, a former noncommissioned officer of the Air Force, centered on the operations conducted by task forces attached to the “La Cueva” secret detention center, which operated on the Mar del Plata Air Base. The charges against Molina include the rape of three women. The records from the oral hearings during the trial at the first instance level feature the testimony of one of the women survivors, who stated, “When that man in uniform raped me, it was the Fatherland that was raping me.”

Molina’s defense team tried to argue, among other things, that the statute of limitations for the crime of rape had expired since it could not be considered a crime against humanity. The argument was rejected, marking the first time that an Argentine court held that rape and sexual offenses qualify as crimes against humanity.

**Key issues:** Sexual offenses as crimes against humanity; inadmissibility of due obedience and the state of necessity as grounds for exclusion of liability; inapplicability of the statute of limitations as a norm of conventional and customary law; importance of taking into account the context in which the events occurred in criminal trials for international crimes.

- b. *ESMA Mega-trial (García Tallada, Manuel Jacinto, et al., accused)* — Sentencia de primera instancia dictada por el Tribunal Oral en lo Criminal Federal No. 5, Causa No. 1279, “Donda, Adolfo Miguel s/infracción al art. 144 ter, párrafo 1° del Código Penal” y sus causas acumuladas 1271, 1275, 1276, 1277, 1278, 1298, 1299, 28 de diciembre de 2011.

First instance ruling handed down by the Oral Federal Criminal Court No. 5 against several Argentine ex-military personnel for crimes committed in and in relation to the secret detention center known as the Navy Petty Officers School of Mechanics (Escuela Superior de Mecánica de la Armada, ESMA). Specifically, the court found the following individuals criminally liable: Manuel Jacinto García Tallada (perpetrator-by-means), Oscar Antonio Montes (perpetrator-by-means), Jorge Eduardo Acosta (co-perpetrator), Antonio Pernias (co-perpetrator), Alfredo Ignacio Astiz (co-perpetrator), Raúl Enrique Scheller (co-perpetrator), Jorge Carlos Radice (co-perpetrator), Alberto Eduardo González (co-perpetrator), Néstor Omar Savio (co-perpetrator), Ricardo Miguel Cavallo (co-perpetrator), Adolfo Miguel Donda (co-perpetrator), Julio César Coronel (co-perpetrator), Ernesto Firmon Weber (co-perpetrator), Juan Carlos Fotea (co-perpetrator), Carlos Octavio Capdevila (co-perpetrator), and Juan Antonio Azic (co-perpetrator). The court also ruled to acquit Julio César Coronel, Oscar Antonio Montes, Manuel Jacinto García Tallada, Carlos Octavio Capdevila, Juan Carlos Rolón, and Pablo Eduardo García Velasco.

In the proceeding, the court specifically addressed various arguments presented by the defense teams of the accused. The most relevant of these, for the purpose of this digest, dealt with the applicability of the principles of *res judicata* and *ne bis in idem* and with the extinction of criminal action through the application of provisions relating to amnesty, the statute of limitations, and/or reasonable time period.

The facts of the case concern the actions carried out by Task Force 3.3.2 and crimes committed in the ESMA. As a secret detention center, the ESMA became the Navy’s political power base during the military dictatorship. Its highest authority was Admiral Emilio Eduardo Massera, a member of the Argentine military junta, and it was directed by Rubén Jacinto Chamorro and Jorge Eduardo Acosta in their capacity as chief of intelligence and chief of Task Force 3.3.2, respectively.

On March 24, 2004, then President Néstor Kirchner signed a decree converting the ESMA into a museum for the recovery of historical and social memory about the military dictatorship and for the promotion of human rights.

**Key issues:** Individual criminal liability for crimes against humanity; subjective and objective criminal liability; perpetration-by-means; relationship between theories of attribution, such as perpetration-by-means, and circumstances giving rise to the exclusion of individual liability; orders from a superior officer; due process in criminal trials for international crimes; right to be tried within a reasonable time period; testimonial evidence.

- c. *Appeal (Jaime Lamont Smart, et al., accused)* — Sentencia de la Cámara Federal de Apelaciones de la Plata, Expediente 5838/III, “G., D.E. s/desaparición forzada de personas (Brigada de Investigación de Quilmes),” 26 de mayo de 2011.

Ruling handed down by Chamber III of the Federal Court of Appeals of La Plata on the defense's appeal of the decision of the Special Secretariat of the Federal Criminal and Correctional Court No. 3 of La Plata ordering the trial and pre-trial detention of Miguel Osvaldo Etchecolatz and Jaime Lamont Smart. The latter, who was minister of government of Buenos Aires Province, is the first civilian with that level of office to be tried for crimes committed during the last military dictatorship in Argentina.

The facts of the case relate to crimes committed in and in relation to the secret detention center known as Pozo de Quilmes, which operated in the Police Investigations Brigade Quilmes. This facility operated from the beginning of the dictatorship until 1979. It fell under the administrative jurisdiction of the Camps Circuit, a chain of secret detention camps operated by the Police Headquarters of Buenos Aires.

According to survivors' testimonies, the Pozo de Quilmes detention center was known for its harsh detention conditions and the brutality of the means and methods of torture and interrogation employed there.

**Key issues:** Perpetration-by-means through control over an organized apparatus of power; co-perpetration (necessary participants); superior orders cannot be invoked as circumstances excluding criminal liability; importance of testimonial evidence in criminal trials for international crimes.

- d. *Criminal cassation remedy (Diego Manuel Ulibarrie, convicted)* — Decisión de la Cámara Nacional Penal, Causa No. 12.313, "Ulibarrie, Diego Manuel s/recurso de casación," 25 de abril de 2011.

Cassation remedy brought by the defense team of Diego Manuel Ulibarrie against his conviction at the first instance level by the Oral Federal Criminal Court of Corrientes. The defense argued that the disputed verdict was arbitrary due to a lack of grounds or faulty grounds. In particular, it called attention to "the omission [by the first instance court] with regard to *'the analysis and rebuttal of the defense's claims in the original petition and at the oral hearing'*" (text of the ruling under study).

The facts of the criminal case against Diego Manuel Ulibarrie relate to the operation in which Vicente Víctor Ayala, Julio César Barozzi, Orlando Diego Romero, and Jorge Antonio Saravia Acuña were detained/abducted. The first instance court determined that Ulibarrie, the commander of the operation, was criminally liable as the perpetrator of the crime of unlawful deprivation of liberty aggravated by his position as a public servant, in real concurrence with the crime of unlawful deprivation of liberty aggravated by the use of torture against a politically persecuted person.

**Key issues:** Admission and weighing of evidence at trials involving international crimes in accordance with the principles of sound judgment; circumstantial evidence; testimonial evidence; proof in cases of forced disappearance.

- e. *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused)* — Sentencia de primera instancia contra Juan Demetrio Luna, Tribunal Oral en lo Criminal Federal No. 1 de San Martín, Causa No. 2203, 30 de diciembre de 2011.

First instance verdict handed down by the Oral Federal Criminal Court No. 1 of San Martín in Case No. 2203 brought against Juan Demetrio Luna for the unlawful deprivation of liberty of Victorio Derganz and Carlos José Fateche. According to the facts the court deemed to have been proven, the victims were detained at the entrance of the Ford Motors Argentina factory and then taken to the police station in El Tigre, where they were subjected to different types of torture. Victorio Derganz was released just under a month from the date of his detention. At the time the verdict was issued, Carlos José Fateche's fate was unknown.

At the time the events transpired, Juan Demetrio Luna was the chief of the El Tigre police station. Part of his defense was that the Armed Forces exercised exclusive control over political detainees and did not allow police involvement. The court convicted Juan Demetrio Luna as a principal offender in the crimes of unlawful deprivation of liberty committed through the abuse of authority and aggravated by the use of violence and threats, and the use of torture aggravated by the victim's status as a politically persecuted person. In imposing the sentence, the court took into account that Luna was not the perpetrator of the crime but had only facilitated its commission through his conduct. The court also took into account the fact that Luna requested leave five days after the victims' arrival at the El Tigre police station, and therefore his participation was very limited.

**Key issues:** Passive subject in the crime of genocide; characterization of the facts as crimes against humanity; physical and psychological torture; complicity as a form of participation; superior orders; testimonial evidence; evidence derived from investigation commissions.

## 2. COLOMBIA

- a. *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee)* — Sentencia parcial de la Sala de Justicia y Paz del Tribunal Superior Bogotá, M.P. Eduardo Castellanos Roso, Radicación interna 1154, Rad. 110016000253200883280, 16 de abril de 2012.

Partial ruling handed down by the Justice and Peace Chamber of the Superior Court of Bogota against Orlando Villa Zapata, a demobilized member of the Victors of Arauca Bloc of the United Self-Defense Forces of Colombia, for the offenses of illicit association, training for unlawful activities, and unlawful recruitment of minors, among others. Orlando Villa Zapata, who became the second in command of this bloc, had already been convicted in the regular court system and sentenced to 25 years in prison for the Caloto massacre, in which 20 indigenous people were murdered. He escaped from prison in 1998, six years into his prison term. Aided by Vicente Castaño, he managed to remain at large and joined the ranks of the United Self-Defense Forces of Colombia, where he initially formed part of Castaño corps of bodyguards.

**Key issues:** War crimes, characterization of the situation as a non-international armed conflict; active and passive subjects in war crimes; recruitment of minors (phenomenon and international legal framework); procedural importance of considering the context for a specific sets of facts before the court in order to determine the nature of the crimes.

- b. *Ruling and motion for comprehensive reparations (José Rubén Peña Tobón, et al., nominees)* — Sentencia de la Sala de Justicia y Paz del Tribunal Superior de Distrito Judicial de Bogotá, M.P. Léster María González Romero, Radicaciones: 1100160002532008-83194; 1100160002532007-83070, 1 de diciembre de 2011.

Ruling and motion for reparations issued by the Justice and Peace Chamber of the Superior Court of Bogota against José Rubén Peña Tobón, Wilmer Morelo Castro, and José Manuel Hernández Calderas as the perpetrators and co-perpetrators of the crimes of aggravated conspiracy, murder of a protected person, torture of a protected person, forced disappearance, aggravated simple kidnapping, destruction and appropriation of protected assets, aggravated theft, and deportation, expulsion, or transfer of the civilian population. José Rubén Peña Tobón was found liable as the perpetrator of the crime of violent carnal access to a protected person.

The three convicted defendants were members of the Victors of Arauca Bloc of the United Self-Defense Forces of Colombia (AUC). At the time of his demobilization, José Rubén Peña Tobón held the highest rank as the commander of the Centauros Company, and he was the director and an instructor at the La Gorgona School. Before joining the AUC, Peña Tobón was a member of the National Army of Colombia. There he “received training as a lancer, parachutist, assault leader, packer, and explorer, and in the use of explosives, free-fall, and urban and rural counterinsurgency; as a noncommissioned officer, he reached the rank of master sergeant, and served in the Special Forces ‘Ambrosio Almeyda de Tolemaida’ until October 29, 1999, when he was discharged through a disciplinary process” (text of the sentence under study).

**Key issues:** Crimes against humanity; ideal concurrence of crimes; crimes against humanity and war crimes; sexual crimes as crimes against humanity and war crimes; forced displacement of persons.

- c. *Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee)* — Decisión del recurso de apelación, Sala de Casación Penal de la Corte Suprema de Justicia, M.P. Sigifredo Espinosa Pérez, Proceso No 32022, 21 de septiembre de 2009.

Appeal, filed by representatives of the victims, of the June 1, 2009, decision by the Justice and Peace Chamber of the Superior Court of Bogota to indict based on the charges brought by Attorney General’s Office 18 of the Justice and Peace Unit against nominee Gian Carlo Gutiérrez Suárez. The charges against Gutiérrez Suárez, a demobilized member of the Calima Bloc of the United Self-Defense Forces of Colombia, included the murder of protected persons, kidnapping, extortion, and forced displacement.

The appeals filed argued that the indictment did not include all of the crimes committed or clarify all of the relevant facts. The victims’ representatives contend, for example, that Gutiérrez Suárez constantly referred to the obedience he owed his superiors but failed to provide the names, places, and motives for the crimes. In this sense, the representatives assert in their pleadings, the right to truth of the victims and their families cannot be considered to have been satisfied, since they should have the opportunity to understand the reason for all those crimes. The Supreme Court ruled in favor of the appeal, overturned the disputed ruling, and returned the case to the court.

**Key issues:** International recognition and evolution of the concept of crimes against humanity; characterization of a non-international armed conflict; link between the conduct and the armed conflict as an element of war crimes; state obligations to establish and define international crimes and investigate and prosecute those responsible; procedural aspects of the criminal prosecution of international crimes.

- d. *Motion for review (Gustavo Amaya Ruiz, et al., accused)* — Decisión de la Sala de Casación Penal de la Corte Suprema de Justicia, M.P. Julio Enrique Socha Salamanca, Proceso No. 31091, 4 de mayo de 2011.

Criminal Prosecutor Thirty of Bogota filed the motion for review of the ruling by the Superior Military Tribunal, which upheld the resolution of the Inspector General of the National Police ordering that the proceeding against several defendants for the crime of homicide be discontinued.

The facts in the case relate to the murder of Professor Santos Mendivelso Coconubo. According to testimony given before the authorities of jurisdiction, Mendivelso was allegedly murdered because of his activities as a trade unionist and his alleged membership in the National Liberation Army. At the time the events occurred, the alleged perpetrators of the murder—who benefited from the resolution to discontinue the proceedings—were members of the National Police.

While the investigation of the events was originally before the ordinary authorities, on March 2, 1995, the Disciplinary Chamber of the Superior Council of the Judiciary remanded the case to the military criminal courts, arguing that “the crime was attributed to active duty members of the National Police and in the course of their duties” (text of the ruling under study). In May 1995, the Office of the Inspector General of the National Police ordered that the proceedings be discontinued. This decision was upheld two months later by the Superior Military Tribunal.

In January 2009, then Criminal Prosecutor Thirty of Bogota brought a motion for review of the aforementioned decision pursuant to Article 220 (3) of Law 600 of 2000 (Criminal Procedures Code), to rulings from the Constitutional Court of Colombia, and to the subsequent regulation of the principles contained therein through Law 906 of 2004 (Criminal Procedures Code). In his pleadings, the prosecutor argued that the murder of Professor Mendivelso Coconubo had been the subject of a judgment by the Inter-American Court of Human Rights, which determined that the Colombian State had failed to fulfill its obligations to investigate, try, and punish. The Supreme Court of Justice ruled that the petition had merit and remitted the file to the Office of the Attorney General of the Nation to pursue the matter.

**Key issues:** Crimes against humanity; international crimes that are excluded from military criminal jurisdiction; requirements for reopening a case or a matter and for determining the nonapplicability of the principle of *ne bis in idem*.

### 3. GUATEMALA

- a. *Case of the Dos Erres Massacre (Roberto Aníbal Rivera Martínez, et al., accused)* — Sentencia de primera instancia, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, C-01076-2010-00003, Oficial 1°, 2 de agosto de 2011.

First instance ruling handed down by the First Sentencing Tribunal for Crime, Narcotics, and Crimes against the Environment against members of the Kaibil patrol,<sup>1</sup> who were responsible for the deaths of 214 people in the hamlet of Las Dos Erres. The patrol was commanded at the time by Kaibil instructor Lieutenant Roberto Aníbal Rivera Martínez. This ruling also determined the criminal liability of Second Lieutenant (Reserve) Carlos Antonio Carías López, commander of the Las Cruces military detachment, to whom the local population went seeking assistance and information about the events that took place in that same area.

The Historical Clarification Commission of Guatemala considered the Dos Erres massacre to be one of the emblematic events in the internal armed conflict in that country. The operation was planned in retaliation for the theft of 21 guns by the guerrillas. Compounding the brutality with which local residents were killed were the actions that followed the massacre itself: the settlement was not only looted and burned, it was literally erased from the map of Guatemala. The Dos Erres massacre entailed the destruction, in every sense of the word, of a community of (nonindigenous) rural farmers that military intelligence had identified as a support base for the guerrilla forces.

**Key issues:** Direct perpetration; co-perpetration (necessary participants); use of investigatory and truth commission reports as evidence; other types of evidence given by military and historical experts and forensic anthropologists.

- b. *Criminal cassation remedy (Juan Guillermo Oliva, convicted)* — Decisión de la Cámara Penal de la Corte Suprema de Justicia, Recursos de casación 109-2003 y 110-2003, 14 de enero de 2004.

<sup>1</sup> The Kaibiles are elite troops of the Armed Forces of Guatemala. According to the final report of the Historical Clarification Commission (CEH by its Spanish acronym), “[a]s combat methods evolved and were modernized, an elite force was created in the 1960s and early 1970s in order to have specialist troops available. In this way, the Army would be able to mount a more rapid response to guerrilla operations in urban and rural areas, one that was more cost-effective and would deal a decisive blow to the insurgent units.” The Kaibil School officially opened in the 1970s with the involvement of Guatemalan army members who had taken courses in other countries, mainly the United States. The CEH final report goes on to say that the training given members of the Armed Forces in the Kaibil School “revolved around survival methods in extreme combat situations, torture techniques for use on prisoners of war to quickly obtain information on the insurgents, anticommunist ideological indoctrination, psychological operations methods, and so forth. The training included simulated attacks, incursions, and destruction of villages. [...] ‘The KAIBIL is a killing machine when foreign forces or doctrines threaten the Fatherland or the Army.’ This is the text of number 9 of the Kaibil Decalogue, which is found under Mission and Capabilities of the ‘KAIBIL’ School. This motto can be regarded as an expression of the Kaibil philosophy.” “Human Rights Violations and Acts of Violence,” chapter 2 in *Guatemala: Memory of Silence*, final report of the Historical Clarification Commission, vol. 1, *Strategies and Mechanisms of the Parties* (Guatemala City: CEH, 1999), paras. 112, 116, and 119.

Ruling handed down by the Criminal Chamber of the Supreme Court of Justice with regard to the cassation remedies brought by the Public Ministry and by joint plaintiff Helen Beatriz Mack Chang, challenging the ruling on the appeal handed down by the Fourth Chamber of the Court of Appeals. In the disputed ruling, the Fourth Chamber modified the ruling of the Third Sentencing Tribunal for Crime, Narcotics, and Crimes against the Environment and acquitted Juan Guillermo Oliva. According to the Fourth Chamber's reasoning, by failing to attribute the plan to murder Myrna Mack Chang to the Presidential High Command (Estado Mayor Presidencial), a causal relationship could not be established between the conduct of Juan Guillermo Oliva and the crime in question.

The Supreme Court of Justice overturned the ruling on the appeal. In its ruling, the high court held that the Fourth Chamber of the Court of Appeals had erred by failing to distinguish between the Presidential High Command and the latter's Department of Presidential Security. The Supreme Court reasoned that even though it could not be proved that the aforementioned plan had been created in the Presidential High Command, there was sufficient evidence to find Juan Guillermo Oliva criminally liable, in his capacity as the deputy director of the Security Department, as the perpetrator of Myrna Mack Chang's murder.

**Key issues:** Co-perpetration (necessary participants).

- c. *Case of Myrna Mack (Edgar Augusto Godoy, Juan Valencia Osorio, and Juan Guillermo Oliva, accused)* — Sentencia de primera instancia, Tribunal Tercero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, C-5-99, Oficial 3ro., 3 de octubre de 2002.

First instance ruling handed down by the Third Sentencing Tribunal for Crime, Narcotics, and Crimes against the Environment against Juan Guillermo Oliva Carrera, deputy chief of the Department of Presidential Security of the Presidential High Command, for the murder of Myrna Elizabeth Mack Chang. The same tribunal decided to acquit defendants Edgar Augusto Godoy Gaitán and Juan Guillermo Oliva Carrera.

As this ruling recognizes, Myrna Elizabeth Mack Chang, a social anthropologist and founder of the Association for the Advancement of Social Sciences (AVANCSO), specialized in the study of forced displacement and its relation to internal armed conflict. Myrna Mack was targeted by the political counterinsurgency carried out by the Guatemalan army high command specifically because of her professional activities. The Historical Clarification Commission regarded this murder as an emblematic case in the Guatemalan armed conflict.

**Key issues:** Co-perpetration (principal offenders); evidence taken from the reports of investigative or truth commissions; importance of including and considering the historical and social context in determining and characterizing the facts.

#### 4. SPAIN

- a. *Constitutional remedy (amparo) brought by Rigoberta Menchú Tum, et al. (Complaint against Guatemalan civilian and military public officials)* — Sentencia de la Sala Segunda del

Tribunal Constitucional, Recursos de amparo No. 1744-2003, 1755-2003 y 1773-2003, STC 237/2005, 26 de septiembre de 2005.

Ruling handed down by the Spanish Constitutional Court in relation to three *amparo* remedies brought by Rigoberta Menchú and other physical persons and associations against the rulings of the Spanish National Court en banc and the Supreme Court. The disputed rulings held that the Spanish courts did not have jurisdiction to hear the suit brought by Rigoberta Menchú for various incidents that occurred in Guatemala from 1978 to 1986. Specifically, the suit included the attack on the Spanish Embassy in Guatemala City in 1980, in which 37 people died, as well as the murder of several Spanish priests.

As far as the first of the disputed rulings, the National Court en banc based its rejection of Spanish jurisdiction on the principle of complementarity, which, it held, should govern the relationship between universal jurisdiction and territorial jurisdiction under Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide. In its ruling, the Supreme Court took a broader view of the principle of complementarity while offering a more narrow interpretation of Article 23(4)(a) of the Organic Law of the Judiciary as the basis for the exercise of universal jurisdiction. The Constitutional Court ultimately rejected the arguments in both rulings and proposed a broader interpretation of universal jurisdiction from the standpoint of the right to access to justice.

While this ruling is not from a Latin American court or tribunal, it presents arguments that are directly related to the Guatemalan Constitutional Court's ruling on the request for the extradition of several generals from Guatemala to Spain. The Guatemalan ruling can be consulted in volume I of the *Digest of Latin American Jurisprudence on International Crimes*.

**Key issues:** Universal jurisdiction; determination of the competence of a court to exercise universal jurisdiction; relationship between the exercise of extraterritorial jurisdiction and state sovereignty; concurrence of jurisdictions and principle of complementarity.

## 5. MEXICO

- a. *Miscellaneous file 912/2010 (Compliance with the judgment in the case of Rosendo Radilla v. Mexico)* — Acuerdo del Pleno de la Suprema Corte de Justicia de la Nación, Expediente Varios 912/2010, 14 de julio de 2011.

Pursuant to the judgment issued by the Inter-American Court of Human Rights in the case of *Rosendo Radilla v. Mexico*, the president of the Supreme Court of Justice of the Nation initiated a consultation process with the Court en banc in order to obtain a ruling on how to proceed in light of that judgment. Toward this end, an initial file was opened (489/2010) and the following decisions were issued, among others: (i) that that Supreme Court of Justice had the power to determine whether the international judgment imposed direct obligations on the Judicial Branch of the Federation, and (ii) that the matter should be sent back to a minister to draft a proposal specifying how those obligations should be met.

In carrying out this process, an agreement was issued in connection to miscellaneous file 912/2010 recognizing the specific obligations of the Judicial Branch under the Inter-American Court judgment. It also set out the measures that the Judicial Branch should take in order to comply with its obligations. According to the decision in question, the measures include the *ex officio* review of compliance with conventions by the judiciary, as well as a new interpretation of Article 57 of the Mexican Code of Military Justice relating to the scope of military criminal jurisdiction.

**Key issues:** Compliance with international obligations by the judiciary; limits on military criminal jurisdiction; exemption of civilians from any form of exercise of jurisdiction by military courts.

## 6. PERU

- a. *Constitutional remedy (Alberto Fujimori Fujimori, convicted)* — Sentencia del Pleno del Tribunal Constitucional sobre el recurso de agravio constitucional, EXP. N.º 4235-2010-PHC/TC, 11 de agosto de 2011.

Constitutional remedy filed by the defense team of Alberto Fujimori Fujimori against the ruling handed down by the Fourth Specialized Criminal Chamber for Cases involving Inmates of the High Court of Justice of Lima on September 2, 2010.

During the criminal trial of former president Fujimori, his defense team filed three motions of recusal against the members of the Permanent Chamber of the Supreme Court of Justice. The First Transitory Criminal Chamber of the Supreme Court of Justice was ordered to reconvene to take up the three motions and decided that they were unfounded. Motions to annul were filed against these decisions. In ruling on those motions, the Supreme Chamber found that it was “not competent to review motions derived from criminal proceedings the review and final appeal of which are before another Criminal Chamber of the Supreme Court of Justice of the Republic” (text of the ruling under study).

The defense team challenged the latter ruling in a *habeas corpus* petition before the Forty-fourth Criminal Court–Inmates of Lima for violation of the right to appeal legal rulings and the right to individual liberty. That court found the petition inadmissible. Fujimori’s defense team then filed an appeal against this decision, which was taken up and rejected by the Fourth Specialized Criminal Chamber for Cases involving Inmates of the High Court of Justice of Lima.

The ruling under study is the last link in this long chain of procedural remedies. It definitively establishes the content and scope of the right of access to remedies or to appeal legal rulings as an inherent part of the basic right of appeal.

**Key issues:** Criminal trials of international crimes must adhere to the rules of due process; right of appeal.

- b. *Motion for dismissal of criminal proceeding (Santiago Enrique Martín Rivas, et al., accused)* — Decisión de la Primera Sala Penal Especial de la Corte Superior de Justicia de Lima, Exp. 28-2001, 15 de septiembre de 2010

Ruling of the First Special Criminal Chamber of the High Court of Justice of Lima on the motion for dismissal filed by the defense team of the accused in Case 28-2001. The defense’s petition is based on Legislative Decree No. 1097, which expedited the entry into force of several provisions of the new Criminal Code in order to “regulate the application of procedural norms for crimes involving human rights violations.” According to the relevant articles, a final stay must be ordered in proceedings related to serious human rights violations and crimes against humanity when the time period established for pre-trial proceedings or pre-trial investigation has been exceeded. In its ruling, the Special Chamber declared the petition for dismissal inadmissible, finding that the measure was incompatible with the international human rights obligations of the Peruvian State.

This ruling was issued in the trial of members of the so-called Colina Group or Colina Detachment for the Barrios Altos massacre and the kidnapping and murder of journalist Pedro Herminio Yauri Bustamante and of nine farmers from the El Santa community. The first two incidents were part of the criminal trial against Alberto Fujimori. The third, the disappearance and murder of the nine farmers, occurred on May 2, 1992. According to the final report of the Truth and Reconciliation Commission of Peru, the motive for the murders was to teach a lesson to employees of companies owned by Jorge Fung Pineda who “were causing problems.” During the course of events leading up to the murder of the nine victims, there were also reports of attacks by groups from Sendero against the company owned by the Fung family.

**Key issues:** Nonapplicability of the statute of limitations as a rule of international conventional and customary law; dismissal of criminal cases.

## 7. URUGUAY

- a. *Appeal (Juan Carlos Blanco Estradé, convicted)* — Sentencia del Tribunal de Apelaciones en lo Penal de Tercer Turno, IUE 17-414/2003, Sentencia No. 22, 16 de febrero de 2012.

Ruling handed down by the Criminal Court of Appeals for the Third Circuit on the appeal and joint appeal filed by the defense team of the person identified in the ruling as “AA” and by the Office of the Prosecutor, respectively, challenging the ruling handed down by the First Instance Judge of the Criminal Court for the First Circuit on April 21, 2010.

The facts in the case concern the detention of Elena BB, who was held in the facilities of Battalion No. 13 from the beginning of July 1976 until she was executed in November of that year. Significantly, the ruling notes that at the moment of her apprehension, Elena BB temporarily escaped her captors and entered the grounds of the Venezuelan Embassy in Uruguay, screaming for political asylum. The officers involved in the operation also crossed into the embassy grounds, where they violently apprehended Elena BB. In light of these actions, the diplomatic representation requested a response from the Uruguayan government and the

immediate transfer of the victim to the embassy. This is the context for the account provided in the ruling of the actions and involvement of the accused, AA, who was minister of foreign affairs of the Republic at the time the events occurred. The incident acquired such importance that it ultimately led to the severing of Venezuelan-Uruguayan relations.

This is a very unusual ruling in that it establishes the criminal liability of a civilian government official who had never belonged to the armed forces of his country for the detention and execution of a political activist. Although the ruling does not reveal the name of the accused, it is obvious that it refers to Juan Carlos Blanco Estradé, who was the foreign minister in the constitutional government (1972–1973) and later in the de facto government (1973–1985) of Juan María Bordaberry. This conviction is in addition to a previous one obtained in the trial of Bordaberry and Blanco Estradé for the murders of Zelmar Michelini and Héctor Gutiérrez Ruiz, former legislators, and of Rosario Barredo and William Whitelaw, members of the Tupamaros National Liberation Movement.

**Key issues:** Co-perpetration; evidence taken from the reports of investigative or truth commissions; relevance of circumstantial evidence in establishing an extrajudicial murder.

- b. *Remedy of unconstitutionality (Articles 1, 3, and 4 of Law No. 15.848. Law on the Expiration of the Punitive Claims of the State)* — Sentencia de la Suprema Corte de Justicia, Ficha 97-397/2004, Fallo 365/2009, 19 de octubre de 2009.

Remedy of unconstitutionality filed by the National Prosecutor for Criminal Matters for the Second Circuit in the proceedings initiated pursuant to the complaint filed by AA. The complaint requested an investigation into the circumstances surrounding the June 29, 1974, death of AA's sister in a military facility. The judge of jurisdiction requested the Executive Branch to pronounce on the applicability, in this specific case, of the Expiry Law (Law on the Expiration of the Punitive Claims of the State). The response was affirmative. In this context, the prosecutor filed the aforementioned remedy, arguing that the law was incompatible with the Constitution of the Republic and with the international treaties ratified by Uruguay.

After an analysis that touched on certain aspects of international law but mainly relied on constitutional arguments, the Supreme Court of Justice found the law unconstitutional and not applicable to the case in question.

**Key issues:** Duty of states to combat impunity; judicial control over national laws that perpetuate impunity does not infringe on the separation of powers; evolution of the prohibition of amnesty laws under international human rights law; the direct exercise of civic sovereignty through a referendum to derogate cannot confer constitutionality on a law that violates principles or norms enshrined in the constitution.

# CHAPTER I

## CRIMES UNDER INTERNATIONAL LAW

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### 2. GENOCIDE

#### B. Elements of the crime of genocide

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

*ARGENTINA, Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna (defendant) (List of Judgments 1.e), Whereas IV.* As for the argument in the joint lawsuit represented by Drs. Dinani and Dentone, the Court has already had the opportunity to rule on the issue of the crime of genocide and held that that criminal definition is not applicable. Instead, it is a matter of crimes against humanity.

Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, which sets out the conducts that are considered to fall under the definition of genocide, states that “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

We concur with the ruling from the Oral Tribunal of Tucumán in the Vargas Aignasse case, which found that the conduct could not be subsumed under the definition of genocide in international criminal law by considering the victim to be a member of a national group, since this would ascribe a meaning to such a group other than the one set out in international law and hence in the Genocide Convention. Under international law, “national group” always refers to groups of individuals united by a common past, present, and future, by a common cultural universe that immediately connotes the idea of nation. That specific meaning, in turn, is associated with the international community’s interest in protecting national minorities in the context of the emergence of plurinational States at the end of World War II. It is therefore difficult to argue that the Argentine Republic constituted a plurinational State that, during the period in which the events in this case occurred, encompassed at least two nationalities—one consisting of the coup participants and the other, those persecuted by the de facto government—in order to interpret the events as having been committed by a State controlled by one national group against another national group. Nor is it possible, given the meaning of “national group” under international law, to include the entire Argentine nation as a single national group by regarding the crimes as acts committed against a member of a national group by other members of the same group.

In his analysis of the crime defined in Article II of the Convention, Kai Ambos (“Remarks on the General Part of International Criminal Law”) asserts that the list is exhaustive from two perspectives: with respect to the crimes mentioned and with respect to the groups mentioned. The object of the attack, then, is a set of persons distinguished from the rest of the population

by one or more of the aforementioned characteristics, and “*groups of individuals related by characteristics other than those mentioned, for example, political or cultural groups, are not protected.*”

In its 2007 doctrinal report on the difference between crimes of genocide and crimes against humanity, the Nizkor Team of Brussels asserted that in order to qualify as genocide, the alleged murders or other prohibited acts must have been “*committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.*” It points out that the victims of the Argentine military were targeted for their presumed political beliefs and because military personnel regarded them as “incompatible with [the military’s] political and social project” and a threat to the country’s security. They were not targeted “because of their membership in a group,” as required under the international standard for genocide, but rather because of their presumed individual political views or social values. Therefore, these acts do not amount to genocide under international law.

It is noted that when such acts are intended to destroy a political group, under international law they fall directly into the category of crimes against humanity, which do not require the specific intentionality inherent to genocide. A reading of the preparatory documents for the Genocide Convention shows that certain groups, such as political and economic groups, were excluded from protection because they are regarded as “mobile groups”—meaning that one joins them out of individual political commitment—while the Convention presumably was intended to protect relatively stable, permanent groups. [...]

Similarly, Alicia Gil Gil (“*Posibilidad de persecución en España de violaciones a los derechos humanos cometidos en Sudamérica*”) defines the “group” referred to in the Convention as a certain number of individuals related by common characteristics that distinguish them from the rest of the population, with an awareness of this. She argues that the following can never be genocide: “*The mass killing of people of a single nationality... when the intention is not to eradicate that national group.*” She explains that when the aim is to eliminate people who share the same nationality as the active subject because of their refusal to submit to a particular political regime, then their nationality is not being destroyed either in whole or in part. The group identified as the victim is not characterized as a national group—which is to be eliminated for that reason—but rather as a “*subgroup of the national group, whose cohesiveness is determined by its opposition, or refusal to acquiesce, to the directives of the criminal.*”

### 3. CRIMES AGAINST HUMANITY

COLOMBIA, *Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 4.* By crimes against humanity [*footnote omitted*], we mean serious violations of international human rights law that offend the moral conscience of humanity and negate the existence of the norms essential for human coexistence. In this sense, a crime against humanity has a dual effect: it inflicts direct harm on a group of people with shared ethnic, religious, or political characteristics, and it inflicts symbolic harm on humankind as a whole.

In the latter case, the prejudicial act is of such magnitude that all of humankind comes to embody the harm, evoking the pain and suffering that those types of acts have inflicted on other human beings, in the belief that the dignity of all individuals is undermined by the mere fact that such acts have been committed, even though the nationals of other countries were not directly involved. Therefore, the harm caused by a crime against humanity is symbolically

transferred to the international community as a whole and goes beyond the limit of what is tolerable for humanity and for human beings.

On the essence of crimes against humanity, it is worth bearing in mind what the International Criminal Tribunal for the former Yugoslavia had to say in its judgment in the Erdemović case:

*“Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perform demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.”*

## B. Elements of crimes against humanity

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

A key aspect of the jurisprudential interpretation of the legal definition of crimes against humanity is that it delimits what we are to understand as a widespread or systematic attack directed against the civilian population as an inherent element of such crimes. Beyond a general definition of crimes against humanity, none of the legal instruments directly applicable to the trials before the criminal tribunals established for the former Yugoslavia and Rwanda sets out a clear definition of what should be understood by “attack.” The interpretations developed by both tribunals are critical in this regard.

Specifically, in its legal rulings in cases such as *Prosecutor v. Duško Tadić*, *Prosecutor v. Mile Mrkšić, et al.*, and *Prosecutor v. Dragoljub Kunarac, et al.*, the International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that for the purposes of crimes against humanity, an “attack” must be understood not only as the use of armed force in the course of hostilities, but also as “a course of conduct involving the commission of acts of violence.”<sup>2</sup> Supplementing this definition, in the case of *Prosecutor v. Ante Gotovina, et al.*, Trial Chamber I argued that an attack on a civilian population, as distinguished from an armed attack, is composed of multiple acts of violence and mistreatment of the type referred to in Article 5 of the ICTY Statute.<sup>3</sup> Similarly, Trial Chamber I held that in order for an offense to amount to a crime against humanity, “it must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a

<sup>2</sup> International Criminal Tribunal for the former Yugoslavia (hereafter, ICTY), *Prosecutor v. Dragoljub Kunarac et al.*, Trial Chamber, Judgment, Case No. IT-96-23-T and IT-96-23/1-T, February 22, 2001, para. 415. More recently, see ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Trial Chamber III, Judgment, Case No. IT-98-32/1-T, July 20, 2009, para. 873; and ICTY, *Prosecutor v. Momčilo Perišić*, Trial Chamber I, Judgment, Case No. IT-04-81-T, December 6, 2011, para. 82.

<sup>3</sup> ICTY, *Prosecutor v. Ante Gotovina and Others*, Trial Chamber I, Judgment, Case No. IT-06-90-T, April 15, 2011, para. 1702.

limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context of an attack against a civilian population.”<sup>4</sup>

In contrast to the *ad hoc* criminal tribunals, the Rome Statute of the International Criminal Court (ICC) specifically sets out what must be understood by “an attack against the civilian population.” According to Article 7(2)(a) of that instrument, “Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 [of this Article] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” In interpreting Article 7 of the Rome Statute, different chambers of the ICC have established that, as a course of conduct, an attack against the civilian population refers to the commission of the constitutive or underlying offenses (murders, forced displacement, rape and other sexual attacks, torture, etc.), and that, “beside the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.”<sup>5</sup> It has also been asserted that the “multiple commission of acts” means that more than a few isolated incidents have occurred, insofar as the requirement of a State or organizational policy implies that the attack follows a regular pattern.<sup>6</sup> More specifically, it has been established that “[t]he policy [State or organizational] need not be formalized [*footnote omitted*]. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion [...]. [Hence], in determining whether an act forms part of a widespread [or systematic] attack, the Chamber considers the characteristics, the aims, the nature or consequences of the act.”<sup>7</sup>

The international jurisprudence presented in this section stresses the importance of emphasizing, in national proceedings against the perpetrators of international crimes, the tie between the facts of the case and the general historical context. Moreover, as a litigation strategy, it is important to present cases that show the course of conduct and, as stressed in international precedents, (i) constitute in and of themselves an attack against the civilian population and are proof of such an attack, and (ii) indicate the existence of a pattern of multiple acts and/or acts related to a policy implemented or promoted by a State or organization with the capacity to commit crimes of this nature. Incorporating the context is important not only for arriving at the legal truth about the events, but also for determining the exact nature of the crimes committed. The paragraphs transcribed below focus specifically on the importance of arguing a course of conduct in order to refute the argument of isolated offenses.

COLOMBIA, *Ruling and motion for comprehensive reparations (José Rubén Peña Tobón, et al., nominees) (List of Judgments 2.b), Whereas section.* [T]he horrors of the War also led to the identification of crimes against humanity. The latter refer to criminal events [*footnote omitted*] committed as part of a widespread and systematic attack against a civilian population, pursuant

<sup>4</sup> ICTY, *Prosecutor v. Dragoljub Kunarac, et al.*, *supra* note 3, para. 417, citing the *Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, (*gks: sic orig. says Apr 30*) April 3, 1996, in the case of *Prosecutor v. Mile Mrkšić and others*, Case No. IT-95-13-R61.

<sup>5</sup> International Criminal Court (hereafter, ICC), *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision confirming charges, ICC-01/05-01/08-424, June 15, 2009, para. 75.

<sup>6</sup> *Ibid.*, para. 81.

<sup>7</sup> *Ibid.*, paras. 81 and 86.

to a policy to commit such acts and to promote that policy, which must be driven by an illegal armed organization, as is the case here.

[T]he crimes taken up here meet the definition of crimes against humanity. In the first place, and as noted in the factual background for this decision, they occurred in a context of a widespread and systematic attack on the civilian population as a result of the deterioration of the Colombian internal armed conflict.

Second, the Office of the Attorney General of the Nation [...] documented massacres, selective murders, personal injuries, forced disappearances, forced displacement, kidnappings, threats, and violent carnal access committed by the Victors of Arauca Bloc, acts which—since they were committed in a widespread and systematic way against the population in the territories where the Bloc had influence—amount to crimes against humanity.

Third, the prosecution showed that these acts were not committed in an isolated or sporadic manner, but instead followed a course or pattern of conduct characteristic of the illegal armed organization Victors of Arauca Bloc, as recorded in the indictment of the nominees. The commission of serious violations against the civilian population was identified as a pattern of conduct [*footnote omitted*] of the Bloc.

According to statistics for 2010 provided by the Office of the Public Prosecutor, the Justice and Peace Information System [Sistema de Información de Justicia y Paz] recorded 2,113 victims of actions by the Victors of Arauca Bloc, and only 16 of those records (0.76%) were the result of battles between the illegal armed group and the subversives. The other 2,097 records (99.24%) involved members of the civilian population, who are known to be rural farmers and residents of the region [...].

[T]he Office of the Public Prosecutor documented the commission of serious human rights violations in which the Victors of Arauca Bloc participated: 15 massacres, 860 selective murders, 203 forced disappearances, 418 cases of forced displacement, 210 threats, 191 incidents of extortion and taxation, 150 cases of cattle rustling, 43 incidents of personal injury, 6 attempted homicides, and 3 cases of violent carnal access, two of which were duly substantiated and will be the subject of the instant decision.

The commission of massacres was determined to be a pattern of conduct of the Victors of Arauca Bloc during its incursions into the territories. Similarly, the group consistently engaged in the practice of forced disappearances, aggravated by a policy of covering up the acts by dismembering and burying the bodies or throwing them into the region's canyons and rivers. This explains why, out of the 203 reported cases, just four sets of remains have been recovered.

Similarly, the persecution of the civilian population was manifest in aspects such as control over community life. Using pamphlets, direct messages, communiqués, and graffiti, the organization constantly threatened the inhabitants in the region where it was operating, causing other crimes such as forced displacement. The control wielded by the organization was such that the Bloc was known to organize meetings. It convened population sectors such as cattle ranchers and merchants to convey the illegal armed structure's directives and orders, which included [demands that these sectors pay] a percentage of the profits from their economic activities as well as make other contributions to finance the Bloc.

This control, and its impact on the communities, was [reflected] in other patterns of conduct such as the commission of selective crimes. It was determined that these crimes were committed using lists drawn up from information provided by certain units of the public security forces, whose members were paid a bribe in exchange [*footnote omitted*]. Local politicians also provided

this type of information in exchange for support for their campaigns [*footnote omitted*]. The individuals on the list were labeled as having ties to subversion and ultimately murdered.

In this way, this Chamber has corroborated that despite its antisubversive discourse, the basic strategy of the Victors of Arauca Bloc focused mainly on unilateral attacks targeting people on the margins of the conflict and powerless to defend themselves. This is a grave affront to the conscience of humanity.

Indeed, it is clear that the paramilitaries chose the path of least resistance to achieve territorial advantage and expansion vis-à-vis their natural opponent, the subversion, by mounting every possible form of attack against a civilian population that was defenseless and posed no risk to them whatsoever.

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna (accused), Case No. 2203, List of Judgments 1.e), Whereas IV*. [I]nternational law has clearly defined crimes against humanity as any of a series of inhuman acts including intentional homicide, incarceration, torture, and forced disappearance, committed as part of a widespread or systematic attack against any civilian population, in time of war or in time of peace. These inhuman acts include murder, extermination, torture, enslavement, deportation, political, racial, or religious persecution, arbitrary detention, forced disappearance of persons, and other inhuman acts.

In other words, when such acts are committed systematically or on a large scale, they are no longer common crimes and instead fall under the **more serious category of crimes against humanity**. And this is the conclusion of the Report [doctrinal report on the distinction between the crimes of genocide and crimes against humanity by the Equipo Nizkor, Brussels, 2007], which asserts that: **“Between 1976 and 1983 a series of acts were committed in Argentina as part of a common criminal plan that consisted of extermination, extrajudicial executions, forced disappearances, torture, political and trade union persecution, and illegal or arbitrary detentions.”** [*Emphasis in the original; unofficial translation*]

[The Report goes on to say that] “[s]uch acts against the civilian population amount to crimes against humanity as defined under international law and jurisprudence, mainly because of their widespread and systematic nature. These crimes cannot be characterized as falling within the definition of genocide, since they do not include the elements of *mens rea* specific to this type of crime or of *actus reus*.” [*Emphasis in the original; unofficial translation*]

Some national rulings have used other legal formulas to highlight the cumulative nature of the crimes committed by the accused, without referring explicitly to the widespread or systematic nature of crimes against humanity. An example of this is the ruling transcribed below, in which an Argentine court concludes that the conducts aired in the case cannot be considered part of a real concurrence of crimes, but must be understood as offenses with respect to which there is a criminal unity and resolution, since they were committed as part of a common predetermined plan.

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), Whereas IV*. In its pleadings, the National Human Rights Secretariat argued a real concurrence between the inhuman detention conditions—which we have considered torture—and the actual application of a specific form of physical or psychological torture (electric prod, simulated execution, etc.). This is not the case.

Both actions—subjection to inhuman detention conditions and application of another form of torture—were consistent with the perverse design set out in the plan implemented.

And such a perverse design when put into practice amounts to a crime that may encompass a multiplicity of movements.

And within this multiplicity of movements, the imposition of physical torture supersedes the abuse and harsh treatment inherent to inhuman detention conditions, because the disvalue reflected in the latter is already subsumed in encompassed by the former (subsumption).

As for the rest, the recurrence of offenses does not amount to a case of real concurrence, but rather adds content to the wrongdoing. *Were we to take the view that a real concurrence exists, each individual use of some form of torture would have to be regarded as an independent fact to which, from this perspective, each specific form of psychological torture could be added. This is not appropriate.*

*Contrary, then, to the argument set out in the aforementioned complaint, I submit that there is a criminal unity. Indeed, clearly there is a common resolution given the existence of a common plan, which implies the aggravated seriousness of the behavior taken as a whole.*

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

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

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), Whereas IV*. The applicable offense, moreover, refers to “torture of any kind,” which includes especially harsh treatment or detention conditions. As Creus has pointed out, torture is characterized by the intensity of the victim’s suffering, [by] the use of procedures that produce intense physical or mental suffering. Soler concurs that the threshold is met based on the intensity and the presence of physical or mental suffering.

According to the report by the Unit for Coordination and Follow-up in Cases Involving Human Rights of the Attorney General of the Nation, the criterion of intense physical or psychological harm is also used by organs of the inter-American and European human rights protection systems and by international criminal tribunals to distinguish torture from other less serious types of attacks against personal integrity. Hence, in *Tibi* and later in *Caesar*, the Inter-American Court of Human Rights held that “*keeping a detainee in overcrowded conditions, lacking natural light and ventilation, without a bed to rest on or adequate hygiene conditions, in isolation and incommunicado or with undue restrictions to the system of visits, constitutes a violation of that person’s right to humane treatment.*” In its August 18, 2000, Judgment in *Cantoral Benavides v. Peru*, the Court held, “*according to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim.*”

Elsewhere, the Court and the Inter-American Commission on Human Rights have repeatedly asserted that *the mere consciousness of the risk of death or the risk of suffering severe bodily injury amounts to a case of psychological torture in and of itself.*

The European Court of Human Rights (en banc), in its January 18, 1978, judgment in *Ireland v. The United Kingdom*, held that the concept is derived mainly from a difference in the intensity of the suffering inflicted. It pointed out that the term “torture” implies suffering of “particular intensity and cruelty.” The International Criminal Tribunal for the former Yugoslavia

asserted that it is necessary to take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalization of the ill treatment, the physical condition of the victims, the manner and method used, and the position of inferiority of the victim (*Kvočka* case, Trial Judgment).

Argentine positive law leaves no room for doubt about this, given the broad concept of torture adopted by our legislature: it is clear that the term “torture of any kind” includes mental or psychological torture. In light of this, factors such as the duration of the suffering or the constant repetition of the mistreatment must be taken into account in determining the intensity of the harm to physical or psychological integrity. One can argue, then, that a *combination* of behaviors that are not as severe in and of themselves, or the *reiteration* of one of those behaviors over time, can amount to a specific case of torture. Without question, whether or not the person subjected to such treatment was detained at the time will be a key factor in making this determination, and even more so if the person was in a secret detention center or concentration camp, given the atmosphere of terror, defenselessness, and utter uncertainty about their fate that such establishments instill in the victims.

It is therefore possible to argue that the cumulative effect of the techniques and conditions to which detainees in secret detention centers were subjected amounts to a state of extreme suffering that falls under the legal concept of torture, regardless of whether, in addition, specific forms of physical torture were applied to the victims.

#### 4. WAR CRIMES

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section*. A war crime is a serious violation of the laws and customs applicable to armed conflicts. In other words, it demonstrates a disregard for international humanitarian law, which is ultimately the body of norms and principles used to save lives and alleviate suffering during armed conflicts (internal or international).

In contrast to crimes against humanity, war crimes need not meet any requirements of a widespread or systematic attack. An isolated act can constitute a war crime.

As far as the origin of the concept of a war crime, the Statute of the Nuremberg Tribunal defined it as “*violations of the laws or customs of war*,” which could take the form of murders, ill treatment, deportation, forced labor by civilians and prisoners, execution of hostages, and destruction not justified by military necessity. Subsequently, this category of crimes was included in the Statutes of the international criminal tribunals for Rwanda and the former Yugoslavia, and in the Statute of the International Criminal Court. [...]

[The latter] criminalizes war crimes committed in internal and international armed conflicts and therefore the term “war” includes both situations.

## A. Elements of war crimes

### i. Existence of an armed conflict

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

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section.* The existence or declaration, or not, of an internal armed conflict is determined by verifying the occurrence of factual situations that fall within the normative postulates that have been established to regulate armed conflicts.

[Using Article 1 of Protocol II Additional to the Geneva Conventions of 1949 as the reference], [a]n armed conflict is a set of verifiable facts indicative of battles between the armed forces of the State and insurgent armed forces [*footnote omitted*] that are under responsible command (structure), with sustained territorial control and the ability to carry out military operations in a regular manner against the forces of the State. This is without detriment to the fact that armed structures such as “paramilitaries” may emerge during the conflict with the same structure as that previously described to identify subversive groups. The objective of the former, however, is to fight and destroy the insurgency rather than to attack the political and constitutional establishment. In this case, clashes may occur between the State and any of the irregular groups (insurgents or paramilitaries), between irregular groups, or between the two irregular forces and the armed forces of the State [*footnote omitted*]. [...]

In response to any potential questions as to the content of Additional Protocol II, and drawing on the Rome Statute of the International Criminal Court, the International Committee of the Red Cross has concluded that:

*“In this context, it must be reminded that Additional Protocol II “develops and supplements” common Article 3, “without modifying its existing conditions of application.” [Footnote omitted] This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC [non-international armed conflict] in general. The Statute of the International Criminal court, in its article 8, para. 2(f), confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II.” [Emphasis in original]*

Moreover, the criminal jurisprudence of the International Criminal Tribunal for the former Yugoslavia, in the case of *Duško Tadić*, clearly established that “an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.” [*Footnote omitted*]

[Hence], “it is not required that insurgents exercise territorial control or comply with their obligations under Common Article 3, nor is it necessary that the government employ its armed forces against them (or that the government even be a party to the conflict), or that the insurgents be recognized as belligerents [*footnote omitted*].”

COLOMBIA, *Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 4.* [I]n order for the offenses described in Title II of the

special section of the Criminal Code of 2000 to be applicable,<sup>8</sup> the first requirement is that a special normative element be present, namely a situation that could be characterized as a non-international “armed conflict,” because all of the crimes set out in that section require the act to have been carried out in the course or context of that conflict [*footnote omitted*].

It should be noted, in the first place, that the matter of confirming the existence of an armed conflict of a non-international nature—in other words, of an objective situation—is completely separate from recognizing the belligerent status of the parties to the conflict. Today, from a legal standpoint, Common Article 3 of the Geneva Conventions rejects the notion that the application of humanitarian norms has a legal bearing on the status of the opposing parties. The Constitutional Court recognized this when it took up the constitutionality of Law 171 of 1994, which incorporated Protocol II Additional to the Geneva Conventions of 1949 into domestic law:

*“Common Article 3 expressly provides that the application of its provisions “shall not affect the legal status of the Parties to the conflict.” At the time, this short phrase entailed a veritable judicial revolution, insofar as it meant that the application of humanitarian norms in internal conflicts would no longer be contingent on recognition of the belligerent status of the insurgents.*

*Prior to the Geneva Conventions of 1949, one current of the doctrine held that the law governing armed conflicts was only triggered once the State in question, or other States, had recognized the belligerent status of those who had taken up arms. This meant that in order for a rebel group to be considered subject to international humanitarian law, it was necessary to first recognize the group as a genuine subject of international public law, since, in very simple terms, the declaration of belligerence confers on the rebels or irregular armed groups the right to wage war on an equal footing and with the same international guarantees as the State. Pursuant to such a declaration, the belligerent parties are no longer subject to the domestic law of the country and the internal conflict becomes a civil war governed by the same standards as inter-state wars, since the insurgents have been recognized, whether by their own State or by other States, as a “belligerent community” with the right to wage war. In this situation, any belligerent forces captured by the State automatically have the right to prisoner of war status and ultimately cannot be penalized for the mere fact of having borne arms and participated in the hostilities, since the declaration of belligerent status has afforded them the right to be combatants.*

*Obviously, this circumstance led to a failure to apply humanitarian norms in non-international conflicts, since a declaration of belligerence has a powerful impact on national sovereignty. For this reason, the Conventions of 1949 included a rigorous distinction between the declaration of belligerence and the application of humanitarian law, pointing out that the provisions of the latter could not be invoked to modify the legal status of the parties. The abovementioned phrase, then, eliminated any doubt as to whether humanitarian law could erode State sovereignty. In effect, it means that the application of humanitarian norms by a State in an internal conflict does not imply recognition of the belligerent status of those who have taken up arms.*

<sup>8</sup> Editors’ note: Law 599 of 2000 established the new Criminal Code, which lists, in Book II, Title II, “crimes against persons and property protected under international humanitarian law.”

*Consequently, in a non-international armed conflict, those who have taken up arms are subject to international humanitarian law inasmuch as they are bound to respect humanitarian norms which, as jus cogens norms, are incumbent on all parties to the conflict.”*

*[Footnote omitted]*

The Court is aware that recognizing the existence of an armed conflict is a political act with complex ramifications, and that such a declaration does not fall under the purview of the judicial branch. This does not mean, however, that the legal operator may not verify the existence of such a situation—exclusively for the purpose of enforcing the law of justice and peace, in keeping with its nature and purpose, and in the course of investigating and judging conducts that could meet the definition of “crimes against persons and property protected under international humanitarian law”—in order to safeguard the values protected by international humanitarian law, which take precedence over any political consideration.

In order to determine the minimum requirements for characterizing an internal crisis as an armed conflict subject to international humanitarian law, it is necessary to begin with the concepts that can be inferred from Common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II of [1977].

While Article 3 mentions and regulates non-international armed conflicts, it does not define them. Protocol II, in setting out its sphere of application, describes the elements of an internal conflict as follows:

*“1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*

*2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”*

This means that according to Protocol II, the following is required in order to speak of an armed conflict: (i) battles between the state and dissident armed forces, as long as the latter have (ii) responsible command, and (iii) sufficient control over a territory to carry out military operations, and (iv) to apply humanitarian norms *[footnote omitted]*.

Therefore, the notion of armed conflict reflects the existence of a collective confrontation in which the groups of individuals involved have a sufficient level of organization to plan and carry out sustained and concerted military operations and to impose discipline on behalf of a *de facto* authority. As far as territorial control, moreover, the International Committee of the Red Cross, in its commentary on Protocol II Additional to the Geneva Conventions of 1949, points out that:

*“The word “such” provides the key to the interpretation. The control must be sufficient to allow sustained and concerted military operations to be carried out and for the Protocol to be applied, i.e., for example, caring for the wounded and the sick, or detaining prisoners and treating them decently”* *[footnote omitted]*.

It is also relevant to note that Article 8(2)(f) of the Rome Statute, in relation to the war crimes set out in Article 8(2)(e), expands the scope of the notion of armed conflict to cover confrontations between organized armed groups that do not involve the armed forces of the State:

*“2 (f) ... Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”*

On this point, it is worth noting that in its recent decision confirming the charges in the Lubanga case, Pre-Trial Chamber I of the International Criminal Court characterized the battles between several organized armed groups (UPC/FPLC, FNI, and PUSIC) in the territory of Ituri District (Democratic Republic of Congo) as an armed conflict of a non-international character which did not involve governmental armed forces [*footnote omitted*].

An essential element in determining the existence of an armed conflict is the degree of organization of participating non-State groups. In the excerpts presented below, the Superior Court of Bogota examines the level of organization of the Victors of Arauca Bloc as an essential element for characterizing the situation as a non-international armed conflict. According to the text of the ruling, the Superior Court appears to frame its reasoning using Protocol II Additional to the Geneva Conventions. While the analysis is based on a specific body of law, the characteristics identified by the Court with respect to the degree of organization of a group can shed light on a broader debate. This is particularly true of its examination of the participation of a non-State structure that engages in other criminal activities such as drug trafficking or terrorist acts.

The debate over the degree of organization of a non-State actor, for purposes of characterizing a situation as a non-international armed conflict, has also been the focus of international decisions. In this regard, it is important to point out, first of all, that the mere possibility of the existence of a conflict of this nature means that at least one of the actors in the situation will identify itself as a non-State group. In other words, it is not necessary to establish a tie, direct or indirect, between an armed structure and a state in order to arrive at the aforementioned classification. What is truly relevant, then, is to establish the degree or level of organization of such a group as an essential element for determining that a non-international armed conflict exists under Common Article 3 of the Geneva Conventions and/or Article 8(2)(f) of the Rome Statute of the International Criminal Court.

In its initial ruling at the first instance level in a case before the ICC, the First Trial Chamber found that “[w]hen deciding if a body was an organized armed group [...], the following non-exhaustive list of factors is potentially relevant: the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement [*footnote omitted*].” After listing these factors, the Chamber stressed that “[n]one of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organized armed group,

given the limited requirement in Article 8(2)(f) of the Statute that the armed group was ‘organized.’”<sup>9</sup>

One can conclude from the foregoing that the specific requirements for characterizing a situation as a non-international armed conflict are contingent upon the sphere of application of different international instruments. Many elements will be required for a situation to qualify as an internal armed conflict under Protocol II Additional to the Geneva Conventions of 1949, such as demonstrating that the non-State group was under a responsible command and had control over part of the territory of a state. In contrast, the relevant articles of the Geneva Conventions of 1949 and the Rome Statute only require, with respect to the parties to the conflict, that the armed groups be “organized,” clearly a much lower standard than that required under the Protocol.

In any event, the excerpts from the Colombian ruling transcribed below shed light on one court’s analysis when confronted not just with a non-State group but with an organization that, in addition to participating in an armed conflict, is also engaged in activities identified with common or organized crime or even terrorism. This is, without a doubt, a novel interpretation that other domestic and international courts will have to consider in the future.

*COLOMBIA, Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section.* It is no easy task to characterize a group as an organized armed structure with an objective in a situation of armed conflict. The intensity of the violence in the region as the rationale for denoting an armed conflict has already been discussed. It is also necessary to delve more deeply into the organizational nature of the [Victors of Arauca] Bloc.

An initial consideration that must be born in mind is found in international humanitarian law, which, since Protocol II [Additional to] the Geneva Conventions (1977), has established that an armed group is characterized by being under responsible command and capable, at least temporarily, of exercising sufficient control over part of the territory to enable it to carry out sustained military operations.

In light of these precepts, the Victors of Arauca Bloc meets the three objectively observable criteria: it had a permanent and stable command structure headed by Vicente Castaño and the Mejía Múnera brothers, as well as zone commanders and military commanders who, while fungible, were in command of their troops during the time they held those positions.

Moreover, as stated earlier, the Victors of Arauca Bloc had a presence in nearly 60% of the territory of Arauca, especially in the urban seats of six of its seven municipalities, and a strong rural presence in the municipalities of Tame and Puerto Rondón. Indeed, the group’s control over the rural area and urban center of Tame was virtually undisputed during the time it was present there and up until its demobilization. This suggests a degree of territorial control that, while not absolute, is indicative of an organized structure for carrying out violence and wielding authoritarian power in an area, implementing economic measures, and controlling the population, information, and the flow of people into and out of the zone. [...]

<sup>9</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, March 14, 2012, para. 537.

As already observed, the Bloc's *modus operandi* was focused not on open combat with guerrilla structures but rather on ongoing activities to control the population, attack informers and alleged collaborators, and tackle the insurgents' support networks. It is important to mention this since the notion of armed conflict, and of an armed organization's involvement in it, is not tied to direct involvement in battles or in the theaters of conflict. International jurisprudence has already pronounced on this matter on several occasions. In the case of "Dragoljub Kunarac, et al.," the International Criminal Tribunal for the former Yugoslavia stated that "the laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it," and in another section, that "there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war [*footnote omitted*]."

Similarly, it is not necessary to delimit specific areas where military combat is actually occurring in order to determine the general existence of an armed conflict in a region: "[I]t is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part" [...] [I]t is not necessary that a particular municipality be fraught with armed confrontation for international humanitarian law standards to be applied there [*footnote omitted*]."

Another inherent characteristic of a hierarchical, organized armed structure is that it fulfills an organized objective conveyed by a command structure. This distinguishes it from purely criminal, terrorist, or drug trafficking organizations. This means that, while the Victors of Arauca Bloc committed crimes of all sorts, engaged in drug trafficking as a funding source, and clearly carried out terrorist acts, its aims were not confined to those three objectives. It was part of a larger expansionist project called the United Self-Defense Forces of Colombia which clearly had a national project. In this sense, the Court points out certain characteristics inherent to the Victors of Arauca Bloc that tie it to the armed conflict and reinforce the notion that we are dealing with an armed organization. [...]

[I]t is relevant to examine the phenomenon of self-defense/paramilitary forces from the standpoint of their expansion to different parts of the country; their increasing strength, manpower, and firepower; and their sources [of support]. These are indications of the level of local and regional support they enjoyed, their financing capabilities, and their national economic and cultural diffusion based on the concept of self-defense to defend against the advance of the guerrillas. [...]

[U]ltimately, the function of paramilitary groups and their underlying ideological and military discourse was to attack guerrilla groups. In practice, this meant they were a strategic ally of the armed forces of the state, even if the latter has explicitly and legally declared such groups illegal. While the paramilitary group also attacked civilians—who were its main victims—this criminal behavior must be understood in the context of the conflict and not as isolated decisions linked to common or organized crime. It is the group's openly counterinsurgent nature that makes it paramilitary, regardless of whether it has had the support of officialdom or of specific sectors of the country's army.

Finally, another important characteristic of the paramilitary phenomenon is its offensive approach to the hostilities. This is a clear departure from the phenomenon of defensive (or static) self-defense or of offensive (or dynamic) self-defense that occurred in other parts of the country. The objectives of the self-defense forces (static or dynamic) are geared toward

protecting an important bastion, for example, a hacienda, shopping center, or economic enclave. Their troop movements may even be dynamic. They may temporarily leave the area where the bastion is being protected to avail themselves of a military advantage to attack the enemy. But they always return, and their intent is not to control a territory other than the bastion they wish to protect, which is frequently their funding source.

In contrast, the paramilitary phenomenon is openly dynamic, offensive, and economically predatory [*footnote omitted*]. In other words, their expansionist mission is to contest territories controlled by the enemy (the FARC and ELN in the case of Arauca) and they attempt to seize control of diverse legal or illegal economies in order to sustain their army and its operations. [...]

[Other characteristics, such as the illegal nature of the Bloc, its rapid growth, and its ties to a national project], [...] along with the existence of certain statutes, a disciplinary regimen, and the use of long-range and high-caliber weapons, show that in addition to common crime, the Victors of Arauca Bloc aimed to carry out sustained operations in certain areas of the department, dispute territory and populations with the guerrillas, and attack the latter's structures in order to force them to retreat further from the Araucan area. This indicates that the Bloc was a highly militarized structure of an anti-subversive and paramilitary nature (in the sense described herein) that adhered to the expansionist logic espoused by Castaño House.<sup>10</sup>

## ii. Nexus between conduct and armed conflict

*COLOMBIA, Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 4.* Verifying that the conduct took place in the context of an armed conflict, however, is insufficient to characterize the crime as a violation of international humanitarian law. The evidence must also show that the conduct is related to the conflict, in that the existence of the latter plays a substantial role in the perpetrator's decision to engage in the prohibited conduct, in his capacity to do so, or in the way it is carried out [*footnote omitted*]. This requirement derives from the concept of war crimes as serious violations of the norms regulating the conduct of the opposing parties in situations of armed conflict.

Given the nature of the required nexus, and because this aspect is not defined in the Rome Statute or in any other applicable international rule, much less in the national Criminal Code, it is pertinent to turn to the concept established in the judgments of international tribunals

<sup>10</sup> Editors' note: Castaño House (Casa Castaño) refers to brothers Fidel, Vicente, and Carlos Castaño Gil, leaders of the illegal armed organization known as the United Self-Defense Forces of Colombia (AUC by its Spanish acronym). Fidel founded the Peasant Self-Defense Forces of Córdoba and Urabá (ACCU) in the early 1990s. Carlos took over the ACCU after the death of his brother, Fidel, and later (1995) founded and led the AUC until his death in 2004. The extensive body of literature on paramilitarism in Colombia includes documentation on the groups led by the Castaño Gil brothers. On the emergence and evolution of paramilitarism under Castaño House, see, among other publications, "El imperio paramilitar de los hermanos Castaño Gil de las ACCU a las AUC," in *Deuda con la humanidad: Paramilitarismo de Estado en Colombia 1988–2003* (Bogotá: Banco de Datos de Derechos Humanos y Violencia Política/Centro de Investigación y Educación Popular, 2004); and Rainer Huhle, "La violencia paramilitar en Colombia: Historia, estructuras, reacción del Estado e impacto político," in *Violencia y regulación de conflictos en América Latina*, ed. Klaus Bodemer, Sabine Kurtenbach, and Klaus Meschkat (Caracas: Adlat-Heinrich Boell Stiftung-Nueva Sociedad, 2001).

[the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)]:

*“On this matter, the Appeals Chamber of the ICTY [footnote omitted] and the ICTR [footnote omitted] has pointed out that there need not be a direct nexus between the act and the armed conflict in the sense that it is not necessary that the conduct occur in the heat of battle. According to the Appeals Chamber, it suffices that there be a certain proximity between the conduct and the hostilities taking place in any other part of the territory controlled by the opposing parties, in order to assert that its commission or the way it is carried out is influenced by the existence of an armed conflict [footnote omitted].”*

*For its part, in its decision confirming the charges in the Lubanga case, [Pre-Trial Chamber I] [footnote omitted] of the [International Criminal Court] [footnote omitted] has reaffirmed the jurisprudence of the Appeals Chamber of the ICTY and the ICTR in this regard, while underlining that although the armed conflict does not have to be the ultimate cause of the commission of the conduct, it must at least have played a substantial role in the perpetrator’s decision to engage in the prohibited conduct, in his capacity to do so, or in the manner in which it was carried out. In any case, it is important to underscore that this does not mean that the perpetrator must be a member of the armed forces of any of the parties to the conflict, since, as has been clearly pointed out, war crimes may also be committed by people who are neither combatants nor participating directly in the hostilities [footnote omitted].”*  
[Unofficial translation]

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

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section.* Specifically in relation to war crimes committed during internal armed conflicts, it should be noted that the relevant criminal definitions include non-State armed organizations. This means that like the regular public forces, members of irregular armed groups may be the active subjects of such crimes. Moreover, as far as this type of conflict is concerned, the aforementioned body of law does not include the requirements of territorial control and responsible command set out in Protocol II [Additional to the Geneva Conventions of 1949]. This broadens the range of internal conflicts in which such crimes may occur.

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

#### **a. Civilian person**

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section.* The use of permanent weapons and insignia and uniforms, in addition to regular patrols and attacks, combat, and defensive actions against insurgent groups, distort the civilian status of members of this armed group. As a result, they forfeit the protection afforded civilians in an armed conflict insofar as they voluntarily choose to take up arms, carry out sustained operations, and participate directly in the hostilities.

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

### iv. Colombian case (new)

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section*. Given the objective situations that have occurred in Colombia in the past 50 years, and especially since the 1970s, it is evident that an internal armed conflict is taking place in the country that has often exhibited irregular features or characteristics. This type of armed conflict has three basic components: (i) its long duration, (ii) its irregularity, and (iii) its complexity [*footnote omitted*].

The most significant characteristic of such conflicts [as far as the methods and means of warfare] is the tendency to avoid direct combat. Open battles are relatively rare, while the tactics of choice are surprise attacks such as ambushes, assaults or terrorist acts, selective murders, and massacres. Irregular wars are waged on ill-defined territories; there are invisible territorial demarcations and each group wields specific control over a certain part of the territory. These groups do, however, create well-defined local and regional niches where they maneuver to co-opt the local political system or else displace the original population and replace it with “their own people” in order to create a support base. Similarly, conflict is neither constant nor sustained, but is waged through periodic acts of war followed by periods of normalcy or lessened military tension. In irregular conflicts, the means of war or violence are particularly cruel and indiscriminate because of the emotional ties and different interests involved in carrying out armed activities, which may include revenge, dissuasion, exemplarization, and cruelty as means to instill terror and thus ensure the obedience of the population.

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

### iii. Recruitment and enlistment of minors (new)

The use, recruitment, or enlistment of boys and girls by armed groups, whether state or non-State, has become one of the most dramatic features of modern armed conflicts. Worldwide, in 2001, an estimated 300,000 children under the age of 18 were actively participating in some type of armed group.<sup>11</sup> In a stark illustration of the magnitude of this phenomenon, “[i]f these children stood side by side, locked their hands, and spread their arms, they would form a human chain 250 miles long.”<sup>12</sup> It is reasonable to think that these figures have only risen in the past eleven years, especially if one includes children involved in organized crime and other types of organizations (such as gangs) inherent to violent situations that cannot be classified as armed conflicts.

In response to this appalling reality, the international community continues to look for ways to better protect children who have been incorporated into the ranks of armed groups. It has adopted international treaties and other instruments relevant to this issue<sup>13</sup>

<sup>11</sup> Michael G. Wessells, *Child Soldiers: From Violence to Protection* (Cambridge, MA: Harvard University Press, 2007), at 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> International legal instruments for the protection of children in situations of armed conflict include: (i) Convention on the Rights of the Child, adopted by the United Nations General Assembly in Resolution

and has created specialized technical mechanisms such as the United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict. Similarly, in 2005, the United Nations Security Council established a special monitoring and reporting mechanism on the condition of children living in situations of armed conflict. Up to now, this mechanism—which includes the participation of national governments, civil society, and United Nations agencies—has focused on a pre-established group of countries that, in the view of the United Nations Secretary-General, pose the toughest challenge in terms of violence against children in armed conflicts.<sup>14</sup>

These legal measures and international monitoring mechanisms are just one example of the international community's efforts to tackle the problem. Yet they are not enough. The reality of children involved in regular armed forces and/or non-State armed groups poses a true challenge nationally and internationally, given the complexity and brutality of their experience. Children are used as lookouts and weapons carriers and in many cases are made to participate directly in the hostilities. Moreover, they are used as slaves and as sexual slaves, or as “spouses” for other combatants. It is not unusual for children to be forced to participate in attacks against their own communities, effectively cutting them off from their own families. In this chaotic picture of extreme victimization, the reintegration of children associated with armed groups has proven extremely complicated and requires the collaboration of a wide range of national and international actors, along with the design of appropriate policies for demobilization, reintegration, reincorporation, justice, and reparations.<sup>15</sup>

A keystone of international protection of children has been the struggle against impunity for the crimes committed against them. The United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict has identified six categories of grave violations against children: (i) killing or maiming of children; (ii) recruitment or use of children as soldiers; (iii) sexual violence against children; (iv) attacks against schools or hospitals; (v) denial of humanitarian access for children; and (vi) abduction of children. These crimes have been included in the Rome Statute as offenses amounting to war crimes and/or crimes against humanity. In addition, a significant number of individuals currently being prosecuted by the ICC are accused of committing crimes against children, mainly the recruitment or enlistment of minors under 15 years of age.<sup>16</sup>

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44/25 of November 20, 1989, and entered into force on September 2, 1990; (ii) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted by the General Assembly in Resolution A/RES/54/263 of May 25, 2000, and entered into force on February 12, 2002; and (iii) the Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, adopted by the ministerial meeting sponsored by UNICEF in February 2007. Other relevant international humanitarian law norms have been adopted to protect children in situations of armed conflict and children associated with armed groups.

<sup>14</sup> See United Nations Security Council Resolution 1612, adopted at Security Council session 5235 of July 26, 2005.

<sup>15</sup> For a critique of the international norms, standards, and policies related to this topic, see, for example, Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York: Oxford University Press, 2012).

<sup>16</sup> Seven [*sic*] people are currently facing charges before the ICC for the recruitment, enlistment, or use in hostilities of minors under 15 years of age: four in the context of the situation in the Democratic Republic of Congo (Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, and Bosco Ntaganda) and

Thomas Lubanga Dyilo, the first person ever convicted by the ICC, was sentenced to 14 years in prison for this crime.<sup>17</sup> In addition to the trials before the ICC, the Special Court for Sierra Leone has also tried these types of cases, including the prosecution of former Liberian president Charles Taylor.

Thomas Lubanga's conviction includes several relevant aspects from the technical-legal standpoint. In examining the material elements of the crime of recruitment, enlistment, and/or use of minors under 15 years of age in international and non-international armed conflicts, Trial Chamber I of the ICC concluded that such acts were separate offenses. While recruitment includes an element of compulsion in linking the minor with the armed group, and enlistment may be a voluntary act, both amount to an international crime. The Trial Chamber also stressed that the use of minors to participate in the hostilities is a separate underlying offense. Therefore, when determining whether or not a minor has been conscripted or enlisted, it is not necessary to establish that he or she has participated directly in combat. Hence, according to this Trial Chamber, there is recognition of the variety of tasks that armed forces or groups assign to children among their ranks.<sup>18</sup>

While the international prosecution of crimes against children, and particularly those committed based on or because of their membership in armed forces or groups, is extremely important, States must also do their part. They should define such conducts as crimes under the relevant local laws and ensure the investigation and prosecution of acts of this nature. In this sense, the ruling transcribed below is another step forward in the struggle against impunity for these serious crimes.

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee), (List of Judgments 2.a), Whereas section.* The Attorney General noted that in order to determine the nature of the offenses committed by the Victors of Arauca Bloc and Orlando Villa Zapata, it was first necessary to determine whether the acts were committed during and in the course of waging an armed conflict, with the continuous presence of a known illegal group.

As far as illegal recruitment, the National Constitution, the bloc of constitutionality theory, and other laws in force in Colombia provide the legal basis for the status of these young people as victims. The Attorney General's Office representative pointed out that Article 162 of the C.P.P. [Criminal Code] clearly stipulates that "*Anyone who, in the course of waging an armed conflict, recruits minors under eighteen (18) years of age or forces them to participate directly or indirectly in the hostilities or in armed action*" has committed an unlawful act that amounts to a crime against international humanitarian law. [He further asserted] that, in light of the evidence compiled, Mr. Orlando Villa Zapata, second in command of the Victors of Arauca Bloc, engaged in this type of criminal behavior from August 2001 until the time of his demobilization.

In this regard, the Attorney General's Office offered a general description of the forced recruitment of the legally recognized victims. It included their living situation prior to joining the illegal armed group, their reasons for joining, and the length of time they spent in the organization. [...] The Office of the Public Prosecutor clarified that, as of the date of the

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three [*sic*] in the context of the situation in northern Uganda (Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen, all leaders of the Lord's Resistance Army).

<sup>17</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, July 10, 2012.

<sup>18</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 9, paras. 607–09.

incident, information was available for just 44 victims, due to the difficulties associated with locating the victims and the lack of information about demobilized minors in the other State institutions responsible for their reintegration.

In its presentation, [the Colombian Institute for Family Welfare] described the minor victims recruited by the Victors of Arauca Bloc. They noted that this type of recruitment disrupts the period of life between childhood and adolescence, just when personal identity is being formed, with the attendant psychological and social impacts. Recruitment denies victims their right to a family and to a private life. It disrupts their living conditions and circumstances, causing psychological, physical, and physiological impacts, among others, and ultimately causing the recruited minor's socialization process to break down. [...]

The Court considers it pertinent to offer a [...] clarification of the applicable law [...]. [I]n cases of unlawful recruitment of minors, it was necessary to study several domestic and international documents and instruments in order to determine the applicable *corpus iurise*. [...]

According to the report of the United Nations Secretary-General titled *Children and Armed Conflict*, instruments applicable to members of armed groups who are minors include the Geneva Conventions of 1949 and the relevant obligations under the Additional Protocols of 1977; the Convention on the Rights of the Child (CRC) and its Optional Protocol of May 25, 2000; International Labour Organization (ILO) Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 1997; and the Convention on Cluster Munitions of 2008 [*footnote omitted*].

Recruitment encompasses any kind of involvement with an armed group, whether it is compulsory, forced, or voluntary. There is a legal basis for compulsory recruitment, which is also known as conscription [*footnote omitted*].

International law prohibits the recruitment and direct participation in hostilities of adolescents who have not attained the age of 15, in any armed group ([Convention on the Rights of the Child], Article 38; Protocol I Additional to the Geneva Conventions (1977), Article 77(2); Protocol II Additional to the Geneva Conventions (1977), Article 4(3)(c)). In other words, under no circumstances may regular or irregular armed forces, including militias, civil defense or local defense forces, or organized armed groups operating outside the law have recruits under the age of 15 among their ranks. In cases where domestic law establishes a minimum recruitment age that is over 15 years, then that becomes the applicable rule.

Moreover, if a State recruits individuals between the ages of 15 and 18, it must give priority to those who are oldest (CRC, Article 38(3); Protocol I Additional to the Geneva Conventions, Article 77(2)).

Nonetheless, recent trends in international law encourage States to take measures to ensure that no one under 18 years of age participates directly in hostilities, and that individuals who have not reached the age of 18 are not subject to compulsory recruitment (African Charter on the Rights and Welfare of the Child; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; ILO Convention 182 on the Worst Forms of Child Labour, among others). [...]

[T]he forced recruitment of people of any age—meaning recruitment carried out through abduction, any form of threat or intimidation, the use of force or violence against minors or

members of their families—is prohibited, especially where minors are involved, since such an act violates human rights.

## 5. IDEAL CONCURRENCE OF CRIMES: CONDUCTS THAT AMOUNT TO DIFFERENT CRIMES UNDER INTERNATIONAL LAW (NEW)

The notion of ideal concurrence of offenses—which recognizes that a single conduct may constitute several crimes, as a single act that encompasses a plurality of offenses—has also been recognized in the jurisprudence of international criminal tribunals. According to the International Criminal Tribunal for Rwanda, what neo-Romanic tradition defines as an ideal concurrence of offenses is legally possible under international criminal law, since each international crime comprises different elements and protects different legal interests.<sup>19</sup> As the ICTY has pointed out in various rulings, certain offenses which, in the context of a widespread or systematic attack against the civilian population, amount to crimes against humanity may occur before, during, or after an armed conflict. Similarly, a conduct that constitutes a war crime *per se* may not be part of a multiple course of conduct and therefore would not be considered a crime against humanity.

These arguments aptly illustrate the distinctions between the different categories of international crimes, even when the specific conducts that constitute such crimes (e.g., murder, rape or sexual slavery, population transfer, or torture) are the same. These distinctions make it possible, under certain circumstances, to prosecute and punish someone for two different crimes based on the same conduct. Again, according to the Appeals Chamber of the ICTY, “[...] only distinct crimes may justify multiple convictions, [leading] to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.”<sup>20</sup> Even more explicitly, beginning with the first ruling handed down by the ICTR, Trial Chamber I has consistently stated that

“On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different [legal] interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did [the offence]. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where: (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g., genocide and complicity in genocide. [...]”

<sup>19</sup> International Criminal Tribunal for Rwanda (hereafter, ICTR), *Prosecutor v. George Rutaganda*, Trial Chamber I, Judgment, Case No. ICTR-96-3-T, December 6, 1999, para. 117.

<sup>20</sup> ICTY, *Prosecutor v. Željko Delalić, et al.*, Appeals Chamber, Judgment, Case No. IT-96-21-A, February 20, 2001, para. 412.

[With regard to point (a) in the preceding paragraph] the Chamber does not consider that any of genocide, crimes against humanity or [war crimes] are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or [war crimes] are in all circumstances alternative charges to genocide and thus lesser included offences. As stated [...] these offences have different constituent elements.”<sup>21</sup>

This is not to say, however, that justice operators do not face significant challenges in prosecuting multiple offenses. As stated earlier, it is necessary to argue the existence of offenses that comprise distinct material elements. This entails producing and introducing evidence for each one of those elements: evidence of the existence of an armed conflict; evidence of the existence of a widespread or systematic attack; evidence of the subject’s status as a protected person under international law; evidence that the attack was directed against the civilian population, and so forth. This additional evidentiary burden may be one of the reasons why some have questioned the viability of prosecuting cases involving multiple offenses, such as simultaneously prosecuting the crime of rape as both a crime against humanity and a war crime.

Regardless of the decision made in terms of a strategy for criminal prosecution, it is important to bear in mind that, according to the definition of international crimes, the constituent conducts of one are, at the same time, the underlying offenses of the other. From this standpoint, there is an unquestionable potential for an ideal concurrence of crimes to exist.

*COLOMBIA, Ruling and motion for reparations (José Rubén Peña Tobón, et al., nominees) (List of Judgments 2.b), Whereas section.* [O]ffences committed in a conflict situation may have a dual nature as war crimes and as crimes against humanity, as is the case of crimes that occur in a situation where [international humanitarian law] is applicable and corresponds to acts perpetrated as part of a policy of widespread and systematic attack against a civilian population. This is true of crimes of a sexual nature and forced displacement, for which the Chamber will issue a special pronouncement.

## **A. Sexual crimes (new)**

Attacks of a sexual nature perpetrated in situations of armed conflict or under dictatorial or repressive regimes are no longer regarded as an unforeseen, virtually inevitable consequence of those repressive and violent circumstances. The international community has come to understand that sexual violence is, rather, a crucial aspect of a plan intended to eliminate a particular group or attack the civilian population. It is a decisive factor in large-scale aggression, the direct purpose or consequence of which is to destroy the structures that define and unite a society.

In a process of collective reflection that contributed to a better understanding of the experience of victims of sexual violence, international law has gradually come to recognize

<sup>21</sup> ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I, Judgment, Case No. ICTR-96-4-T, September 2, 1998, paras. 468 and 470.

such acts as an offense that could give rise to the individual criminal liability of the perpetrators. The Statute of the International Criminal Tribunal for the former Yugoslavia (1993), in its Article 5(g), was the first to establish sexual violence as a constituent conduct of crimes against humanity. The Statute of the International Criminal Tribunal for Rwanda followed suit a year later by including Articles 3(g) and 5(e), which establish rape as an underlying offense of crimes against humanity and war crimes. These provisions gave rise to a significant corpus of international jurisprudence that recognized, for example, the importance of understanding sexual violence as more than a mechanical act motivated by sexual instincts. In the words of the ICTR, “[This] tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and [human] body parts. [...] The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”<sup>22</sup> Similarly, the jurisprudence of these *ad hoc* criminal tribunals, particularly that of the ICTR, has recognized rape as a lesser included conduct in the constituent offenses of genocide—such as grievous bodily and psychological harm of members of the group or preventing births within the group—when they are committed with the specific intention required for that crime.<sup>23</sup>

Parallel to these developments in the jurisprudence of the *ad hoc* tribunals, the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998 became a milestone in international recognition of sexual violence as an international crime. Besides defining rape as a constituent conduct of crimes against humanity and war crimes in international and non-international armed conflicts, the Statute expanded the catalog of sexual offenses to include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other sexual abuses of comparable gravity.<sup>24</sup> As for the incorporation of this broad catalog of sexual offenses into domestic law, it should be noted that, based on a careful reading of the “Elements of Crimes”—the guide for interpreting the Rome Statute—it is easy to identify the various elements that distinguish one crime from another. Significantly, while the ICC has yet to hand down a ruling on the commission of a crime

<sup>22</sup> Ibid., paras. 687 and 688.

<sup>23</sup> See, for example, ICTR, *Prosecutor v. Jean-Paul Akayesu*, *supra* note 22, paras. 507–508, 731; ITCR, *Prosecutor v. Athanase Seromba*, Appeals Chamber, Judgment, Case No. ICTR-2001-66-A, March 12, 2008, para. 46: “The Appeals Chamber recalls that ‘serious bodily or mental harm’ is not defined in the Statute [footnote omitted], and that the Appeals Chamber has not squarely addressed the definition of such harm. The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs [footnote omitted]. Relatedly, serious mental harm includes ‘more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat’ [footnote omitted]. Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings [footnote omitted]. To support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part [footnote omitted].” See also ICTY, *Prosecutor v. Dragoljub Kunarac, et al.*, Appeals Chamber, Judgment, Case No. IT-96-23 and IT-96-23/1-A, June 12, 2002, para. 150; ICTR, *Prosecutor v. Pauline Nyiramasubuko, et al.*, Trial Chamber II, Judgment, Case No. ICTR-98-42-T, June 24, 2011, para. 5731.

<sup>24</sup> See Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute of the ICC.

of a sexual nature, many of the people currently facing charges before that court have been accused of committing such crimes.<sup>25</sup>

The work of the Special Court for Sierra Leone deserves special mention in this regard. As a mixed tribunal, established by agreement between the government of Sierra Leone and the United Nations, it has jurisdiction to try the perpetrators of crimes of genocide, crimes against humanity, and war crimes, among others. On these statutory grounds, the Appeals Chamber of the Special Court, in an unprecedented decision, held that forced marriage—a common practice in armed conflicts and in systematic or widespread attacks against the civilian population—constitutes a crime separate from other forms of sexual violence, specifically sexual slavery, which must be regarded as a lesser included offense in the crime against humanity constituted by other inhuman acts.<sup>26</sup> As the Chamber argued,

“[N]o tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement. [...] The Appeals Chamber finds that the evidence before the Trial Chamber established that victims of forced marriage endured physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty. Many were psychologically traumatised by being forced to watch the killing or mutilation of close family members, before becoming “wives” to those who committed these atrocities and from being labelled rebel “wives” which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation.”<sup>27</sup>

<sup>25</sup> As of August 2012, over half the people facing charges before the ICC had been accused of some specific type of sexual crime, whether as crimes against humanity or war crimes. They are: Germain Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana, and Sylvestre Mudacumura (situation in the Democratic Republic of the Congo); Jean-Pierre Bemba Gombo (situation in the Central African Republic); Joseph Kony and Vincent Orti (situation in Uganda); Ahmad Muhammad Harun (“Ahmad Harun”), Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Omar Hassan Ahmad Al Bashir, and Abdel Raheem Muhammad Hussein (situation in Darfur, Sudan); Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (situation in Kenya; confirmation of charges has not occurred); and Laurent Gbagbo (situation in Côte d’Ivoire).

<sup>26</sup> See Article 2(i) of the Statute of the Special Court for Sierra Leone. A similar provision was included in the Rome Statute of the ICC under Article 7(1)(k), which includes under crimes against humanity “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

<sup>27</sup> See Special Court for Sierra Leone, *Prosecutor v. Alex Tamba Brima, et al. (case of the Armed Forces Revolutionary Council, “AFRC”)*, Appeals Chamber, Judgment, Case No. SCSL-2004-16-A, February 22, 2008, paras. 195 and 199.

Although no Latin American country, to date, has prosecuted a case based on the notion of forced marriage, the final reports of some of the region's truth commissions, including those of Peru and Guatemala, recognized the existence of this practice during those countries' respective armed conflicts. For example, the final report of the Truth and Reconciliation Commission of Peru underscores, with respect to sexual crimes committed by members of Sendero Luminoso, that "[a]nother form of sexual violence consisted of subjecting women to forced unions, motivated by the fear that the women might 'capitulate' (surrender) and join the forces of the State. This was premised on a notion of the vulnerability of women, who needed men as companions in order to survive, since if they were alone, they might escape or surrender. [...] [footnote omitted]. In other cases women were forced to marry for fear of being killed."<sup>28</sup> [Unofficial translation]

Leaving aside the issue of forced marriage, Latin American courts have begun to find their own voice with respect to the criminalization of sexual violence, particularly rape, as an international crime. The rulings transcribed below offer two verdicts of this type, which clearly represent a milestone—this time for national justice systems—in the prosecution and suppression of crimes of a sexual nature.

ARGENTINA, *Criminal cassation remedy (Gregorio Rafael Molina, convicted) (Vote of Judge Mariano Hernán Borinsky) (List of Judgments 1.a), Whereas section. [I]* consider it appropriate to begin by clarifying the question raised in this case as to whether or not the facts that have been corroborated, and which constitute the crime of rape, may be qualified as crimes against humanity. In my opinion, in light of the specific circumstances that have been proven in the case, I find no obstacle whatsoever to asserting, just as the lower court has done, that the sexual abuses for which Gregorio Rafael Molina has been charged, tried, and convicted form part of the widespread attack against the civilian population designed by the last military government in the context of a systematic plan of State repression, which qualifies them as crimes against humanity and renders the statute of limitations inapplicable.

[I]n order for such conducts to be qualified as such, they must form part of a "*widespread or systematic attack directed against any civilian population.*" The latter, in turn, must be understood as a course of conduct involving the multiple commission of acts such as those mentioned against a civilian population, pursuant to a State or organizational policy to commit such acts or promote such a policy (Rome Statute, Article 7(2)(a)).

Herein lies the error of the defense, which contends that the sexual abuses cannot be interpreted as encompassed by the systematic or widespread "attack" that characterizes crimes against humanity. [...]

[According to the historic ruling handed down in Case 13/84, which tried and convicted the commanders in chief of the Armed Forces, the power apparatus in place under the military dictatorship aimed to impose its policy and ideology through criminal acts].<sup>29</sup> One of the conclusions included in the description [given by the National Federal Criminal and

<sup>28</sup> "Crimes and Human Rights Violations: Patterns in the Commission of Crimes and Human Rights Violations: Sexual Violence against Women," section 4 in *Final Report of the Truth and Reconciliation Commission*, vol. 6 (Lima, 2003), at 292.

<sup>29</sup> Editors' note: The bracketed text synthesizes passages from the ruling that precede the paragraphs transcribed here. They were included to provide a more detailed context for the principle examined in this digest.

Correctional Court] relates to the scope of the criminal plan documented in the ruling. The commanders “*granted subordinate members of the armed forces considerable discretion to deprive of their freedom individuals who, according to the intelligence, were apparently linked to subversion. It was stipulated that they be interrogated under torture and subjected to inhuman living conditions while secretly held in captivity. Ultimately, they conferred enormous freedom to determine the fate of each victim: transfer to the legal system (National Executive Branch or Judiciary), freedom, or, simply, physical elimination*” [footnote omitted].

This, and no other, is the historical criminal context of the facts for which Gregorio Rafael Molina was tried and convicted. On this basis, it can be concluded that the lower court’s assertion—that the rapes for which Molina was found criminally liable may be included in the category of crimes against humanity—must be, *ex ante*, accepted. This is so because such acts constitute criminal conducts within the scope of discretion that the commanders conferred upon their subordinates in order to carry out the criminal plan—attack—directed against the civilian population.

This initial analysis is insufficient to determine the outcome of the appeal, since the relevant issue is to establish whether, *ex post*, the aforementioned discretion to act in the specific case under review became an actuality in the specific case under review. In other words, it is important to determine whether abuses against sexual integrity in the secret detention center known as “La Cueva” (the Cave), which operated on the Mar del Plata Air Base, also known as “Radar,” amounted to a common practice that could be considered a component of the widespread attack against the population, which the Rome Statute requires in order to classify these incidents as crimes against humanity.

It is a complicated matter to try to examine at the macro level, since, naturally, the magnitude of the effects of the systematic plan of state repression implemented during the military dictatorship—attack—extends well beyond the facts examined in the instant case. The level of complexity is reduced considerably, however, by studying the *thema decidendum* in the specific case. In the latter, even though all, absolutely all, of the aforementioned common characteristics set out in the ruling in Case 13/84 *supra* have been registered, the facts, as already pointed out, are still just a small subset of the universe of criminality described therein.

An analysis of this nature is, in my opinion, the only possible avenue for reaching a conclusion that ensures a well-reasoned application of the law to the specific circumstances that have been demonstrated in the case and avoids any taint of arbitrariness in its resolution.

In this regard, it can be concluded, as the trial court did, that the sexual abuses in the secret detention center known as “La Cueva” were not isolated incidents. Instead, they amounted to a regular practice that was manifested, indistinguishably, through various conducts that violated legal protections of sexual integrity. The information amassed in the file supports this assertion. Independently of the accounts given by the victims in this case about the events that harmed them, the testimony of Marta Haydée García de Candeloro is extremely relevant, insofar as she describes the suffering and humiliation of Mercedes Lhon—a victim of illegal deprivation of liberty and torture in this case, whose current status is “disappeared.” According to the witness, she was repeatedly raped and reduced to a state of utter servitude.

In addition, other statements were given during the oral and public trial by individuals who, while in captivity in “La Cueva,” were aware of the different types of sexual aggression suffered by those who were being held there. [...]

Given this panorama, it can be concluded, just as the lower court en banc has done, that the rapes for which Gregorio Rafael Molina was tried and convicted in the instant case were—in the context of the secret detention center that operated on the Mar del Plata Air Base—part of a widespread attack of illegal repression orchestrated by the last military dictatorship. This being the case, and, therefore, in addition to having verified the regularity of the sexual aggression suffered by the individuals, especially the women, held captive in “La Cueva,” I find no reason whatsoever to exclude the sexual infractions from the criminal plan of the State documented in the ruling in Case 13/84. If the discretion the commanders granted their subordinates included the ability to make decisions that sealed the victims’ fates (life or death), there is no rationale for attempting to exclude sexual aggression, as criminal conducts, from the scope of the discretion granted.

This is especially true when the international norm that defines crimes against humanity explicitly includes this situation (Article 7(1)(g) of the Rome Statute), and its inclusion in this category of crimes underscores the true criminal offense substantiated in the inquiry and the suffering of the victims of State terrorism.

[As for the specific facts that constitute rape as a crime against humanity], [i]t was proven, [among others], that between June 25 and 28, 1977, and between July 7 and 10 of that year, while unlawfully deprived of her liberty in the secret detention center known as “La Cueva”—which operated in the former radar station of the Mar del Plata Air Base—Marta Haydée García de Candeloro was, on three occasions, subjected to carnal access against her will and through the use of force and intimidation by one of the individuals responsible for her, abusing his position as a guard.

From January 16, 1978, until approximately April 18 of that year, while unlawfully deprived of her liberty in the secret detention center known as “La Cueva,” Carmen Ledda Barreiro de Muñoz was subjected to carnal access through the use of force and intimidation by one of the individuals responsible for guarding the “detainees” held there. This event was repeated on two occasions.

During the same period, the same individual who had carnal access to Barreiro in the circumstances described in the preceding paragraph attempted to have carnal access to Carmen Ledda Barreiro de Muñoz for a third time through the use of force and intimidation, but was unable to do so for reasons beyond his control.

The body of evidence that identifies Gregorio Rafael Molina as an operational agent in “La Cueva,” who used the alias “Charly” and is remembered for being a sexual abuser and someone prone to drinking, includes the testimony of victim Marta Haydée García. In the statement she gave at the hearing concerning her experience in the secret detention center, she described her unlawful deprivation of liberty, the torture she suffered, and the sexual abuse to which she was subjected by “Charly.” In regard to the latter, she explained that Molina usually engaged in such acts during torture sessions and that rape was not an isolated practice in “La Cueva.” In this respect, the witness recalled the sexual abuses that Mercedes Lhon (a disappeared victim in this case) suffered during the entire time she was in the detention camp, and Lhon’s own efforts to stop Molina from abusing María de las Mercedes Argañaraz de Fresneda (also a disappeared victim), who was pregnant at the time.

COLOMBIA, *Ruling and motion for reparations (José Rubén Peña Tobón, et al., nominees) (List of Judgments 2.b), Whereas section*. In the context of the internal armed conflict in Colombia it has been determined that [sexual crimes] were committed against civilians [footnote omitted] as part of a policy of widespread and systematic attack against the civilian population implemented as a result of the deterioration of the Colombian armed conflict. [...]

[I]t is necessary to examine crimes of this type from the gender perspective, because although the Colombian internal armed conflict affects both men and women, it has been recognized that its impact on the two groups is different, particularly with regard to the perpetration of sexual crimes [footnote omitted]. This is reflected in the statistics, which show that 96% of the victims of the sexual crimes reported in 2010 were women [footnote omitted].

The Honorable Constitutional Court recognized that the conflict has a disproportionate effect on women, who are at greater risk than men of falling victim to sexual violence, sexual exploitation, or sexual abuse. For this reason, pursuant to a constitutional mandate and in keeping with the Colombian State's international obligations in the area of [international human rights law] and [international humanitarian law], women were recognized as "subjects of enhanced constitutional protection" [footnote omitted].

In this context, the first aspect to point out is that crimes with sexual connotations have been a constant presence in the Colombian internal armed conflict. International experiences—specifically those of the international criminal tribunals for the former Yugoslavia and Rwanda—have shown that sexual crimes and attacks are frequently committed in situations of armed conflict [footnote omitted].

The Constitutional Court took up several cases and identified different patterns related to sexual crimes:

*[...] The Court underscores the risk of sexual violence, corroborating the gravity and widespread nature of the situation, which has been brought to its attention in different proceedings, through the repeated, coherent, and consistent information provided by the victims or by the organizations that promote their rights. The accounts of episodes of sexual violence against women to which it has been alerted include: [...] (a) acts of sexual violence committed as an integral part of large-scale violent operations—such as massacres, takeovers, pillaging and destruction of villages—against women, including adolescents, children, and adults, in the affected area by members of armed groups acting outside the law; (b) deliberate acts of sexual violence committed not in the context of large-scale violent actions but rather individually and in a premeditated manner by members of all the armed groups participating in the conflict, as part of (i) military strategies intended to intimidate the population, (ii) retaliation against real or presumed supporters of the enemy group through violence against the women in their families and communities, (iii) retaliation against women accused of being collaborators or informers of one of the armed groups in conflict, (iv) efforts to take control of territory and resources, (v) coercion for different reasons in the course of strategies for the advancement of the armed groups, (vi) efforts to obtain information through kidnapping and sexual subjugation of the victims, or (vii) sheer brutality; (c) sexual violence against women accused of having family or affective relationships (real or presumed) with a member or collaborator of one of the legal or illegal armed actors, committed by the enemy group as a form of retaliation against or intimidation of their communities; (d) sexual violence against women, adolescents, and girls who are recruited by armed groups acting outside the law, including repeated and systematic sexual violence: (i) rape, (ii) forced family planning, (iii)*

*sexual enslavement and exploitation, (iv) forced prostitution, (v) sexual abuse, (vi) sexual enslavement by chiefs or commanders, (vii) forced impregnation, (viii) forced abortion, and (ix) transmission of sexually transmitted diseases; (e) subjection of civilian women, adolescents, and girls to individual or gang rape, abuse, and harassment, by members of the armed groups operating in their region for the purpose of obtaining sexual pleasure; (f) acts of sexual violence against civilian women who have, by their public or private behavior, violated de facto social codes of conduct imposed by armed groups operating outside the law in broad swaths of the national territory; (g) acts of sexual violence by armed actors perpetrated against women members of social, community, or political organizations, or human rights leaders or promoters, or against their female family members, as a form of retaliation, or repression, or to silence their activities; (h) cases of forced prostitution or sexual enslavement of civilian women perpetrated by members of armed groups acting outside the law; or (i) threats of committing the aforementioned acts or similar atrocities [footnote omitted].” [Emphasis in the original]*

[T]he Court wishes to underscore that sexual crimes are serious infractions that directly attack the dignity of the individual victims as well as the social fabric. The National Commission for Reparation and Reconciliation stated, in this motion, that:

*“[...] the impact and effects of sexual violence extend beyond the individual sphere of the victim to the family and community. Individual instances of rape affect the communities, since they have repercussions for couples, family relationships, the women in the community, and the community as a whole. This has been reflected in, among other things, the breakdown of support and social networks for women, changes to the cultural roles of men and women in the community, the stigmatization of these women their communities, and their abandonment by partners and other relatives” [footnote omitted].*

Similarly, the United Nations has stated that:

*“[...] sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security” [footnote omitted].*

[T]he invisibilization of sexual crimes in the context of Colombia’s internal armed conflict has led to the high level of impunity for such crimes.

[The specific facts in the case] [a]s described in the decision to indict involved successive, homogeneous acts of violent carnal access. The victims, DIANA CAROLINA CASTILLA ZULETA and LUZ MARY REYES CUADRO, were subjected to the will of PEÑA TOBÓN, alias “Tom,” through the psychological violence they experienced due to the retention and uncertain fate of their partners, TEOBALDO and ÉDINSON MARTÍNEZ, and were under the illusion that acquiescing to Peña Tobón’s demands would somehow guarantee the integrity of the Martínez brothers. The aforementioned circumstances also reveal that these behaviors were carried out and conceived by the nominee himself<sup>30</sup> as an ideal way to humiliate, subjugate, and control the civilian population, inasmuch as those conditions would facilitate the expansion and strengthening of the illegal armed group.

<sup>30</sup> Editors’ note: According to Law 975 of 2005, known as the Justice and Peace Law, in order to access the benefits established under the law, an individual demobilized from an armed group operating outside the law must be included by the government on a list sent to the Office of the Attorney General of the Nation. These individuals are known as “nominees” (*postulados*) under the Justice and Peace Law.

## B. Forced displacement of persons (new)

Together with other types of human mobility, such as refugee flight and migration, forced displacement of persons has taken center stage in the debate over national and international protection of people who are forced to leave their places of habitual residence. While no international treaty on this subject has been adopted to date, in 1998 the former United Nations Commission on Human Rights adopted the Guiding Principles on Internal Displacement proposed by the Representative of the Secretary-General on Internally Displaced Persons.<sup>31</sup> According to these principles, forced displacement is understood as the “[the movement of] persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>32</sup> Based on this definition, the Principles prohibit arbitrary displacement, including “[w]hen it is based on policies of apartheid, ‘ethnic cleansing’ or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population, [or] in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, [among others].”<sup>33</sup> This prohibition, which is expressly directed toward States, is without prejudice to individual criminal responsibility under international law for the commission of international crimes.<sup>34</sup>

Obviously, this last point is particularly relevant. In tandem with [changes to] jurisprudential norms and principles related to the responsibility of States in relation to forced displacement, the international legal framework has also evolved in important ways with respect to the responsibility of individuals who deliberately or consciously perpetrate or participate in situations of violence or coercion that oblige persons or groups of persons to become displaced. In this regard, the Rome Statute of the ICC identifies deportation or forcible transfer of population and forced displacement of population as underlying or constituent elements of crimes against humanity and war crimes in international and non-international armed conflicts.<sup>35</sup> While the ICC has yet to hand down a ruling on this matter, the crime of deportation or forcible transfer of population as a crime against humanity has been a particularly relevant charge in cases stemming from the situations in Kenya and Sudan.

In addition to the rulings the ICC has issued to date, the *ad hoc* criminal tribunals have also contributed significantly to international jurisprudence. Specifically, the chambers of the ICTY have established that the forcible transfer of persons (comparable to forced displacement) may, in certain circumstances, meet the threshold of suffering under the criminal definition of genocide that is required for it to be considered subsumed

<sup>31</sup> *Guiding Principles on Internal Displacement*, UN document E/CN.4/1998/53/Add.2, February 11, 1998.

<sup>32</sup> *Ibid.*, para. 2.

<sup>33</sup> *Ibid.*, Principle 6(2).

<sup>34</sup> *Ibid.*, Principle 1(2).

<sup>35</sup> See Articles 7(1)(d), 8(2)(a)(vii), 8(2)(b)(viii), and 8(2)(d)(viii) of the Rome Statute. According to the elements of the crimes, the terms “deportation” or “forcible transfer” can be used interchangeably with “forced displacement.”

in the constituent element of serious physical or mental harm<sup>36</sup> and an indicator of the intent to destroy a group as such.<sup>37</sup> In parallel, the same tribunal has established other key aspects relating to deportation, transfer, or forced displacement as a crime against humanity/war crime, among them: (i) the conceptual distinction between deportation and forcible transfer of persons;<sup>38</sup> (ii) physical or emotional coercion as an element that determines the illegality of the transfer or displacement; (iii) in case of armed conflict, the requirement that it be motivated by the safety of the population or military imperatives;<sup>39</sup> and (iv) recognition of forced displacement as an offense under international customary law,<sup>40</sup> among others.

The ruling presented below was issued in one of the cases currently under way in Colombia under the Justice and Peace Law. It comes as no surprise that the Colombian courts have produced one of the first rulings on this issue, given the magnitude and gravity of the phenomenon of forced displacement in that country. This situation is not unique to Colombia, however, and therefore national justice operators must continue to familiarize themselves with established principles concerning forced displacement and individual criminal responsibility.

*COLOMBIA, Ruling and motion for reparations (José Rubén Peña Tobón, et al., nominees) (List of Judgments 2.b), Whereas section.* [Forced displacement has been] [d]efined [by the Colombian legal system] as coercive measures taken against members of the civilian population so that “[...] [they] migrate within the national territory, abandoning their habitual place of residence or economic activities because their life, their physical integrity, their personal security or liberty have been violated or are directly threatened due to [violations of international humanitarian law (IHL) or serious and evident violations of international human rights norms in the context of the internal armed conflict]”<sup>41</sup> (Article 60(2) of Law 1448 of 2011). Under domestic law, forced displacement is defined as a crime against individuals protected under international humanitarian law (Article 159 of Law 599 of 2000).

Accordingly, and recognizing that this conduct, which clearly contradicts principles of IHL such as that of [distinction] [...], may also constitute one of the acts inherent to a widespread and systematic attack against the civilian population (Article 7(1)(d) [of the Rome Statute of

<sup>36</sup> See, for example, ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Chamber I, Section A, Judgment, Case No. IT-02-60-T, January 17, 2005, paras. 650–54.

<sup>37</sup> ICTY, *Prosecutor v. Radislav Krstić*, Appeals Chamber, Judgment, Case No. IT-98-33-T, April 19, 2004, para. 33.

<sup>38</sup> ICTY, *Prosecutor v. Radislav Krstić*, Trial Chamber I, Judgment, Case No. IT-98-33-T, August 2, 2001, para. 521: “Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.” See also ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber II, Judgment, Case No. IT-99-36-T, September 1, 2004, para. 540. To date, this distinction has not been recognized in decisions issued on this matter by some pre-trial chambers of the ICC.

<sup>39</sup> ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Chamber, Judgment, Case No. IT-98-34-T, March 31, 2003, paras. 519–21.

<sup>40</sup> ICTY, *Prosecutor v. Milorad Krnojelac*, Appeals Chamber, Decision on Appeal, Case No. IT-97-25-A, September 17, 2003, para. 223.

<sup>41</sup> Editors’ note: The brackets are in the original sentence; for clarity, the acronym used by the Court to refer to international humanitarian law was replaced with the full name.

the International Criminal Court]), having the dual nature of a war crime and a crime against humanity just as sexual crimes do, in the context of the Colombian internal armed conflict.

Many of the causes that have led to forced displacement as a strategy to obtain military advantages have been recognized. As a result of the deterioration of the armed conflict, however, it has also been used as a weapon to seize lands for the enrichment of the parties and their collaborators.

It has been recognized that forced displacement entails the violation and deprivation of the enjoyment of at least seventeen (17) constitutional rights:

*“1. The right to live in conditions of dignity [...]. 2. The rights of children, women heads of household, persons with disabilities and the elderly, and other groups with special protections ‘given the precarious conditions that persons forced into displacement must face’ [footnote omitted] [...]. 3. The right to choose one’s place of residence [...]. 4. The rights to free development of personality, freedom of expression and of association [...]. 5. [...] their economic, social, and cultural rights strongly affected [interpreted] in accordance with the [Guiding] Principles [on Internal Displacement] 3, 18, 19, and 23 to 27 [...]. 6. [The right to family unity] [...]. 7. The right to health, in relation to the right to life [...]. 8. The right to personal integrity [...]. 9. The right to personal security [...]. 10. The right to freedom of movement within the national territory [footnote omitted] and the right to freedom of residence [...]. 11. The right to work [footnote omitted] and freedom to choose a profession or trade [...]. 12. The right to adequate nutrition [footnote omitted], [which has repercussions] for the full enjoyment of all of the other basic rights, particularly the rights to life, personal integrity, and health [...]. 13. The right to education [...]. 14. The right to dignified housing [...]. 15. The right to peace [...]. 16. The right to a legal personality, since the loss of personal identification documents due to displacement makes it difficult to register as displaced persons and access different types of aid, as well as to identify legal representatives in cases of minors who are separated from their families [...]. 17. The right to equality [...].” [Footnote omitted]*

Given this situation, the particular vulnerability of the displaced population has been recognized, since [forced displacement] affects “[...] persons afforded special protection by the Constitution—such as women heads of household, minors, ethnic minorities, and the elderly” [footnote omitted]. For this reason, it is recognized as a problem and described as “[...] a monumental crisis in terms of both scope and intensity” [footnote omitted] and as “(a) ‘a problem of humanity that must be tackled collectively by everyone, beginning, as is logical, with government officials’ [Ruling T-227/07 (of the Colombian Constitutional Court)]; (b) ‘a bona fide state of social emergency,’ ‘a national tragedy that affects the fates of countless Colombians and will mark the future of the country in the decades to come’ [Ruling SU-1150/00 (of the Colombian Constitutional Court)]; and, more recently, (c) an ‘unconstitutional state of affairs’ [Ruling T-215/02 (of the Colombian Constitutional Court)] [...].”<sup>42</sup>

<sup>42</sup> Editors’ note: The text in parentheses, “(of the Colombian Constitutional Court),” which follows the ruling numbers, was added to clarify that the Supreme Court of Justice is citing rulings from the Constitutional Court of Colombia.

## CHAPTER II

# INDIVIDUAL CRIMINAL RESPONSIBILITY AND FORMS OF PUNISHABLE CRIMINAL INTERVENTION

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In contrast to the international criminal tribunals for the former Yugoslavia and for Rwanda—whose precedents rely on the doctrine of joint criminal enterprise (in its three forms) as the main form of criminal responsibility—the chambers of the ICC have understood that, under the Rome Statute, a person may be charged as principal perpetrator, direct perpetrator, co-perpetrator, or indirect perpetrator of a crime. This new position with respect to the forms of involvement is based not only on a formal reading of the Rome Statute, but also on a rethinking of the dogmatic bases for distinguishing between principal perpetrators and accessories. According to the relevant precedents, the distinction is not premised on an objective criterion, which would limit principal perpetrators to those who directly and physically carry out one of the objective elements of the crime; nor is it based on a subjective one, which takes into account individual will as a determining factor in distinguishing between principals and accessories. Instead, the ICC has adopted a combined criterion in which “the principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.”<sup>43</sup>

This criterion for distinguishing between principals and accessories, which has also been described as control over the event or the crime, has given rise to a vast body of jurisprudence in the area of punishable criminal intervention. To date, this jurisprudence has dealt mainly with co-perpetration, indirect perpetration, indirect co-perpetration, and the remaining forms of participation under Article 25(3)(d) of the Rome Statute. In this sense, in contrast to the *ad hoc* tribunals, the precedents coming from the International Criminal Court appear to be more aligned with the doctrinary and legal debates currently taking place in various Latin American countries.

## 2. DIRECT PERPETRATION

GUATEMALA, *Dos Erres Massacre, Roberto Aníbal Rivera Martínez, et al., accused* (*List of Judgments 3.a*), *Whereas section*, DESCRIPTION OF THE FACTS REFERRED TO IN THE INDICTMENT OR THE ORDER TO PROCEED TO TRIAL. Pursuant to a preconceived military plan designed by the high command of the Armed Forces of Guatemala, from December 4 through December 8, 1982, you, Manuel Pop Sun, in your capacity as a

<sup>43</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on confirmation of charges, ICC-01/04-01/06-803, January 29, 2007, para. 330.

Corporal Specialist and Kaibil assistant instructor—a member of that elite special patrol of the Armed Forces of Guatemala commanded by Kaibil instructor Lieutenant ROBERTO ANÍBAL RIVERA MARTÍNEZ and Kaibil assistant instructors Corporals and Specialist Sergeants CESAR ADÁN ROSALES BATRES and OSCAR OVIDIO RAMÍREZ RAMOS and Second Lieutenant JORGE VINICIO SOSA ORANTES—were commissioned as an integral part of that patrol, to carry out a military operation against the civilian population of Dos Erres.<sup>44</sup> The latter was a hamlet in the jurisdiction of the village of Las Cruces, La Libertad municipality, Petén Department, that had been classified as a population sympathetic to the guerrillas (red zone). In order to carry out the aforementioned military operation, you and the Kaibil patrol were provided logistical support—a detachment of 40 soldiers with Kaibil training and a guide familiar with the area—by the high-ranking commanders of Military Zone 23 of Poptún municipality. Soldiers from the military detachment in the village of Las Cruces, in La Libertad municipality in the same department, under the command of Second Lieutenant (Reserve) CARLOS ANTONIO CARÍAS LÓPEZ, also provided support.

Aided by the guide, on December 6, 1982, at approximately ten o'clock at night, you and the Kaibil patrol departed by truck from the Santa Elena Air Base in the direction of Dos Erres hamlet. As you approached that location, you were ordered to divide yourselves into groups that had been organized in advance by your respective superiors, and you took up combat positions in accordance with the pre-established operational patrol plan. At approximately two o'clock in the morning of December 7, 1982, you, as a member of the patrol's Assault Group, roused people from their homes in the hamlet of DOS ERRES using violence and mistreatment, assembling the men and the elderly in the local school (Escuela Rural Mixta) of Dos Erres, and the women and small children in the evangelical church. Subsequently, you and the military patrol took the women from the church and raped them, including girls and pregnant or elderly women.

Afterward, you and the members of the military patrol proceeded to interrogate and torture the men of the Dos Erres community in order to obtain information relevant to the Army. In the afternoon of that same day, at lunch time, five young women who had been raped earlier were forced to feed the entire patrol. At approximately 1300 hours, you and the other members of the military patrol began to kill the civilian population of Dos Erres. You and the others took some people to a well that was under construction on land belonging to Juan Arévalo, where you first murdered the children and tossed them into the well. Immediately afterward, you took men and women of different ages to the same well to interrogate them about the whereabouts of some guns. Upon receiving no response, you struck them in the head with sledgehammers and, in order to cover up your crimes, you threw them into the well and then fired your weapons and tossed fragmentation grenades into it. You killed the remaining members of the group by firing on them with your weapons along the path toward the mountain. In this way, you and your companions killed more than 214 people for the purpose of totally destroying the national group of the Dos Erres hamlet [...].

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<sup>44</sup> The Kaibiles are elite troops of the Armed Forces of Guatemala (see *supra* note 1).

### 3. PERPETRATION-BY-MEANS

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

Since it was first introduced by Claus Roxin, the theory of perpetration-by-means through domination or control over an organized apparatus of power has come to play a key role in the national and international prosecution of those responsible for committing international crimes. The theory is premised on the importance of establishing the responsibility of the highest-level commanders, who, while not physically present at the scene of the crimes, make sure that their orders and criminal designs are carried out through extremely well-organized hierarchical structures. Because compliance with the orders and directives of high-level commanders is virtually automatic, they are the ones who have true control over the commission of the crime. Based on the principle of control or domination over the act, then, the perpetrator behind the perpetrator becomes an indirect perpetrator of the crime.

On this basis, rather than develop a new theory of imputation, the jurisprudence of the International Criminal Court has combined two particularly relevant theories: perpetration-by-means through an organized apparatus of power and co-perpetration. The concept of indirect co-perpetration draws from both of these theories and is characterized by the following elements: “(i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; [...] (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crime; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).”<sup>45</sup> From a careful reading of the text transcribed above, it is easy to deduce that the decision refers to indirect co-perpetration, which is also referred to as co-perpetration-by-means through control over an organized apparatus of power. In other words, when the ICC refers to indirect co-perpetration, this must be understood as a fusion of the theories of co-perpetration (in the traditional sense) and the theory of perpetration-by-means through an organized apparatus of power, as Roxin proposed.

Latin American courts have yet to apply this combination of theories explicitly in their rulings. This represents a clear opportunity for a jurisprudential dialogue between the courts of the region and the ICC, on the basis of which our courts must determine the applicability, or non-applicability, of this complex form of perpetration. Meanwhile, some domestic rulings have continued to develop jurisprudence on a more pure version of perpetration-by-means through control over an organized apparatus of power. A part of

<sup>45</sup> ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on confirmation of charges, No. ICC-01/09-01/11, January 23, [2012], para. 292. See also ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, Decision on confirmation of charges, ICC-01/04-01/07-717, paras. 491–539.

this judicial discussion is presented below. At the same time, as discussed in the following section, co-perpetration, also in its most elemental form, has increasingly been used as the most relevant theory for determining individual criminal responsibility for international crimes or for the common crimes subsumed in the former.

ARGENTINA, *ESMA Mega-trial (García Tallada, Manuel Jacinto, et al., accused)* (*List of Judgments 1.b*), *Whereas section*. Notions [about imputation of criminal responsibility and participation] and the constructs developed in the most current, specialized doctrine do not reflect conflicting positions that engender legal insecurity. Rather, a brief examination of the jurisprudence suggests the possibility of arguing, as the main issue, that the theory and the imputation of criminal responsibility are complementary and have a reciprocal influence on each other.

This was the finding in Tucumán Province (“Police Headquarters of Tucumán re/ kidnappings and disappearances,” File J-29/09): “[...] 8.3 *OBJECTIVE IMPUTATION*: While it is true that the causal connection between the conducts imputed to the defendants in these proceedings has been fully established in light of the so-called ‘theory of domination of the act through the use of organized power apparatuses,’ *it can be reasonably argued that the dogmatic tool employed poses no obstacle to, but rather complements harmoniously, another imputative construct: the objective imputation theory. It is common knowledge in criminal legal doctrine that this theory entails two basic requirements: (a) the creation of a prohibited risk to the legally protected value, and (b) the realization or culmination in a result of that legally disapproved risk. In other words, the perpetrator (or co-perpetrator) of the act will be the one who sets in motion one (or more) conducts that create a prohibited risk for the legally protected value and that risk then gives rise to the criminal results. In this way, we can factually determine that the foregoing elements are present in the multiplicity of crimes facing [the accused]. This is the case because the power apparatus that carried out its illegal tasks during the de facto government unleashed a series of activities that directly or indirectly jeopardized the most highly valued legally protected interests in our criminal inventory: life, liberty, and physical integrity. These individuals systematically undertook to organize a structure that endangered the life and liberty of individuals, resulting in the crimes of murder, injury, torture, violations against residences, and deprivation of liberty, among others. But this is not just a dogmatic and eminently theoretical pronouncement. In making this assertion, and to avoid an erroneous claim of lack of sufficient grounds, it has been noted that all of these activities have been duly proven in the course of the trial. Therefore, the factual basis, in other words, the facts judged, emerged in the course of the hearing with sufficient certainty to support the censure implied in the conviction*” [footnote omitted]. [...]

Noting [that the transcribed paragraphs will not be the end of the dogmatic discussion], and without too much preamble in the sense that the notions of criminal responsibility and imputation go hand in hand and have a reciprocal influence on one another—in other words, that they are cognizant of and do not underestimate their most profound dogmatic problems—the science of criminal law has already rejected the classic system with its ideas and scenarios in which the active subject of the crime could only be determined through data and physical information. Indeed, based on the classic model it was in actually possible to stumble upon the perpetrator of the crime and, due to his temporal-spatial proximity, hit upon him as the perpetrator. [...]

[V]irtually by genetics or *ex officio*, modern criminal science as a whole understands, then, that imputation of criminal responsibility is no longer based on proximity, or lack thereof, to the harm done to the legally protected value in order to guide or attribute this role. The content

of the analytical position suggested by the aforementioned author (Roxin) teaches us that it is a matter of conceptually specifying the normative guidelines based on which this role is ascribed to a subject [*footnote omitted*]. [...]

It has also been asserted in this regard: “*Explaining Roxin’s doctrine, Edgardo A. Donna adds a concept from Peters: ‘Whoever, by ordering and directing, takes part in the enterprise is, irrespective of his hierarchical level, a perpetrator. He bears full responsibility even though he, in turn, is subordinate to another entity that issues the orders’*” [*footnote omitted*].

Furthermore: “*In the dogma, different theories have been developed to interpret and explain the content of that legal precept. One of these is the ‘Dominion over the act theory.’ According to Zaffaroni, Alagia, and Slokar [*footnote omitted*], based on this theory, ‘... a perpetrator is someone who dominates the act, who holds the causal course in his hands, who can decide the whether and the how, or, more succinctly put, who can determine the central configuration of the event.’ At the same time, dominion over the act cannot be conceived of in a broad characterization of the phenomenon since it occurs concretely in three forms: (a) dominion over the action, exercised by a perpetrator who carries out the act personally; (b) functional dominion over the act, based on the idea of co-perpetration when there is a division of labor in the execution stage; and (c) dominion over will, the main premise of which is perpetration-by-means, and which occurs through dominion over the volition of others, whether by necessity or by error. For his part, Claus Roxin developed a thesis related to perpetration-by-means, in which dominion over the act occurs by means of the force wielded by an organized apparatus of power. He explained this using the case of Eichmann, who was convicted by the Jerusalem Court on December 15, 1961, for crimes committed in the context of National Socialism. Roxin argues that in crimes committed by the state, by mafia organizations, or war crimes, the theory of perpetration-by-means is admissible with respect to the subject within an organized apparatus of power who is closer to the executive decision-making organs and further removed from the victims, and who issues orders to subordinates. What is unique about this is that it assigns that subject greater dominion over the act, even though he is the furthest removed from the victim. An important aspect of this theory is the fungibility of the executors, as well as their criminal responsibility [...]. Consequently, this form of perpetration-by-means coexists with the figure of a responsible executor, as Claus Roxin argues” [*footnote omitted*].*

ARGENTINA, *Appeal (Jaime Lamont Smart, et al., accused) (List of Judgments 1.c), Whereas XIII*. [I]t is worth recalling that in Case 13/84, the Federal Chamber of Buenos Aires established certain guidelines according to which those in a higher-ranking position could be considered perpetrators (by means) of crimes committed by their subordinates, even if they did not have concrete dominion over the action. Basically, the guidelines can be summarized as follows: (a) dominion over the act is the main factor in characterizing the perpetrator of a crime; (b) on this basis, in cases such as this one, dominion is exercised over the will of the executor, thereby giving rise to perpetration-by-means; (c) this must occur in the context of an organized power structure; and (d) it is characterized by the ease with which the executor can be replaced should he refuse to carry out the action—that is, by fungibility.

This Court offered an in-depth discussion of these guidelines in the ruling handed down this past March 15 in the “Raffo” case. This circumstance has also been addressed in Cases No. 36.873, “Olivera Róvere, re. committal to trial with pre-trial detention” (Reg. No. 55 of 2/9/06), and No. 37.079, “Crespi, Jorge et al., re. committal to trial with pre-trial detention” (Reg. No. 429 of 5/17/06), both before the First Chamber of the National Federal Criminal

and Correctional Court. In these rulings, the subzone and area chiefs were held liable for acts carried out by their subordinates in territories that were under their control under domestic law.

Similarly, in their review of the ruling in Case 13, Justices Enrique Santiago Petracchi and Jorge Antonio Bacqué of the Supreme Court of Justice of the Nation held that “[...] superiors retain dominion over the events through the use of an organized power structure, a circumstance that makes them perpetrators-by-means of crimes committed in that manner. A relevant feature of this type of perpetration-by-means is the dominion wielded by someone who manages the system discretionally, not over a specific [person’s] will, but rather over an indeterminate will, since regardless of the executor of the criminal order, the act will take place. This is the case because another salient aspect of this form of perpetration is the fungibility of the executor, who is not operating individually but rather is a cog in the system. The perpetrator need only control the workings of the structure, since even if one executor eludes the task, he will immediately be replaced by another, who will carry it out. This conception of perpetration-by-means is wholly applicable to the case since the hierarchical structure of the military institution enables whoever is at the top to use all or part of the forces under his command in the commission of illegal acts ...” [...].

In the Court’s opinion, the role attributed on this occasion to M.O.E, R.A.C., and L.G.B [initials used to identify some of the accused in this ruling] fits within those parameters. In other words, those individuals meet the definition of perpetrators-by-means of the crimes attributed to them.

On the one hand, based on what has been substantiated thus far, the aforementioned individuals do not appear to have participated directly in the execution of the acts for which they have been summoned in this case, for which that form of perpetration is discarded.

Nonetheless, their positions in the hierarchy enabled them to issue directives to lower-ranking individuals, even as they themselves were subject to the orders issued by the military junta in power at the time, which were transmitted in turn by their immediate superiors. This setup, while precarious, shows how the hierarchies were structured and responsibilities were distributed down the ranks.

It should be clarified, as well, that the fact that the aforementioned individuals were not at the top of the hierarchical pyramid does not preclude using the category of “perpetration-by-means” to gauge their level of participation. Indeed, Claus Roxin described this situation as one of the specific problems associated with this form of perpetration and concluded that “... *whoever is employed in any part of an organizational machinery so that he is able to issue orders to subordinates is a perpetrator-by-means by virtue of his dominion over volition, if he uses his authority in order for punishable acts to be committed. Whether he does so at his own initiative or in the interest of superior entities and at their orders is irrelevant, since the only factor that determines his criminal responsibility is that he is able to steer the part of the organization subordinated to him, without having to leave it up to others to decide whether the crime will be committed ...*” [footnote omitted].

Based on this examination, the level of involvement the trial judge attributed to M.O.E, R.A.C, and L.G.B.—as necessary participants—should be changed to perpetrators-by-means of the crimes imputed to them.

In the realm of Latin American criminal trials for international crimes, the academic purity of some of the doctrines proposed by different authors has run up against the complexity of the arguments presented by the defense teams of the accused. In this context, a particularly contentious area relates to the application of new theories of imputation in pleadings arguing grounds for exclusion of criminal responsibility, such as carrying out superior orders, state of necessity, or coercion (which is derived from an insurmountable fear).

In principle, such arguments, known in Anglo-Saxon doctrine as “defenses,” have been checked by international rules that limit the possibility of invoking them as grounds for exclusion in criminal trials for international crimes. Despite the precision of these rules, they must be articulated in a legal discussion that is consistent with theories of imputation under international criminal law aimed at establishing the criminal responsibility of individuals who wield real power or control over the crime but who, in many scenarios, maintain a physical distance from the scene of the crime.

To give an example, several criminal trials in Argentina have debated the compatibility of the theory of perpetration-by-means through control over an organized power apparatus with the inability to invoke carrying out superior orders as grounds for exclusion of criminal responsibility. Briefly, the contention is that if virtually automatic compliance with the orders issued is an intrinsic feature of this form of perpetration-by-means, then one cannot at the same time argue that the direct perpetrators, as part of a highly organized and hierarchical power structure, should have disobeyed orders from their superiors. The paragraphs transcribed below present a part of this debate and a partial response to it.

This ruling is but one example of the complicated debates that will continue to surface in the judicial system. As in other cases, Latin American jurisprudence is making strides in the development of legal arguments that have yet to be addressed with the same degree of precision by the international criminal tribunals. In the context of this debate, which is being fueled by the contributions of the various parties and participants in criminal proceedings, it will be important to strengthen the dialogue between the various stakeholders in order to articulate responses to extremely complicated arguments.

*ARGENTINA, ESMA Mega-trial (García Tallada, Manuel Jacinto, et al., accused) (List of Judgments 1.b), Whereas section.* [T]he perpetrator who, in the context of his service, receives an order that contains all of the necessary ingredients to be considered illegal, and who, despite this, carries out the manifestly illegal order he has received—with knowledge of that illegitimacy—is eminently punishable. In such cases, [theories of imputation such as perpetration-by-means through dominion over organized power apparatuses] solve a problem that is not solved by genuine cases of traditional criminal responsibility because they correct the focus of the imputation by attributing responsibility to the one steering the power apparatus, or a retransmitter with authority, which is no longer based on the “non-punishability of the instrument” but instead on its fungibility.

In other words, whoever controls the apparatus, or makes such subjective dominion possible, is responsible, not so much because the instrument is not punishable, but because the executor or executors are fungible in the chain of command. And this is essentially because when someone directing a power apparatus such as the military issues a manifestly illegal order—in a context in which compliance with such orders is routine and their legitimacy is not questioned—he knows

full well that the order will be executed, since, given its inherent efficiency, the organized power apparatus guarantees, in the context of fungibility, that the order will, in fact, be executed. [...]

[As the Oral Procedure Court for Federal Crimes No. 1 of La Plata has held]: *“When someone, in an illegal power system, issues orders that lead to torture and even to death, this is not the result of a perverse system. It is not the product of a miserable policy, as Jakobs teaches, but rather a problem of criminal responsibility within an organized apparatus of power, just as the perpetrators of crimes in the concentration camps, or in Argentina’s secret center[s], or the guards who shot people at the [Berlin] wall of the former DDR, are the final link in a chain of causes. This is why in organized power apparatuses, the people at the top bear more responsibility than mere physical causality, and members of those apparatuses may only seek impunity based on individual grounds of exculpation [...]. This was known by their authorities, who also knew that they could oppose this illegal system, just as they could refuse to discharge detainees during the night, abandoned and defenseless, so that they could be easily set upon by the extermination groups that lay in wait for them at the prison’s exit. Apocryphal seals and signatures are not enough to excuse the grave responsibility that rests on their shoulders. It is not necessary to have a twisted imagination, as Jakobs proposes. It is not easy to imagine oneself a ‘jailer in a secret center,’ nor is it necessary to have a ‘great character’ in order not to be one, as Schroeder points out [...]. In the absence of a formal-normative configuration for this structure, the main problem in the trial of the former commanders lay specifically in proving that they, through their orders or by virtue of the aforementioned plan, had causally triggered certain punishable acts on the part of their subordinates—the problems of vertical responsibility—and that there were equivalent roles and responsibilities—the problem of horizontal responsibility [...].”*

[As acknowledged in some doctrinal writings,] *“[...] [O]ver time, the courts of justice in Latin America and Spain have increasingly [and] more frequently realized that the traditional approach [whereby the superior, after issuing the order, had no further involvement in the crime and therefore was merely another participant in it] does not adequately reflect the nature of the superior’s contribution to those crimes (planning and dominating the means by which the criminal activity is carried out) because it relegates him to a secondary role that does not correspond to the actual magnitude of his involvement. [...] Since the concept of perpetration-by-means is based on the superior’s dominion over the volition of his subordinates by virtue of his control over the organization, while the concept of co-perpetration requires shared dominion between superiors and subordinates, another problem becomes which of these two legal definitions should be applied to high-ranking political and military authorities in the hierarchy of the organization who planned systematic and widespread criminal campaigns and issued orders to their inferiors to execute them. Advocates of the theory of perpetration-by-means stress that when the crimes are committed through an organized apparatus of power, superiors and inferiors do not actually agree to a common plan, nor do they share dominion over the commission of the crimes, since the organization has its own autonomy and subordinates only execute or implement superior orders in an automatic manner. Advocates of the co-perpetration theory, in contrast, contend that superiors do not, in fact, exercise total dominion over the commission of the crimes since the final decision as to their commission falls to the subordinates who freely and knowingly choose to adhere to their superiors’ plan by carrying out the latter’s orders. As a result, superiors and their subordinates share dominion over the commission of the crimes, particularly when their involvement continues while the criminal orders are being implemented” [footnote omitted]. [...]*

[In addition to these discussions questioning the aptness of Roxin’s theory,] we cannot overlook the critiques stemming from one of the verdicts cited [in the instant ruling] (TOF No. 1 of San Martín, Case No. 2005) and shared, in part, by certain doctrinaires (cfr. including

García Víctor [...]), to the effect that Roxin's theory encourages impunity, as occurred here in Argentina with the Due Obedience law. For its part, the verdict held that that theory contributed to the theory of the two demons.

Indeed, the Court emphatically rejects that posture, mainly because of its dogmatic nature.

As we have seen, efforts to establish responsibilities for behaviors linked to organized power apparatuses have triggered profound discussions in the legal field, especially with respect to characterizing the actions of the so-called “desk perpetrators.” The responses have been inconsistent: there are those, such as ourselves, who espouse perpetration-by-means, while others support co-perpetration, and still others argue instigation.

Everyone agrees, however, on the complex operational network of an organized apparatus of power, in which orders are issued by superiors and executed by subordinates.

It appears, then, that those who, in choosing one of these three forms to characterize such behaviors, think they are forestalling the state's misguided efforts to establish impunity—for example, through the Due Obedience law—have failed to grasp the full extent of the functioning of the organized power apparatus and the attendant and well-known protestations of those who appear as direct executors to the effect that they acted in due obedience.

## D. Examples of organized structures or apparatus of power

### v. Argentine case: Illegal conduct of the armed forces as a structure of power (new)

*ARGENTINA, Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, defendant). List of Judgments 1.e), Whereas III.* As Sancinetti pointed out (“Análisis crítico del juicio a los excomandantes”), the last military junta officially acknowledged the organized structure of a power apparatus in a document dated April 28, 1983 (original draft of May 2, 1983), which read as follows: “All operations against subversion and terrorism carried out by the armed forces and by the security, police, and penitentiary services under their operational control, in compliance with Decrees 261/75, 2770/75, 2771/75, and 2772/75, were implemented in accordance with **plans approved and supervised by the organic superior commanders of the armed forces and by the military junta from the moment of its inception**” [*emphasis in original*]. According to this, then, the system not only included a pyramidal hierarchy within each force, such as that inherent to any armed force, but also a relationship involving a distribution of roles and reciprocal assistance between the forces pursuant to a plan approved and supervised by the higher echelons.

## 4. CO-PERPETRATION

As discussed at the beginning of this chapter, the ICC's adoption of a combined standard—that is, control over the crime as a key factor in distinguishing between principal perpetrators and accessories in the commission of a crime—has prompted the development of an important body of jurisprudence on the different forms of criminal involvement. This new area of jurisprudence in international criminal law is, without a doubt, more compatible with and relevant to the dogma and legal interpretation in many Latin American countries.

In this context, the ICC, like various Latin American courts, has paid particular attention to the criminal definition known as “co-perpetration.” Under Article 25(3)(a) of the Rome Statute, “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual, [or] jointly with another [...]” Different chambers of the ICC have found, in this provision, the basis for what they have termed “direct co-perpetration” or “co-perpetratorship” of the crime.

According to the relevant precedents, direct co-perpetration or co-perpetratorship requires the participation of two or more people who, acting in accordance with a common agreement or plan, make a coordinated and essential contribution to the commission of the crime.<sup>46</sup> In the words of Pre-Trial Chamber I, “only those to whom essential tasks have been assigned—and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks—can be said to have joint control over the crime.”<sup>47</sup> By setting out this element of co-perpetratorship, i.e., the essential contribution to the commission of the crime, Trial Chamber I held that the task assigned to a co-perpetrator need not always entail the direct commission of a material element of the crime. To the contrary, “Those who commit a crime jointly include, *inter alia*, those who assist in formulating the relevant strategy or plan, become involved in directing or controlling other participants or determine the roles of those involved in the offence. This conclusion makes it unnecessary for the prosecution to establish a direct or physical link between the accused’s contribution and the commission of the crimes.”<sup>48</sup>

With regard to the second element, i.e., the existence of a common agreement or plan, the ICC has held in several decisions that the common agreement or plan must include a critical element of criminality, namely, “[...] that its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.”<sup>49</sup> That opinion notwithstanding, Trial Chamber I has stressed, in line with the precedents from the pre-trial chambers, that it need not be proven that the plan or agreement in question was expressly and specifically directed at committing a crime or crimes under the competence of the ICC.<sup>50</sup>

In addition to the two objective elements described above, relevant precedents from the ICC have held that, in order to determine the joint commission of a crime, it is necessary to prove two mental elements: “(i) the accused and at least one other perpetrator meant to [commit the crime under the competence of the ICC] or they were aware that in implementing their common plan [a crime would] ‘occur in the ordinary course of events,’ and (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.”<sup>51</sup>

The paragraphs from Latin American rulings transcribed in this section focus specifically on determining the criminal responsibility as co-perpetrators of different

<sup>46</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 9, paras. 980–1006 and 1018.

<sup>47</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on confirmation of charges, ICC-01/04-01/06-803, January 29, 2007, para. 347

<sup>48</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 9, para. 1004.

<sup>49</sup> *Ibid.*, para. 984.

<sup>50</sup> *Ibid.*, paras. 982, 984–985, and 988.

<sup>51</sup> *Ibid.*, para. 1013.

individuals involved in the commission of crimes that qualify as or are subsumed in some international crime. Along these lines, each of the rulings includes, in relation to the facts in the case, the elements identified in the ICC's jurisprudence for establishing joint commission of a crime: (i) the existence of a common agreement or plan; (ii) the division of labor by virtue of which the accused takes on an essential role in carrying out the material elements of the crime and/or in the implementation of the common plan; (iii) the intention to commit the crime or awareness that, in the ordinary course of events, implementation of the plan will result in the commission of a crime; and (iv) the accused's awareness of his contribution to the agreement or plan. The arguments developed in the Uruguayan and Argentine sentences are particularly significant with regard to the accused's assuming the risk as a determining factor in establishing the relevant mental element.

Those two rulings also stand out in the sense that the accused in the respective criminal proceedings were never members of the armed forces. Rather, they were part of the operational structure of the dictatorships in strictly civilian positions: minister of foreign affairs and interior minister in Buenos Aires Province, respectively. Both rulings, then, underscore the important role that the civilian authorities played through their acquiescence and their national and international collaboration in the implementation of the criminal plans of the region's dictatorships.

It is important to point out, moreover, that a comparison of the various rulings reveals the spectrum or range of conducts—which are considered an essential contribution—that may be deployed in order to operationalize the structure through which crimes are committed or, as applicable, to implement the plan through which the material elements of the crime will be carried out. They include readying areas of confinement in inhuman conditions; providing intelligence or the necessary physical means to commit the crime; containing the population to keep them from escaping a massacre; or the international defense, through spurious claims, of the structure that directly commits the crimes. All of these are contributions that Latin American courts have found essential in determining the responsibility, as co-perpetrators, of persons who engaged in such behaviors.

Finally, it is important to clarify that some of the court rulings refer to the responsibility of the accused as “necessary participants” rather than as co-perpetrators. The use of a different nomenclature stems from the different ways that the criminal act has been included in the relevant codes and laws of each country. Nonetheless, those rulings have been included in this section because (i) the elements of necessary participation are the same as those that international jurisprudence has identified for co-perpetrators, and (ii) in accordance with the relevant law, the same penalties apply to necessary participants and to the perpetrators of the crime. This determination or outcome of the criminal sanction, in the reasoning of the ICC, is an essential aspect derived from the distinction between principal perpetrators and accessories.

URUGUAY, *Appeal (Juan Carlos Blanco Estradé, convicted) (List of Judgments 7.a), Whereas VI*. [A]s far as another of the defense team's arguments concerning AA's lack of participation in the crimes imputed to him by the trial court, it too, is not considered acceptable.

In its ruling on the appeal of the indictment, this Court offered a chronological account of the way in which the events related to [Elena] BB played out at the level of international

relations and of the active participation of the Ministry of Foreign Affairs—the minister of which was the defendant, AA—in the emergency, that is very illustrative. It stated as follows:

“(a) On June 28, 1976, at approximately 10:30 in the morning, a woman entered the grounds of the Embassy of the Republic of Venezuela screaming and asking for political asylum. As they went outside, the diplomats saw that several people had followed her in and one of them violently removed the woman from the grounds. The counselor of the Embassy, Mr. EE, was even injured in the struggle. The woman, who later was positively identified as a teacher called [Elena] BB, was put into a Volkswagen automobile with license plates ending in 714 and taken to an unknown location.

Venezuelan Ambassador Julio Ramos immediately contacted the Ministry of Foreign Affairs, first by telephone and then personally, at a meeting with Undersecretary Michelín Salomón, to register a complaint over the flagrant violation of the inviolability of his country’s diplomatic headquarters [*footnote omitted*].

Before the ambassador left, Dr. Michelín Salomón immediately contacted the Office of the President of the Republic and the interior minister by telephone. After the ambassador had left, the interior minister told Michelín Salomón that he could provide no information about the ambassador’s complaint, since the episode was not registered by the police or any of the other divisions.

(b) On [June] 29, the undersecretary, Dr. Guido Michelín Salomón, and the director of foreign policy matters, Ambassador Álvaro Álvarez, visited the ambassador of Venezuela in his residence to inform him of the results of the steps that had been taken by the competent authorities (Ministry of the Interior), which was reiterated on the following day by the minister of foreign relations, Dr. AA [*footnote omitted*].

Also on June 29, 1976, the Embassy of Venezuela sent its first note to the Ministry of Foreign Relations [...] reiterating the complaint made the day before concerning the events that occurred on the grounds of its headquarters, protesting the violation of its diplomatic headquarters, and demanding as reparations that they return the woman who was taken from there. The Ministry of Foreign Affairs forwarded a copy of this note to the Ministry of the Interior. The same day, that Ministry received from the Montevideo Police Headquarters a copy of the report by Police Chief Fontana, complaining, in the accompanying letter, about the accusations made by the secretary of the Venezuelan Embassy against the police, which they considered unfounded [...]. Later, a note from the Ministry of the Interior to the Ministry of Foreign Affairs included a vigorous complaint about the statements made by Embassy officials and reported that the police officer [who had been] guarding the Embassy at the time the incident [occurred] had been sanctioned and an indictment was being prepared.

(c) On July 1, 1976, the Ministry responded to the note from the Embassy of Venezuela [...] stating that their inquiries clearly showed that no government bureau was responsible for the incident.

That same day, the president of the Republic [of Uruguay], Dr. Alberto Demicheli, sent a telegram to his Venezuelan counterpart conveying the government’s regret and condemnation of the unfortunate incident and its plan to exhaust all means to ensure the success of investigations to identify and punish the guilty parties. [...]

The president of the Republic [of Venezuela], Carlos Andrés Pérez, stated that if they did not return the woman, relations with Uruguay would be severed [...].

(d) On July 2, 1976, Venezuelan Ambassador Julio Ramos sent a second note to the Ministry of Foreign Affairs in which, duly instructed by his government, he specifically requested the identification of Ms. BB "... age 31, a schoolteacher, whose family resides on Los Jockeys street in El Hipódromo neighborhood," and also requested that the official known as "Cacho," who, according to Police Chief Fontana, is an official of the Information and Intelligence Service, present himself to the diplomatic mission in order to clarify any questions about the woman taken from the grounds and about the person "who committed that outrage" [...].

(f) Also on July 2, when the Ministry of Foreign Affairs received the second note from the Embassy of Venezuela, Minister AA ordered the director of foreign policy, Ambassador Álvaro Álvarez, to write a memorandum on "Response to the Venezuela case from the standpoint of international relations" ("Conducta a seguir frente al caso Venezuela desde el punto de vista de las relaciones internacionales").

(g) It is interesting to point out, digressing a little from this account, that the events that occurred at the Embassy of Venezuela in our country on June 28, 1976 were reported immediately to the Department of Diplomatic Affairs of the Ministry [of Foreign Affairs], the evening of that same day or at the latest, the following evening.

(h) In the days that followed, from July 3 to 5, AA called a meeting of the three commanders in chief of the Armed Forces, the chief of Esmaco, and the minister of the interior. Also present at the meeting were Álvaro Álvarez, Michelín Salomón, and Julio César Lupinacci.

Following that meeting, events occurred in rapid succession: on July 6, the Ministry [of Foreign Affairs] issued a press release, which was delivered to the media by Álvaro Álvarez [*footnote omitted*].

The press release basically expressed regret and condemnation of the incident, and accused the ambassador of Venezuela of attempting to attribute responsibility to members of the police in civilian dress without evidence to support its version and of making public statements to disseminate its unfounded version. The same day, the Ministry [of Foreign Affairs] sent a note to the Embassy of Venezuela declaring the ambassador to be *persona non grata*. It attached to that note another one, No. 64/76, containing background information on [Elena] BB and stating that she left the country on January 24, 1976 [*footnote omitted*].

(i) On July 5, 1976, Venezuela adopted the decision to suspend diplomatic relations with our country, giving notification of this decision on July 6, 1976 [...].

(j) On July 15, 1976, the Ministry [of Foreign Affairs], by means of circular CT 12/3-P, instructed the diplomatic headquarters in our country on the lines of conduct they should follow in relation to the episode with Venezuela, adhering with regard to the events "[...] to the point of view of the Uruguayan government as stated in the communiqué from the Ministry of Foreign Affairs [...]," stressing that the emphasis will be on the responsibility of the ambassador of Venezuela, Julio Ramos, while the suspension of relations will be downplayed [*footnote omitted*]."

The defense attorney's position is based on the argument that AA, in his capacity of minister of foreign affairs of the Republic at the time the events in the case occurred, never knew that the woman involved in the events at the Embassy of Venezuela was being held by the Uruguayan authorities. In this sense, the defendant was induced into error by the competent authorities, in

whom he honestly believed, entirely ruling out any wrongdoing. [...] [As another contributing factor to its position, the defense [...] points out that AA never had command or dominion over the events, it was not in his hands to impede the outcome, and, specifically, the presumed death of BB was not a result of the defendant's actions.]<sup>52</sup>

Based on its examination of the body of evidence in the case, the Court finds that those contentions directly contradict [the evidence]. Accordingly, the grounds for rejecting [those contentions], which this Court provided in a timely manner, still stand. Therefore:

(a) Dr. AA was minister of foreign affairs of the Republic beginning before the *de facto* government and was *ex officio* a member of the National Security Council (COSENA);

(b) His statements before the Court indicate that he was almost immediately aware of the events that occurred at the Venezuelan Embassy on June 28, 1976, and on June 30, 1976, he even received Venezuelan ambassador Julio Ramos at the Ministry, in compliance with the responsibilities inherent to his position and in his capacity as a member of COSENA;

Indeed, as stated, he received the ambassador of Venezuela in his office on June 30, 1976, and informed him that the various inquiries carried out by the relevant authorities (Ministry of the Interior) had failed to clarify the matter, but that he had insisted on "... immediate information on this matter in order to respond to the ambassador of Venezuela's complaint ...". [...] Later, on July 1, he responded to the Embassy's note of June 29, 1976, stating that according to the information gathered, no government office was responsible. This was consistent with the telegram sent by the president of the Republic, Dr. Demicheli, to his Venezuelan counterpart, Andrés Pérez, although the latter expressed regret for the event and the intention to exhaust all efforts to clarify it;

(c) Upon receiving the second note from the Embassy of Venezuela, AA ordered the director of foreign policy matters, Álvaro Álvarez, to draft a memorandum on "Response to the Venezuela case from the standpoint of international relations." Guido Michelín Salomón, Julio César Lupinacci, and AA himself were involved in drafting that memorandum. [...]

As the most important piece of State evidence regarding the knowledge AA had that the detention of the teacher, BB, at the Venezuelan Embassy was the work of officials attached to the official security services, that "memorandum," in addition to other corroborating evidence, [must be analyzed in light of the facts described earlier].

According to Álvaro Álvarez, the minister (AA) had requested he prepare the "memorandum," with the instructions that it "[...] articulate or determine what was the position of the Ministry of Foreign Affairs in relation to the reported events in the Venezuelan case, strictly from the standpoint of international relations." There was discussion with AA, Michelín Salomón, and Lupinacci, "[...] and following the indications of the minister, he prepared a draft [...]," states Álvaro Álvarez [...]; later "[...] it was considered by the group [...], which made clarifications, additions, and modifications that, after being accepted by all concerned, particularly the minister, were included in the draft [...]" [...]

[The court had a typewritten copy of the memorandum from which] the structure of this document or "memorandum" is easily extracted. As follows:

Title: "Re: Response to the Venezuela case from the standpoint of international relations."

<sup>52</sup> Editors' note: The text in parentheses or brackets is found in another area of the original ruling, but was included here because of its relevance to this section.

“(1) Defining elements of the matter.”

Cited here are the Embassy of Venezuela’s note of June 29, 1976; the response of the Ministry of Foreign Affairs of July 1, 1976, to the aforementioned note; the telegram from the president of the Republic and the Embassy of Venezuela’s note of July 2, 1976.

“(2) Alternatives for action: [...] (a) turn over the woman [...] (b) do not turn over the woman.”

“(3) Analysis of the two categories of alternatives.”

(a) Do not turn over the woman: after pointing out the advantage of not producing proof of the illegal act and of avoiding any statements from her, the disadvantages are examined in 7 points.

(b) Turn over the woman: the advantages are examined in 3 points and the disadvantages in 4 points, some clarifications are given, and it concludes, “we are inclined toward the alternative based on turning over the woman.” [...]

[If it were true that the public officials were unaware of the victim’s detention], then [t]he alternative set out in point number 2 of the memorandum [...] would seem absurd, to say the least. If Minister AA was cognizant of the monolithic, firm, and categorical denial by the commanders in chief of the Armed Forces, the chief of the Joint High Command of the Armed Forces, and the minister of the interior of any participation by their forces in the episode that took place on the grounds of the Embassy of Venezuela, then why were those two alternative responses for our country chosen? It should not be forgotten that the memorandum was to be taken to a meeting he called as a member of COSENA, which would be attended by its members, in other words, by the aforementioned chiefs and minister of the interior, who denied holding the woman.

Obviously there is only one explanation for this: AA anticipated those as the only alternatives to take to the meeting because he had personal knowledge that the person removed violently from the Embassy grounds was being held by the security forces.

However, the knowledge that members of official security forces had been the ones to remove the woman is also corroborated in the memorandum, in point number 3, which, when considering the option of “not turning over the woman,” begins by noting that “it is not possible to continue to allege that the Venezuelan accusation is baseless, given the specific findings contained in the last note from Venezuela.”

AA claims that this statement was a working hypothesis so that “[...] in case a discussion of this should take place within the government [...] it was an attempt to anticipate possible elements of discussion in this regard” [...].

That justification is absolutely unacceptable. The criteria of reasonableness consistent with the natural course of events (or, if you will, sound judgment, Article 174 of the C.P.P. [Criminal Procedures Code]) make it impossible to accept such an explanation and lead to the conclusion that AA convened the other members of the *de facto* government fully aware that the woman who had been taken was in the hands of the official security services and that what is set out in this document reflected his faithful knowledge and conviction. [...]

There is no question that former minister of foreign affairs, Dr. AA, was fully aware of this episode of the removal of a woman, who turned out to be [Elena] BB, from the grounds of the Embassy of Venezuela by personnel from the official security forces. This is set out in the memorandum, despite the denial of those responsible.

It should be borne in mind as well that AA, in his capacity as minister of foreign affairs and “permanent member” of COSENA [...], was fully aware of reports that kidnappings, illegal detentions, and disappearances of persons were occurring in Uruguay, not only through “extra-official commentary” that circulated in society, but also through specific complaints brought before recognized international bodies.

It is also impossible to accept that AA “was induced into error” by military personnel, since he, in his capacity as foreign minister, had to report to international bodies on numerous occasions in response to specific complaints of disappearances or the unexplained death of detainees. It was the defendant who supervised or drafted these responses, issued orders to the Foreign Service, and represented our country at international events, denying such human rights violations.

In other words, it is clearly wrong to regard the oft-cited memorandum as a “mere working hypothesis.” Analyzed in light of the powerful institutional position of the defendant and his profound knowledge of the Uruguayan reality, it is in fact one of the main pieces of evidence demonstrating his liability.

The defendant, after the undisputed meeting to discuss the memorandum he submitted—which provides a detailed analysis of all the advantages and disadvantages of each of the two options presented, including that of persisting in the commission of the crime of, at minimum, unlawful deprivation of liberty—makes an abrupt about-face in the position he articulated therein, with no apparent justification.

So he shifted, as can be observed, from giving positive consideration to the Embassy of Venezuela’s complaint to declaring its ambassador *persona non grata* and accusing him, along with the counselor of that Diplomatic Mission, of having “flagrantly violated the national sovereignty and causing serious harm to the dignity of the Uruguayan people and Government,” and instructing all Uruguayan diplomatic headquarters to heed the language set out in the communiqué from the Ministry of Foreign Affairs in regard to this “incident,” stressing the Venezuelan ambassador’s responsibility and downplaying the prevailing situation of suspended relations [...].

It is because of AA’s direct cooperation, during the period the alleged crime was carried out, by acting to distort the reality, and not “for the mere fact of having occupied the position of minister of foreign affairs of the Republic” during the period of exception (institutional alteration or dictatorship), that he should answer criminally as a co-perpetrator of the especially aggravated crime of homicide (Article 61(3) of the Criminal Code).

GUATEMALA, *Case of the Dos Erres Massacre (Roberto Aníbal Rivera Martínez, et al., accused) (List of Judgments 3.a)*, *Whereas III and IV*. PRECISE AND DETAILED DETERMINATION OF WHAT THE COURT CONSIDERS TO BE SUBSTANTIATED FACTS: [...] That the accused, Carlos Antonio Carías López, was a second lieutenant (reserve) and commander of the military detachment in the village of Las Cruces, La Libertad municipality, Petén Department, in the months leading up to December 1982.

That the civilian population in the hamlet of Dos Erres, located in the jurisdiction of Las Cruces, La Libertad municipality, Petén Department, was considered a conflictive or red area and for that reason an operation was planned with the military objective of recovering guns that had been stolen by the guerrillas.

That over the period of December 6–10, 1982, in fulfillment of the military plan drawn up in advance in the context of the armed conflict, the accused, CARLOS ANTONIO CARIAS LOPEZ, carried out a series of acts essential to ensuring the massacre of residents of Dos Erres perpetrated by the Kaibil patrol under the command of Lieutenant Roberto Aníbal Rivera Martínez.

That on December 7, 1982, in the early morning hours, he ordered the soldiers and a group of civil self-defense patrollers subordinate to them in the aforesaid military detachment to conduct constant surveillance of all roads leading to the Dos Erres hamlet in order to make sure that no one left Las Cruces village and that no one from Dos Erres hamlet entered the village. The purpose was to make sure that no person would witness [the operation] or attempt to help the residents there, and that none of the residents under attack would manage to escape or seek help.

That the accused, CARLOS ANTONIO CARIAS LOPEZ, cooperated with the Kaibil patrol in carrying out the pre-planned military operation with absolute impunity, and that they roused the people of Dos Erres from their homes, using violence and cruel and inhuman acts to assemble the men and the elderly in the Dos Erres school (Escuela Rural Mixta), while they gathered the women and small children in the church.

When residents of Las Cruces village approached the accused, CARLOS ANTONIO CARIAS LOPEZ, in his capacity as a military authority, to request that he confirm what was happening in the hamlet of Dos Erres, he told them that a cleanup operation was underway. When family members persisted, the accused, CARLOS ANTONIO CARIAS LOPEZ, assembled all of the residents of Las Cruces village and told them not to inquire further about [the people of Dos Erres] because they had already been murdered for being guerrillas.

That the accused, CARLOS ANTONIO CARIAS LOPEZ, cooperated in preparing and carrying out the operation in which the Kaibil patrol commanded by Lieutenant Roberto Aníbal Rivera Martínez committed torture, rape, and inhuman and degrading acts, and murdered 201 people who have been individually identified and described in the indictment and in the preceding section.

That the accused, CARLOS ANTONIO CARIAS LOPEZ, was aware of the events surrounding the massacre before, during, and afterward, and with that knowledge made sure that the Kaibil patrol commanded by Lieutenant Roberto Aníbal Rivera Martínez would be able to commit murder, torture, rape, and inhuman and degrading acts against 201 people, including children, women, men, and the elderly.

That on December 9, 1982, the accused, CARLOS ANTONIO CARIAS LOPEZ, ordered the soldiers and the civil self-defense patrols under their command to enter Dos Erres hamlet in trucks and carts pulled by tractors to take possession of the livestock, crops, and movable goods of the residents who had been murdered there. He also ordered that the houses of the massacred population be destroyed, along with any trace of what had occurred in the preceding days, in order to cover up the egregious human rights violations that had been committed against the civilian, noncombatant population of Dos Erres hamlet. [...]

The statement given by expert ROBLES ESPINOZA establishes that the commander or chief of a military zone is responsible for decision-making and for any actions that are carried out. This circumstance is relevant in order to establish that the accused, CARLOS ANTONIO CARIAS LOPEZ, did in fact hold the position of military chief of Las Cruces, the military

zone in whose jurisdiction Dos Erres was located. Based on this, it can be inferred that he was in fact aware of the incursion into the area and of everything that took place there. [...]

It is important to point out that according to the military expert analysis, the Kaibil patrol's actions and participation were planned, followed a single pattern of behavior, and none of those involved put up any resistance. It is therefore established that the plan was effective inasmuch as everything had been anticipated, which proves that the chief of the Military Detachment of Las Cruces, CARLOS ANTONIO CARIAS LOPEZ, knew about the plan and complied with it. [...]

As for the accused, CARLOS ANTONIO CARIAS LOPEZ, the statements given by the witnesses— RICARDO MARTINEZ GONZALEZ, BLANCA DINA ELIZABETH MAYEN RAMIREZ, PEDRO ANTONIO MONTEPEQUE GARCIA, MARIA ESPERANZA ARREAGA, RAUL DE JESUS GOMEZ HERNANDEZ, SANDRA ORFILIA GOMEZ HERNANDEZ, FRANCISCO ARREAGA ALONZO, PETRONILA LOPEZ MENDEZ, FELICITA HERENIA ROMERO RAMIREZ, LUIS SAUL AREVALO VALLE, PETRONILA LOPEZ MENDEZ [*sic*], and SALOME ARMANDO GOMEZ HERNANDEZ—corroborate that at the time in question, December 1982, the accused was chief of the Las Cruces garrison and was known as Lieutenant Carías. Moreover, it has been established that he was aware of the events in Dos Erres, and that despite the petitions of the relatives of the dead who went to him to seek help and request an investigation into the events, he did not assist the victims' relatives. It should be noted that based on the military expert analysis given by General Rodolfo Espinoza and the witnesses' statements, and in light of the Principles of Sound Judgment, which include Logic and Experience, we find that the accused, CARLOS ANTONIO CARIAS LOPEZ, must have been informed of everything that had occurred in Dos Erres hamlet since he was chief of the Las Cruces garrison, which had jurisdiction over the hamlet where the victims died. It has also been shown that preparations were made prior to the criminal act, according to the statements given by witnesses IBAÑEZ and PINZON JEREZ, and it is therefore logical that Lieutenant CARLOS ANTONIO CARIAS LOPEZ was aware of the plans and issued the instructions necessary to support the elite Kaibil patrol. [...]

As far as CRIMES AGAINST HUMANITY regulated under Article 378 of the Criminal Code, the Justices find that the evidence we have examined proves that the residents of Dos Erres were peasant farmers, a civilian population, which was attacked and which offered no resistance whatsoever. The expert social-historical and military testimony, along with the statements given by eyewitnesses IBAÑEZ, PINZON JEREZ, and OSORIO CRISTALES, has amply demonstrated that the men, women, and children of Dos Erres hamlet were subjected to inhuman treatment, having been rousted from their homes where they were sleeping; they were tortured, several of the women were raped, and ultimately all were executed and tossed into a well to conceal them. This demonstrates the viciousness and brutal perversion of the treatment meted out to them, which ultimately erased this population from the geographic map.

After studying and piecing together the actions carried out by the accused and corroborating them with the evidence produced in the arguments, the Justices hold that, in fact, through their inhuman treatment of the civilian population of Dos Erres hamlet, the accused, REYES COLLIN GUALIP, MANUEL POP SUN, DANIEL MARTINEZ MENDEZ, and CARLOS ANTONIO CARIAS LOPEZ, carried out acts that amount to OFFENSES AGAINST DUTIES TO HUMANITY in accordance with Articles 36(1) for the accused

REYES COLLIN GUALIP, MANUEL POP SUN, and DANIEL MARTINEZ MENDEZ, and Articles 36(3) and 378 of the Criminal Code (insofar as he acted as an accessory) in the case of the accused CARLOS ANTONIO CARIAS LOPEZ, for which the relevant punishment should be imposed. [...]

As for the crime of AGGRAVATED THEFT, the Judges hold that in light of the statements by witnesses LAURA GARCIA GODOY, CRISTINA ALFARO MEJIA, FRANCISCO ARREAGA ALONZO, RAUL DE JESUS GOMEZ HERNANDEZ, and PEDRO ANTONIO MONTEPEQUE GARCIA, it has been demonstrated that following the massacre in Dos Erres hamlet, Lieutenant CARLOS ANTONIO CARIAS LOPEZ took possession of the victims' household goods. The witnesses clearly stated that they saw the victims' belongings being taken away in carts and that the victims' next of kin never recovered them. For this reason, the actions of the accused, CARLOS ANTONIO CARIAS LOPEZ, fit the definition of AGGRAVATED THEFT contained in Article 247(2) of the Criminal Code, since the accused, CARLOS ANTONIO CARIAS LOPEZ, took advantage of the collective danger, of the calamity visited upon the residents of Dos Erres who were massacred, to take for himself the simple belongings of those who had died. For this, the corresponding penalty should be imposed on the accused, CARLOS ANTONIO CARIAS LOPEZ.

Based on the evidence examined, the laws invoked, and the [respective] articles to be considered, this court [...] in a UNANIMOUS RULING, DECLARES: (I) That the accused [in this case, including] CARLOS ANTONIO CARIAS LÓPEZ, are liable as perpetrators of the crimes of MURDER committed against the life and integrity of the residents of DOS ERRES. (II) For this offense, they must be sentenced to an INCOMMUTABLE PRISON TERM OF 30 YEARS. [...]. (III) That the accused [in this case, including] [...] CARLOS ANTONIO CARIAS LÓPEZ, are liable as perpetrators of CRIMES AGAINST HUMANITY committed against the Security of the State. (IV) For this offense, they should be sentenced to an INCOMMUTABLE PRISON TERM OF 30 YEARS. (V) That the accused, CARLOS ANTONIO CARIAS LÓPEZ, is liable as the perpetrator of AGGRAVATED THEFT committed against the property of the residents of DOS ERRES hamlet. (VI) For this crime, he should be sentenced to an INCOMMUTABLE PRISON TERM OF SIX YEARS.

*ARGENTINA, Appeal (Jaime Lamont Smart, et al., accused) (List of Judgments 1.c), Claims and Pleadings, Whereas XII and XIII.* Upon obtaining the investigative statement from [JLS], the [First Instance] judge accused him of having participated, in his capacity as Minister of Government of Buenos Aires Province, in the unlawful deprivation of liberty and torture that the aforementioned individuals suffered (...) while they were illegally held in the section of the police precinct in Buenos Aires Province known as "Pozo de Quilmes" [...]. This participation was attributed to him for his essential contribution in making available Buenos Aires provincial police resources and personnel to carry out those actions, with knowledge of the illicit nature of the system, and derived from his obligations in relation to public order, prevention and security, and police organization, direction, and regimen, as set out in Article 15(6) of Law 7279 (...).

[In his pleadings, the accused] explained that his responsibility in relation to the Police of Buenos Aires Province was limited to administrative duties and that, in relation to the fight against subversion, that force was directly and exclusively under the jurisdiction of the First Army Corps, through the Chief of Police—first, Colonel C., and later, General R.

This activity, according to the declarant, was outside the purview of civilian officials, and as demonstrated in Case No. 13/84, the actions carried out by the Armed Forces against terrorism were governed by absolute secrecy. [...]

The [accused] was appointed Minister of Government of Buenos Aires Province through Decree No. 1 of April 8, 1976, and his term ended on September 4, 1979, upon acceptance of his resignation, as indicated in Decree 1737/79.

His official duties in that post are described in Article 15(6) of provincial law 7279/67, which refers to “(o)rders, prevention and public security. Police organization, direction, and regimen,” and their scope is set out in the agreement approved by means of provincial law 8529/75. It should be noted that this agreement defined the powers conferred under the aforementioned provincial law when the personnel and resources of the Buenos Aires provincial police and penitentiary system were placed under the operational control of the Defense Council. At the same time, however, it established that this control did not include powers to intervene in specific functions or in *administrative aspects of the provincial police and penitentiary forces*.

The aforementioned individual accepted that position, and the powers that came with it, as a *de facto* official. In other words, [he did so] *knowing or having to have known of the illegality of his appointment and the illegitimacy of the acts carried out in the course of his duties, given that under the Historical Constitution of the State, an action by any armed force that usurps the rights of the people is considered seditious*. Therefore, political—and, where applicable, civil, criminal, and administrative—responsibility is incurred by (a) *accepting* high-level national or provincial public posts in the power structure of *de facto* governments, (b) *remaining in them*, and, as a result, (c) *participating in the perpetration of inherently illegitimate acts*.

The obvious conclusion is that the defendant, as Minister of Government of Buenos Aires Province under the military government from 1976 to 1983, was identified with the violent, inhuman, and repressive system that had been installed. This organic integration and ideological identification with the military government implied a certain degree of collaboration—or, better yet, according to the lexicon, of *participation*—inasmuch as he was part of the functional and vertical structure of the State or became part of the power structure: that is, “he had something to do with it.” Collaboration with or participation in executive, ministerial, police, and penitentiary bodies, among others, signifies that he was clearly represented in the outcomes of his contribution to the acts carried out under a clandestine system of repression with victims on a collective scale. The duties he *voluntarily* assumed point to the conclusion that such government officials must have considered, consciously and inexcusably, the risks of participating in the execution of the systematic plan that had been drawn up and the implications of carrying out that plan. Proof of this is found in the historical-political context of the period under examination, which leaves no doubt that those acts occurred, and occurred according to the plan. There can also be no question about the correlation between the acts that were committed and the aforementioned individual’s tenure in that post, or about the extreme gravity of the ways in which the acts were committed, based on what was known at the time and what was later clarified in a manner that is only possible under constitutional governments.

From the foregoing, it can be deduced that (...) he had *full knowledge of the systematic and far-reaching plan of inhuman and illegal repression unleashed in the Buenos Aires region*. What is more, the aforementioned individual discharged the duties inherent to his *de facto* position in the government of Buenos Aires Province, as minister of that government, which ultimately were essential for the effective implementation of the criminal plan.

From the standpoint of international human rights law, it should be recalled (i) that the acts carried out pursuant to that plan included a large-scale attack on the population; (ii) that the attack was the result of a structural policy designed by the State for the purpose of collective or widespread repression and extermination; and (iii) that the active *civilian and military* subjects (perpetrators or accessories) were aware of the policies contained in the plan for repression and widespread extermination. This gives rise to a universal crime, known as a *crime against humanity* [footnote omitted]. [...]

Indeed, the unlawful deprivation of liberty, captivity in secret centers, torture, and disappearance of persons would not have been possible without the complicity of the defendant, among others, whether by relinquishing his own duties in favor of the objectives of the plan directed by the military dictatorship—as a civilian—or by making the local administrative structure available for the exclusive benefit of that far-reaching plan.

It follows, then, that the contribution of the Ministry of Government—whose functions and actions were under the purview of the accused, S.—was essential in ensuring the full effectiveness of the offensive capacity of the repression and extermination plan, taking into account that it was an available and permanent *subsystem* intended to tactically and strategically carry out the organized criminal and unlawful activities. The Buenos Aires provincial police forces, which must operate under the jurisdiction of the responsible ministry, were put at the direct service of the command structure charged with carrying out the “anti-subversive struggle.” In this way, the operational use of those forces for different acts—e.g., unlawful deprivation of liberty, kidnappings, detentions, disappearances, torture, etc.—occurred with the *participation* of the Minister of Government of Buenos Aires Province, even though his actions may not satisfy the criminal definition of *perpetrator* of the act.

Pursuing this train of thought, clearly it should be emphasized that the accused occupied this important post knowing that he was doing so for the purpose of enforcing the mandates from laws and decrees issued prior to his investiture (provincial laws 7279 and 8529, and decrees 2770, 2771, and 2772). Those norms clearly stipulated relinquishing the organization and control of the local security forces (police and penitentiary service) while continuing to administer them for the struggle and the types of struggle planned for the region. This was an essential contribution to the perpetration of the crimes—in the case at hand, unlawful deprivation of liberty and torture—without which they could not have been carried out. As a result of the foregoing, he will be punished for (...) the unlawful deprivation of liberty and the torture to which [the victims] were subjected. [...]

JLS participated in the crimes not only through his mere knowledge of the act, but through his contribution to making it happen. For this reason, it has long been said that “participation is a form of action” [footnote omitted].

Specifically, as a primary accessory, he provided essential cooperation to the perpetrator or perpetrators—co-perpetrators—meaning those who took part in carrying out the act. According to Article 45 of the Criminal Code, there is a radical distinction between providing essential aid or cooperation for a crime, which applies to those who carry it out, and providing essential aid and cooperation to the perpetrator(s) of the act.

In line with these clarifications, while the accused has “acted outside the sphere of activity associated with the actual commission of the crime” [footnote omitted], it is no less true that he acted in his capacity as an accessory or necessary participant, since if he had not provided that aid, the act could not have been committed (hypothetical mental suppression in the theory of

*conditio sine qua non*). Necessary participation, in this case, stems from the contribution to the criminal act of the perpetrator or perpetrators in cases where there was a contribution to their act (commonality of action) and a desire to contribute to the action or particular intentions toward a common objective (intentional convergence).

The confluence of will was joined with the confluence of action, which includes complicity through consent or omission, in that, and insofar as, the provincial government had the inherent duty to act or to serve as guarantor of the population.

GUATEMALA, *Myrna Mack Case (Edgar Augusto Godoy, Juan Valencia Osorio, and Juan Guillermo Oliva, defendants) (List of Judgments 3.c), Whereas section*. The reports submitted by the Presidential High Command [have] amply demonstrated that on September 11, 1990, the date of Myrna Elizabeth Mack Chang's violent death, the defendants, Edgar Augusto Godoy Gaitán, Juan Valencia Osorio, and Juan Guillermo Oliva Carrera, were serving as Chief of the Presidential High Command and Deputy Chief of Security of the Presidential High Command, respectively. [...]

As documented in the rulings from the first instance, appeals, and cassation proceedings introduced at this hearing, army specialist Noel de Jesús Beteta Álvarez was found criminally liable in the murder of anthropologist Mack Chang. At the time, this individual was on active duty with the Presidential High Command, which, pursuant to the act establishing the Guatemalan armed forces, is part of the army and therefore has a military structure governed by the principles of hierarchy, obedience, and respect for the laws of the military, as indicated by expert witness Quilo Ayuso. It is a department that, according to expert witness Rosada Granados, has an extremely complex structure that was originally created for the use of a military-style government. When Marco Vinicio Cerezo Arévalo took office, however, he tried to give it a different nature, restructuring it so that its sole function was to provide security for the president and his family in keeping with legally established procedures. [...] President Cerezo, then, appointed the defendants to their high-level posts, choosing them from a list of individuals sent to him by the Ministry of Defense. He appointed defendant Godoy Gaitán as Chief of the Presidential High Command, and Valencia Osorio as Chief and Oliva Carrera as Deputy Chief of the Security Department. Noel de Jesús Beteta Álvarez served as an army specialist in that department.

[T]he statements provided by witnesses Clara María Josefina Arenas Bianchi, Bishop Julio Edgar Cabrera Ovalle, Bishop Gerardo Humberto Flores Reyes, Rubio Amado Caballeros, and Justino Rodríguez Santana demonstrate that Myrna Elizabeth Mack Chang had been followed and persecuted beginning approximately two weeks prior to her death. These actions are inherent elements of an intelligence plan of the type designed and implemented by the army, as expert witness Pino Benamu has shown us. All of the foregoing leads us to conclude that the violent death of anthropologist Mack Chang was the result of a previously developed plan. This is confirmed by the statement given by witness Jorge Guillermo Lemus Alvarado, who described how the direct perpetrator of this crime told him in confidence that the assassination of this individual was the result of a plan and an order delivered personally and directly by then Chief of Security of the Presidential High Command, defendant JUAN VALENCIA OSORIO, who handed him the file and said "surveillance" and ... gave him the traditional Roman hand gesture for death.

On this point, we judges have achieved a level of legal certainty that by his conduct, this defendant is criminally liable as the perpetrator of the crime of MURDER against the life of anthropologist Myrna Elizabeth Mack Chang, under Article 36(3) and Article 132 of the Criminal Code. This is because at all times, even prior to giving Mr. Beteta the order to kill, he participated in the commission of this crime, since as he handed the file over to the direct perpetrator, he also ordered him to eliminate her. These are acts which, without his involvement, could not possibly have led to that result and, in any case, were totally contingent on his will, since a single order could have prevented the acts from being carried out.

The ruling handed down by the first instance court was subject to multiple appeals. In its ruling of May 7, 2003, the Fourth Chamber of the Court of Appeals vacated several of the dispositions from the trial chamber ruling and proceeded to acquit Juan Valencia Osorio. The Public Ministry and Helen Mack as joint plaintiff filed a cassation petition challenging this ruling. In its ruling, the Criminal Chamber of the Guatemalan Supreme Court of Justice overturned the Court of Appeals ruling and upheld Juan Valencia Osorio's individual liability as perpetrator of the murder of Myrna Mack. The Supreme Court's main arguments concerning his individual liability are transcribed below.

GUATEMALA, *Criminal cassation remedy (Juan Guillermo Oliva, convicted) (List of Judgments 3.b), Whereas section.* [I]n conducting the required comparative analyses, the Court of Cassation found that in its ruling of May 7, 2003, the Fourth Chamber of the Court of Appeals had determined that the Department of Presidential Security was *the same* as the Presidential High Command. This was pivotal to its decision to acquit the accused, Juan Valencia Osorio, as it was the basis for the conclusion that there was no evidence of a causal relationship in the act attributed to the accused and, therefore, of the perpetratorship attributed to him, without this fact having been proven by the Third Criminal Trial Court.

[According to the text of the ruling on appeal] [...] the Court *ad quem* takes as fact that the Security Department of the Presidential High Command and the Presidential High Command are one and the same, when according to the circumstances set out in the records, the first instance court demonstrated the distinction between the Security Department of the Presidential High Command and the Presidential High Command itself with absolute and explicit clarity in its ruling. Hence, the Court *a quo* had deemed proven, in the [...] section titled **PRECISE AND CIRCUMSTANTIAL DETERMINATION OF THE FACTS THAT THE COURT DEEMS TO HAVE BEEN PROVEN**, that the defendants Edgar Augusto Godoy Gaitán, Juan Valencia Osorio, and Juan Guillermo Oliva Carrera, on September 11, 1990, held the posts of Chief of the *Presidential High Command* [and] Chief of the *Department of Presidential Security* of the Presidential High Command, respectively. From this, it is easily deduced that the trial court accepted as a proven fact the existence of the Presidential High Command *per se*, and as a demonstrated fact the existence of the Security Department as an integral part of the former, as well as the position that each of the defendants held in each of them. In addition to this, in number six of the aforementioned section, it accepts as a proven fact that the murder of anthropologist Mack Chang was carried out with resources pertaining to the Security Department of the Presidential High Command, from whence came the order to kill her. And, in number four, it is deemed proven that the order to kill anthropologist Mack Chang was transmitted by Colonel Juan Valencia Osorio. In other words, with these facts, and

the arguments set out throughout the text [of the] ruling, it is once again determined with certainty that the first level court accepts as proven facts the existence of the aforementioned Security Department of the Presidential High Command, whose chief was defendant Juan Valencia Osorio, and that of the Presidential High Command itself, whose chief was defendant Edgar Augusto Godoy Gaitán.

[T]he trial court specifically established that defendant Juan Valencia Osorio, as Chief of the Security Department of the Presidential High Command, is the one criminally liable as the perpetrator of the crime of murder committed against the life of Myrna Elizabeth Mack Chang. And, with respect to the criminal liability of defendant Edgar Augusto Godoy Gaitán, it clearly stated that while it is true that he was the superior chief of the Presidential High Command, it is also true that it was not totally proven that the plan of execution that was referred to had been conceived at the level of the Presidential High Command. [...]

Based on the foregoing, the Criminal Chamber holds that, in effect, the tribunal *a quo* was correct in determining that the accused, Juan Valencia Osorio, is the liable perpetrator pursuant to Article 36(3) of the Criminal Code, since, as transcribed in the preceding paragraph, it accepted as a proven fact that he cooperated in the murder of Myrna Elizabeth Mack Chang by ordering Mr. Beteta to carry it out. [...]

[Turning now to the second part of the plea on the merits submitted by the joint plaintiff, it is important to begin by pointing out that] according to Article 27(2) of the Criminal Code, malice aforethought occurs when the crime is committed using means, modalities, and forms that are directly or especially conducive to ensuring that it will be carried out, without risk associated with any attempt at defense that the offended party may make; or when the victim, due to his or her personal conditions or circumstances at the time, cannot prevent or avoid the act or defend against it.

In the instant case the Chamber determines that the trial court did deem to have been proven facts that corroborate that the defendant, Juan Valencia Osorio, made use of means, modalities, and forms conducive to ensuring that the killing of Mack Chang would be carried out. First, because it accepted as fact that the killing of the anthropologist was carried out with resources pertaining to the Security Department of the Presidential High Command, from whence the order to kill her was issued. Second, because as Chief of the Security Department, Juan Valencia Osorio was the one who specifically used Army Specialist Noel de Jesús Beteta as the means to carry out the assassination, by ordering him to kill the anthropologist. Third, because in order to consummate the murder, surveillance and persecution was employed up to the actual day of death, as can be observed particularly in the facts related to numbers two, three, four, and six of the section titled PRECISE AND CIRCUMSTANTIAL DETERMINATION OF THE FACTS THAT THE COURT DEEMS TO HAVE BEEN PROVEN. Therefore, it should be apparent to even the dullest mind that the means employed—resources pertaining to a State entity, an army specialist, and surveillance and persecution, all within the broad context of the actual nature and functions of the Security Department of the Presidential High Command—were the ideal means, modalities, and ways of ensuring the death that is attributed to the defendant, Juan Valencia Osorio. Therefore, it is legally correct to apply Article 132(1) of the Criminal Code, which refers to malice aforethought as a qualifying circumstance in the crime of Murder.

Closely tied to the aforementioned qualifying circumstance is the provision in 132(4) of the Criminal Code. In this regard, Article 27(3) of that Code states that there is known

premeditation when it is shown that the external acts carried out reveal that the perpetrator thought of the idea of the crime sufficiently in advance to organize it, deliberate about it, or plan it, and that in the time elapsed between the intention and its commission, he prepared it and carried it out coldly and thoughtfully.

As stated previously, the aforementioned proven facts and those found throughout the first instance ruling establish that the accused, Juan Valencia Osorio, acted with known premeditation. This is demonstrated by the fact of the surveillance and persecution of Mack Chang prior to her murder under orders from Valencia Osorio, as the trial court found to have been demonstrated in the first instance ruling. All of the foregoing leads us to conclude that the violent death of anthropologist Mack Chang was the result of a previously designed plan, in which it can be inferred that the defendant, Juan Valencia Osorio, aware of the legal prohibition against murder, consciously and voluntarily carried out the act through another person, which makes him guilty of and liable for the acts attributed to him.

## 7. OTHER FORMS OF PUNISHABLE CRIMINAL INTERVENTION

### A. Complicity

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), Whereas III*. The excuses [offered by the accused] are simply puerile, starting with the internal inconsistencies in his statement. Luna essentially contends that police personnel were completely removed from the actions of military personnel in relation to what he calls people detained on grounds of subversion. In the next line, however, he adds that he changed the location where the detainees would be held in his police station to one that differed from what military personnel had indicated. Needless to say, this is not consistent with the supposed division of labor between the police and the military.

This is no minor detail, given that the aim is to prove his involvement in the deprivation of liberty of the victims and in the conditions of their detention and that, at least from the standpoint of collaboration, his own excuses describe the way in which he readied his police station to illegally house these prisoners.

The inconsistencies in his statements are also confirmed by the wealth of evidence compiled in the case on the close relationship between military and police personnel. For example, Luna claimed to be removed from anything that might have to do with repressive action, which was exclusively the domain of military personnel.

Yet the police who gave statements described another reality, even if indirectly. [...]

[For example,] Police Inspector Norberto Ismael Maiolo testified that he recalled an occasion when a special meeting was held, during which Lieutenant Inspector Molinari harshly berated police personnel, telling them that he understood that the procedures to repress subversion were extremely ineffective since “they were not establishing clear targets and carrying out concrete operations.”

At the risk of being redundant, it should be noted that this case illustrates a recurrent theme in numerous previous cases, that of joint military and police repression. In the case at hand, Fateche and Derganz are arrested by the police, transported in a patrol car by combined

personnel, and held at a police station that housed both military and police personnel. In other words, there is nothing to substantiate the claim of separation of functions. [...]

It is also easy to discount his supposed ignorance of what was taking place in the so-called restricted area. Personnel under his responsibility at the time refuted this at the hearing and when they gave their statements back in 1985.

[Santos] Miño [a former policeman and trial witness] said that **those individuals were held in the file room, in the officers' casino, and in the radio room** [*emphasis in the original*], which obviously covered virtually the entire facility if one adds the kitchen and the lower staircase mentioned by Derganz. [His ignorance of the situation is also belied by] his **admission that police personnel had access to that area** [*emphasis in the original*].

Also when he stated that **military personnel interacted with senior police personnel at the station, that senior personnel were aware that detainees were present, and that the latter were hooded** [*emphasis in the original*].

Peralta, too, said that **there was a restricted area from which all personnel were barred except for the military and station chiefs** [*emphasis in the original*], and that the so-called "political prisoners" were brought in military trucks and **they were held in a cell to which only the chiefs had access** [*emphasis in the original*]. [...]

To summarize: (1) on the date the events occurred, Juan Demetrio Luna was chief of the First Police Precinct of Tigre [...]; (2) the testimony cited establishes beyond a shadow of a doubt that Fateche and Derganz were held in the Tigre police station [...]; (3) it has been proven that their arrests were not recorded in the station's arrest log [...]; (4) [Luna's] awareness of the unlawful nature of the detentions has also been proven [...]; (5) the police chief also could not have been unaware of the conditions in which they were detained and the torture to which they were subjected. [...]

Luna's knowledge of the detention conditions and torture of the victims is obvious. It would not be plausible to think otherwise. For example, when the detainees arrived at the station, they were interrogated about their personal information, hoods were placed over their heads, their hands were bound, and they were savagely tortured with an electric prod (one need only recall when Derganz said that Fateche would be taken to the "grill") and beaten (sometimes with rubber hoses, an instrument frequently employed by the police).

He could not have been unaware of it, could not have avoided seeing or hearing it. And he was the chief of the station, no less.

And in addition to what has already been said, it should be noted that the events occurred in December 1976, when the massive scale of illegal detentions and disappearances was obvious, particularly to someone who had been the chief of that police station for the preceding six months.

Accordingly, from his vantage point as chief of the station, he would have observed some of the actions that without a doubt amounted to the inhuman detention conditions and torture inflicted on the victims in different areas of the facility under his command.

Luna must therefore be held liable for the unlawful deprivation of liberty of Carlos José Fateche and Victorio Derganz, for the inhuman detention conditions they endured, and for the torture that was inflicted on them.

He shall not be accused as a co-perpetrator inasmuch as it has not been proven that he had joint control over the act.

Luna's direct involvement in the perpetration of any of the crimes also was not proved, despite serious suspicions in this regard.

Nonetheless, he was aware of them, he tolerated them, and he facilitated them.

## CHAPTER III

# GROUNDS FOR EXCLUSION FROM CRIMINAL RESPONSIBILITY

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### 1. DUE OBEDIENCE TO SUPERIOR ORDERS

#### B. Exclusion of due obedience to superior orders as a defense

##### i. Order is manifestly illicit

ARGENTINA, *Criminal cassation remedy (Gregorio Rafael Molina, convicted) (Vote of Judge Mariano Hernán Borinsky) (List of Judgments 1.a), Whereas section*. Finally, [...] it should be made completely clear that if the intention of the defense is to question the perpetrator's degree of guilt in carrying out superior orders based on the vertical military structure to which their client belonged—as appears to be the case in the appeal—then the undeniably and manifestly illegal nature of the acts, and consequently, of the orders carried out by the accused in the context of an illegal repressive system which provided the context for the acts attributed to him, preclude any exoneration from responsibility based on due obedience (Article 33(2) of the Rome Statute adopted by means of Law 25.390).

At the same time, given the manifestly illegal nature of the orders carried out by the agent, it is impossible to entertain any hypothesis that uses ignorance of the illegality of the acts verified in the inquiry to sustain an argument of mistake of law.

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), Whereas III*. And clearly there was nothing that would lead one to believe that the orders were legitimate, since the orders were not service-related but rather for the commission of crimes so egregious that no one could be so utterly mistaken as to their nature.

ARGENTINA, *Appeal (Jaime Lamont Smart, et al., accused) (List of Judgments 1.c), Preliminary matters*. [S]ince 1868, the Supreme Court of Justice of the Nation, invoking the grounds set out by the Office of the Attorney General of the Nation, has held that a superior order is not sufficient to cover the subordinate agent who carried out that order and shield him from all criminal liability if the act is unlawful and amounts to a crime.

And drawing from the same source, “... *obedience is not due if the act obviously amounts to a crime, because it is clear that such acts are crimes that the law condemns and punishes, and the agent who carries them out should be punished and should not be allowed to take refuge in an order he should not have obeyed, if he had no criminal intent ...*” [...].

The Appeals Chamber of the National Federal Criminal and Correctional Court also rejects a defendant's excuse of having obeyed superior orders, holding that “... *between the law that generally requires obedience to a superior order and a prohibitive law that is manifestly contrary to what the superior orders, the choice is clear. Above all else, compliance with the law, which is superior to*

*all orders ... Authority ceases when the order is obviously unjust ... discipline, which is essential to the unity of action of an authority, is legitimate when it serves what is just and good; placed at the service of a criminal order, it does nothing more than organize the crime ...* [...]

In other words, even accepting that they may have acted based on “legal” orders, absolute and unconditional obedience is unacceptable and must be contingent on a degree of control over the mandate [*footnote omitted*].

This control should not be merely formal, because while compliance with orders is an essential premise for the existence of any State organization—as it is unthinkable that a system of administrative hierarchies could possibly function if inferiors were to constantly exercise control over superior orders—it is no less true that allowing obedience to an order contrary to the basic principles of the rule of law is a dangerous course, given that [the order’s] authoritarian content directly implicates the State and its international responsibilities under the treaties. [...]

It should be made very clear that there is no truth whatsoever to the assertion that the illegality of the clandestine system of repression installed during the so-called National Reorganization Process only became known beginning in 1983.

The very nature of those aberrant crimes—the systematic use of torture, illegal detentions, secret centers, and forced disappearance of persons—forces one to discard the notion that someone could have thought it was legitimate to collaborate in acts that entailed absolute disregard for human dignity. Compliance with an order can never be considered valid grounds for claiming unawareness of the injustice of acts carried out for the purpose of destroying the moral and physical integrity of the human being and erasing his or her will.

The intent to justify the perpetration of acts—truly aberrant crimes—that harmed basic human rights in the course of carrying out the order requires one to completely discard the argument that has been attempted. Specifically: those orders, because of their material content, should have been disobeyed by the accused, and no type of erroneous action, whether vincible or invincible, may be admitted.

On the relationship between perpetration-by-means through control over an organized power apparatus and due obedience as grounds for excluding criminal responsibility, see ARGENTINA, *ESMA Mega-trial (García Tallada, Manuel Jacinto, et al., accused) (List of Judgments 1.b), Whereas section.*

### 3. STATE OF NECESSITY

ARGENTINA, *Criminal cassation remedy (Gregorio Rafael Molina, convicted) (Vote of Judge Mariano Hernán Borinsky) (List of Judgments 1.a), Whereas section.* [T]he defense’s argument that the state of necessity in which Gregorio Rafael Molina allegedly found himself when he committed the acts for which he was convicted is an exonerating circumstance must be discarded *in limine*, inasmuch as this claim has been attempted and rejected by the court *a quo* based on specific and solid grounds that the defense was unable to refute in its appeal.

On this point, it cannot be overlooked that the exonerating circumstance that the defense invokes requires the perpetrator to have committed the crime to avoid an immediate danger to himself or to a third party, a threat to life, bodily integrity, or liberty, whether physical or

sexual—harming, in the process, a legally protected interest of equal or greater value. The important element in such cases is precisely the agent's inability to consider those legally protected interests in circumstances that threaten the legally protected interest he is trying to protect. The classic academic example of a situation of this nature is two people struggling over a lifeboat, raft, or plank at sea in order to save their lives after a shipwreck [*footnote omitted*].

In the instant case, there is no evidence of, nor does the defense report, any actual danger that could justify—given the unenforceability of a different course of conduct—the crimes committed by the accused, which have been established as facts. There has been no claim and there is nothing to indicate that the actions confirmed in the *sub lite* can be justified by the advent of a serious and imminent threat of suffering harm that could mitigate the agent's guilt.

## CHAPTER IV

# NATIONAL LEGISLATION ON CRIMES UNDER INTERNATIONAL LAW AND THE PRINCIPLE OF LEGALITY

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### 1. STATES HAVE AN OBLIGATION TO ADOPT THE NECESSARY LEGISLATION RELATED TO CRIMES UNDER INTERNATIONAL LAW

*COLOMBIA, Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 4.* [I]n accordance with the [duty to criminally prosecute international crimes], the Criminal Code of 2000 introduced a catalogue of related punishable conducts, penalizing serious crimes against persons and property protected under IHL [international humanitarian law]. They were included in Book II, Title II, Sole Chapter of Law 599 of 2000 [footnote omitted] in response to the need to provide a special level of protection to the civilian population affected by the magnitude of the decades-long armed conflict in Colombia, as evidenced in a reading of the preamble to this Law:

*“In the context of the internal armed conflict in Colombia, many of the conducts that violate or threaten Human Rights are also violations of International Humanitarian Law. They are acts or omissions in which those participating directly in the hostilities—the combatants—fail to discharge their duties or violate the prohibitions set out in Common Article 3 and Protocol II additional to the Four Geneva Conventions.*

*The active subject of an International Humanitarian Law violation may be any of the individuals fighting on behalf of any one of the warring parties in an armed conflict. Today, international jurisprudence and doctrine refers to serious violations of humanitarian law as war crimes.*

*These war crimes entail a more intense and manifold harm than other common crimes, since they not only attack legally protected values such as the life and physical integrity of protected individuals, dignity, individual freedom, and the right to legal due process, but also offend the autonomous legal interest that is international law governing armed conflicts.*

*The proposed legislation includes a special chapter titled “Punishable acts against persons and property protected under International Humanitarian Law,” which sets out a series of offenses that characterize and penalize conducts amounting to the most serious crimes under that international body of law that Colombia has undertaken to respect and enforce [...].*

*The reasons for which it is fitting and necessary to establish these punishable conducts are clearly manifest in the acute armed conflict facing the country.*

*As Messrs. Nigel Rodley and [Bacre Waly] Ndiaye—the United Nations special rapporteurs on torture and on extrajudicial, summary or arbitrary executions, respectively—stated during their visit to the country on October 17–26, 1994: ‘... Areas of armed conflict continue to be the scenario of large-scale human rights violations and abuses by members of the security forces, paramilitary or “private justice” groups often said to cooperate with them,*

*and the armed insurgent groups.’ (Joint report on the visit by the special rapporteurs on the question of torture and on extrajudicial, summary or arbitrary executions, January 16, 1995, p. 9).*

*One of the conducts included in that body of law is the unjust and distressing forced displacement of people caused by human rights violations and by the armed conflict. All parties to the conflict share responsibility for this human migration, which reflects their blatant negligence and disregard for basic principles of humanity.*

*The Colombian State should take all measures, including in the sphere of criminal legislation, to tackle this human and social drama that affects thousands of Colombians whom this fratricidal war has deprived of their basic means of survival. This draft legislation is a contribution to this institutional imperative.”*

## CHAPTER V

# JURISDICTION OVER CRIMES UNDER INTERNATIONAL LAW

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### 1. CRIMINAL PROCEDURE: OBLIGATION TO INVESTIGATE, PROSECUTE, AND PUNISH CRIMES UNDER INTERNATIONAL LAW

COLOMBIA, *Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 4.* It should be recalled that Article 93 of the Political Constitution accords primacy over domestic law to certain provisions of international human rights treaties ratified by Colombia. In that regard, constitutional doctrine has explicitly stated that in order for those treaties to have primacy in the domestic sphere, “two situations must occur simultaneously: the first is recognition of a human right, and the second, that the latter fall within the rights that may not be restricted during a state of exception” [footnote omitted]. In such circumstances, international humanitarian law treaties such as the Geneva Conventions of 1949 and their Additional Protocols of 1977 clearly meet both of those requirements, since they enshrine human rights that may not be restricted during a state of exception.

In this regard, the Colombian State has the duty to ensure that serious violations of international humanitarian law are punished for what they are: attacks not only against the life, physical integrity, dignity, and freedom of persons, among other relevant values, but also against the basic values recognized by all of humankind and embodied in a set of standards that make up what is known as international humanitarian law.

### B. Judicial processes must be carried out according to due process norms

ARGENTINA, *ESMA Mega-trial (García Tallada, Manuel Jacinto, et al., accused) (List of Judgments 1.b), Whereas section.* [I]t should be stated that one of the characteristics that reflect a society’s level of commitment to democracy is the intensity with which it respects the individual rights and protections of those accused of crimes that are committed as part of the power apparatus of a dictatorship and that affect humanity.

Failure to do so has pernicious consequences that can distort the system, which itself is characterized by respect for basic human rights.

As a result, the rule of law will be tailored to the unique and sensitive situations of those who must undergo criminal proceedings against them, regardless of the seriousness or odiousness of the crimes that have been attributed to them. Moreover, [the law] will transform and apply its corrective measures in keeping with what is required by and upholds the dignity of the person, as the feature that distinguishes and legitimizes the political system established by our Constitution. Therefore, basic human rights are not derived from one’s status as a national of a particular State, but rather from the attributes of the human person. [...].

As a colophon of sorts, we should say that there is no such thing as a criminal law of the enemy, but rather a single body of criminal law through which the State includes the accused in

the legal system and makes sure that they enjoy all of the protections the National Constitution affords to someone who is suspected of having violated a norm and must undergo the necessary due process to define his or her status under the law and in society.

## ii. Right to appeal (new)

Within the right to due process, the right of appeal is recognized in Article 8(2) of the American Convention on Human Rights (ACHR), which stipulates that “[e]very person accused of a criminal offense has the right [...] to the following minimum guarantees: [...] (h) the right to appeal the judgment to a higher court.” Similarly, Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR) recognizes that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

Based on this normative framework, international jurisprudence has identified the right to appeal a verdict as an inherent part of the right to a defense. As the Inter-American Court of Human Rights has held, the possibility of a comprehensive review of a judgment by a superior judicial body is an appropriate means of ensuring that the ruling is well founded. This minimizes the risk of convictions handed down based on legal errors or in violation of due process.<sup>53</sup> In light of these basic premises, the Peruvian judgment transcribed below discusses the content and scope of the right recognized in Article 8(2)(h) of the ACHR and Article 14(5) of the ICCPR. Without a doubt, in this ruling the Peruvian Constitutional Court rightly exercises constitutional and conventional oversight of norms regulating the right to appeal legal rulings handed down in criminal trials. Judgments of this nature strengthen domestic application of international criminal law as well as the struggle against impunity through respect for due process.

PERU, *Constitutional remedy (Alberto Fujimori Fujimori, convicted) (List of Judgments 6.a)*, *Whereas 8–10, 16–22, and 36*. The jurisprudence of the Constitutional Court has consistently held that the right of appeal is set out in Article 139(6) of the Constitution, which in turn is subsumed in the basic right to due process envisaged in Article 139(3) [*footnote omitted*].

In relation to the content of the right of appeal, this Multi-judge Court has established that “its purpose is to ensure that all persons, whether natural or legal, involved in a legal process have the opportunity to have the ruling handed down by the court reviewed by a higher body of the same nature, as long as they have availed themselves of the relevant appeal procedures within the legally established time period” [*footnote omitted*]. Accordingly, the right of appeal is closely related to the basic right to a defense envisaged in Article 139(14) of the Constitution.

Of course, the name of the legal remedy that provides access to a higher appeals court is immaterial. Whether it is called an appeal, motion to annul, motion for review, or simply challenge, what is important from the constitutional standpoint is that it allows for effective oversight of the initial legal ruling. [...]

On this matter, Article 8(2)(h) of the American Convention on Human Rights (ACHR) provides that “[d]uring the proceedings, every person is entitled, with full equality, to the

<sup>53</sup> Inter-American Court of Human Rights (hereafter, IACourtHR), *Case of Barreto Leiva v. Venezuela*, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C, No. 206, paras. 88–89.

following minimum guarantees [...] [the right] to appeal the judgment to a higher court.” For its part, Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR) states that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

One can argue, in light of the aforementioned provisions, that part of the essential content of the basic right of appeal is the right of all persons to appeal rulings that have resulted in a criminal conviction. In this Court’s interpretation, moreover, since the underlying purpose of this basic protection is, among other things, to directly and duly protect the basic right to personal freedom, it follows that part of the core content of this right is the opportunity to appeal any legal decision that directly imposes a serious form of personal coercion on the individual (e.g., pre-trial detention).

While this is binding content derived directly from the Constitution, the conditions for determining the legitimacy of the appeal may be subject to legal regulation, without detriment to the fact that those conditions must not constitute unreasonable barriers to access to this remedy and to its due efficacy. [...] In the words of the Inter-American Court of Human Rights, “While States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment [*footnote omitted*]. The Court has established that the ‘formal existence of remedies is not sufficient; these must be effective’; in other words, they must provide results or responses to the end that they were intended to serve.”

Similarly, the requirement that the remedy be effective means that the court before which the appeal is lodged must exercise reasonably broad supervision over any factors that may have led to the conviction, in order to ensure that the right to a *review from a multi-judge court* may actually be realized in form and in substance. [...] In this regard, the Inter-American Commission on Human Rights has asserted that “Article 8.2.h [of the ACHR] refers to the minimum characteristics of an appeal required to ensure the correction of both substantive and procedural errors. In this respect, from a formal point of view, the right to appeal a decision before a higher judge or tribunal, as referred to in the American Convention, must first proceed against any first instance decision, in order to examine the improper application, failure to apply, or misinterpretation of the rules of law that form the basis for the resolution in the decision. The Commission has also felt that in order to guarantee the full right to a defense, the appeal must include a material review of the interpretation of procedural rules that may have influenced the decision in the case, when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of such rules” [*footnote omitted*].

Moreover, while an isolated interpretation of Article 14(5) of the ICCPR could lead to the conclusion that the essential content of the right of appeal is exhausted by the possibility of appealing criminal convictions, the Constitutional Court considers that this is not the proper criterion. Not only because, as stated *supra*, it also covers the right to challenge other legal rulings, such as those that seriously restrict personal freedom, but also because the ACHR does not define the scope of this right as narrowly as the ICCPR. As stated earlier, its Article 8(2)(h) provides that “[d]uring the proceedings” (without specifying which), “every person is entitled, with full equality” [...] to the minimum guarantee [of the right] to “appeal the judgment to a higher court” (without mentioning a conviction). It is in this vein that the Inter-American

Court has made a point of specifying that “Even though the said article [Article 8 of the ACHR] does not specify minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal, or any other nature, the minimum guarantees established in the second paragraph of this article also apply in these areas and, consequently, in these areas the individual has the right to due process in the terms recognized by criminal law, to the extent applicable to the respective proceeding” [footnote omitted].

In light of these principles, the Constitutional Court takes the view that the core content of the right of appeal includes the right to appeal rulings handed down in proceedings other than criminal ones. This is understood to include any legal ruling that, in a hetero-composite process, rules on the merits of the dispute, as well as any legal ruling that, without pronouncing on the merits of the matter, is intended to bring the case to a conclusion.

Now then, under both Article 14(5) of the ICCPR and Article 8(2)(h) of the ACHR, the right of appeal must be exercised before a “higher” judge or court. In the opinion of the Constitutional Court, this requirement is related to the *telos* of the right of appeal, namely access, through the appeal, to *more experienced legal minds* than the one that handed down the initial ruling. Since there is no way to subjectively guarantee that higher qualification in the abstract, legal systems usually attempt to guarantee it through deductive reasoning based on objective criteria such as the superior status, rank, or level of the review court and the increasingly rigorous requirements for appointments to judicial positions as one ascends the hierarchy. [...]

In the view of the appellant, the right to challenge Supreme Court rulings on requests for recusal of magistrates is included in the content of the basic right to appeal legal rulings within the basic right of appeal. Of course, in light of the provisions of F. J. 25 *supra*, this right is not part of the core content of the right of appeal, not only because it does not challenge a conviction, a measure restricting personal freedom, or a ruling intended to put an end to a proceeding, but because the rulings claimed to be subject to appeal were handed down by a multi-judge court made up of the highest-ranking justices in the Judiciary.

### iii. Right to be judged within a reasonable time period (new)

Like the right to the natural judge and the right to appeal a verdict, the right to be judged within a reasonable time period is recognized in international human rights treaties, including Article 8(1) of the American Convention on Human Rights and Article 14(3) (c) of the International Covenant on Civil and Political Rights.

Beginning with its earliest judgments, the Inter-American Court of Human Rights, referencing the jurisprudence of the European Court of Human Rights, has held that there is no pre-established period measured in months or years that can or should be considered adequate when determining the reasonable duration of a criminal proceeding. To the contrary, this must be established on a case-by-case basis, taking into account four basic criteria: (i) the complexity of the matter, (ii) the procedural activity of the accused, (iii) the procedural activity of the authorities, and (iv) the impact of the legal situation on the person involved in the proceeding.<sup>54</sup> Similarly, when determining the duration of the

<sup>54</sup> See, for example, IACourtHR, *Case of Valle Jaramillo et al. v. Colombia*, Merits, Reparations and Costs, Judgment of November 27, 2008, Series C, No. 192, para. 155; IACourtHR, *Case of Radilla Pacheco v. México*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 23, 2009, Series C, No. 209, para. 244.

proceeding, it is important to bear in mind that the Inter-American Court “considers the proceeding to be at an end when a final and firm judgment is delivered and the jurisdiction thereby ceases [...] and that, particularly in criminal matters, that time must cover the entire proceeding, including any appeals that may be filed.”<sup>55</sup>

As observed in the judgment transcribed below, these criteria have had a significant impact on the constitutional law of Latin American countries. Nonetheless, a look at the criteria established by international tribunals specializing in international criminal law helps to complete the picture.

The statutes of the international criminal tribunals for the former Yugoslavia and Rwanda and the International Criminal Court recognize the right to be judged without undue delay.<sup>56</sup> For its part, the ICTR has held that “[t]his right only protects the accused against *undue* delays [*footnote omitted*]. Whether there was undue delay is a question to be decided on a case by case basis [*footnote omitted*]. The following factors are relevant [for this decision]: the length of the delay; the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence [presented by the parties], the complexity of the facts and of the law); the conduct of the parties; the conduct of the authorities involved; and the prejudice to the accused, if any.”<sup>57</sup> In that judgment, the ICTR also held that, given the inherent complexity of criminal proceedings for international crimes, it is not unreasonable to expect that they will take significantly longer than domestic proceedings for ordinary crimes.<sup>58</sup> The tribunal also underscores that, in certain cases involving several counts or several accused, the proceeding becomes even more complex, and this will be reflected in its duration.<sup>59</sup> This assertion is quite relevant, since, as discussed in Chapter VII of this digest, a litigation strategy that has been particularly successful in domestic criminal trials of international crimes has been a joinder of cases or charges against several accused. This has made it possible to present more coherent cases that reflect the true gravity of the crimes, as well as the role of each one of the accused in a common plan or within the apparatus of power used to commit the crime. In evaluating what constitutes a reasonable time period in this type of proceeding, then, domestic courts will have to keep in mind the criteria established by the specialized international criminal tribunals, particularly since they are consistent with the regional jurisprudence in this regard.

For a discussion of the applicable criteria for determining a reasonable time period for a criminal proceeding for international crimes, see PERU, *Petition for dismissal of criminal proceeding (Santiago Enrique Martín Rivas, et al., accused) (List of Judgments 6.b), Whereas 1, 5, 7, 10, and 13.*

<sup>55</sup> IACourtHR, *Case of Suárez Rosero v. Ecuador*, Merits, Judgment of November 12, 1997, Series C, No. 35, para. 71.

<sup>56</sup> See Article 21(4)(c) of the ICTY Statute, Article 20(4)(c) of the ICTR Statute, and Article 67(1)(c) of the Rome Statute.

<sup>57</sup> ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Appeals Chamber, Judgment, Case No. ICTR-99-52-A, November 28, 2007, para. 1074.

<sup>58</sup> *Ibid.*, para. 1076.

<sup>59</sup> *Ibid.*

### 3. EXCLUSION OF MILITARY JURISDICTION

#### A. Crimes under international law are excluded from military jurisdiction

COLOMBIA, *Motion for Review (Gustavo Amaya Ruiz, et al., accused) (List of Judgments 2.d), Whereas 8, 12, and 13*. Prosecutor 147 Criminal Circuit II, in reassigning the case, pointed out that the criminal proceeding cited in the motion dealt with a serious breach of International Humanitarian Law insofar as the murder victim was an educator and trade union activist who was killed because his assailants believed that he belonged to an irregular armed group.

During the proceedings, adds the representative of the Public Ministry, the military criminal court dismissed the case despite an affidavit that directly accused members of the National Police of committing the crime. This situation was brought to the attention of an international human rights monitoring body, which qualified it as a “conspicuous breach of the obligations of the Colombian State to undertake a serious and impartial investigation of that violation.” This led the Inter-American Commission on Human Rights, in its Report 62/99 of April 13, 1999, to recommend, among other things, that the State adopt “the necessary measures for the regular justice system to undertake a serious, impartial, and effective investigation for the purpose of judging and punishing those responsible” for the events aired in the respective proceeding. [...]

Indeed, the plaintiff and the Prosecutor-Delegate before this Court have both requested a review of the criminal proceeding in question. [This is] based on the finding of the aforementioned international entity that in the course of that proceeding, the Colombian State had, in relation to the victims of the criminal incident, violated the right to judicial protection set out in Articles 8 and 25 of the American Convention on Human Rights, since the military criminal court had dismissed the case even though, given the way in which the events transpired and their serious implications, the mere fact that the individuals accused of committing the punishable acts were active members of the national police was insufficient grounds to conclude that they had acted in the course of their duties. [...]

In relation to the military criminal justice system, this Court has repeatedly specified the steps required to properly establish the necessary causal relationship between the service and the crime in order to justify the military justice system as the natural judge of criminal acts committed by its members. Because this doctrine [*footnote omitted*] has remained constant and is wholly applicable to the instant matter, it must be reiterated at length:

*“The Criminal Cassation Chamber of the Supreme Court of Justice, in its own words, but also echoing those of the Constitutional Court, has set forth the established, undisputed, and confirmatory explanation that in order for a conduct to be considered ‘service-related,’ it is not enough that the agent have such status at the time the acts were committed. The act must also be clearly related to the duties assigned to the military forces. [...]*

*“The requirement that the punishable act be directly related to a legitimate military or police mission or task stems from the need to preserve the special status of military criminal law and to avoid expanding military jurisdiction to the point where it becomes nothing more than a privilege of the military class. Accordingly, not everything that is done as a substantive consequence of service, or while on duty, can be included in the scope of military criminal law, since the reprehensible conduct must have a direct and close relationship with the military or police function. The concept of service may not be mistakenly extended to cover everything that*

*an agent actually does. Otherwise, his action will be delinked in practice from the functional element at the core of this specialized branch of law.*' (Judgment C-358 of 1997 [of the Colombian Constitutional Court])

*As a result of the verdict cited hereinabove, terminology such as 'in the course of service or as a result of the latter or of the duties inherent to his position,' found in some of the provisions of the Military Criminal Code, was excluded from the law based on the realization that the legislature had extended the sphere or scope of competence of the military justice system beyond the bounds established by the Constitution. It was therefore clarified that Article 221 of the Constitution would only apply when, in addition to verifying the personal aspect—namely, active-duty status in a public force—it could be demonstrated that the crime had 'a clear causal link between it and the service-related activity. In other words, the punishable conduct must stem from an overstepping of the bounds or abuse of power that has occurred in the context of an activity directly tied to a function inherent to the armed forces. In addition, however, the nexus between the crime and the service-related activity must be close and direct rather than merely hypothetical and abstract. This means that the excess or overstepping must have occurred in the course of carrying out a task inherently related to the legitimate duties of the Armed Forces and the National Police.'*

*The Court also identified two extremely important aspects that must be taken into account in determining whether or not military jurisdiction is applicable.*

*The first is that under no circumstances may offenses defined as crimes against humanity fall under the military criminal justice system, given the obvious contradiction between such crimes and the functions assigned to the public forces by the Constitution. Such crimes not only have no connection whatsoever with those functions, but are, in and of themselves, an offense against the dignity of the person and a clear violation of human rights. It was therefore established that such crimes must always be investigated by the ordinary justice system so as not to infringe on the very nature of the military justice system and, ultimately, the language of the Constitution.*

*The second has more to do with the dynamics of the proceeding. It was established that, in the course of such proceeding, clear evidence must be introduced concerning the connection between the criminal conduct of the public agent and the service that was being performed. In cases where such evidence is lacking or there are doubts about which organ should be assigned jurisdiction, the decision should always err in favor of the ordinary justice system."*

This issue has not escaped the attention of international justice organs. In its August 16, 2000, judgment in the *Case of Durand and Ugarte v. Peru*, the Inter-American Court of Human Rights took a similar stance on military criminal jurisdiction, stating that it "has been established by diverse legislation to maintain the order and discipline within the armed forces. Even such functional jurisdiction states that this legislation is enforced for soldiers who have committed a felony or offense exerting their functions and under some circumstances."

This organ has also pointed out that in a democracy governed by the rule of law, the military criminal jurisdiction must be restricted and exceptional in scope and geared toward the protection of special legal interests related to the functions assigned to the military forces under law. Therefore, civilians should not be tried by military courts, and military personnel should only be tried for the commission of crimes or misdemeanors that by their very nature undermine the legally protected values inherent to the military system [footnote omitted].

Based on these premises, the Inter-American Court considers that the military justice system should be strictly reserved for active-duty military personnel. Therefore, when that jurisdiction takes up a matter that should come under the ordinary justice system, it is violating the right to the natural judge and, *a fortiori*, to due process. The latter, in turn, is closely related to the right of access to justice itself insofar as the judge assigned to the case must be competent, independent, and impartial.

In conclusion, bearing in mind that the punishable conduct investigated in the criminal proceeding under review has to do with an extrajudicial murder—the motive for which was the possible relationship or tie between the victim and an insurgent group—and that the individuals accused of perpetrating the act were at the time attached to the National Police, in light of the arguments set out hereinabove, it is evident that such an occurrence cannot remain under the purview of the military justice system, since under no circumstances could this act be construed as related to, or a consequence of, the duties of the Public Force.

Based on the objective examination conducted to determine whether the Military Criminal Court undertook a serious and impartial proceeding, the Court also observes that the proceeding in the aforementioned jurisdiction was detrimental to the interests of the victims (the deceased's next of kin). This is the case not only because, according to the provisions of Decree 2550 of 1988 (the Military Criminal Code in force at the time), the Civil Party previously recognized by the Office of the Public Prosecutor did not participate in the process and, as a result, was deprived of the opportunity to pursue any remedy against unfavorable decisions, but also, and primarily, because the military court's proceedings were only partial. After the finding of invalidity at the conclusion of the pre-trial phase, the court confined its actions to verifying the defendants' status as active-duty members of the public forces, a circumstance that had already been established. A year later, and without having obtained any additional evidence, it dismissed the entire proceeding in favor of the accused.

It is clear then, just as the international organization observed, that the military criminal court did not, strictly speaking, conduct a serious and impartial investigation. Moreover, the proceeding before that court violated the principle of the natural judge insofar as the facts and the arguments put forth demonstrated beyond a shadow of a doubt that the conduct under investigation had nothing whatsoever to do with a service-related act. It could not have, when the attack showed clear signs of being an extrajudicial murder perpetrated against an individual who was presumed to be involved in a subversive organization. This amounts to a clear violation of International Humanitarian Law, just as the Inter-American Commission on Human Rights pointed out in its Report 62/99 of April 13, 1999, in Case 11.540. For this reason, the regular court had jurisdiction to air this matter, under the direction of the Sectional Office of the Public Prosecutor in the pre-trial phase and a criminal circuit court in the trial phase. [...]

Lastly, it should be pointed out that besides being a conspicuous violation of due process and the principle of the natural judge, the irregularity also violated the victims' rights to truth, justice, and reparations, since, as the Inter-American Court of Human Rights, the Constitutional Court, and this Court have held, due process guarantees have a bilateral connotation in that they are assumed to be equally valid for the defendant and for the victims.

Conclusion: Given that the bounds of jurisdiction and competence have been overstepped insofar as a clear violation of the right to a serious and impartial investigation has been amply demonstrated, as noted hereinabove, there is no other choice—wherever a violation of a

constitutional guarantee is involved, even by informal declaration—but to declare the nullity of the proceeding.

## B. Civilians are excluded from military jurisdiction

MEXICO, *Miscellaneous File 912/2010 (Enforcement of the Judgment in the case of Rosendo Radilla v. México) (List of Judgments 5.a), Whereas 8*.<sup>60</sup> The specific measures included in the judgment [of the Inter-American Court of Human Rights in the case of *Radilla-Pacheco*] [...] require the Mexican State to undertake legal reforms in order to restrict military jurisdiction exclusively to the prosecution of active-duty members of the armed forces for crimes and misdemeanors against the legally protected values inherent to the military system. [...]

Although [the relevant section of the Inter-American Court judgment] comes under the headings [...] “Reforms to legal stipulations” and “Constitutional and legislative reforms in matters of military jurisdiction,” [indicating that] these reforms could fall under the jurisdiction of a constitutional reform or of the legislative branch of the Mexican State, an examination of the content reveals that these obligations also apply to the Judiciary of the Federation. This applies in particular to exercising oversight of the constitutionality [...] of Article 57(II)(e) of the Code of Military Justice so that it is deemed incompatible with the provisions of Article 2 of the American Convention on Human Rights. This, in turn, informs the interpretation of the meaning of Article 13 of the Federal Constitution. [*footnote omitted*]

While the Inter-American Court does not stipulate the need to amend the normative language that regulates Article 13 of the Political Constitution of the United Mexican States,<sup>61</sup> in practical terms, it must be interpreted in light of the conventional and constitutional principles of due process and access to justice set out in the Constitution itself and in the aforementioned American Convention [*footnote omitted*].

The thrust of the conclusion reached in the judgment for which compliance is being examined herein was that under no circumstances may military jurisdiction apply in situations that violate the human rights of civilians. This is because when military courts take up acts that constitute human rights violations against civilians, they are exercising jurisdiction not only over the defendant, who must necessarily be an active-duty member of the military, but also over the civilian victim, who has the right to participate in the criminal proceeding not only to obtain appropriate reparations for the harm done, but also to exercise his or her rights to truth and justice.

In addition to the foregoing, the [Inter-American] Court held that the victims of human rights violations and their next of kin have the right to have those violations heard and resolved by a competent civilian court in keeping with due process and access to justice. The importance

<sup>60</sup> Known in Spanish as “Expediente Varios,” this decision was adopted based on an internal procedural inquiry of the Mexican Supreme Court. This is not a judgment or ruling, but results from a writ filed by the parties in the case.

<sup>61</sup> Editor’s note: The relevant section of Article 13 of the Constitution, which is cited several times, stipulates, “Military jurisdiction is for crimes and misdemeanors against military discipline; but military courts in no case and under no circumstances may extend their jurisdiction to cover persons who are not members of the Army. When a civilian is implicated in a crime or misdemeanor against the military order, the case shall be taken up by the appropriate civilian authority.”

of the passive subject transcends the sphere of military jurisdiction, since legally protected rights inherent to the ordinary jurisdiction are involved.

Hence, in strict adherence to the ruling of the Inter-American Court of Human Rights, this Supreme Court of Justice of the Nation holds that the interpretation of Article 13 of the Federal Constitution in keeping with Article 2 of the American Convention must be consistent with the constitutional principles of due process and access to justice contained therein and in accordance with Article 8(1) of the American Convention on Human Rights, which, among other prerogatives, envisages the right to appear before a competent judge.

Therefore, Article 57(II)(e) of the Code of Military Justice is incompatible with the provisions of Article 13, based on this interpretation in light of Articles 2 and 8(1) of the American Convention on Human Rights. This is the case because in establishing which crimes violate military discipline, it fails to ensure that civilians, or their next of kin, who are victims of human rights violations will have the opportunity to be heard by an ordinary judge or court.

The foregoing, it should be reiterated, is the case not only because of the conclusion reached in the investigation undertaken by the Inter-American Commission on Human Rights, in the sense that what happened violated specific norms of the American Convention on Human Rights, in particular the right to life, but also because the circumstances surrounding the events show that the probable involvement of the State agents accused of participating in these criminal acts was clearly unrelated to their constitutional, legal, and regulatory mandate, particularly that of the National Police, to safeguard institutions and the welfare of their members.

## 6. UNIVERSAL JURISDICTION

### A. Determination of a tribunal's jurisdiction when exercising universal jurisdiction

While the purpose of this digest is to compile, systematize, and examine Latin American court decisions from proceedings dealing with the commission of international crimes, it is important to acknowledge the growing jurisprudential dialogue between our courts, international courts, and even national courts outside our region. The ruling below, from the Spanish Constitutional Court, has been included in this digest because it is directly connected to a ruling handed down by the Guatemalan Constitutional Court in 2007.<sup>62</sup> Both decisions—which have to do with Spain's request for extradition of a group of former Guatemalan military officers, including former dictator Efraín Ríos Montt—discuss, from their unique perspectives, the content and scope of the principle of universal jurisdiction. They engage in a fascinating dialogue about the exercise of this type of jurisdiction and its relation to domestic (territorial) and international courts and the concept of State sovereignty.

<sup>62</sup> See Constitutional Court of Guatemala, File 3380-2007, Ruling of September 12, 2007. Extracts from that ruling can be found in Volume I of the *Digest of Latin American Jurisprudence on International Crimes* (Washington, DC: Due Process of Law Foundation, 2010).

SPAIN, *Constitutional remedy (amparo) brought by Rigoberta Menchú Tum, et al. (Complaint against Guatemalan civilian and military officials) (List of Judgments 4.a), Legal bases 5–9*. As the record amply shows, the Supreme Court bases its rejection of Spanish court jurisdiction on different grounds than those invoked by the National Court [Audiencia Nacional], especially as far as the inherent limits on the application of the rule of universal jurisdiction set out in Article 23.4 of the Organic Law of the Judiciary (LOPJ). In the first place, the disputed ruling bases the applicability of the aforementioned precept on the fact that an international agreement to which Spain is party supports such an extension of jurisdiction. [...]

Hence, the Supreme Court's conclusion would be that the remedy of unilateral universal jurisdiction would only be legitimate and applicable when it is explicitly allowed under conventional law [...].

It would seem to be an extremely narrow and baseless interpretation to conclude from the [Genocide] Convention's mention of only a few of the possible mechanisms to prosecute genocide—and its silence on the matter of extraterritorial international jurisdiction—that one must infer a prohibition directed toward States Parties to the Convention (which paradoxically would not extend to those who are not Parties) on introducing other instruments into their domestic law in keeping, in fact, with the mandate to prosecute such crimes set out in Article 1. From the unilateral vantage point of States, and leaving aside the reference to international tribunals, what Article 6 of the Convention establishes is a minimum obligation that makes it incumbent upon them to prosecute international crimes in their territory. In those terms—in other words, assuming that the oft-cited Convention does not include a prohibition but rather leaves it up to signatory States to establish mechanisms to prosecute genocide—Article 27 of the Vienna Convention on the Law of Treaties cannot be construed as posing any obstacle whatsoever to the Spanish Courts' claim of jurisdiction over acts allegedly committed in Guatemala. This is especially true given that the overarching purpose of the Genocide Convention would suggest an obligation to intervene as opposed to any prohibition on such intervention.

Indeed, the Supreme Court's finding that the Genocide Convention does not authorize a State to unilaterally activate international jurisdiction is not only inconsistent with the principle of universal prosecution and prevention of impunity for this international crime, which, as stated earlier, informs the spirit of the Convention and forms part of international customary law (and even *jus cogens*, according to the preeminent doctrine); it is a blatant contradiction. That the signatory Parties should agree to reject a mechanism for prosecuting this crime is contrary to the very existence, object, and purpose of the Genocide Convention, particularly taking into account that the ability to actually satisfy the main criterion for (territorial) jurisdiction will often be weakened by the circumstances surrounding different cases. Similarly, it is inherently contradictory to the spirit of the Convention that its signing would impose constraints on the ability to combat the crime that would not apply to nonsignatory States, inasmuch as they would not be bound by that supposed, and questionable, prohibition.

Since, in the Supreme Court's view, the Genocide Convention does not recognize universal jurisdiction, the Second Chamber of that high court holds that the ability to assert it unilaterally under domestic law is necessarily restricted by other principles of international customary law. The foregoing would imply a restriction on the sphere of application of LOPJ Article 23.4 to the effect that it may only be invoked if certain "linkages" are present, which might be that the alleged perpetrator is residing in Spanish territory, the victims are Spanish nationals, or there is some other direct connection to national interests. The ruling in question bases the applicability of such

checks on international custom, concluding that, since it does not fall to each individual State to unilaterally undertake the task of stabilizing order, universal jurisdiction may only be legitimately exercised when the aforementioned linkage is present. And, the disputed ruling emphasizes, this linkage must have a significance equivalent to the criteria found in domestic or treaty law that allow for extraterritorial jurisdiction.

Similarly, the Supreme Court ruling lists the international treaties to which Spain is party that address the prosecution of crimes relevant to the international community in order to show, first, that none of those treaties explicitly stipulates universal jurisdiction, and second, that they do provide for collaboration through the classic formula *aut dedere aut judicare*. This means that States shall have the duty to try the perpetrators of crimes included in the treaties when they are present in their territory and the extradition request of another state of compulsory jurisdiction under the provisions of the treaty in question is not granted. In its analysis of this portion of international conventional law, the Supreme Court reasons that it is necessary and legitimate to restrict the sphere of application of LOPJ Article 23.4 to cases in which the alleged perpetrator is present in Spanish territory, pursuant to Article 96 of the Spanish Constitution, to LOPJ Article 23.4, section (g), and to Article 27 of the aforementioned Convention on the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Regardless of what we will have to assert later on the interpretation employed by the Supreme Court to justify such a restriction on the law must be rejected outright for methodological reasons. To begin with, the intentional systematic reference to Article 23.4(g) of the LOPJ cannot be used to extend the High Court's conclusions to the rest of the crimes listed in the preceding sections of the aforementioned provision. This is the case inasmuch as the final clause in section (g) extends universal jurisdiction to other crimes not included in the previous sections of LOPJ Article 23.4 that Spain is bound to prosecute under other international treaties and conventions. In other words, while sections (a) through (f) of LOPJ Article 23.4 list the crimes that are declared prosecutable *ex lege* in Spain even though they were committed abroad or by foreigners, section (g) specifically stipulates that Spain may prosecute, pursuant to an international treaty, crimes other than those explicitly set out therein. It is no less evident, then, that the limitations or conditions based on the interpretation of the international treaties mentioned in the ruling would be applicable by analogy to the former. Besides being contrary to the *pro actione* principle by conspicuously reducing the plaintiffs' access to jurisdiction, drawing such an analogy does not meet the threshold of similar reasoning, as we have just argued. [...]

In addition to the presence of the alleged perpetrator in the national territory, the disputed ruling introduces two other types of linkage: the principle of passive personality, in which universal jurisdiction is contingent on the Spanish nationality of the victims, and the connection between the crimes committed and other relevant Spanish interests, which is nothing more than a generic reworking of the "royal principle" of protection or defense. Again, such restrictions seem to be drawn from international custom, appealing, without further explanation, to the fact that "an important sector of the doctrine and some domestic courts" have tended to recognize the relevance of such linkages.

In this regard, we must point out that the radically restrictive interpretation of the principle of universal jurisdiction set out in LOPJ Article 23.4—which could actually be construed as more of a teleological reduction insofar as it goes beyond the grammatical meaning of the provision—exceeds the bounds of what is constitutionally admissible in the context of the legal right to effective

judicial protection enshrined in Article 24.1 of the Spanish Constitution. This is the case since it implies a reduction *contra legem* based on a set of corrective criteria that cannot be regarded as even implicitly present in the law and that clearly contradict the spirit of the principle of universal jurisdiction, rendering it virtually unrecognizable as originally conceived under international law and effectively reducing the provision's sphere of application to the point of becoming a *de facto* derogation of LOPJ Article 23.4. [...]

Hence, the restriction derived from the victims' nationality adds a requirement that is not found in the law. This restriction also cannot be substantiated teleologically, particularly in relation to the crime of genocide, as this would contradict the very nature of the crime and the common aspiration of its universal prosecution, which would be virtually severed at the root. According to Article 607 of the Criminal Code, the crime of genocide is characterized by the victim's or victims' membership in a national, ethnic, racial, or religious group and by the specific aim of the acts carried out, which is to destroy the group precisely because of that membership. As a result, the exegesis followed in the Supreme Court's ruling would mean that the crime of genocide would only be relevant as far as the Spanish courts are concerned when the victim is a Spanish national and when the conduct is intended to destroy a Spanish national group. The implausibility of such an eventuality should be sufficient proof that this was not the legislature's intent when it introduced universal jurisdiction in LOPJ Article 23.4, and that such an interpretation cannot be consistent with the underlying purpose of that provision.

And the same conclusion must be reached in relation to the national interest criterion. While, as the Public Ministry pointed out in its report, the disputed ruling includes only a token reference to this criterion and lacks even the minimal discussion required to elucidate its content, the fact that it was included virtually strips LOPJ Article 23.4 of its substance by referring back to the rule of jurisdictional competence set out in the preceding number. As already stated, the definitive issue is that making competence to try international crimes such as genocide or terrorism contingent upon the presence of national interests in the terms set out in the ruling is not entirely consistent with the basis for universal jurisdiction. The aim of international and transboundary prosecution found in the principle of universal justice is based exclusively on the unique characteristics of the crimes subject to such prosecution, whose pernicious nature (paradigmatically in the case of genocide) transcends the harm done to the specific victims and extends to the international community as a whole. As a result, the prosecution and punishment [of these crimes] is not only a commitment, but a shared interest of all the States, as we have had the opportunity to assert in the Spanish Constitutional Court (STC 87/2000, of March 27, FJ 4), whose legitimacy, then, is ultimately not contingent upon the interests of any one State.

### **i. Concurrence of jurisdiction and principle of complementarity (new)**

*SPAIN, Constitutional remedy (amparo) brought by Rigoberta Menchú Tum, et al. (Complaint against Guatemalan civilian and military officials) (List of Judgments 4.a), Legal bases 3 and 4. On December 2, 1999, Rigoberta Menchú Tum lodged a complaint before the Duty Court of the Spanish National Court, describing events that the complainant characterized as potential crimes of genocide, torture, terrorism, murder, and unlawful detention allegedly perpetrated in Guatemala between 1978 and 1986 by different individuals who were, at the time, serving as civilian or military government officials. [...]*

In a writ dated March 27, 2000, Central Judge number 1 [...] declared his jurisdiction, [admitted the complaints, and ordered several actions], including a request to the Guatemalan authorities to state whether any criminal proceeding against the accused was underway for the same sets of facts [...]. As grounds for this decision, the pre-trial judge found that the facts presented “the conspicuous appearance of genocide,” insofar as they dealt with the extermination of the Maya people “in their capacity as presumed supporters or cover for—and even originators of—the insurgency or the revolution.” In accordance with Article 23, section 4(a) in relation to 2(c) and Articles 65(1) and 88, all of the Organic Law of the Judiciary (LOPJ), the Judge was competent to take up this crime, which encompassed the others in the complaint. [...]

[The pre-trial judge also found] that there was no *res judicata* since there was nothing to indicate that any other proceedings were underway in Guatemala for the same set of facts. In addition, the States in which such acts are perpetrated may not argue interference with their sovereignty, since the magistrates of the State that asserts competence to prosecute such matters are exercising their own sovereignty in the name of preserving the common interests of civilized humankind. It is not, then, a matter of eluding Guatemalan territorial jurisdiction, which “is not exclusive, since in the absence of its honorable and effective exercise, it must be supplemented by courts that—like the Spanish ones—assert their extraterritorial jurisdiction on grounds of the—internal and international—principle of universal prosecution [...], without disregarding the fact that Article 6 of the [Genocide] Convention of 1948 establishes the subsidiarity of Spanish jurisdiction to that of the State where the recurrent events took place.” [...]

[In settling the motion for review submitted by the Public Ministry against the pre-trial judge’s order, in a December 13, 2002, ruling, the Full Criminal Chamber of the National Court held [...] [that jurisdiction could not be exercised since] “[...] the factual premise of inactivity on the part of the Guatemalan justice system” had not been proven.

[This Second Chamber of the Spanish Constitutional Court holds that,] [a]s the record shows[,] the crux of the dispute lies in the National Court’s and the Supreme Court’s blatantly narrow interpretation of the rule governing jurisdiction set out in LOPJ Article 23.4, with the consequence of denying the Spanish courts’ jurisdiction to try facts that allegedly qualify as genocide, terrorism, and torture. [...]

Now before undertaking an analysis of those arguments, it is important to recall that this Court has already pronounced on the disputed legal principle, albeit in relation to other crimes included in the catalogue under LOPJ Article 23.4, and its pronouncements have certain implications for judging the contested rulings. Specifically, as pointed out in STC 21/1997, of February 10, FJ 3, “by establishing the scope and limitations of the jurisdiction of Spanish courts and tribunals, Article 23.4 of Organic Law 6/1985, of July 1, of the Judiciary, allows our judicial organs to take up acts committed by Spaniards and foreigners outside of the national territory when they meet the definition of crimes under Spanish criminal law, in certain situations [...]. This means that the legislature has established the universal scope of Spanish jurisdiction to take up these specific crimes, in keeping with their seriousness and their international relevance.” Similarly, in STC 87/2000, of March 27, FJ 4, we held that “the final ground for establishing jurisdiction lies in the universalization of the jurisdictional competence of States and their organs to take up certain acts of which the prosecution and trial are in the interest of all States. The logical consequence of this is the concurrence of jurisdiction, or put another way, the concurrent jurisdiction of States.”

This point on the legal basis for universal jurisdiction leads directly to an examination of the constitutional scope of the National Court’s ruling—through the prism of the right to effective

judicial protection—since the theoretical basis for the latter’s finding of lack of jurisdiction, namely the principle of subsidiarity, is *prima facie* inconsistent with the principle of concurrence that this Court has found to have precedence. [...]

In any event, in relation to the National Court and Supreme Court rulings, it is important to stress that in principle, Article 23.4 of the LOPJ attributes a very broad scope to the principle of universal justice, since the only explicit limitation it places on that principle is that of *res judicata*, meaning that the criminal has not been acquitted, pardoned, or punished in another country. In other words, based on a strictly literal interpretation of the precept, and also from the standpoint of *voluntas legislatoris*, it must be concluded that the Organic Law of the Judiciary establishes an absolute principle of universal jurisdiction. That is, it is not subject to narrow admissibility criteria or any hierarchy in relation to the other rules for assigning jurisdiction, since, unlike the other criteria, universal jurisdiction derives from the specific nature of the crimes to be prosecuted. Of course, the latter assertion does not imply that that must be the only standard of interpretation for this precept and that other regulatory criteria may not have a bearing on its exegesis, even to the point of restricting its sphere of application. That said, such an exegetical undertaking—especially when such restriction also narrows the margins of access to jurisdiction—must pay close attention to the lines drawn by a strict or restrictive interpretation of what, as the flip side of that analogy, must be regarded as a teleological reduction of the law, since it excludes from the precept’s scope of application scenarios that are clearly embedded in its semantic core. Through the lens of the right of access to the courts, such a teleological reduction would be inconsistent with the hermeneutic *pro actione* principle and would result in a rigid and disproportionate application of the law contrary to the principle enshrined in Article 24.1 of the Spanish Constitution. This is the line of reasoning that we must follow.

Apart from the fact that the contested ruling does not specifically state the reasons for arriving at that conclusion—rather, a relationship of subsidiarity is inferred from the mere mention of the criterion of territoriality (or the criterion relating to an international criminal tribunal)—we should begin by pointing out that, without a doubt, there are weighty arguments from both the procedural and political-criminal standpoints that support the precedence of *locus delicti*, and that this forms part of the classic corpus of international criminal law. Based on this, and returning to the question that we left unresolved earlier, the fact is that based on its theoretical formulation, the principle of subsidiarity should not be understood as a rule that contradicts or diverges from the rule that introduces the so-called principle of concurrence. This is because when faced with a concurrence of jurisdiction—and in order to preclude any potential duplication of proceedings and violation of the principle of *ne bis in idem*, some rule for establishing priority has to be identified. Since it is the shared commitment (at least in principle) of all States to prosecute crimes so horrendous that they affect the international community, basic procedural and political-criminal reason dictates assigning priority to the jurisdiction of the State where the crime was committed.

That said, it should now be noted that the matter under examination also has constitutional relevance, since what is ultimately being debated—by the plaintiffs seeking judicial protection and by the Public Ministry, and in the Supreme Court ruling challenging the National Court’s criterion for arguing the precedence of the principle of subsidiarity—are the terms in which that rule or principle has been applied: more specifically, the greater or lesser number of requirements relating to the passivity of the State where the events occurred. The National Court ruling cited in the appeal, echoing the doctrine set out in the rulings of November 4 and 5, 1998, defines the terms of application of the rule of subsidiarity as follows: “A state’s courts should abstain from

exercising jurisdiction over events constituting genocide that are being tried by the courts of the country in which they occurred or by an international tribunal.” Taking this assertion literally, such abstention by the courts of a third country would only be required when a proceeding has already been initiated in the territorial jurisdiction or before the international tribunal, while a reasonable modulation of the rule of subsidiarity would also require abstaining from asserting extraterritorial jurisdiction when effective prosecution of the crimes can be expected to occur in the short term. *A contrario sensu*, serious and reasonable indications, whether from official channels or from the plaintiff, of judicial inactivity amounting to an unwillingness or inability to effectively prosecute the crimes should suffice to trigger extraterritorial universal jurisdiction. Nonetheless, in an extremely narrow interpretation of the rule of subsidiarity, which the National Court itself had defined, the December 2003 ruling goes even farther by requiring the complainants to fully demonstrate either the impossibility of legal action or prolonged judicial inaction, to the point of demanding proof that the Guatemalan courts had rejected the complaint outright.

Such a narrow assumption about the international jurisdiction of the Spanish courts under Article 23.4 of the LOPJ amounts to a violation of the right of access to the justice system enshrined in Article 24.1 of the Spanish Constitution as the primary expression of the right to effective protection from judges and courts. On the one hand, and just as the prosecutor argues in his pleadings, by requiring proof of a negative, the party is faced with the impossible task of undertaking a *probatio diabolica*. On the other hand, such a proposition undermines the essential aim of universal jurisdiction enshrined in LOPJ Article 23.4 and the Genocide Convention, insofar as it is precisely the failure to take legal action on the part of the State where the acts occurred—by not responding to a complaint lodged and thereby obstructing the evidence required by the National Court—that would block international jurisdiction and result in impunity for genocide. In sum, such a harsh restriction of universal jurisdiction, in blatant contradiction with the hermeneutic rule of *pro actione*, merits constitutional reproach as a violation of the Constitution’s Article 24.1.

## 7. INTERNATIONAL CRIMINAL JURISDICTION

### B. International Criminal Court

COLOMBIA, *Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 4*. Moreover, apart from the importance of incorporating into domestic law offenses aimed at preventing serious violations of international humanitarian law, it should be noted that the Rome Statute [footnote omitted] reinforced the efficacy of prosecuting and punishing war crimes at the domestic level by establishing a permanent court to complement domestic courts and encourage them to exercise their jurisdiction over the crimes set out in Article 8 of the Statute [footnote omitted].

The International Criminal Court is an *ultima ratio* jurisdiction that will take up war crimes committed in a specific armed conflict if, pursuant to Article 17 of the Rome Statute, the relevant domestic courts:

“(i) fail to carry out any investigation or trial (*inaction a priori*); (ii) initiate proceedings but suspend them before they are concluded with no technical justification under their respective criminal prosecution laws (*inaction a posteriori*); (iii) lack the necessary will to genuinely

*carry through with the investigations or trials initiated (lack of will); or (iv) lack the judicial infrastructure necessary to carry out the proceedings due to the total or partial collapse of their administration of justice system or their lack of one (inability).” [Footnote omitted]*

Therefore, the creation of the International Criminal Court as an organ that is activated after the proceedings in the relevant domestic courts jurisdiction—to the point that it is triggered by the latter’s failure to act—confirms the existence of a principle of universal justice with respect to the investigation and prosecution of war crimes, which reinforces and legitimizes domestic proceedings undertaken for that purpose.

**CHAPTER VI**  
**STATE DECISIONS THAT HINDER INVESTIGATION,  
PROSECUTION, AND, AS THE CASE MAY BE,  
PUNISHMENT OF CRIMES UNDER INTERNATIONAL LAW**

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**1. STATES HAVE THE OBLIGATION TO COMBAT IMPUNITY**

**C. Judicial control over State decisions that perpetuate impunity**

**i. Judicial control does not violate separation of powers**

URUGUAY, *Remedy of unconstitutionality (Articles 1, 3, and 4 of Law No. 15.848. Law on the Expiration of the Punitive Claims of the State (Expiry Law) (List of Judgments 7.b), Whereas section.* [In the judgment of this Supreme Court of Justice] [...], if, rather than granting an amnesty, the disputed law is understood as declaring the expiration of the time limit for the respective criminal proceeding, then it is also unconstitutional. Indeed, declaring that the time limit for a criminal proceeding has expired, in any circumstances, exceeds the powers of the legislature and encroaches on the powers constitutionally vested in judges. Therefore, regardless of the rationale, the legislature could not arrogate the authority to decide that the time limit had expired on criminal proceedings for certain crimes.

A similar critique applies to the notion that the law did not declare, but instead only allowed, the aforementioned expiry. While it is true that the legislature could establish a statute of limitations for pursuing certain criminal actions, that is not what it did. Considering the nature and basis of the measure, it is not rational to stipulate the expiry of an action—that previously was not subject to any time limit—without establishing a reasonable time period for the relevant party to pursue that action, having been forewarned of its expiry. Such action by the legislature is even less warranted when there has been no indication of inactivity and, to the contrary, the intention is to close cases that are being actively investigated.

**2. AMNESTY LAWS**

**C. Evolution of the prohibition against certain amnesty laws**

**iii. Uruguayan case (new)**

URUGUAY, *Remedy of unconstitutionality (Articles 1, 3, and 4 of Law No. 15.848. Law on the Expiration of the Punitive Claims of the State (Expiry Law) (List of Judgments 7.b), Whereas section.* [In the matter of the criminal complaint filed by AA requesting an investigation into

the circumstances of his sister's death in a military facility on June 29, 1974, during the past dictatorship, and the identification of those responsible], the Acting National Prosecutor for Criminal Matters (second duty) filed an exception procedure requesting a declaration of unconstitutionality for Articles 1, 3, and 4 of Law No. 15.848 of December 22, 1986, known as the Law on the Expiration of the Punitive Claims of the State, arguing that the aforementioned provisions violated several of the principles enshrined in the Constitution of the Republic and in international treaties.

The representative of the Public Ministry argued, in sum, that the unconstitutionality of the disputed norms is based on [the following considerations]: [...]

The disputed norms constituted a clear violation of the principle of equality enshrined in Article 8 of our Constitution by creating a privilege for military and police personnel that was not afforded to the civilians who collaborated with them in the commission of the crimes being investigated. By virtue of that privilege, and as a result of the State's decision to refrain from exercising *jus puniendi*, a certain group of people remained exempt from criminal jurisdiction.

In addition, Law No. 15.848 was enacted without regard for Articles 1(1), 8(1), 25(1), and 25(2) of the [American] Convention on Human Rights. This had an unlawful impact on the situation of the victims and their next of kin, who were deprived of due process rights essential to ensuring that the perpetrators of the crimes would be punished. It is common knowledge that domestic law may not be invoked to avoid compliance with international treaties. [...]

The Court shares the view that international human rights conventions are included in the Constitution under Article 72, since they deal with rights inherent to human dignity which the international community has recognized in those pacts. [...]

[In this regard,] [...] Risso Ferrand, citing Nogueira, observes that "in Latin America there is a powerful and increasingly widespread current that recognizes a bloc of rights made up of the rights explicitly guaranteed in the text of the constitution, the rights contained in international human rights instruments, and implicit rights, and therefore the legal operator must interpret rights, making every effort to give preference to the source that best protects and ensures the rights of the human person" [footnote omitted].<sup>63</sup>

A contextual examination of the matter reveals that the classic theory of sovereignty can no longer be invoked to defend the State's power to limit legal protections for human rights. Human rights have shifted the focus of the issue, and the unlimited sovereign power of the State in its constitutive role can no longer be regarded as the point of departure. To the contrary, human rights law today is not based on the sovereign status of States, but rather on the person as inherently entitled to basic rights that may not be disregarded based on the exercise of constitutive power, whether original or derivative.

As Nogueira points out, insofar as human rights are inherent to human dignity, they limit the sovereignty or power of the State, and this power may not be invoked to justify a violation of such rights or to preclude their international protection. Similarly, the principle of nonintervention may not be invoked when the institutions, mechanisms, and guarantees established by the international community are activated in order to ensure the protection and effective exercise of the rights of every person and of all persons that form part of humankind [footnote omitted].

<sup>63</sup> Editors' note: The quotation marks in this paragraph are transcribed as they appear in the original text.

In this regard, Article 27 of the Vienna Convention on the Law of Treaties provides that a State Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

In light of these considerations, and as Dr. Alicia Castro has aptly pointed out, “[W]hen the Law was enacted—and, later, the judgment handed down—the rights explicitly set out in the constitutional text should have been taken into account, along with those that had been progressively added through the ratification of various international human rights treaties, including: the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on December 16, 1966, and ratified by Uruguay by Law No. 13.751 of July 11, 1969; the American Convention on Human Rights, adopted in the Americas on November 22, 1969, and ratified by Law No. 15.737 of March 8, 1985; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on December 10, 1984 and ratified by Law No. 15.798 of October 27, 1985. Through this process, the Uruguayan legal-constitutional order has come to incorporate individual rights that impose inviolable limits on the exercise of the powers vested in the institutional authorities, which the constitutional judge must necessarily enforce” [*footnote omitted*].

She adds that one must not overlook the fact that the problem transcends the domestic sphere, since the United Nations Human Rights Committee and the Inter-American Commission on Human Rights have objected to the disputed law on numerous occasions in their annual reports on Uruguay, and it was also challenged by the Inter-American Court of Human Rights in the advisory opinion requested by Uruguay in 1993 [*footnote omitted*].

In particular, the Inter-American Commission, in Report No. 29/92 of October 2, 1992, recalled having cited the Uruguayan government for “very grave violations” of the right to life, liberty, and personal security, and recommended to the government that it investigate and try those responsible. It also underscored, in this context, that Law No. 15.848 had the opposite effect: in other words, it was intended to dismiss all criminal proceedings involving past human rights violations and eliminate any judicial possibility of an investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact. In this framework, as stated in Whereas III.6 of this pronouncement, the Law in question adversely affected the rights of numerous people (specifically the victims, next of kin, or parties injured by the aforesaid human rights violations). They have been denied their right to legal redress and to an impartial and exhaustive judicial investigation that clarifies the facts, identifies those responsible, and imposes the corresponding criminal punishment, to the point that the legal consequences of the Law with respect to the right to a fair trial are incompatible with the [American] Convention on Human Rights [*footnote omitted*].

As far as the judiciary is concerned, it is relevant to recall certain judgments from the Inter-American Court of Human Rights that declare the nullity of amnesty laws enacted to preclude the punishment of the perpetrators of serious human rights violations and that establish the duty of domestic judges and courts to ensure that international law takes precedence over “laws contrary to its object and purpose, and that lack legal effects from the outset” [*footnote omitted*].

In Argentina, the Supreme Court of the Nation has handed down relevant judgments, such as its June 14, 2005, ruling in Case JJ (Case KK), which is a truly a “leading case,” and the more recent May 4, 2007, ruling in Case LL (Case MM). In the latter ruling, the Court found that the Full Stop and Due Obedience laws (Laws No. 23.492 and No. 23.521) are invalid and

unconstitutional. It also ruled on the validity of Law No. 25.779, adopted by the Congress of the Nation in 2003, which had declared the nullity of the aforementioned laws.

The Supreme Court held that those amnesty laws—like ours—fail to take into account the constitutional rank afforded human rights under Article 75(22) of the Argentine Constitution since the constitutional reform of 1994, and the *jus cogens* nature of international norms, regardless of whether they are set out in covenants or conventions or form part of customary law.

To summarize, international courts, and those of other States that experienced situations similar to Uruguay's during the same period, have found that amnesty laws enacted to benefit military and police personnel who committed crimes of this nature and enjoyed impunity under *de facto* regimes are illegitimate. In light of their similarity to the matter under study and the relevance they have had, these rulings could not be overlooked in an examination of the constitutionality of Law No. 15.848, and the Court has taken them into account in handing down the instant ruling.

#### **D. Prohibition against certain amnesties extends to those adopted by previous and subsequent governments, and not only self-amnesties**

##### **i. Prohibitions on amnesties under international law cannot be overridden by a public referendum (new)**

In contrast to other domestic laws that had blocked the criminal prosecution of those responsible for perpetrating crimes during dictatorships or armed conflicts in Latin America, Uruguay's Law No. 15.848, Law on the Expiration of the Punitive Claims of the State (Expiry Law), not only was enacted by a formally constituted legislative body, but also was later ratified by popular referendum on April 16, 1989, and again in 2009, after a plebiscite defeated a constitutional reform intended to revoke the Law's main articles. Hence, according to Article 1 of the Law, which is still in force, "as a logical consequence of the situation established by the agreement between the political parties and the Armed Forces in August 1984, and in order to complete the transition to full constitutional order, any State action to seek punishment for crimes committed prior to March 1, 1985, by military and police personnel, for political reasons, or in the performance of their duties or on orders from commanding officers who served during the period of the *de facto* government, has hereby expired."

Despite this unique feature of the Expiry Law, international human rights mechanisms have rejected its validity, considering it incompatible with the international obligations of the State. In 1994, the United Nations Human Rights Committee concluded that the Uruguayan State had the duty to investigate human rights violations, even when they had been committed by another regime. In this regard, the Committee affirmed that the Expiry Law was incompatible with the State's obligations and noted with deep concern that its adoption created a climate of impunity.<sup>64</sup> Despite the importance of this decision,

<sup>64</sup> Human Rights Committee, *Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994), July 19, 1994, paras. 12.1–12.4.

the Committee did not directly address the public ratification of the Expiry Law and its validity in a democratic State governed by the rule of law.

Indeed, the Uruguayan courts were the first to engage this crucial debate. The Expiry Law was not a decree-law adopted by a dictatorial or arbitrary regime or by a transitional government with little public support. To the contrary, it was endorsed by one of the mechanisms for direct public participation most recognized by democratic principles. The courts were obliged to undertake a very particular deliberation in order to justify the law's inapplicability based on its incompatibility with the parameters of constitutional control. It is therefore striking that, as shown in the paragraphs transcribed below, the Uruguayan Supreme Court of Justice chose to present arguments of a constitutional nature rather than base this part of its ruling on international human rights law.

The ruling from the Supreme Court of Justice, however, did not mark the end of international scrutiny of the Expiry Law. In 2011, the Inter-American Court of Human Rights published its judgment in the case of *Gelman v. Uruguay*. In its judgment, the Court reconfirmed the incompatibility of amnesty laws—including those adopted by a transitional government—with inter-American standards. In this regard, the Inter-American Court held that “[t]he incompatibility 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 material aspect in what regards the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.”<sup>65</sup> Specifically, with regard to the public ratification of the law, the Inter-American Court held that

“The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter [footnote omitted]. The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a[n] impassable limit to the rule of the majority, that is, to the forum of the ‘possible to be decided’ by the majorities in the democratic instance, those who should also prioritize ‘control of conformity with the Convention’ (supra paras. 193), which is a function and task of any public authority and not only the Judicial Branch.”<sup>66</sup>

This is the context for Uruguayan decisions which, as anticipated, also recognize limits on majority decisions, even in democratic systems of government, when it comes to international human rights law.

URUGUAY, *Remedy of unconstitutionality (Articles 1, 3, and 4 of Law No. 15.848. Law on the Expiration of the Punitive Claims of the State) (List of Judgments 7.b), Whereas section.* [T]he direct exercise of public sovereignty through a referendum on the derogation of laws enacted by the

<sup>65</sup> IACourtHR, *Case of Gelman v. Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C, No. 221, para. 229.

<sup>66</sup> *Ibid.*, para. 239.

Legislature only has potentially abrogatory powers. A public rejection of derogation, in contrast, may not extend to lending a veneer of constitutionality to a law that is flawed *ab origine* because it contravenes constitutionally recognized norms or principles.

As Luigi Ferrajoli has pointed out, constitutional norms that establish basic principles and rights uphold the substantive dimension of “substantive democracy,” which has to do with what cannot be decided, or what must be decided, by the majority, linking the law, under penalty of invalidity, to respect for fundamental rights and the other axiological principles established [in the Constitution] [*footnote omitted*].

[According to this author:]

*“Unlike matters that pertain to what I have called the ‘sphere of the decidable,’ fundamental rights are removed from the sphere of political decision-making and belong to what I have termed the ‘sphere of the undecidable’ (either yes or no). This is due to their specific characteristic: these rights are established by constitutions as limits and bounds on the majority precisely because they are always—from the rights to freedom to social rights—against the majority contingents. What is more, this is the logical way to ensure that they are protected. Whenever there is a desire to protect a right as fundamental, it is removed from politics, in other words, from the powers of the majority, [...] as an inviolable, unassailable, and inalienable right. No majority, not even unanimously, can decide on its abolition or reduction.” [Unofficial translation]*

The phrase “sphere of the undecidable” is very similar in meaning to Garzón Valdés’s concept of *coto vedado* (forbidden territory or reserved domain) or Norberto Bobbio’s *territorio inviolable* (inviolable territory).

Beyond its designated role under the old paleoliberal paradigm, the judiciary serves as a limit on political democracy. In a constitutional or substantive democracy, this sphere of the undecidable—which implies a determination of what matters it is lawful to decide or not to decide—is nothing more than what democratic Constitutions have chosen to remove from the realm of majority decision-making. And the limitation on majority decision-making has two principal elements: the protection of fundamental rights (chief among them the right to life and personal freedom, and there is no majority will, or general interest, or common or public good for which they may be sacrificed), and the subordination of public authorities to the law.

Ferrajoli infers two consequences from the foregoing. The first, related to the judiciary’s new dual role of upholding the basic rights of all and, at the same time, the legality of the public authorities, is, in relation to the paleopositivist and paleoliberal paradigm, a reinforcement of the underlying principle of separation of powers and the independence of judges. The second consequence, related to the growing importance of the judiciary in the context of the separation of powers, is a strengthening of guaranteeism as a source of legitimation and a condition for the credibility of the powers of judges [*footnote omitted*].

Hence, neither a parliamentary majority nor ratification by the Electoral Organ—even if it is unanimous—could prevent the Supreme Court of Justice from declaring the unconstitutionality of a law that envisages the death penalty in our country, which is prohibited under the provisions of Article 21 of the Constitution.

Similarly, a legislative majority ratified by the Electoral Organ cannot transfer the power to exercise a judicial function that falls exclusively under the purview of the Judiciary to the Executive Branch, except through a Constitutional provision that explicitly assigns that function, in exceptional circumstances, to another organ of the State. [...]

In the matter that has been placed before the Court, a power originally vested in the Judiciary was conferred on another branch of government and was the basis for a binding decision on whether or not the Judge in the proceeding may proceed with the investigations in a case file in which an apparently unlawful act has been confirmed. Although the law has characterized the opinion of the Executive Branch as a “report,” it clearly has the legal nature of a decision and ultimately supplants the original constitutional jurisdiction of the Judiciary to determine the criminal charges applicable to the investigated incident. Therefore the subsequent judicial decision to close the case is nothing but an official confirmation that becomes a rubber stamp for the *formula de cierre* [closure of case without legal reasoning] [*footnote omitted*].

#### 4. NON-APPLICABILITY OF STATUTE OF LIMITATIONS TO INTERNATIONAL CRIMES

##### D. Non-applicability of statute of limitations as an international conventional and customary rule

###### ii. Argentine case (new)

ARGENTINA, *Criminal cassation remedy (Gregorio Rafael Molina, convicted) (Vote of Judge Mariano Hernán Borinsky) (List of Judgments 1.a), Whereas section.* [On the matter of the statute of limitations for the crimes under study in the case] [...] while it was not stated explicitly, clearly the appellant’s critique of the retroactive application of the criminal law has the most serious implications for Law 26.200 [...], which implements the provisions of the Rome Statute in our country. Under the section headed “Principle of Legality,” Article 13 of that law stipulates that: “[n]one of the offenses set out in the Rome Statute or in this law may be applied in contravention of the principle of legality envisaged in Article 18 of the National Constitution. In such a circumstance, the prosecution of those facts must be carried out in accordance with the norms set out in our law in force.”

The foregoing could be the motive for the alleged violation of the principle of legality (Article 18 of the National Constitution) claimed by the appellant as grounds for the exception of lack of action due to statute of limitations. This, inasmuch as the categorization of the facts on trial as crimes against humanity was done in compliance with Article 7 of the Rome Statute [...].

Upon proper examination, however, Article 13 of Law 26.200 expressly indicates that the trial of facts of this nature “*must be carried out in accordance with the norms set out in our law in force.*”

This necessarily requires establishing what the law in force was when the events aired in the inquiry occurred. The response to this question is clear from the position taken by the Supreme Court of Justice of the Nation in the “Priebke” (Rulings: 318:2148) and “Arancibia Clavel” (Rulings: 327:3312) precedents.

As far as the inapplicability of statutory limitations to crimes against humanity, in “Arancibia Clavel” our Supreme Court of Justice of the Nation held that statutory limitations on criminal action set out in domestic law are superseded by international customary law and, contrary to the appellant’s claim, by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity [...]—and with constitutional primacy pursuant to Law 25.778 [...]. By way of conclusion, in “Arancibia Clavel,” our highest Court held:

*“(25) That the doctrine of the Court set out in the ‘Mirás’ precedent (Rulings: 287:76) [that statutory limitations on criminal action are closely linked to the principle of legality and therefore an ex post facto law that alters its functionality to the detriment of the accused is inapplicable] remained unchanged the entire time and continues to be in force for interpreting statutory limitations on criminal action in domestic law. It was modified in relation to international law, however, in the ‘Priebke’ precedent (Rulings: 318:2148), in which the Italian government requested the extradition of Erich Priebke in order to try him for acts that could qualify as ‘genocide’ and ‘war crimes’ under international treaties, but with respect to which the statute of limitations on criminal action had expired under domestic law. Nonetheless, this Court granted the extradition in the understanding that, in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide, the rules on statutory limitations on criminal action set out in the Criminal Code were not applicable. [...]*

*(27) That the convention cited is the culmination of a long process that began in the early 1960s when statutory limitations threatened to become a source of impunity for crimes carried out during World War II, since the 20-year mark from the time those crimes were committed was approaching.*

*(28) That this convention only affirms the non-applicability of statutory limitations, which entails recognition of a law already in force (jus cogens) under public customary international law. In this way, it does not infringe on the prohibition on non-retroactivity of criminal law but rather reaffirms a principle established by international custom that was already in force at the time the acts were committed. [...]*

*(31) That at the time the events occurred, the Argentine State had already contributed to the development of international custom in favor of the non-applicability of statutory limitations to crimes against humanity (conf. Rulings: 318:2148, vote of Judge Bossert, Whereas clauses 88 and thereafter). [...]*

*(33) That consequently, the acts for which Arancibia Clavel was convicted were already excluded from statutory limitations under international law at the time they were committed. Therefore, the convention was not applied retroactively, since this was already a rule of international custom in force since the 1960s, which the Argentine State had accepted.” [...]*

That being the case, in light of the moral and institutional authority conferred on the Court’s rulings, which constitute legal doctrine in the matter under examination, it is necessary to reject the defense’s argument against characterizing the events under legal scrutiny in this case as crimes against humanity and, as a result, the statutory extinction of criminal action, since the claimant has not succeeded in refuting in the *sub judice* the arguments of the Supreme Court set out in the precedents cited.

Finally, it is appropriate to conclude that the acts for which Gregorio Rafael Molina was tried are violations of the rights of persons covered by Article 118 of the National Constitution (formerly Article 102 of the Constitution since 1853) and, therefore, an offense against then customary and now conventional international human rights law, which leads inexorably to their exclusion from statutory limitations.

### iii. Peruvian case (new)

PERU, *Request for dismissal of criminal proceeding (Santiago Enrique Martín Rivas, et al., accused) (List of Judgments 6.b), Whereas fifteen.* [A]ssuming the illicit association for the commission of crimes that amount to human rights violations as one definition of those crimes, the *causa petendi* in the instant request to declare that the statute of limitations on criminal action has expired is based on the content of the Decree cited, in other words, on the provision of domestic law that reaffirms the interpretation of Legislative Resolution No. 27998: “1.1 *In accordance with Article 103 of its Political Constitution, the Peruvian State adheres to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity adopted by the United Nations General Assembly on November 26, 1968, for crimes enshrined in the convention committed after its entry into force for Peru.*”

Now then, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity establishes, in Article I: “*Article I. No statutory limitations shall apply to the following crimes **irrespective of the date of their commission:** (...)*” [*emphasis in the original*].

[E]ven though the Peruvian State had not ratified the instrument declaring the non-applicability of statutory limitations to crimes against humanity, it was part of international customary law in force at the time the events in the instant case occurred (1991 and 1992). Therefore, the 2003 declaration of the national Legislature poses no obstacle whatsoever in this regard; to the contrary, it must be understood as consistent with the good-faith rule of interpretation (which takes into account the object and purpose of the instrument [*footnote omitted*]) and the non-applicability of statutory limitations envisaged—and now an explicit norm—for any cases that may have occurred beginning that year. To interpret this declaration, and its ratification by means of Legislative Decree No. 1097, in the sense given to it by the defense—namely, statutory limitations for crimes amounting to human rights violations that occurred beforehand—would give rise to additional international responsibility on the part of the Peruvian State, particularly in light of the oft-cited and clear pronouncement on this matter by the Inter-American Court in the Barrios Altos Case (legal basis 41 of the Court judgment: inadmissibility of statutory limitations).

## 5. PRINCIPLE OF *NE BIS IN IDEM*

### D. Cases of non-applicability of the principle of *ne bis in idem*

COLOMBIA, *Motion for review (Gustavo Amaya Ruiz, et al., accused) (List of Judgments 2.d), Whereas 8, 9, and 11.* The representative of ALFONSO ENRIQUE VELASCO TORRES (currently a National Police colonel) contends that, in light of the aims and principles that inform the motion for review, no irregularity whatsoever has been demonstrated in the matter under examination that could affect the validity of the proceedings before the Military Criminal Court, as demanded by the grounds cited by the plaintiff.

He argues, on the one hand, that the ground provided by the plaintiff is an informal and incomplete document that was submitted without regard for the requirements set out in Article 259 of Law 600 of 2000; and on the other hand, that while Colombia is a member of the Organization of American States and has therefore undertaken to uphold the rights of society

as a whole, it is not the aim of that supranational institution to trample the basic guarantees afforded those who have been tried by the justice system and have obtained favorable rulings on the merits. [...]

He notes that the Inter-American Commission on Human Rights Report No. 62/99 of April 13, 1999, is not a “*NEW FACT*” that detracts from the soundness of the findings of the Military Criminal Court, which terminated the proceedings against his client at the first and second instance levels, since that report includes just one brief reference to the content of the sole piece of evidence for the prosecution. It makes no mention of the content of the other persuasive arguments supposedly provided to that body, nor does it offer reasons for finding those information sources credible. [...]

From a different perspective, he contends that in relation to the trial of his client, it is not possible to argue the applicability of the grounds for review set out in Article 220(3) of Law 600 of 2000, or of those regulated under Article 192(4) of Law 906 of 2004, since those laws were not in force at the time the events occurred. Moreover, even though the International Treaty cited in Report No. 62/99 of April 13, 1999, did exist before the events occurred, the legal standards contained therein do not allow or authorize a disregard for the guarantee of *res judicata*.

After finding that the plaintiff had standing to bring the instant petition, the relevance of the grounds for review had been demonstrated, and the binding force of the recommendations of the Inter-American Commission on Human Rights had been corroborated—all of the foregoing consistent with the jurisprudence of the Constitutional Court and of this Court—the Third Prosecutor-Delegate for Criminal Cassation indicates, in the instant case, that two aspects must be demonstrated in order to declare the grounds for overturning the dismissal of proceedings that shielded the defendants to be well founded. First, the set of facts investigated must be related to or amount to a human rights violation or a serious breach of international humanitarian law. Second, a supervisory authority of those rights must have verified a conspicuous failure on the part of the Colombian State to fulfill its obligations to conduct a serious and impartial investigation of violations of that nature.

In light of the foregoing, the Prosecutor-Delegate points out that the facts aired in the criminal proceedings cited in the petition for review indicate that the murder of Professor Santos Mendivelso Coconubo was committed by members of the National Police, who accused him of belonging to a subversive organization. This course of action can in no way be categorized as an act in their line of duty and therefore amounts to a violation of human rights.

She notes that the criminal proceedings for these occurrences were terminated by a dismissal of proceedings issued by the Military Criminal Court, which lacked jurisdiction precisely because the event was not an act that could be construed as inherent to the police service. It was for this reason that the Inter-American Commission on Human Rights duly formulated recommendations to the effect that the investigation should be continued and completed by the natural judge, with rigorous due process guarantees.

The prohibition on double jeopardy or *non bis in idem* has a long legal tradition [*footnote omitted*] anchored in international treaties [*footnote omitted*] and, of course, in the Constitution of Colombia and its substantive and adjective criminal laws. This prohibition means, quite simply, that someone whose status in relation to a criminal charge has been resolved by a final judgment or by a ruling of equally binding force cannot be subjected to another trial based on the same set of facts, even if the latter are given a different legal appellation.

Despite the importance of this superior prerogative as an integral part of due process in the broadest sense, from which the binding force of *res judicata* is also derived, it is not absolute, and exceptions to it are permitted in cases expressly set out by the legislature. In practice, this occurs in the domestic venue through a motion for review, which introduces the possibility of removing *res judicata* in order to put an end to the material miscarriage of justice inherent to a decision in which the procedural truth is diametrically opposed to the historic truth of the event that is being investigated or tried, so long as one of the grounds specifically established by law and developed in the jurisprudence has been shown to be present.

As far as the requirements governing the grounds for review cited—namely, the provisions of Article 220(3) of Law 600 of 2000, the content of which is similar to that of Article 231(3) of Decree 050 of 1987, which was in force at the time the events occurred on April 5, 1991, and Article 232(3) of Decree 2700 of 1991, which entered into force on July 1, 1992, and was in force during the criminal pretrial proceedings—the aforesaid provision establishes that final judicial decisions may be reviewed in the following circumstances, among others:

*“When, following the conviction, new facts or evidence arise that were not known at the time the matter was aired and that establish the innocence of the convicted defendant or the reasons for which he cannot be held liable.”*

In the context of a public lawsuit challenging the constitutionality of the aforementioned norm (set out in Law 600 of 2000), the Constitutional Court, in Judgment C-004 of January 20, 2003, examined the grounds in light of the Political Constitution of 1991 and in relation to the victims’ rights to truth and justice. Based on this, it conditioned its concurrence with the Constitution on the understanding that it covered, or was valid, on the one hand,

*“[I]n cases of preclusion of the investigation, dismissal of proceedings, and acquittal as long as human rights violations or serious breaches of international humanitarian law are involved and a domestic legal decision or a decision from an international human rights supervisory and control entity formally recognized by our country has confirmed the existence of a new fact or evidence that was not known at the time the matter was aired.”*

And on the other,

*“[A]gainst preclusion of the investigation, dismissal of proceedings, and acquittal in cases involving human rights violations or serious breaches of international humanitarian law, even if there is no new fact or evidence that was not known at the time the matter was aired, as long as a domestic legal decision or a decision by an international human rights supervisory and control entity formally recognized by our country has confirmed a conspicuous failure on the part of the Colombian State to fulfill its duty to conduct a serious and impartial investigation of the aforementioned violations.”*

Heeding the aforementioned Constitutional Court ruling, the national legislature established the conditionality set out by that Court as independent grounds for review by including the following ground in Article 192(4) of Law 906 of 2004:

*“When, following the verdict (of acquittal) [footnote omitted] in cases of violations of human rights or serious breaches of international humanitarian law, a decision of an international human rights supervisory and control entity whose jurisdiction has been formally accepted by the Colombian State establishes that there has been a conspicuous failure on the part of the Colombian State to conduct a serious and impartial investigation into those violations. In this case, it will not be necessary to confirm the existence of a new fact or evidence that was not known at the time the matter was aired.” [...]*

With regard to the retroactive application of the aforementioned grounds for review [...], the Chamber must reiterate the position it has taken in previous rulings on this matter, in the following terms:

*“[I]t is appropriate to point out that the aforementioned criminal procedure laws are applicable to this matter, even though the events that gave rise to the proceedings whose verdicts are the subject of the motion for review occurred in 1990. They occurred, in other words, prior to the entry into force of Law 906 of 2004, and even before Judgment C-004 of 2003 was handed down, which for the first time established as grounds for review the argument that is under examination in the instant ruling. On this particular, Chamber 23 has taken the opportunity to point out that what is relevant to the discussion is not which law was in force at the time the events occurred, but rather the constitutional framework in which they occurred and in which the investigation described in the motion for review was carried out.*

*Hence, the point of departure is the provisions of Article 93(1) of the Political Constitution of 1991, which states that ‘international treaties and agreements ratified by the Congress that recognize human rights and prohibit their limitation in states of emergency have primacy over domestic law.’ This norm articulates the Bloc of Constitutionality, meaning the overarching principles that, while not directly set out in the Constitution, regulate the principles and values contained therein.”*

On these grounds, it must be concluded that the American Convention forms part of the Bloc of Constitutionality and is therefore binding at the domestic level, and that its provisions were in effect in the month of April 1991, when the events summarized at the beginning of this ruling took place.

Now then, some of the parties have argued that the prohibition of *non bis in idem* and the guarantee of *res judicata* must not be subordinated to the basic rights of victims to truth and justice. This tension was examined in the aforementioned constitutionality judgment C-004 of January 20, 2003, in which the highest judicial authority in such matters held that where crimes in general are concerned, it would certainly not be permissible to relinquish the prerogatives that have been established to benefit the defendants in a criminal matter, the situation being diametrically opposite when human rights violations or serious breaches of international humanitarian law are involved. [...]

At this point in the discussion, the Court must respond to the argument put forth by the representative of VELASCO TORRES to the effect that the recommendations in the aforementioned Report are not binding on the Colombian authorities. This assertion is based on a fragmented and biased transcription of the Court’s reflections in its ruling on review of February 24, 2010, in file number 31195, inasmuch as it overlooks the third “whereas,” in which, on this specific issue, the Court concluded that despite the limited and insufficiently binding effect of the recommendations issued by the Inter-American Commission on Human Rights, in cases similar to the one being examined herein:

*“The Report and the aforementioned recommendation contained therein, as a unilateral international legal act, have the sole effect of triggering a review by the Court, but not that of declaring the proceeding invalid, without the Chamber first verifying whether some type of breach occurred in the course of the trial. Consequently, a determination of whether or not to comply with the ground for review of the proceeding stems not, in the strictest sense—as provided in Article 192 of Law 906 of 2004, in its fourth subparagraph—from the fact that that international entity has held in a decision that the guarantees of seriousness and*

*impartiality of the investigation were indeed violated, but rather from the fact that the Supreme Court of Justice, once it has been authorized to take up the proceeding thanks to the recommendation of the Inter-American Commission, finds that this indeed was the case. Should that not be the case, since the said recommendation is not binding, the role of the Chamber would be limited to endorsing the process followed in our country.” [...] [Emphasis in original]*

What this means is that in the instant matter, in order to satisfy the second requirement of the ground invoked, it falls to the Chamber to elucidate whether assigning the Military Criminal Court to take up the criminal proceeding in the death of Santos Mendivelso Coconubo violated due process and ultimately the rights of the victims (the slain man’s next of kin) to have access to an effective legal remedy that would guarantee them truth, justice, and reparations in a serious, impartial, and effective manner.

## 7. DEFINITIVE DISMISSAL OF CRIMINAL PROCEDURES

PERU, *Request for dismissal of criminal proceeding (Santiago Enrique Martín Rivas, et al., accused) (List of Judgments 6.b), Whereas 1, 7, and 10–13*. By means of Legislative Decree No. 1097—*Legislative Decree regulating the application of procedural norms for crimes that entail violations of human rights*, [...] various articles of the new Criminal Code (Legislative Decree No. 957) entered into force related to measures for the enforcement or limitation of rights. As for what is at issue in the instant ruling, Article 6 provided for the entry into force of Articles 344 to 348 and Article 352(4) of the Code, introducing “*dismissal for exceeding the time frame for the Pre-trial or Preliminary investigation phase*” in the proceedings set out in Article 2: “*crimes against life, body, and health envisaged in the Criminal Code of 1924 and the Criminal Code of 1991, considered to be violations of human rights and for the crimes against humanity envisaged in the Criminal Code of 1991.*”

The proceedings [before this Court] (comprising the combined cases of “Barrios Altos,” “El Santa,” and “Yauri”) commenced with the opening of the pre-trial phase on April 18, 1995. [Subsequently], [b]y means of Laws 26479 and 26492, the Democratic Constituent Congress granted an amnesty in the following terms:

*“Article 1. General amnesty shall be granted to Military, Police, or Civilian personnel, regardless of their respective Military, Police, or Functional status, who are accused, investigated, prosecuted, tried, or convicted for common and military crimes in the Ordinary or Military Courts, respectively, for all acts derived or arising from or as a consequence of the struggle against terrorism that they may have committed individually or as a group from May 1980 to the date of the enactment of this Law.”*

In its Judgment of March 14, 2001, in the case of *Barrios Altos v. Peru* (merits), the Inter-American Court of Human Rights declared [the incompatibility of amnesty laws with the American Convention on Human Rights].

In compliance with the international judgment, the superior writ, page 1735, ordered that the proceedings be reinstated and remanded to Criminal Court Sixteen of Lima to continue the process, which, in oral audience, is at the stage of hearing the self-defense or final statements of the defendants.

[The request for dismissal was entered at that moment of the proceeding, based on the aforementioned Decree-Law, which, according to Article 1, “[...] *is intended to proceed with the entry into force of certain articles of the new Criminal Procedures Code [...] in all Court Districts of the country, in order to create a uniform regulatory framework with respect to crimes that entail the violation of human rights*”]<sup>67</sup>.

[The Court makes four specific points in relation to this request.] In relation to the first point [to be outlined]—namely, the matter of the applicability of the norm in light of the force and efficacy of the Political Constitution of the State, the American Convention on Human Rights, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the judgments handed down by the Constitutional Court and the Inter-American Court of Human Rights (particularly the Court’s judgment in the case of *Barrios Altos v. Peru*)—the background given already cited the pronouncements of the Constitutional Court and the Inter-American Court of Human Rights to the effect that there can be no domestic procedural obstacles to compliance with the international obligation of States to investigate and punish acts that amount to human rights violations, and there can be no assumption of “duality” between the Political Constitution of the State and international instruments to safeguard these rights. Rather, they must be understood as an integral whole with direct legal force.

The Court takes these pronouncements to be the inherent legal bases and premises of the instant ruling and finds it necessary to underscore that, independently of the right of victims to due process, reparations, and truth—as articulated specifically for this case by the Inter-American Court in the “*Barrios Altos*” case and in general in the “*Cantuta*” case as well—the nature of the acts transcends the norms and principles that inform domestic criminal law governing common crimes. The investigation and punishment [of these acts] is definitively grounded in the dignity of the human being, in humanity itself and in its ethical meaning, beyond the domestic normative limitations of States. In the pronouncements discussed, the Inter-American Court and the Constitutional Court have consolidated or clarified this area of law based on international instruments, especially the American Convention on Human Rights in interpretive unity with the Constitution, since the former, according to Article 55 of the latter, “(...) forms part of national law.” This unity of interpretation is also clearly established in the Fourth Final and Transitory Provision: “Norms related to the rights and freedoms that the Constitution recognizes are interpreted in accordance with the Universal Declaration of Human Rights and with the international treaties and agreements on these matters that have been ratified by Peru.”

To apply the norm relating to dismissal—in other words, to dismiss the proceeding based on confirmation that the time period for the pre-trial phase has elapsed—is a negation of the Constitution and the international instruments. Moreover, specifically for the civil party, the families of the victims and the surviving victims, it is a negation of the right to truth and the right to obtain all due reparations. It is, in sum, impunity: impunity that goes beyond them [victims and kin] to affect all of humanity.

The legislature has based dismissal on “exceeding the time period for the pretrial or preliminary investigation phase,” and this Court can do nothing less than recall that the right

<sup>67</sup> Editors’ note: The bracketed text was taken from another section of the same judgment transcribed here. It was included to facilitate understanding of the text of the judgment and shorten the transcribed paragraphs.

to be tried within a reasonable time period has been recognized by the Constitutional Court as well as by the Inter-American Court. Hence, in the ruling in file 549-2004-HC/TC, the Court held that: [...]

*“It is necessary to point out that the right to a reasonable time period for pre-trial detention is different—in its content and assumptions—than the right to a reasonable time period for the process as a whole pursuant to Article 8(1) of the American Convention. (...)*

*§. Reasonable duration of a criminal trial*

**7. It is clearly impossible to establish in the abstract a single time period beyond which continuing to try a case could be considered unreasonable. This would entail assigning criminal trials an objective and irrefutable uniformity that is inherently inconsistent with the serious and delicate task of evaluating the potential criminal responsibility of each one of the individuals accused of committing a crime. [...]**

***In this sense, in order to determine whether that reasonable period has been exceeded, it is necessary to address the specific circumstances of each particular case. [...]***

*9. Nonetheless, the impossibility of establishing a single, unequivocal time period for evaluating whether or not the trial is conducted within a reasonable period does not preclude the establishment of criteria or guidelines which, when applied to a specific situation, allow the constitutional judge to determine the impact on constitutional law of being tried beyond the reasonably necessary time frame. The Court elaborates on the aforesaid criteria below.*

*§. Evaluation criteria for determining reasonable time*

*10. On this issue, the Inter-American Court, following the criterion set out by the European Court of Human Rights, has stated that “three points must be taken into account in determining a reasonable time period within which the trial must be conducted: (a) the complexity of the matter; (b) the judicial activity of the interested party; and (c) the behavior of the judicial authorities” [footnote omitted] [emphasis in the original].*

By way of explanation, the legislature that enacted Legislative Decree No. 1097 identified the right with the duration of the pretrial phase, which, according to the arguments put forth by the Constitutional Court in the ruling cited, is inconsistent with the notion of establishing the reasonable time period in each specific case based on three criteria: ***the complexity of the matter, the judicial activity of the interested party, and the behavior of the judicial authorities*** [emphasis in the original].

The norm cannot be applied, in view of its manifest incompatibility with the aforesaid constitutional norms. But that does not mean disregarding the constitutional recognition and rank of the right to a reasonable time period, which is protected and guaranteed through normative mechanisms consistent with constitutional norms that in this case have been negatively affected.

[In addition to the arguments already presented], [a]s already noted, [according to Legislative Decree No. 1097], dismissal on grounds of exceeding the time period for the pretrial or preliminary investigation phase is a type of “special” dismissal applicable only to cases of violations of human rights or crimes against humanity committed by military or police agents, not to cases of common crimes.

With the understanding that the norms on dismissal whose application has been requested clash with constitutional norms interpreted in keeping with international human rights law, there is also a clear contravention of the provisions of Article 103 of the Constitution (amended by Law No. 28389), which stipulates as follows:

*“Article 103. Special laws may be enacted because this is required by the nature of the matter, but not because of differentiations between persons. (...)”* [Emphasis in the original]

The issue of constitutionality discussed in the previous point is closely linked, [obviously], with the principle of equality [...]. [...]

From the standpoint of the principle of equality (before the law), the norm conflicts with the Constitution by introducing a scenario for dismissal applicable only to certain groups of individuals (military and police personnel) involved in certain crimes (“... crimes against life, body, and health envisaged in the Criminal Code of 1924 and the Criminal Code of 1991, considered to be violations of human rights, as well as crimes against humanity envisaged in the Criminal Code of 1991”) and based only on verifying the duration of the pre-trial phase. The norm does not set out the objective and reasonable causes for this differential treatment.

In light of the clear inadmissibility of procedural obstacles in the investigation, trial, and punishment of violations of human rights, this special type of dismissal lacks a legitimate purpose against which to gauge the appropriateness, need for, and proportionality of the differentiation. In other words, it is a case of discrimination based on the military or police status of a group of persons.

Moreover, this is not only a clear case of discriminatory legislation favoring State military and police agents over other citizens involved in legal proceedings, it is also a serious contravention of international human rights instruments to which the Peruvian State is signatory. This because while domestic criminal law is applicable to common crimes, the norms governing cases amounting to violations of human rights are not confined to domestic criminal law but instead encompass the entire body of international human rights law, since they involve not only the interests and rights of the victims and their relatives, but also the dignity of the human being and the shared universal values of all of humankind. This is why it is paradoxical to have a favorable standard for cases of violations of human rights under domestic law that does not extend to cases of common crimes of a less serious nature.]

As shown in this ruling, an important aspect of the discussion was the matter of a reasonable time period for conducting a criminal proceeding. For a more in-depth discussion from a comparative international perspective, see, in this Digest, *Right to be judged within a reasonable time period*, in Chapter V(1)(B)(iii).

## CHAPTER VII

# LA DIMENSIÓN PROCESAL DE LA INVESTIGACIÓN Y JUZGAMIENTO POR CRÍMENES DE DERECHO INTERNACIONAL (NUEVO CAPÍTULO)

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Criminal trials of conducts characterized as international crimes are currently underway in various Latin American countries. Their unfolding reality has underlined the challenges that such trials pose for justice system operators, particularly from the procedural standpoint.

There has been considerable debate over the nature and elements of international crimes, theories of imputation, and arguments to determine the (in)validity of provisions that could create legal obstacles to the prosecution of serious international crimes. At the same time, however, procedural aspects that play a decisive role in the success or failure of investigations and trials have been largely ignored.

This may be due in part to the wide range of procedural rules governing such proceedings among international courts and tribunals or among the countries of the region. It is important, however, to be able to identify some common denominators derived from comparable experiences that can help operationalize these procedures, bearing in mind that the debate surrounding them is just as complex as that over substantive norms related to international crimes. Without question, this is a valid demand from justice system operators, who, with the few tools available, must tackle proceedings that differ substantively from those designed for the prosecution of ordinary crimes. Therefore, this chapter offers an initial discussion of the main procedural issues taken up in the Latin American rulings examined in this digest.

### 1. JOINDER OF CASES OR PROCEEDINGS (NEW)

As Claus Roxin has asserted, “It is absolutely possible that a *plurality of procedural objectives* may be addressed in a single proceeding—that is, in the same external framework—e.g., in the case of a plurality of acts or of participation [of various individuals in the same crime] [...]. [Similarly], [a] court [...] may take up several criminal proceedings at once in similar [although not identical] cases [...].”<sup>68</sup> In any event, as this author states, the joinder of proceedings or cases is always premised on a nexus or connection between the different acts or accused<sup>69</sup> that gives rise to the need to adopt specific procedural measures to avoid the costs related to multiple proceedings, the strain on the individuals involved, or, ultimately, contradictory rulings or verdicts. In other words, if factors are present that

<sup>68</sup> Claus Roxin, *Derecho Procesal Penal* (Buenos Aires: Editores del Puerto, 2000), at 164.

<sup>69</sup> *Ibid.*, at 164–65.

join or connect different cases, combining them can enhance the functioning of the justice system.

Based on such considerations, the joinder of cases has been, as in domestic systems, a recurrent practice in certain international criminal tribunals such as the [International] Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone. In the proceedings before these tribunals, it is common to find cases that encompass two or more accused for the same set of facts.<sup>70</sup>

The joinder of proceedings or cases is also found in international instruments regulating the procedures before the ICC when the individuals have been accused, jointly, as co-perpetrators of the same acts. Examples include Article 64(5) of the Rome Statute<sup>71</sup> and Rule 136 of the Rules of Procedure and Evidence (the international instrument that guides the procedural behavior of the parties and judges in proceedings before the ICC). In an interpretation of these rules, Pre-Trial Chamber I of the ICC has pronounced as follows in the context of the work of that court:

[J]oinder enhances the fairness as well as the judicial economy of the proceedings because, in addition to affording to the arrested persons the same rights as if they were being prosecuted separately, joinder: a. avoids having witnesses testify more than once and reduces expenses related to those testimonies; b. avoids duplication of the evidence; and c. avoids inconsistency in the presentation of the evidence and would therefore afford equal treatment to both arrested persons;

[J]oinder minimizes the potential impact on witnesses, and better facilitates the protection of the witnesses' physical and mental well-being; and

[C]oncurrent presentation of evidence pertaining to different arrested persons does not *per se* constitute a conflict of interests.<sup>72</sup>

In the same decision, Pre-Trial Chamber I seems to be saying that the joinder of proceedings or cases is contingent on the effective protection of the rights of the accused. In this sense, cases may be joined only when doing so would not result in serious prejudice to any or all of the accused. For example, a case could not be joined to another in which the accused has already pled guilty.<sup>73</sup>

In this context, the Colombian ruling presented below appears to raise an additional dimension of the importance of joining, where possible, cases or proceedings dealing with international crimes. In addition to highlighting the procedural advantages in a manner very similar to the Chamber of the ICC, the Colombian Court approaches the

<sup>70</sup> For example, most of the accused before the Special Court for Sierra Leone have been tried in what we could term “mega-cases,” organized around the affiliation of the accused with different factions of combatants during the conflict in that country. These include (i) the case against three leaders of the Civil Defense Forces (*CDF Case*); (ii) the case against five leaders of the Revolutionary United Front (*RUF Case*); and (iii) the case against three leaders of the Armed Forces Revolutionary Council (*AFRC Case*). The exception to this strategy of joining cases is the trial of former Liberian president Charles Taylor. While it has occurred frequently, the joinder of cases in the ICTY seems to be a strategy that the tribunal developed in practice rather than a preconceived effort to equitably address the different groups participating in the conflict.

<sup>71</sup> According to Article 64(5), “Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.”

<sup>72</sup> *Decision on the Joinder of Cases against Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, ICC-01/04-01/07-307, March 10, 2008, at 8.

<sup>73</sup> *Ibid.*, at 9–10.

issue from the standpoint of the rights of the victims and their families to truth, justice, and reparations. The national court appears to base its argument on the importance of integrating procedurally acts and perpetrators that, if tried jointly, provide a more complete and exhaustive version of the violations and/or crimes.

COLOMBIA, *Appeal filed by representatives of the victims (Gian Carlo Gutiérrez Suárez, nominee) (List of Judgments 2.c), Whereas 2*. Furthermore, if we know that the commanders are accountable for all of the events because of the pyramidal structure of the group,<sup>74</sup> but also that the actual commission can be attributed to many people, clearly the atomization of the investigations and the dispersion of efforts undermines the basal principles of Law 975 of 2005 on the point of truth, justice, and reparations. In addition, numerous hearings are being held on the same set of facts, resulting in inefficient use of the limited resources available, as well as the risk that the content of the rulings will vary in terms of the circumstances of time, place, and manner, in violation of the principles of legal security and equality. There is, moreover, the inconvenience to the victims, who are summoned to numerous hearings where the same facts are being aired.

Similarly, if in addition to individual reparations, the goal is to ensure collective redress, then fragmenting the deliberations of the same set of facts among several different reparations hearings not only spreads the aforementioned resources very thin, but also reduces the chance of obtaining comprehensive reparations for the harm done.

In light of these circumstances, it is conceivable that future charges in the context of the justice and peace process could, to the extent possible, be brought against a group of defendants in a criminal proceeding—by front or bloc, for example—provided, of course, that the members of the group have been identified individually beforehand through their demobilization and confessions and that the events are framed as resulting from the bloc’s ideology in order to establish their connection to high-level and mid-level commanders.

Then, in order to make sure that efforts to obtain truth, justice, and reparations are not in vain, such a combined proceeding would require the Office of the Prosecutor to maintain an updated database with information on each paramilitary bloc and the individuals who have been demobilized from it. In this way, after having gathered and duly investigated the preliminary testimony, the prosecutor can file a single set of charges and immediately proceed with a single trial for that particular bloc and those individuals.

## **2. IMPORTANCE OF INCLUDING THE CONTEXT FOR INTERNATIONAL CRIMES IN CRIMINAL PROCEEDINGS (NEW)**

As part of the debate over the scope of State obligations to investigate, try, and punish those responsible for serious violations of human rights and/or international crimes, the Inter-American Court has developed a particularly relevant concept for evaluating the conduct of administration of justice officials: due diligence. This concept reinforces State

<sup>74</sup> Note in the original: “See, in this regard, the reasoning of the Chamber in the recent cassation judgment of September 2, 2009, file number 29.221, which concluded that where transitional justice is concerned, it is feasible in the Colombian case to apply the theory of ‘confluence of people in the crime and the organized power apparatus,’ ‘perpetration-by-means through an organized apparatus of power with a fungible but responsible instrument,’ or ‘perpetrator behind the perpetrator’ [...].”

obligations vis-à-vis the commission of certain crimes that, because of their characteristics or nature, require actions beyond the normal requirements of a criminal investigation or proceeding. Based on an analysis of Inter-American Court precedents, due diligence embodies the conviction that “[...] clarification of the truth, to ensure that victims have a voice in the proceeding or to identify some of the acts or omissions that give rise to responsibility, goes beyond what is strictly necessary to guarantee a fair trial for the accused in a criminal proceeding.”<sup>75</sup>

As the Inter-American Court has emphasized, criminal investigations and proceedings, if they are to exercise due diligence, must take into account the context in which the violations and/or crimes occurred. Specifically, the Court has held that

[i]n complex cases, the obligation to investigate includes the duty to direct the efforts of the apparatus of the state to *clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators*. [...] Thus, determination of the perpetrators of [systematic violations of human rights and serious violations of humanitarian law] will only be effective if it is carried out based on an *overall view of the facts that takes into account the background and context in which they occurred and that seeks to reveal the participation structure*.

As part of the obligation to investigate extrajudicial executions such as the one perpetrated in the instant case, *the State authorities must determine, by due process of law, the patterns of collaborative action and all the individuals who took part in the said violations in different ways, together with their corresponding responsibilities* [footnote omitted]. It is not sufficient to be aware of the scene and the material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, *it is not a question of examining the crime in isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure*.<sup>76</sup>

As the transcribed paragraphs show, a diligent investigation of acts that could amount to international crimes must (i) take into account all of the alleged criminal acts that have been perpetrated in a particular situation or against a particular victim or group

<sup>75</sup> Centro por la Justicia y el Derecho Internacional, *Debida diligencia en la investigación de graves violaciones a derechos humanos* (San José, Costa Rica: CEJIL, 2010). Based on a systematic reading of the jurisprudence of the Inter-American Court, due diligence encompasses the principles of assiduousness, timeliness, competence of institutions and officials, independence and impartiality, participation of the victims, and thoroughness. For an in-depth discussion of the criteria established by the Court with respect to the principles and elements of due diligence, see the cited report by CEJIL, as well as María Clara Galvis, “La debida diligencia judicial en la investigación de la violencia basada en género,” in *Visibilizar la violencia de género* (Bogotá: GIZ/Embassy of the Federal Republic of Germany, 2011), at 53–80.

<sup>76</sup> IACourtHR, *Case of Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of May 26, 2010, Series C, No. 213, paras. 118–119 [emphasis added].

of victims; (ii) consider the context in which the crime was committed, which could (or should) reveal important elements for appropriately characterizing the acts (whether the crimes are isolated events or inserted in a pattern of systematic or widespread criminal activity); (iii) investigate the power structures involved in the perpetration of the crimes in order to identify the individuals who bear the greatest responsibility; and (iv) use all appropriate procedural resources to shed light on patterns of behavior that characterize the acts<sup>77</sup> and reveal the true dimensions of the power structures through which the crimes were committed.

At the domestic level, judicial authorities responsible for investigations and prosecutions as well as decision-making bodies (judges and courts) have begun to work with these criteria. The rulings presented below illustrate these dynamics in domestic legal proceedings against individuals accused of perpetrating serious international crimes.

*ARGENTINA, Criminal cassation remedy (Gregorio Rafael Molina, convicted) (Vote of Judge Mariano Hernán Borinsky) (List of Judgments 1.a), Whereas section.* [In order to determine whether the crimes in this case can be subsumed in the category of crimes against humanity as part of a widespread or systematic attack against the civilian population,] [...] it is relevant and useful to recall that the facts aired in the *sub examine* are only a tiny portion of the universe of State criminality verified during the last military dictatorship that began on March 24, 1976. At this point in the history of our country, this circumstance has become a notorious fact, since, based on the discovery, description, and legal evidence in Case 13/84, the National Federal Criminal and Correctional Court that tried the commanders-in-chief of the Armed Forces in power under the last military dictatorship established the existence and organization of a State power apparatus which, based on a criminal plan rooted in a doctrine of action used the public force of the State as a whole to achieve its ideological and political ends.

[T]hat historic trial examined and verified a significant increase in the disappearance of persons beginning with the military coup of March 24, 1976, [and] systematic abductions with a common *modus operandi*: (1) they were carried out by security forces who took precautions to avoid being identified; (2) a considerable number of heavily armed individuals were involved; (3) the operations included alerting the authorities of the “Free Area” zone; (4) the victims were abducted from their homes during the night and their property was looted; and (5) the victims were rendered unable to see or communicate and were placed in vehicles, with measures taken to hide them from public view (Chapter XI). They were immediately taken to secret detention centers—one of the main ones being the “Radar Station of the Mar del Plata Air Base,” also known as “La Cueva” (the Cave) (Chapter XII, p. 173)—where they were interrogated under different forms of torture and even raped (Chapter XIII, p. 208) and guarded by individuals other than their torturers or members of the “gangs” (“*patotas*”) that usually carried out the abductions (Chapter XIV). There the victims’ fates varied: some were released under measures to ensure they would not reveal what had happened to them, while others, after a certain time period, were prosecuted or placed in the custody of the National Executive Branch, covering up their time in captivity. The majority of those illegally deprived of their liberty, however, are held

<sup>77</sup> In this regard, the Inter-American Court underscored the importance of “tak[ing] into account all the evidence from other proceedings that allows patterns to be revealed; hence this execution [in the Cepeda Vargas case] should be related to other similar cases, such as the threats, harassment and murder of other [victims].” *Ibid.*, para. 120.

without anyone knowing their current whereabouts or fate (Chapter XV). In some cases they were physically eliminated, for example, in staged armed battles (XVI).

COLOMBIA, *Partial ruling and motion for comprehensive reparations (Orlando Villa Zapata, nominee) (List of Judgments 2.a), Whereas section*. The Court deems it pertinent to offer an [...] explanation of the applicable law for each of the acts that have been admitted and are under examination in the instant ruling. [...] [It is essential] to clarify that based on a national or regional contextualization of the armed conflict, and the description of the structure of the Victors of Arauca Bloc, the Court can address the structural elements of the conflict in order to apply International Humanitarian Law to the Colombian case [...].

In order to understand the phenomenon of paramilitary violence in the context of war or widespread violence that has characterized Colombia's recent past, it is necessary to take a *long-term view* [footnote omitted], according to Fernán González SJ, a historian and expert in armed conflicts. This sheds light on the macro (national), meso (regional), and micro (local) dynamics of the gestation and development of the violence, which has been neither spontaneous nor isolated, but rather is rooted in the history of the country.

Now the Court is aware that there are no direct or simple causes of the phenomenon of violence in Colombia. Therefore, an examination of the conditions leading up to one or more social circumstances is insufficient to explain the occurrence of a subsequent event. In light of the foregoing, it is necessary to adopt approaches that acknowledge this complexity and examine the ways in which various contexts interact, the interdependence of social phenomena, and the capacity for rational decision-making of the parties to the dispute.

It is for this reason that the Court shall review the national situation in order to understand the framework in which paramilitarism emerged. It will then address the regional dynamics in order to understand the ways in which they evolve and overlap.

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), pleadings*. Once the evidentiary stage had concluded, the Attorney General, in his pleadings, first [offered] a clarification concerning various references he would be making to evidence from previous proceedings before this Court and before those in other jurisdictions. He went on to describe the historical context, an understanding of which, in his view, was critical to an analysis of the facts in this case. He referred to the existence of a systematic plan set in motion by the last *de facto* government whose level of social violence and certain other characteristics—which he described—justified its characterization as “state terrorism.”

Later, he offered a detailed description of the methodology used. He discussed the emergence and spread of the concept of “disappeared” and the coexistence of two legal systems, one formal and visible and the other a secret, underground, parallel system of repression, a crucial aspect of which was the secret Army Plan Contributing to the National Security Plan [Plan del Ejército Contribuyente al Plan de Seguridad Nacional]. In regard to the latter, he discussed the combat method employed, the technique of dividing the territory into zones and areas, and the scale and methodology for the use of torture, secret murders, and re-education of certain prisoners.

The Attorney General described how the concepts of “enemy” and “subversive” emerged in this context and the consequences of their being applied. In his pleadings, he went on to describe the way in which the notion that these were “crimes against humanity” gradually took

hold, based on an understanding of the historical facts and of the evolution, characteristics, and scope of those crimes. [...]

As for the facts in this case, Dr. García Berro noted that they cannot be regarded and understood as isolated events, but rather must be seen as part of the whole history that he summarize[d]. [...]

To substantiate this assertion, he offered a cogent appraisal of the evidence. He evaluated the judgments handed down by this Court in Cases 2005, 2031, 2034, 2043, and 2046, pointing out the general evidence of the existence of a zone with designated functions in the plan under the command of the Military Institutes at Campo de Mayo, with its defined geographic area, and the wealth of documentation showing that the Buenos Aires provincial police stations were outfitted to include restricted areas designated as “military zones,” each of which was assigned military personnel from one of the Military Institutes Command Schools. He explained that he was abbreviating his statement by referring to matters that had already been proven at trials before this same Court, based on the evaluation of Directive No. 404/75 of the General Commander of the Army [...], the Army Plan Contributing to the National Security Plan of February 1976—in particular the point on “Instructions and Coordination”—and, lastly, the facts demonstrated in the Case 13 ruling and cited in the aforementioned rulings.

Testifying in their capacity as representatives of the National Secretariat of Human Rights, Dr. Rosario Álvarez Garriga and Dr. Mariana Maurer stated that they would do so on behalf of that office as well as of the 30,000 detained-disappeared and all the victims of State terrorism in our country, in keeping with their express mandate to seek respect for human rights, in strict compliance with their legal and constitutional obligations.

They established their position in relation to the historical context in which they considered the facts in this case to have occurred, and, in terms similar to those used by the Office of General Attorney, they described and explained in detail the characteristics of the terrorist State, its systematic extermination plan, and the organized power apparatus that implemented the latter, all of which, in their view, had already been proven and accorded the authority of *res judicata* in Case 13 of 1984. [...]

They subsequently made several points about the police forces under the operational control of the Army during the last civil-military dictatorship, noting that the acts imputed to former police chief Juan Demetrio Luna were not isolated. Instead, his actions formed part of the systematic plan of State terrorism, giving rise to responsibility for crimes against humanity in the context of the genocide committed against Argentines.

GUATEMALA, *Case of Myrna Mack, Trial Chamber ruling, C-5-99, Whereas section*. The testimony of witnesses Clara María Josefina Arenas Bianchi, Julio Edgar Cabrera Ovalle, and Gerardo Humberto Flores Reyes establishes that on the date the events occurred, the country was still in the throes of an armed conflict between the army and the insurgency, the consequence of which was the emergence of displaced persons and refugees. This is where anthropologist Myrna Elizabeth Mack Chang appears and, in the course of her social research, specifically as part of the Association for the Advancement of Social Sciences in Guatemala (AVANCSO), carries out a field study on this group of people, in the course of which she is stabbed to death.

Here we must ask ourselves: What was the motive for conceiving, planning, and ordering the execution of this person? As demonstrated by the historical documents introduced during the proceedings—including the report of the Historical Clarification Commission, *Guatemala:*

*Memory of Silence*, the report of the Interdiocesan Project for the Recovery of Historical Memory, *Guatemala: Never Again*, and the book *De la Guerra ... a la Guerra*—Guatemala, in this era, was still gripped by an armed conflict between the insurgency and the army. According to the testimony of expert witness Cléber Alberto Pino Benamu, the armies of Latin America, including Guatemala's, were [operating] under the National Security doctrine. According to General Héctor Alejandro Gramajo Morales, under this foundational doctrine, the Guatemalan Army recognized an internal enemy and based on this premise, acted based on [a] series of campaign plans that provided its members with operational guidelines. Dr. Héctor Roberto Rosada Granados confirms this in his analysis. In the context of this armed conflict, displaced persons and refugees were regarded as a “sensitive issue,” since, in the army's view, they were considered insurgents or sympathizers of the insurgency. This is where Myrna Elizabeth Mack Chang comes in, conducting a field study in Quiché and Cobán, the most conflictive zones. She had not yet completed this work when she was killed in what the witness considered to be a fatal consequence of the work she was doing. This theory is confirmed by Bishop Julio Edgar Cabrera Ovalle and Bishop Gerardo Humberto Flores Reyes, who stated that anthropologist Mack Chang had told the former that she was being watched and persecuted, according to her, for touching an issue that the army was not interested in having publicly exposed.

### **3. EVIDENCE/EVIDENTIARY MATERIAL IN THE INVESTIGATION AND TRIAL OF CRIMES UNDER INTERNATIONAL LAW (NEW)**

A characteristic of the proceedings followed for the commission of international crimes is the need to resort to evidence that possibly would not be considered ideal in trials of ordinary crimes. We are referring, for example, to circumstantial evidence, the application or development of hypotheses, the evaluation of the body of evidence as a whole, the particular weighing of testimonies by individuals directly affected by the crime—even when a certain degree of discrepancy is present—or the admission of expert studies or witnesses in areas that do not necessarily refer to technical sciences, such as forensic medicine.

Including these types of evidence in the case or proceeding and according them the evidentiary value that is reasonable, based on their merits and taken together with other evidence, is not only desirable but also imperative, given the inherent characteristics of the acts that are being investigated and judged. As pointed out in some of the rulings transcribed below, part of the logic behind the commission of crimes of this nature is the illegal behavior of the structures that commit or promote them and the intentional measures taken to ensure impunity for them. In this regard, it would be impossible to request, for example, official documents explicitly ordering the extrajudicial execution of a particular individual or group of individuals. It would also be ridiculous to require corroboration from another eyewitness, for example, in a sexual crime or torture, when the repressive apparatus was designed to ensure the absolute isolation of the victims.

In any event, Latin American courts have clearly defined the nature and distinguishing characteristics of this type of crimes and in doing so, have been able to identify guidelines for evaluating the evidence introduced at trial. This is not to say, however, that a court can convict someone if the facts and his or her responsibility have not been proven beyond a

doubt, according to the standard required under the applicable procedural rules. To the contrary, it means finding the most appropriate way of evaluating evidence, bearing in mind the characteristics of the crime or the type of responsibility that is to be established.

### A. Circumstantial evidence (new)

ARGENTINA, *Criminal cassation remedy (Diego Manuel Ulibarrie, convicted) (List of Judgments 1.d)*, *Vote of Judge W. Gustavo Mitchell, Section VII*. As far as its evidentiary value, it is important to point out that “it lies in the degree of necessity of the connection it reveals between a known fact (the evidentiary fact), whether psychological or physical, that has been duly corroborated, and another that is not known (the fact indicated), whose existence one is attempting to prove. In order for the relationship between the two to be necessary, the ‘evidentiary fact’ must not be connected to any fact other than the fact indicated; this is known as the ‘univocality’ of the evidentiary fact. If the explanation for the evidentiary fact is consistent with a fact other than the fact indicated, or at least would not preclude it, then the relationship between the two shall be contingent: this is called ‘amphibological evidence’” [*footnote omitted*].

Contrary to the arguments of the defense, then, I think that taking these statements together, one can establish with a degree of certainty—since they are univocal indications—the number of people detained, the identity of one of the subjects, that this was a police operation, and the acting security force: in other words, that there were four detainees, one of whom is identified as Víctor Vicente Ayala, and that it was an operation carried out by members of the police from Corrientes Province. [...]

[F]ar from reflecting a partial understanding of the charges, the grounds given by the lower court in the decision under appeal reflect logical–deductive reasoning based on the principle of sound judgment (*sana crítica*), since the evidence was not evaluated in a fragmented or isolated way. Nor has that court committed any omission or error in the verification of the events leading to the trial verdict. To the contrary, it has clearly presented its vision of the whole picture, interweaving all of the evidence. The appellant’s argument is based on a fragmentation of those aspects that do not fit with the analysis of the evidence and is inconsistent with the methodology for weighing evidence recognized by the Supreme Court of Justice of the Nation (Rulings: 308:640, among others).

ARGENTINA, *Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e)*, *Whereas II*. In this point, I will discuss some of the general guidelines that were taken into account in order to properly evaluate the evidence, since we are trying acts that took place more than 30 years ago and were planned and carried out in secret by an organized power structure, which informs the standard used to evaluate the evidence. [...]

[U]nder the system of free inner conviction, the evaluator is not constricted by legal standards, but instead must offer a rational explanation of the grounds for arriving at a particular conclusion.

There is no obstacle, then, to arriving at a value judgment based on the testimonial evidence, as long as the latter is examined in light of the principles of sound judgment [...].

Given the special characteristics of the cases under examination, it is relevant to determine exactly how much value should be assigned to testimony in general and to witness statements in particular. We will also discuss the evaluation of the circumstantial evidence. It should be

clarified, however, that beyond the weight that will be assigned to the testimony, the case file is not limited to the victim's statements. An abundance of documentary and circumstantial evidence corroborates the accusation, which will be described throughout the verdict.

It is also necessary to assess the consistency between the statements, in the sense that they mutually reinforce each other. [...]

It would be difficult to discover precedents for events of the nature and magnitude examined here.

Because tragedies of the dimension the Nation experienced during the military dictatorship that usurped power from 1976 and 1983 would be unlikely to happen again. [...]

Indeed, incidents of this nature are distinguished, from the start, by the secrecy and privacy in which they are cloaked, and by the impossibility of gathering direct evidence of their consummation.

An example of this is the ruling of the Criminal and Correctional Court of the Capital, which holds that "the circumstance that only the statements of the minor and her mother are available cannot be used as the exclusive and definitive grounds for concluding forthwith that it is impossible to verify that the crimes under investigation actually occurred. Since such acts usually are carried out in the private rather than the public realm, following that line of reasoning, most cases would go unpunished. Given the inherent difficulty of compiling proof of (such) crimes, it is necessary to weigh the evidence, taking into account each and every relevant aspect of the pre-trial phase, in order to arrive at a comprehensive final judgment based on the entirety of the evidence."

The same ruling went on to state that "[i]nvariably, given the circumstances and privacy surrounding abuses, investigations into their occurrence often fails to yield incriminating evidence. It is therefore appropriate to examine just the circumstantial evidence in order to try to reconstruct what happened and attribute any criminal liability as applicable." [...]

Given that these acts, involving the kidnapping, abuse, and subsequent disappearance of one of the victims, were carried out in the private realm and in the context of State terrorism, and given that the seditious elements themselves appropriated the powers of the State in order to carry them out, clearly one cannot require the presence of two able witnesses to attest to each one of the events that occurred within their orbit.

At the same time, it should be noted that the matters being aired in this proceeding are not isolated events, but follow the same pattern as thousands of cases that occurred throughout the country, a pattern that, in addition to being public and common knowledge, was also confirmed in Case 13/84 of the Federal Court of Appeals Criminal Division of Buenos Aires. [...]

The Federal Court of San Martín held in Case 2005—record of this Court—that "the methodology used in this type of incidents was marked by a factual context that reflected the forms and procedures used to repress the subversion. In this sense, it is worth recalling the unique behavior of the organs of power which, through their executors, acted in secrecy, covering their tracks and impeding access to the relevant sources of legal information necessary to recreate the crimes that occurred."

*ARGENTINA, Case of Victorio Derganz and Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), Whereas II.* In addition to the foregoing, it is important to mention the time that had elapsed since [the act's] commission. All of these circumstances conspire

against proving what happened, which can only be substantiated based on the testimonial and documentary evidence contained in the file.

Because of this, it is even more important to evaluate the entirety of the hypotheses and circumstantial evidence in the case rather than weighing each individual detail separately, since, by definition, no single element in isolation amounts to convincing grounds, which are derived, precisely, from those hypotheses and circumstantial evidence taken as a whole. [...]

As stated at the beginning of this discussion, comparable precedents must be found in rulings that deal with events from the period in which the State held a monopoly over organized violence.

One unquestionably solid example is the ruling handed down by the Oral Tribunal of Federal Criminal Court No. 1 of Córdoba, in case 40/M/2008.

This precedent held, in relation to circumstantial evidence, that [...] “[...] *with respect to crimes committed by the State apparatus with an expectation of impunity, the probative force of the evidence offered lies in the direct link between the known fact (indiciario) and the fact indicated (indicado) that one is attempting to prove.*”

[Also according to the Oral Tribunal of Federal Criminal Court No. 1 of Córdoba,] “[i]n the case, the known fact–fact indicated nexus presents no fissures from the standpoint of the principle of sufficient reason. Here, the nexus and the solution for corroborating and reconstructing the events under examination in the proceeding appear to be univocal, insofar as there is no compatible rational explanation that would point to a different solution, especially taking into account the degree of power and control wielded by the Armed Forces at the time the events occurred. It is therefore impossible to believe—as there is no evidence to indicate a contrary scenario—that the events could have occurred in any other way than what has been described here, [based upon] the ample evidence discussed earlier.”

#### **i. Circumstantial evidence in establishing a disappearance followed by extrajudicial execution (new)**

URUGUAY, Appeal (Juan Carlos Blanco Estradé, convicted) (List of Judgments 7.a), Whereas IV. [In his appeal], the Defense takes issue with the criterion followed by the first instance Magistrates in relation to the “flexibilization” of the concept of circumstantial evidence, which has imbued it with a broad and illegal meaning.

[In response to the Defense’s arguments in relation to the disputed evidence of the death of [Elena] BB, the matter must be approached from various angles, as it presents different facets and issues of considerable interest.

First, it appears appropriate to raise notions about the *corpus delicti* (“body of the crime”) in order to try to shed light on this much-debated issue, as discussed later on.

In its Ruling of July 29, 1950, published in “La Justicia Uruguaya” as Case No. 3248, the First Duty Criminal Chamber pointed out that opinions issued with the aim of discerning the authentic notion of *corpus delicti* “can be divided into two groups: those that follow an objective, material, or realistic criterion and understand *corpus delicti* as the thing in which or with which the crime has been committed or carried out, or which contains signs of it, such as the corpse, the weapon used, the fake key, etc., and those espousing an ideological or rationalist criterion, conceived as an abstraction of the crime, meaning only its execution, its existence, the fact of the crime itself, so that it is simply nothing more than the punishable act. The former commit the previously mentioned error of confusing the *corpus delicti* with the evidence of it, since the

object on which the action relied, and the object with which it could have been carried out, do not have to be present in order to confirm the existence of a crime.”

And there it concluded that “the *corpus delicti* is none other than the crime itself, and determining the *corpus delicti* means nothing more than verifying, in the proceeding, its existence, in other words, that it actually has occurred, that it took place in real life, the hypothesis typically found in criminal law.”

Hence, this Court takes the view that, even though the victim’s body has not appeared to date, it has been amply demonstrated that BB was murdered in early November 1976, by military personnel, in the facilities of the Materiel and Weapons Service.

This conclusion stems from an examination of the wealth of evidence in light of the “rules of sound judgment,” as set out in Article 174 CPP [Criminal Procedures Code]. [...]

[From this perspective, in] the evaluation of the evidence one cannot overlook the historical context in which the events occurred, because the latter makes it possible to understand the many peculiarities in the evidence compiled and weigh them in their fair and legal measure, without engaging in any undue “flexibilization.” [...]

It is impossible to ignore the fact that those events occurred in the very particular context of a *de facto* government under which individual guarantees clearly were severely breached and the official security forces operated with absolute impunity in the type of situations such as those under examination here, since only the military justice system had jurisdiction to potentially take them up. [...]

[The conviction regarding the detention, torture, and murder of BB stems from a comprehensive study of the evidence in the file. It includes (i) the investigations opened in relation to the unlawful detention of BB, which were cut short by the Expiry Law, (ii) the conclusions reached by the Investigative Committee created in the Senate, (iii) the final report of the Peace Commission, (iv) the testimonies of individuals who were detained with BB, as well as of (v) former military police personnel]. [In particular, the testimony given by DD], who was a military police officer at the time, describes the “following of BB (...) who was going to make a contact,” in which she [the officer] did not participate. Upon his return, another soldier, “gesturing nervously, said that the detainee had run toward the Embassy and that she had grabbed her and at that moment an Officer among them arrived and between the two of them they took the woman out. They put her into a vehicle—from what I heard I think it could have been a Volkswagen—and took her away from there. When they reached 8 de Octubre [Avenue], they transferred her to a military pickup. She continued to resist and one of the Officers punched her. A while later, I cannot say exactly how many days, the soldiers that had been on night guard duty in Battalion No. 13 arrived and told us in astonishment that some soldiers had dragged the Embassy detainee, as we called her, out of the barracks, along with some shovels, and that some time later, they weren’t sure exactly when, they returned without the detainee, tossed down the shovels, and she never appeared again.”

Another legal basis that supports what was stated at the beginning of this section is a reality that is incumbent on the judge through logical and experienced reasoning.

In this regard, what the 2<sup>nd</sup> Duty Colleague has ruled on numerous occasions is totally compatible, namely that “(...) all of the disappeared have died, since that is what the data show in reality—such as, for example, the report of the Peace Commission—but basically the incontrovertible circumstance that efforts are being made to locate them in SECRET GRAVES which, after so many years, can yield no other answer than that they are dead.” [...]

Therefore, taken together, all of these elements that have been discussed *ut supra* are what lead this Court to conclude, as stated earlier, that it has been proven beyond a doubt that BB was murdered in early November 1976, by military personnel, in facilities of the Materiel and Weapons Service.

## ii. Circumstantial evidence in establishing a forced disappearance (new)

ARGENTINA, *Criminal cassation remedy (Diego Manuel Ulibarrie, convicted) (List of Judgments 1.d), Vote of Judge W. Gustavo Mitchell, Section VII*. The criminal records of Vicente Víctor Ayala, Orlando Diego Romero, and Julio César Barozzi found in the Corrientes Police Station were of enormous evidentiary value. In its ruling, the trial court noted that there were several requests in the case of Ayala (March 14, 1975), which corroborated that the police had carried out surveillance of this person. In addition, there is a fingerprint identification of the person named in the Federal Police Station in Corrientes Province, which supported the statement given by the Camino witness to the effect that the identification of the detainees was carried out by the Federal Police.

The annotations in the file of Orlando Diego Romero showed that he was the target of political persecution. Above all, it was relevant to encounter his record number in the Corrientes Police Station, since that proved that he had been detained by that security force, given that he was not originally from that area and there was no record that a request for a national identity card [*cédula*] was processed for him in that province that would explain why his record number would appear there.

## B. Testimonial evidence (new)

ARGENTINA, *ESMA Mega-Trial (García Tallada, Manuel Jacinto, et al., accused) (List of Judgments 1.b), Whereas section*. On numerous occasions, the accused have strongly questioned those they referred to as necessary witnesses, saying that many of them served as intelligence agents in the Task Unit and now their statements are motivated by revenge. [...]

Evidently, the accused's efforts to discredit the victims-witnesses stem, in this case, from their status as such.

In response to them, it is important to recall what has been said [...] about the cruel conditions of captivity, such as the so-called "recuperation process," which did not always lead to freedom but instead sometimes ended with the "transfer" of the kidnapped individuals [...].

The accused's belief that the activities they imposed on the captives, on threat of death, amounted to free decisions, contains a serious conceptual error that must be elucidated here.

The members of this Court do not know how we would have behaved if faced with a similar personal experience of cruel suffering and the immediate threat of death such as that experienced by the victims in the clandestine detention center. Perhaps we would have "collaborated" with the "*lancheos*" [operations in which detainees were taken around the city by their captors to identify other subversives] when faced with the real possibility of losing our lives or those of our family members. Perhaps we would have pretended to collaborate in order to survive. Perhaps we would have laughed while dining with the officers in "El Globo" restaurant and then scrawled a phrase expressing our freedom on the bathroom wall.

When faced with extreme situations, humans behave in unexpected and varied ways. This must always be respected. Even more so when their survival is what makes it possible to construct the narrative of what happened and to duly judge the individuals who committed those serious crimes.

Being a survivor of a detention and extermination center does not imply that a person has lied, as the accused claim, nor can this assumption be made about someone who has been the victim of an assault, fraud, injuries, or rape. [...]

[As stated earlier], [s]ince the defense teams have, [besides questioning their credibility], disputed many of the versions given by the witnesses, this Court deems it necessary to make some general clarifications about the parameters that were taken into account when evaluating the different types of evidence.

This need stems from the unique circumstances surrounding this trial in general and the evidentiary proceedings in particular.

Hence, the context in which the events occurred—the absolute secrecy and the special care taken to ensure impunity through practices like blindfolding and, in most cases, strict isolation of detainees—is itself an obstacle to the victim-witnesses' ability to provide details about what they experienced.

In light of the foregoing, it is necessary to evaluate all the factors that go into this situation of being victims and witnesses: the suffering they experience when they have to testify so many times in front of the individuals responsible for their greatest suffering, and the anguish they experience in having to recall and relive those events. There are also the consequences of so much time having elapsed, over 30 years. This means that some of them have forgotten details, names, nicknames, circumstances, and the like. Conversely, many times their memories return with even more clarity due to the distance from the event that caused so much pain and/or because they feel protected, without fear of reprisals. It must be taken into account that the fear, a consequence of what they lived through, did not disappear overnight. Rather, as many of them described in their statements, they lived with it for years, long after the events that victimized them; years in which they remained under surveillance and control, in some cases having to report to their victimizers on a daily basis. [...]

Hence, we understand that the witness called to testify so long after the event can confuse real observations with imagined ones. This is so extreme that it will be imperative to navigate by making use of all of the means available to obtain a conceptual reconstruction of the events being investigated. In other words, to contrast the statements given by the deponent with the rest of the body of testimonial and documentary evidence in order to arrive at the truth and find the state of certainty that must exist in the mind of the judge when the time comes to issue a ruling [*footnote omitted*].

In addition, we concur with the what the Federal Criminal Oral Court No. 2 of this city has held in relation to the real observation of the events: *“Another important issue capable of hampering understanding of the facts, and one that we took into special account when evaluating the testimonies, is that the victims’ perceptions may have been affected by their experience of the events they describe. To begin with, almost all of them said that they were blindfolded to make sure they could not see. They also said that despite this, they were able to see out from under the blindfolds, albeit with difficulty. This limited vision not only had the obvious effect of preventing them from seeing all of what was happening to them, but also affected them in other ways. Hence, many of the witnesses said that they did not have an accurate sense of time. This was aggravated by two things. One has to*

*do with the intensity of what was happening to them and the other with their inability to distinguish night from day—since their eyes were covered—without access to openings that would allow them to perceive natural light. As a result, those who spent enough time in captivity to be able to learn to distinguish routines, and therefore differentiate the times of the day, showed a better understanding of the passing of time than those who were imprisoned for a short period. We also took into account that, given the particular circumstances that the facts being judged took place in secret, the witnesses are also victimized by attacks which, due to the unusual intensity of what they lived through and the severity of the damage it caused, must have left indelible marks on their memory. This is not to say that there would be no differences between the narratives of witnesses who describe having experienced the same pain or who witnessed a particular episode. It should be made clear that these differences are not substantial and usually correspond to different capacities for observation resulting from, for example, the physical positioning of the witnesses, their knowledge, their age, the length of time they spent in captivity, etc.”*

Along these same lines, it is also important to acknowledge that different subjects will not always have the same perception of a situation and that this does not disqualify the testimony as evidence. Indeed, it is normal for several witnesses not to have exactly the same perception of how an event transpired, no matter how uncomplicated it might be. Each person observes the incident and remembers it, and the differences in the details pose no obstacle to admitting the testimonies based on the essential aspects in which they do correspond.

It is also fitting to discuss an issue highlighted by all the defense teams: the alleged “contamination” of the testimonies presented by the victims or their immediate relatives due to the passage of time, their having read books on the issue, or their contact with other victims. [...]

[In this regard,] [t]wo issues must be underscored. The first is that in the oral arguments, by applying the principle of immediacy it is possible to “decontaminate” the perceptions of witness through the production of the different types of evidence: judicial inspections, comparisons with other testimonies, and the compilation or obtainment of documentary, expert, and informational evidence, among others.

The second issue to underscore is that what the witness “heard,” “saw,” and “felt” in those circumstances is beyond doubt. No one can erase what has been branded into them by the fire of their own experience. This is not to say that there may not be differences which, as stated before, relate to the uniqueness of each human being and how each one has managed to survive experiences as traumatic as those they had to face, based on what can be gleaned from the events that have been examined.

For this reason we are convinced that the passage of time may have caused some impressions to fade, but not the most important ones, the most significant ones that really interest us in this type of proceedings, where the essential rights of the human being have been violated.

*ARGENTINA, Appeal (Jaime Lamont Smart, et al., accused) (List of Judgments 1.c), Whereas section.* Both the nature of the systematic extermination plan implemented in the period from 1976 to 1983 and the strategy to ensure impunity that those responsible later followed, with a view to impeding investigation of those aberrant crimes, were intended solely to escape punitive power.

These acts were implemented outside the law, in secret, covering up every trace, and with the expectation of impunity. Given these circumstances, it comes as no surprise that the testimonies of the victims and their relatives would be one of the most important elements in the body of

evidence compiled during the investigation, not only because of the particular characteristics of the crimes investigated here, but essentially because of the credibility of the accounts and the coherence and concurrence between them.

This same matter was taken up by the National Appeals Chamber of the Federal Criminal and Correctional Court in its ruling in Case 13/84. It held that “... *testimonial evidence acquires a unique value due to the nature of the facts under investigation... (1) The testimonial statement is especially relevant when the particular forms of execution involve deliberately erasing any traces of the crime or in cases of crimes that leave no traces of their commission or are committed in private. In such scenarios, the witnesses are termed necessary ... In this case, the clandestine approach to the repression, the deliberate destruction of documents and other traces, and the anonymity with which the perpetrators tried to shield themselves all support this assertion. It should come as no surprise, then, that most of those who provided evidence are relatives or victims. They are necessary witnesses... (2) The persuasive value of those accounts supports “the conclusion as to the probability that the events they describe actually occurred... It is a well-known fact—just like the existence of terrorism—that during the period in which the imputed acts occurred, people disappeared; secret detention centers under the jurisdiction of the Armed Forces existed; uniformed personnel carried out continuous detentions, raids, and seizures; and there was no subsequent news about the fate of those affected.”*”

ARGENTINA, *Criminal cassation appeal (Diego Manuel Ulibarrie, convicted) (List of Judgments 1.d), Vote of Judge W. Gustavo Mitchell, Sections VII and VIII.* I observe that the ruling from the lower court has been substantiated based on different pieces of circumstantial evidence. All of these, along with the conclusions, are cited in the grounds for the ruling. It is germane, then, to examine whether this evidence has been evaluated by the trial judges in light of the principles of sound judgment. [...]

The challenge mounted by the defense concerning the [alleged inconsistencies] in the witnesses' statements [is examined below].

In this analysis, however, one cannot fail to recognize or take into account that this type of evidence is made up of “[...] *psychological elements [...]: (a) perception; (b) memory; (c) testimony. The perception of an event or object is channeled through any of the senses. Therefore, it will vary according to the characteristics and abilities of the individual, as well as the conditions of time, place, and manner affecting him or her at the moment of perception ... Individual capacity for perception and mnemonic evocation necessarily entails an incomplete memory of the event. This means that one cannot expect an all-inclusive description of the event even from the most reliable of witnesses, much less infer from that any inefficacy or reticence on his or her part... [A]dded to this is the evocation process that links the perception to the statement provided. When someone is faced with a surprising or rapidly unfolding situation, individual differences in curiosity, sensitivity, or impressionability will cause that person to pay attention to the fragments of the event that attract his or her attention. This means that he or she will always be left with a distorted, confused, or even nonexistent memory of the rest of the event. Moreover, even though the central aspects of an event will generally be the ones that attract the most attention, it is often the case that in a rapidly unfolding event, some people, because of their degree of sensitivity, will focus their attention, and therefore their observations, on a purely incidental detail [...]* Memory involves a complex mental process that inherently entails retaining what has been perceived [...]; nonetheless, psychology and experience tell us that the primary factor in this regard is the interest, pleasure, or curiosity that the event triggers in the person. [T]hat is, these three aspects determine that some people, due to their unique personality traits, will remember certain circumstances perhaps for the

*rest of their lives, because they are beneficial to their state of mind. Conversely, unpleasant, unfortunate, or traumatic events will immediately be repressed by the conscious mind, to be hidden away in the psychological stratum of the subconscious, and this repression will make recollection impossible. [...] The witness's testimony or statement is without a doubt the most critical moment; this is when the two psychological processes mentioned earlier play out in transmitting his or her knowledge of the events to the judge. During the examination, it is essential to extract as much information as possible concerning what the witness knows about the event and to try to ascertain the accuracy of each assertion made. [...] These individual aspects must be complemented in turn by the objective nature of the event, for example the ease or difficulty of observing it, the time, place, manner, and rapidity of its occurrence, its plausibility, etc.” (Eduardo M. Jauchen, *Tratado de la prueba en materia penal*, Rubinzal-Culzoni Editores, City of Santa Fe, 2002, pp. 359 and 369). [Unofficial translation]*

It is possible, therefore, that the description of secondary or irrelevant circumstances related to the event will contain inconsistencies, in which case “*only the erroneous or irrelevant fragments [should be] discarded [...] and the rest retained, if their veracity is established through sound judgment [...]*” (ibid.).

Ultimately, in my judgment, the discrepancies between the [statements of] witnesses to the event—Esteban Fabián Cele, Angélica Nieve de Gauna, Miguel Ángel Tannuri, and Héctor Ceccotto—are immaterial, inasmuch as the main point, namely the existence of the operation, was consistent in all of them. Also, the witnesses concurred in their descriptions of the date, time, and place of the event aired at the trial.

Therefore, I see no fissures or inconsistency, only a reasonable degree of nuance that, far from suggesting any intent to deceive, reveals the spontaneity with which the witnesses, in their testimonies, described their memories of the way in which the event transpired, differences that in my view are minor and only attributable to the passage of time. In this regard, it should be noted that 30 years had elapsed between the occurrence of the event under investigation and the trial. [...] [footnote omitted].

## **C. Expert testimony (new)**

### **i. Expert testimony from military personnel (new)**

GUATEMALA, *Case of the Dos Erres Massacre (Roberto Aníbal Rivera Martínez, et al., accused) (List of Judgments 3.a), Whereas IV*. After our deliberations, the Judges undertook the following analysis of the evidence introduced during the proceeding, in accordance with the principles of sound judgment [...]. Expert RODOLFO ROBLES ESPINOZA corroborated the MILITARY EXPERT ANALYSIS, which described the chain of command and the way in which the Guatemalan Army planned the military operation against the hamlet of DOS ERRES. [...]

[As far as the expert’s experience and technical expertise, it was determined that he] [h] as given military expert analysis on other occasions. He has acted as an adviser to the Public Ministry in the [Myrna] Mack case, and internationally in the case of FUJIMORI, who has been convicted; in the case of Vladimiro Montesinos; in the case of the LA CANTUTA massacre; and in the case of the Barrios Altos massacre. He [h]as participated in several expert analyses in Peru. His position was described in relation to his ability to provide expert analysis. He is a Major General in the Peruvian Army, which is the highest rank in the Peruvian Army. [...]. He is knowledgeable about how armies operate in Latin America, having attended courses

in countries such as Colombia, Argentina, Panama, and Guatemala. Since 2000, he has been a consultant to the [Myrna] Mack Foundation [in the] area of military reconversion. [For the past] 11 years, [...] he has been involved [...] in proposing democratic guidelines for the conversion of the Guatemalan army. [...]

His expert analysis has been accorded evidentiary value for the following reasons: (a) It establishes that a massacre occurred on December 7, 8, and 9, 1982, [in] the hamlet of Dos Erres and environs, with a toll of 201 victims. The latter were noncombatant civilians who put up no resistance or fight whatsoever, and who were completely unarmed and defenseless. (b) The Kaibil Special Patrol was a combat patrol to engage insurgent groups in direct combat; it was highly operational and capable of operating in different settings. In the case at hand, it comprised a group of army officers, specialists, and soldiers, all of whom had Kaibil training. (c) It can be inferred from the sources consulted and from the expert analysis that the actions of the Kaibil Special Patrol in Dos Erres were planned and consistent with the normal operational procedures characteristic of military Special Forces of the American continent in general and the Guatemalan Army in particular. (d) According to the sources consulted, the patrol in question was divided into four groups: command, assault, support, and security. Based on the Army's hierarchical structure and chain of command, the highest-ranking officers in the patrol command these groups. (e) It was possible to determine that officers holding the rank of lieutenant and Kaibil instructors were assigned to command each group. The groups consisted of Kaibil assistant instructor specialists, and each included a contingent of 40 soldiers with Kaibil training. In the case at hand, a specialist with the rank of corporal would have been the head of the security group, although he probably did not have decision-making power in the chain of command given his inferior rank in the context of the military operation. This was corroborated by witnesses Franco Ibáñez and Pinzón Jerez. (f) According to the sources consulted, the lieutenant patrol chief would have topped the chain of command or hierarchy of the Kaibil Special Patrol, and, according to military doctrine and rules, he would have had complete responsibility for carrying out the mission, making decisions, directing the operation, and disciplining each member of the patrol. The rest of the officers are responsible for making recommendations as requested to inform the patrol chief's decision-making and for obeying all orders that amounted to crimes during the course of the operation. For their part, the specialists and soldiers are liable for carrying out manifestly illegal orders, which they obeyed without resistance. (g) Each group performed predetermined tasks that were a routine part of their regular operational procedures and surely had been performed previously in the course of operations in other settings. These are standard combat procedures for use against an adversary (an enemy army or an insurgent or terrorist group), but in the specific case of Guatemala, they were used against the noncombatant civilian population. (h) The missions carried out by each group in the organizational structure of the Kaibil Special Patrol were identified based on the sources consulted, the doctrine, and the expertise of the expert witness. The ASSAULT GROUP raid[ed] people's homes and led them to pre-established meeting points. The COMMAND GROUP took up a central position near the meeting points, from whence it direct[ed] the operation and maintained communications with the military unit under whose command it was operating. The SUPPORT GROUP was ready to back up or augment the firepower of the assault group and maintained constant contact with the chief of the Kaibil Special Patrol so that it could be used as reserves if necessary. Finally, the SECURITY GROUP was responsible for creating a perimeter around the area of action and preventing people from entering or leaving.

This group was required to report to the aforementioned patrol chief on an ongoing basis and to obtain his authorization to resolve any incidents or unanticipated situations that might arise or affect their routine orders. (i) There is nothing whatsoever to suggest that those commanding and directing the Kaibil Special Patrol exercised any control or discipline to prevent or punish those acts. To the contrary, there is every indication that they all took part in them. (j) Based on the sources consulted, the commander of Las Cruces Military Detachment carr[ied] out actions to consolidate the intervention of the Kaibil Special Patrol in the hamlet of Dos Erres, plundering the victims' possessions and burning down their homes. (k) It [the expert testimony] is useful in substantiating the participation of the accused, Carlos Antonio Carías López, in the crime of Aggravated Theft. (l) The expert has extensive experience in the subject matter. (m) The expert offer[ed] a detailed explanation of the content of military policy planning and Plan Victoria 82. (n) His statement and expert analysis is also useful in determining that the 21 rifles were indeed lost in the San Diego ambush. (ñ) He clearly explained the circumstances of the incursion into the hamlet of Dos Erres. (o) His expert analysis is based on an examination of the documentation he discussed in his testimony. (p) It also provides information on the operational structure of the Guatemalan Army. (q) It shows that the Kaibil elite patrol received orders to act, and this is consistent with the guidelines set out Plan Victoria 82. (r) Applying the principles of reasoned and sound judgment, we the judges have been able to establish, based on the military expert analysis, that the operation carried out in December 1982 in the hamlet of Dos Erres was a duly planned military activity and that this is corroborated by the statements of witnesses Franco Ibáñez and Pinzón Jerez. (s) This expert analysis serves to determine that as commander of Las Cruces Military Detachment, Lieutenant Carías López was aware of what was happening in the hamlet of Dos Erres, since Plan Victoria 82 established the duty to communicate and share information. (t) This expert analysis is useful for determining that the Kaibils' actions and participation were planned and followed a pattern of behavior, and that none of them resisted the orders and instructions given, which is corroborated by the statements of witnesses César Franco Ibáñez and Favio Pinzón Jerez. (u) Based on the expert analysis, it is possible to create a profile of the Kaibils and the training they received, since they are given preparatory training to carry out the mission. (v) It is also useful in determining that the instruction manuals do not include sexual violence as a method for obtaining information, from which it can be inferred that the Kaibils exceeded their bounds by raping girls and women from the hamlet of Dos Erres. (w) It also substantiates that looting is not included in consolidation activities, a circumstance that we take into account in finding that the accused, Carlos Antonio Carías López, participated in the crime of Aggravated Theft. (x) It also serves to establish that in December 1982, the military system included a security doctrine whereby the internal enemy, understood to refer to opposition groups, had to be destroyed. (y) It is useful in determining that, at the time, the hamlet of Dos Erres was erroneously considered to be a red zone and had been link[ed] to an ambush of the army that had occurred in San Diego in October of that year, at which time 21 rifles were lost; the incursion into the aforementioned hamlet was planned as a result of this. (z) It confirms that the population of Dos Erres did not match the description of internal enemies, since this expert analysis and the witness statements have shown that it was a noncombatant civilian population devoted exclusively to subsistence farming.

## ii. Expert testimony from historians (new)

*GUATEMALA, Case of the Dos Erres Massacre (Roberto Anibal Rivera Martínez, et al., accused) (List of Judgments 3.a), Whereas IV.* Expert MANOLO ESTUARDO VELA CASTAÑEDA corroborated the socio-historical expert analysis dated May 6, 2010. [...] The expert stated as follows: The historical context is marked by the event that took place in the context of the war in Guatemala. It is understood that [the conflict] transpired in three phases. The first was from 1960 to 1967, the second from 1967 to 1982, and the third from 1983 up to the time of the [P]eace [A]ccords. In this context of war, the event [in question] took place during the second cycle of the war, which lasted from 1967 to 1982. As part of the [conflict,] a large-scale mobilization occurred in Guatemalan society in which different social sectors presented their demands to the State and the State's response played out in rural, as well as urban, areas. In the rural areas where the events took place, the Guatemalan Army committed a series of massacres. [Some] of them are seen on a map that was made available to the Historical Clarification Commission, which lists the departments where a certain number of massacres were committed. The greatest number of massacres took place in the highlands of the Petén [...]. As far as the time frame, most of the massacres were committed in 1981 and 1982, in five departments: Alta Verapáz, Baja Verapáz, Quiché, Chimaltenango, and Huehuetenango. The gray column shows the total number of massacres and the blue column the cases that occurred between 1981 and 1982, which coincides with [...] the Dos Erres massacre. The other diagram shows the percentage of massacres perpetrated by State security forces between 1981 and 1982 in relation to the total number of cases in those five departments, where the majority of the massacres are concentrated. *What this shows is that at the core of the Guatemalan genocide there was a brief but intense wave of massacres committed in rural areas. They did not take place gradually over an extended period of time, but rather were part of a large-scale military operation carried out like a lightning strike, framed by the operational structure characteristic of any army. [According to the data presented,] in three of 10 cases the armed forces had military commissioners and civil patrollers accompany them [emphasis added].* The civil self-defense patrols also committed massacres without an army presence in 3 percent of all cases. The Historical Clarification Commission concludes by naming the specific places where acts of genocide were committed, in particular [...] the Maya Canjobal and Maya Chub region in the municipalities of Barillas, Nentón, and San Mateo Ispacán in Huehuetenango Department, where 3.6 percent of the population was annihilated; Maya Ixchil in the municipalities of Santa María Nebaj, San Juan Cotzal, and San Gaspar Xajul, where the war affected some 15 percent of the total population, and 60 percent of the villages were razed; Maya Quiché, in the municipality of [Z]acualpa, Quiché Department, where 11 percent of the population was murdered; and Maya Achi, in the municipality of Rabinal, where 15 [percent of the population] was murdered. In light of these data, one might ask what exactly happened in Dos Erres and what is the connection between the massacre and the genocide. [...]

For many years, the Petén was Guatemala's outer frontier: virgin territory, inhospitable and forested. Until 1960, all transportation had to be by air. In the territory of the Petén, a combination of chicle extraction, production of resin (the main ingredient in chewing gum), and harvesting of timber (especially mahogany), xate palm, and allspice took place alongside an agrarian colonization process. [...] In 1959, the Promotion and Development of the Petén company [Fomento y Desarrollo del Petén – FYDEP] was created to integrate the department into the national development process. In 1964, FYDEP opened a Colonization Office, and

in 1966 the decision [was] made to colonize the department. Colonization meant large-scale colonization: a major transformation in which the population grew from nearly [16,000] inhabitants in 1950 to [132,000] inhabitants in 1982. [...] By 1980, Petén Department ranked first [...] in corn production and second in bean production and had made its debut in oil. It also ranked first in cattle production [...]. The hamlet [of Dos Erres] was part of these dynamics. The hamlet was part of the colonization of the Petén mainly by migrant peasant farmers. [...]

[Also according to the expert analysis, with regard to the guerrilla presence in the zone, after a failed attempt to penetrate the northern part of Alta Verapáz and Quiché Departments, the FAR [Fuerzas Armadas Revolucionarias] settled in the Petén region. For years its military activity gradually shifted toward political activism, until, with the victory of the Sandinista movement in Nicaragua, it reverted to military activities.] A process of what could be termed preparation, training, logistics, and propaganda ensued from 1979 to 1982. The ambush [against the Guatemalan Army] on October 22, 1982, was the first military operation in the region characterized as massive due to the number of guerrilla troops involved and the outcome in terms of enemy casualties. [...]

The issue with this hamlet is that [in] 1971, Federico Aquino Ruano and Marco Reyes used the initials of their surnames to name a new hamlet, Las Dos Erres (the Two Rs), located in La Libertad municipality in Petén Department. In 1981, the hamlet had a registered population of 14,919. The next closest village, [which was] six kilometers away, was Las Cruces [...]. After discovering how easy it was to obtain farmland, many residents of Las Cruces decided to emigrate to Las Dos Erres, but that migration was only partly accomplished. [...] Founding the hamlet required enormous effort on the part of the families, [who had to] tackle the jungle with nothing but their hands, rubber boots, machetes, and the hope of having a plot of land to work [...]. By 1981, the area was becoming militarized. The forces the army had deployed in the Petén included, in 1982, a detachment called Miralvalle, a small post on the outskirts of Las Cruces. In mid-1982, the detachment chief at the time started to organize civil self-defense patrols. The detachment militarized life in the hamlet. Anyone entering or leaving the hamlet to or from the departmental capital had to pass by there. As the teacher [in charge of the rural school of Dos Erres] recalls: "They had people get off with their ID cards in their hand. Several times on my way to work they asked me where I was coming from and whether I knew the guerrillas." Fear gradually changed the rhythm and way of life. The government instituted the civil self-defense patrols in 1981. These were local residents organized by the army and joined by military commissioners who carried out the patrols. Patrolling was continuous. Residents worked 12-hour day shifts from six in the morning until six at night, and night shifts from six in the evening until six in the morning [...]. In mid-1981, the neighbors [of Dos Erres] received notice that they should report to the Las Cruces soccer field in order to join the civil patrol. They were being forced to patrol the adjacent hamlet rather than their own. As neighbor Orlando Aguilar put it: "One night they came to patrol. They were there with us, lamenting that they were supposed to abandon their own families in order to come here to guard and that the guerrillas were going to show up and rape their daughters and wives, and here we are, guarding this place. Later, in September, during a meeting of the men from the hamlet of Dos Erres, [they asked] how they were supposed to be watching over these people if the ones who had nice stores weren't doing their shifts, and who knows who they were paying off." This farmer, Aguilar, affirm[ed] that some of the neighbors of Las Cruces did not do shifts, and he concluded by saying that the ones from Dos Erres agreed that they would do whatever the [A]

rmy asked them to, but not in Las Cruces, while leaving their own hamlet abandoned [...]. [After the decision not to patrol Las Cruces], the Army took [note and] began to send in soldiers disguised as guerrillas to gather information and verify the loyalty of the peasant farmers. [...] An unhappy coincidence ultimately confirmed the supposed intelligence the Army had already gathered [...]. [According to the statements included in the expert analysis, the residents used sacks to take their corn to sell. In order to identify their new sacks and make sure they were not misplaced, they marked them with the initials of Federico Aquino Ruano – “FAR.” The Army took this to mean that residents of Dos Erres were involved with the guerrillas.]

### iii. Expert testimony from forensic anthropologists (new)

*GUATEMALA, Case of the Dos Erres Massacre (Roberto Anibal Rivera Martínez, et al., accused) (List of Judgments 3.a), Whereas IV.* [As far as the forensic anthropology expert analysis, it should be noted that], [i]n general, the stages for any [expert analysis of this nature] [...] begin by documenting the preliminary stage or historical research, [in order to] gather enough documentation or testimony about the events to determine the location of possible burial sites and any ties between those sites and individual victims[:] in other words, where the bodies are located and who they might be. Because the objective of this task is obviously to recover the skeletal remains and also to try to contribute evidence to the investigation, whether by identifying the remains or suggesting the victims’ possible cause of death. Next, the archeological work *per se* is carried out using traditional archeological methods applied to forensic contexts. These methods are conducive to recovering, in the most effective manner—meaning in the most complete way and in the best possible conditions—any findings, and not only skeletal remains, but also any others related to the home or the remains [of the victims]. [...]

The statements of experts PATRICIA BERNARDI and SILVANA TURNER, and the expert analyses they prepared, are accorded evidentiary value for the following reasons: (a) Because they describe the findings from the archeological excavation conducted in the hamlet of Dos Erres in July 1994. (b) “Site One” is described as the unfinished well, known as Arévalo Well [or El Pozo] [...], located seven kilometers northeast of Las Cruces. (c) According to the informants, it was filled with corpses during the events of December 1982. (d) “Site Two” is La Aguada, about a 30-minute walk northeast of Site One. This is an area spanning approximately 1,400 square meters, covered with brush and leafy trees, where, together with the legal authorities, they observed human skeletal remains scattered all over the ground, together with scraps of clothing. (e) “Site Three,” called Los Salazares, is located one and a half hour’s walk south of Site One and spans approximately 400 square meters. There, just as in Site Two, human remains were found on the ground bearing unequivocal signs of recent intentional burning, circumscribed by the surface area where the remains of clothing and skeletons were found. [...] (j) Each one of the skeletons recovered had some type of clothing, which is described in each case, along with the other evidence uncovered, relating in particular to bullets and bullet fragments from firearms [...]. (k) The expert report dated July 25, 1995, describes the findings from the archeological excavation carried out in what was the hamlet of Dos Erres between May 8 and July 14, 1995. (l) The initial objective was the exhumation of human remains and related evidence found at the three sites [...]. (m) Sites Two and Three were unique in that the remains were dispersed across the surface of a large area covered in vegetation. There the work consisted of systematically collecting all of the remains discovered, while the work in El

Pozo was an excavation. (n) In the course of the work in 1994 at Site One, or Pozo Arévalo, it was possible to establish the veracity of the testimony stating that the well contained the corpses of people who had died during the events of December 1982. (ñ) The very bottom of the well was reached, at a depth of 12 meters and 20 centimeters. The preliminary findings of the exhumation included no fewer than 162 individuals of both sexes. Remains of clothing and personal effects associated with the skeletal material were also found, as well as bullet fragments from firearms, which constituted clear evidence as to the cause of death. [...] (q) Upon examining [the experts'] statements, it is possible to determine the order in which people fell as they were beaten and thrown into the well. The experts clearly indicate that the human remains of children were found at the bottom, the skeletal remains of women in the middle, and men toward the top. This corroborates the statements given by witnesses Franco Ibáñez and Pinzón Jerez in relation to the way in which the victims were killed. (r) The declaration given by expert Patricia Bernardi serves to establish that the craniums presented with multiple fractures, which is consistent with the statements of witnesses Franco Ibáñez and Pinzón Jerez, who said that [the victims] were struck in the head with a sledgehammer<sup>78</sup> or a wooden hammer before being tossed into the well. (s) Their statements are further corroborated by the photograph album containing the excavations and exhumations carried out in the hamlet of Dos Erres. (t) Their statements are also useful in determining the diameter, length, and depth of the well where the human remains of the victims were discovered. (u) The expert analyses performed also determines what articles of clothing and objects the victims were wearing, which in some cases helped to identify them. (v) From the findings obtained from the skeletal remains, it was possible to determine that they showed signs of torture, because the remains of bonds were found on the bones, neck, and upper and lower extremities.

#### **D. Evidence taken from the reports of investigation or truth commissions (new)**

ARGENTINA, *Caso Victorio Derganz y Carlos José Fateche (Juan Demetrio Luna, accused) (List of Judgments 1.e), Whereas II*. In response to the specific objection lodged by Luna's defense, it should be noted, as stated in Case 13/84, that the National Commission on the Disappearance of Persons "was a public entity and its members enjoyed civil servant status, and their proceedings, therefore, are instruments of that same character." The court went on to say that "... the evidence gathered by CONADEP and introduced through an appropriate channel is useful in creating a state of certainty in the judge, when accompanied by a corroborating body of evidence, although the evidence provided by that entity should not be the exclusive basis."

GUATEMALA, *Case of the Dos Erres Massacre (Roberto Aníbal Rivera Martínez, et al., accused) (List of Judgments 3.a), Whereas IV*. [The evidence includes the] **volume of the report of the Historical Clarification Commission (CEH), Guatemala: Memory of Silence**, titled *Human Rights Violations and Acts of Violence*. **The report's evidentiary value is based on the following:** (a) It establishes that the Army's strategy during the conflict that began in the 1980s is summed up in the mission of the *Victoria 82* campaign plan, which states: "The commandos involved

<sup>78</sup> Editors' note: The term *almagana*, which appears in the original Spanish text of the judgment, is not found in the Dictionary of the Royal Spanish Academy. Based on the context, the correct term is most likely *almádena*, which the dictionary defines as "a long iron hammer used to break rock."

*shall conduct security, development, counter-subversion, and ideological warfare operations in their respective areas of responsibility, beginning day 'D' hour 'H' until further orders, for the purpose of locating, capturing, or destroying subversive groups or elements, in order to guarantee the peace and security of the Nation...";* (b) The description of these military operations conducted by the Army is not exhaustive; rather it is simply limited to those that led to human rights violations and became known. A reading of the campaign plans facilitated by the Army and the testimonies received by the CEH shows that the main counterinsurgency operations that caused terror were, among others, those intended to control and punish the civilian population, such as the one that occurred at Dos Erres. (c) The military *punishment operations* employed violence and terror to punish communities in order to deter any attempt to support the insurgency. Whenever a guerrilla presence or a guerrilla action was detected in a particular area, the Army would go to that location or to a nearby population center and perpetrate a violent act against the civilian population. These acts became very frequent, mainly in rural areas where the Army was tracking the guerrillas. (d) It is a historical document that sheds light on the ideological war waged during the armed conflict, and it provides the context for the set of facts under examination. [...]

[The record also includes the] volume and copy of the Report of the Commission for Historical Clarification, *Guatemala: Memory of Silence, illustrative case [of] the Dos Erres massacre. It is accorded evidentiary value for the following reasons:* (a) Because as an illustrative case in the Historical Clarification Commission's report *Memory of Silence*, [...] it corroborates aspects of the Socio-historical Expert Opinion given by Manolo Estuardo Vela Castañeda, especially as follows: (1) Relations between the people in the hamlet and the chief of the military detachment of Aldea Las Cruces were becoming increasingly strained, since the local residents had refused to allow the civil patrol of Dos Erres to patrol the hamlet of Las Cruces. (2) The Army believed that the residents of Dos Erres had ties with insurgent units of the [Revolutionary Armed Forces (FAR)]. This was compounded by the confusion created by the way community leader Federico Aquino Ruano marked his sacks of corn. (3) The FAR's military operation on October 11, 1982, during which the Army lost human lives as well as weapons, failed to anticipate the possibility that the Army could track the guerrillas and determine which population centers were closest to the guerrillas' alleged position. (4) The Dos Erres massacre was a military punishment operation carried out in retaliation for the FAR's ambush and seizure of 21 rifles on the aforementioned date. (5) The Army High Command of the National Defense sent the Kaibil Patrol, a unit specialize[d] in operations of this nature, to perpetrate the massacre. (6) In November, the ambush and seizure of the 21 rifles led to the Dos Erres massacre, as one of the military options on the table for planners and strategists of the Army High Command. (7) Throughout the month of December, the Army deployed its best combat unit to root out the FAR, precisely the unit that was the most ruthless with the civilian population. (8) The massacre was the result of an error in the intelligence the Army had collected in that zone. Basically, the information gathered was used to plan a punishment operation against a population that was becoming increasingly vulnerable. (9) The Dos Erres massacre was the only one in the history of the Petén in which an entire community was completely erased from the national map.

URUGUAY, Appeal (*Juan Carlos Blanco Estradé, convicted*) (*List of Judgments 7.a*), *Whereas IV*. Just as [the testimonial evidence and official documents] describe, the final Report of the Peace

Commission confirms the illegal detention of BB, the episode at the Venezuelan Embassy, the return to OCOA [Coordinating Entity for Counter-subversion Operations] headquarters located in the Materiel and Weapons Service at the bottom of the grounds of Infantry Battalion No. 13. [According to that report,] “[BB] was harshly tortured over a period of several months and finally murdered in early November 1976” [...].

[The] way the Commission carried out its activities [...] was described in detail by one of its distinguished members, namely Dr. RAMELA, before the court, in the presence of the Office of the Prosecutor and the Defense [...]. This even led the particularly trustworthy former Defender to qualify those statements as “meticulous and clear, and unmistakably categorical in the now unquestionable affirmation concerning the death of Mrs. BB.”

As this Court has already stated, these latter statements are not those of an ordinary “earwitness,” but rather that of someone who compiled, systematized, and compared information on the matter before us. And even though the “sources” of the information cannot be disclosed, that does not mean it lacks any evidentiary value in the case under examination. In the absence of any rule that prohibits these testimonies in principle—just as was the case with all those [who] were members of the Peace Commission, along with the deponent—it is a matter of undertaking a painstaking analysis of the evidentiary value that should be attributed to it in the specific case.

It should be recognized that Dr. Carlos RAMELA and his colleagues on the Commission were specifically convened and entrusted with discovering, among other things, the fate of the disappeared individual, Mrs. BB. In that undertaking, they took statements from people who had been detained with her in the same place, and from military and police officers who participated in the specific events subject to this inquiry. By comparing and/or cross-checking the information obtained, it became possible to obtain a balanced picture of what might have been these individuals’ general degree of willingness to tell the truth and to what extent that willingness might have actually been expressed, given the special circumstances of the case. Ultimately, all of this afforded him the credibility to express the aforementioned conclusions. If this was further strengthened by the fact that there were six well-known figures on that Commission with no interest other than to faithfully, honestly, and impartially fulfill their assigned mission, and that their conclusions were unanimously adopted under a system of inner conviction or moral conviction, then clearly this enhances the credibility of his version of the events significantly [...].

What is more, the Executive Branch approved the conclusions issued by that Commission in all of their terms, adopting them as the official version of the situation of the disappeared during the *de facto* regime [...].

As one more piece of evidence of the *corpus delicti*, this final report retains its full validity, notwithstanding that it is common knowledge that the bodies of the “disappeared,” which had reportedly been cremated and tossed into the sea, were discovered to have been buried. And it remains valuable in the context of the evidentiary analysis carried out, because beyond these specific circumstances related to other cases, those conclusions corroborate that the crime of which BB was a victim actually occurred.

Since its appearance, this final report of the Commission has been one more input to be taken into consideration in the overall analysis of the matter. Just as it could not have been legally considered the “revealed truth” before, it cannot now be regarded as having become a useless intellectual exercise.

As stated, the findings of the report, taken together with the entire body of evidence, fully corroborate that the crime under study occurred.

GUATEMALA, *Myrna Mack Case, Trial Chamber ruling, C-5-99, Whereas section*. [The] Report of the Historical Clarification Commission (CEH), *Guatemala: Memory of Silence*, Volume II, *Human Rights Violations and Acts of Violence*, First Edition, on the pages and in the numerals of the text set out in the corresponding act, familiarizes us with the contemporary history, and its content allows us to understand what happened during the armed conflict. A reading of the content of the National Security doctrine leads us to conclude that anthropologist Myrna Mack was mistakenly considered to be an internal enemy by connecting her scientific research with the situation of displaced persons in the country, which confirms the political motive for her murder.

The practice by regional courts of admitting public reports by investigative commissions into the evidence has not been limited exclusively to those produced by official entities or commissions. In the *Myrna Mack* case, the Third Criminal Trial Court admitted and accorded evidentiary value to a report produced by civil society. That report, in the words of the court, served to corroborate the data contained in the final report of the Historical Clarification Commission.

GUATEMALA, *Myrna Mack case, Trial Chamber ruling, C-5-99, Whereas*. [The documentary evidence introduced into the file includes] the Report of the Interdiocesan Project for the Recovery of Historical Memory, *Guatemala: Never Again*, volume III, *The Historical Context* [...]. [This report] is useful to us in establishing the following: (A) The report corroborates essential aspects of the content of the report produced by the Historical Clarification Commission, by describing human rights violations recorded during the armed conflict. (B) The paragraphs cited offer an account of the social, political, and economic developments in Guatemala from 1986 to 1990, describing the army's behavior vis-à-vis society. (C) It refers to the government of President Cerezo and the existence of a supervised democracy; this concurs with the statement given by the former leader, who indicated that he did not have absolute control of the State. (D) As did the report of the Historical Clarification Commission, it reveals the difficult situation in which the displaced population was living and the grievance issued by the Communities of Population in Resistance on September 7, 1990, just days before the murder of Myrna Mack. (E) The report cites the anthropologist as the sole independent expert on the issue of displaced persons and states that her death, which it qualified as a political murder, was a message to the civilian population.

## EPILOGUE

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The first volume of the *Digest of Latin American Jurisprudence on International Crimes* covered the period from 1993 to 2009. During these years Latin American courts underwent a gradual shift, transforming themselves from guarantors of impunity into important actors in the struggle to challenge and defeat it. The problems they faced had to do mainly with the need to bring cases of mass crimes before domestic courts and with the legacy of dictatorships and armed conflicts. They encountered a myriad of legal obstacles. Amnesties had been issued in most Latin American countries, and these had to be derogated or interpreted in such a way as to allow legal proceedings to move forward. Statutes of limitation were another roadblock that in certain cases made it impossible even to open an investigation. International crimes were not included in the criminal codes of many countries of the region; where they were included, they were added only after the fact. Similarly, while many States had ratified human rights treaties, they had only done so after the events in question, and this prompted friction around the retroactive application of the law and respect for the principle of legality.

As this second volume of the *Digest* goes to press, there is less doubt about the capacity of the region's courts to take up and judge these cases, but those concerns have been overshadowed by the practical difficulties of prosecuting such cases and of ensuring due process guarantees. The courts have experimented with different ways of organizing trials in an effort to balance the due process rights of the accused, the rights of the victims to be heard, and the capacity of the courts to organize and conduct trials with the resources available to them and within a particular time frame. In Argentina, for example, the courts and legislators have dealt with the need to try multiple actors in a single case—the so-called “mega-trials”—while safeguarding the individual rights of the accused and protecting the victims.

The courts of the region have continued to develop innovative jurisprudence related to theories of individual criminal responsibility, especially in the area of co-perpetration and the fine line between principal perpetrators and accessories. Their efforts in the domestic arena continue to broaden international jurisprudence on the definitions of crimes and how they are interpreted.

Evidentiary issues take center stage in this second volume of the digest. Latin American courts have dealt with the role of military and forensic experts as witnesses at trials, and with the evidentiary value of testimony provided by victims who saved their lives by collaborating when necessary with the military.

Volume II also raises several new issues, in particular the recent focus on rape and other sexual crimes and the differential impact they have on women, girls, and boys. In this regard, Latin American courts have mostly followed international jurisprudence. Early on, the trials focused primarily on forced disappearances and deaths, with little emphasis on torture, much less on sexual violence. This was in part because few victims were willing to publicly denounce what had happened, given the social stigma frequently attached to rape, but it also

reflected a lack of attention on the part of investigators and judges. This has begun to change as international courts have developed a vast body of jurisprudence on crimes involving sexual violence, and women's rights defenders across the region have insisted on the importance of publicly recognizing these crimes as such and of focusing attention on specific violations against women. In part their persistence stems from the recognition that violence against women continues under civilian, democratic systems, and here, as in many other spheres, the crimes of the past fuel the social attitudes of the present. A similar pattern is observed with regard to crimes against children, especially forced recruitment. The emergence of jurisprudence on forced displacement, especially in Colombia, is another recent development; this jurisprudence will prove useful as the phenomenon of forced displacement spreads throughout the world, regardless of whether it occurs in the context of an armed conflict.

Ongoing trials, especially groundbreaking cases in Uruguay and Guatemala, are testament to the vitality of norms to combat impunity. In Uruguay, the trials began following the repeal of the Expiry Law (*Ley de Caducidad*). While the law has not changed in Guatemala, an energetic and committed Attorney General and a new group of judges have pursued indictments and trials. An impressive number of indictments and trials are currently underway in the region: according to statistics from early 2012, 1,926 people have been or currently stand accused of the crimes covered in the digest. Of these, 262 have been found guilty, although only a small portion of these convictions are final.<sup>79</sup> In Chile, 1,342 people have been or are currently being tried for these crimes; 250 of them have been convicted and 62 are serving prison sentences. Together they account for approximately 75 percent of the victims of extrajudicial killings or forced disappearances, but only a small number of cases of torture or arbitrary detention.<sup>80</sup> In Peru, as of 2012, 66 people had been convicted at trials related to human rights, while 113 have been acquitted.<sup>81</sup>

The increase in trials, coupled with the waning effects of amnesty laws and statutory limitations, has led to both progress and setbacks. In Peru, the courts have acquitted more people than they have convicted. This is explained in part by the fact that, while the jurisprudence of the Supreme Court accepts the theory of perpetration-by-means through control over an organized power apparatus in trying high-level officials for the acts of their subordinates, lower courts have refused to adhere to this jurisprudence and have demanded proof of the direct participation of the commanders. Guatemala's National Reconciliation Law excludes the crimes of genocide, disappearance, and other international crimes from the amnesties adopted during the peace process. For years, the courts have interpreted the law in the spirit in which it was written. As new investigations have been opened and charges brought against high-level military personnel who continue to wield enormous influence, however, the courts and legislatures have found themselves under growing pressure to "reinterpret" or change the law.

One particularly thorny issue involves the criteria for convictions and for granting pardons following a conviction. Domestic and international efforts have focused mainly on

<sup>79</sup> Center of Legal and Social Studies (CELS), "Estadísticas de los juicios por crímenes de lesa humanidad en Argentina," August 2012, <http://www.cels.org.ar/wpblogs/estadisticas/>.

<sup>80</sup> Universidad Diego Portales, Observatorio de Derechos Humanos, "Estadísticas juicios ddhh Chile," February 2012.

<sup>81</sup> Jo-Marie Burt, *Estadísticas y gráficos sobre las Sentencias en casos de Graves Violaciones de Derechos Humanos*, September 9, 2012, on the electronic portal "Human Rights Trials in Peru," [http://www.rightsperu.net/index.php?option=com\\_content&view=category&layout=blog&cid=40&Itemid=58](http://www.rightsperu.net/index.php?option=com_content&view=category&layout=blog&cid=40&Itemid=58).

investigations, trials, and convictions in part because of the perceived importance of establishing clear norms for the repudiation and punishment of the conducts investigated. Even as they have moved forward with investigations and trials, however, a good number of States in the region have created diverse mechanisms to improve prison conditions and reduce the jail time of inmates. Prisoners convicted of international crimes are held in prisons designed especially for them, in comfortable facilities, and some defendants have even been allowed to remain at home while awaiting trial on account of their age. More worrisome still, in some countries sentences have been reduced due to the amount of time that elapsed between the crime and the trial. In recent years, for example, Chilean courts have applied a “partial statute of limitations” (*media prescripción*), in many cases reducing the sentence to under five years. This means that some convicted individuals go straight to probation without having spent a day in jail. While this practice has declined recently, it raises relevant questions as far as the limitations States face in punishing international crimes. Similar questions have arisen in light of the ongoing petition to pardon former Peruvian president Alberto Fujimori, ostensibly for health reasons.

International treaties have little to say in this regard. The Convention against Torture requires States to make acts of torture punishable “by appropriate penalties which take into account their grave nature.”<sup>82</sup> And while the Convention on the Prevention and Punishment of the Crime of Genocide requires “effective penalties,”<sup>83</sup> it does not specify what those are. The Rome Statute of the International Criminal Court requires it to take into account, when imposing a sentence, “such factors as the gravity of the crime and the individual circumstances of the convicted person.”<sup>84</sup> The Inter-American Court requires proportionality of punishment and has held that “the punishment which the State assigns to the perpetrator of the illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrator acted.”<sup>85</sup>

Similarly, with regard to pardons following a conviction, international law allows courts to take into account the age and health of the convicted person in their decision (see, for example, Articles 53(2)(c) and 78 of the Rome Statute). The inter-American system has emphasized that victims should have the chance to be heard and should have access to judicial protection under Articles 8 and 25 of the American Convention; a pardon following a full and fair trial would not necessarily contravene those provisions. Nonetheless, like any other measure, a pardon may not be used to achieve “exclusion of criminal responsibility,” in the way that an amnesty or a statutory limitation on criminal action is used to preclude the punishment of individuals responsible for serious human rights violations. Therefore, to the extent that a pardon is granted in circumstances in which it would not be granted for a common crime, or is granted with the intention of shielding the pardoned individuals from any punishment, it would be violating the jurisprudence of the Inter-American Court.

A final change that occurred between 2009 and 2012 makes the two volumes of the digest even more valuable. In this three-year period there has been growing emphasis on “positive complementarity” in the sphere of international criminal law. As it becomes increasingly

<sup>82</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4(2).

<sup>83</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Article V.

<sup>84</sup> Rome Statute of the International Criminal Court, Article 78(1).

<sup>85</sup> IACourtHR, *Case of the Rochela Massacre v. Colombia*, Judgment of May 11, 2007, Series C, No. 163, para. 196.

evident that the investigations and trials before the International Criminal Court are going to be slow and plagued with difficulties in the coming years, governments and international cooperation agencies have highlighted the key role that domestic courts and investigations can play. And as prosecutors and judges in Africa, Asia, and the rest of the world embark on serious investigations, and civil society tries to promote respect for rights on the part of prosecutors, the latter will encounter many of the same legal hurdles that their Latin American counterparts have faced. In Africa, just as in Latin America, for example, provisions on international crimes were added to domestic criminal codes long after the crimes to which they must be applied were committed. African countries also share many (although not all) of the concerns about trying indirect perpetrators. In Africa in particular, the pressing need for victims and civil society to play a protagonist role in promoting effective domestic trials has made South-South exchanges with Latin American activists, judges, and prosecutors a top priority. The digest can be an invaluable tool with which to translate the difficult lessons learned and victories won against impunity in Latin America into a step toward a worldwide crusade against this scourge.

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**Due Process of Law Foundation (DPLF)** is a non-profit human rights organization, based in Washington DC, founded in 1996 by Thomas Buergenthal , former judge of the International Court of Justice and the Inter-American Human Rights Court, and the other members of the Truth Commission for El Salvador, with the mandate to monitor and promote changes in national justice systems to improve Rule of Law in Latin America.

DPLF works with local organizations, provides legal technical assistance, promotes dialogue with government representatives and creates opportunities for exchange of information and experience. DPLF also conducts research and publications to analyze and discuss, in the light of international law, some of the major challenges for the respect of human rights in the region, through our four program areas: a) Judicial Independence, b) Human rights and extractive industries, c) Inter-American System, and d) Transitional Justice.

The Transitional Justice Program promotes the **use of international and inter-American law** for holding States and individuals accountable for international crimes and grave human rights violations in Latin America. This Program is responsible for the production of Volume I and II of the *Digest of Latin American jurisprudence on international crimes*.



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