WHEN ORDER IS NOT ENOUGH:
THE BAN ON TORTURE AND DISAPPEARANCES IN THE JURISPRUDENCE OF THE IACtHR AND THE SPANISH COURT SYSTEM

by

MARÍA VICTORIA PÉREZ-RÍOS

VOLUME I

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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ABSTRACT

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MARÍA VICTORIA PÉREZ-RÍOS

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The dissertation examines how human rights norms are being implemented in the post-Cold War era through an analysis of the jurisprudential developments of the Inter-American Court of Human Rights (international/regional level) and of the Spanish court system (national level) regarding the violations of the ban on torture and on disappearances that occurred in Latin American during the Cold War; an analysis that shows the increasing centrality of intergovernmental networks in fostering human rights implementation.

This matter belongs to a growing subfield of international relations, i.e., IR/IL in which international relations (IR) and international law (IL) are coming together to explain relevant political phenomena. Thus, the theoretical framework I have chosen includes the strand of institutionalism which focuses on intergovernmental networks; the solidarist version of the British school characterized for emphasizing the relevance of the historical background in any analysis of international relations and for prioritizing human rights over order; and a legal perspective which incorporates to positivism the significance of how the process of implementation affects the outcomes which can be favorable or unfavorable toward the furthering of human rights norms.

Based on the case studies (including the Nuremberg precedent, the jurisprudence of the IACtHR and of the Spanish court system regarding the ban on torture and on disappearances), it is possible to underline the following findings: first, the implementation of human rights norms underlines the crucial role that governmental networks, mainly of judges and prosecutors, play in furthering such norms by exchanging knowledge and providing cooperation across the world. Second, states are better analyzed as disaggregates with diverse and contending interests, including the fostering of human rights. And third, certain human rights norms—including ending impunity, *ius cogens* status of the ban on torture and on disappearances, centrality of the individual as the beneficiary of human rights, and legitimacy of the use of universal jurisdiction to prosecute the worst violations of human rights norms—are currently being entrenched into the practices of the state.

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To my parents and to my other teachers

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ABBREVIATIONS

AAPDHM	Asociación Argentina Pro Derechos Humanos (Argentinean Association in favor of human rights). Located in Madrid, Spain
ACUNS	Academic Council on the United Nations System
AFARIIREP	Asociación de Familiares y Amigos de Represaliados de la II República por el Franquismo (Association of Relatives and Friends of the Republicans Repressed during the Franco Era)
AI	Amnesty International
ATCA	Alien Tort Claim Act
BOE	Boletín Oficial del Estado (Official Gazette of Spain)
CAT	1984 UN Convention against Torture and its Committee
CCD	Centros Clandestinos de Detención (Clandestine Detention Centers, Argentina)
CDHG	Comisión de Derechos Humanos de Guatemala (Guatemalan Human Rights Commission)
CE	Constitución española (Spanish Constitution)
CEH	Comisión de Esclarecimiento Histórico (Commission of Historical Clarification, Guatemala)
CEJIL	Center for Justice and International Law
CICR	Comité Internacional de la Cruz Roja (International Committee of the Red Cross)
CNBND	Comisión Nacional de Búsqueda de la Niñez Desaparecida (National Commission Searching for Disappeared Children, Guatemala)
CODEPU	Corporación de Promoción y Defensa de los Derechos del Pueblo (Corporation for the Promotion and Defense of the Rights of the People, Chile)

CONADEP	Comisión Nacional de Desaparecidos (National Commission on Disappeared People, Argentina)
CPT	Committee on Torture of the European system
DINA	Dirección de Inteligencia Nacional (National Intelligence Directorate in charge of the secret service, Chile)
DINCOTE	División Nacional contra el Terrorismo (Counterterrorism National Section, Peru)
EAAF	Equipo Argentino de Antropólogos Forenses (Group of Argentinean Forensic Anthropologists)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights. Since the elimination of the Commission, the Court can be referred to as ECHR. However, I prefer the older acronym ECtHR to preserve the parallelism with the IACtHR
ESMA	Escuela Mecánica de la Armada (Argentinean Mechanized School of the Navy)
EU	European Union
FAMDEGUA	Asociación de Familiares de los Detenidos-Desaparecidos de Guatemala (Association of Relatives of the Disappeared of Guatemala)
FEDEFAM	La Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos (Latin American Federation of Associations of the Families of the Disappeared)
FEDEPAZ	Fundación Ecuménica para el Desarrollo y la Paz (Ecumenical Foundation for Development and Peace, Peru)
FRMT	Fundación Rigoberta Menchú Tum (Foundation Rigoberta Menchú Tum)
GA	General Assembly of the United Nations
HIJOS	Hijos por la Identidad y la Justicia contra el Olvido y el Silencio (Children for Identity and Justice and against Oblivion and Silence, Argentina)

HRW	Human Rights Watch
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law or the Laws of War
IIDH	Instituto Interamericano de Derechos Humanos (Inter-American Institute of Human Rights)
IL	International Law
IMTFE	International Military Tribunal for the Far East
IR	International Relations
IU	Izquierda Unida (Spanish Party made up of a coalition of parties from the Left with a Communist ideology)
LEC	Ley de Enjuiciamiento Civil (Spanish Law of Civil Procedure)
LECrim	Ley de Enjuiciamiento Criminal (Spanish Law of Criminal Procedure)
LOPJ	Ley Orgánica del Poder Judicial (Spanish Law that regulates the judicial branch)
MINUGUA	United Nations Mission in Guatemala for the Verification of the Accord on Human Rights
MIR	Movimiento de Izquierda Revolucionario (Revolutionary Movement of the Left, Chile)
NGO	Non Governmental Organization

OAS	Organization of American States
OEA	Organización de Estados Americanos (Spanish Acronym for OAS)
OHCHR	United Nations Office of the High Commissioner for Human Rights
ONG	Organización No Gubernamental (Spanish Acronym for an NGO)
OSI	Office of Special Investigations, Department of Justice of the U.S.
PC	Partido Comunista (Spanish Communist Party)
PP	Partido Popular (Spanish Conservative Party)
PS	Partido Socialista (Spanish Socialist Party)
POW	Prisoner of War
RSHA	Reichssicherheitshauptamt (Reich Security Head Office)
TVPA	Torture Victims Protection Act, U.S.
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNWCC	United Nations War Crimes Commission
URNG	Unidad Revolucionaria Nacional Guatemalteca (Guatemalan Revolutionary National Unit)
WOT	War on Terror/Terrorism

GLOSSARY

***Acción popular*.** (Sp) Criminal action filed by private citizens regardless of whether they have suffered directly any injury.

***Acusado*.** (Sp) Defendant.

***Antecedentes de hecho*.** (Sp) Section of a Spanish court decision compiling the facts of the case.

***Apelación*.** (Sp) Appeals process.

***Archivo del terror*.** (Sp) "Archive of the Terror." It is a collection of files including documentation on the heinous violations of human rights that took place during the Cold War in Paraguay. It was located by a former victim of the repression

***Audiencia Nacional*.** (Sp) Spanish Court that has jurisdiction to decide cases involving crimes committed abroad. It has jurisdiction over the whole territory of Spain.

***Aut dedere, aut judicare*.** (L) Principle of international law meaning that, in a process of extradition, the state that has the custody of an alleged criminal has the duty to either extradite him/her or, in its defect, to prosecute him/her domestically.

***Auto de procesamiento*.** (Sp) Indictment.

***Citación*.** (Sp) Summons.

***Cimarrones*.** (Sp) Maroons-bushnegroes living in Suriname.

***Comisión rogatoria*.** (Sp) Rogatory Commission. It is an instrument of jurisdictional cooperation used by the domestic judiciary to ask for help from abroad.

***Congreso de los diputados*.** (Sp) Lower chamber of the Spanish legislative branch or parliament.

***Cortes*, Las.** (Sp) Name given to the Spanish legislative branch or Congress. Nevertheless, in many Latin American countries—and lately in Spain—it is used to mean court. For example, the Inter-American Court of Human Rights is called "Corte" and not "Tribunal."

***Delicti juris gentium*.** (L) Crimes against international law.

***Demanda*.** (Sp) Action, lawsuit.

***Declaración jurada*.** (Sp) Affidavit.

***Denuncia*.** (Sp) Official complaint.

***Excepciones preliminares*.** (Sp) Preliminary exceptions that respondent states can use to stop the proceedings before the IACtHR.

***Fallo*.** (Sp) Judgment.

***Fiscal*.** (Sp) Prosecutor.

***Fiscal general del estado*.** (Sp) Attorney General.

***Fiscalía*.** (Sp) Office of the public prosecutor.

***Fundamentos de derecho*.** (Sp) Questions of law.

***Guerra sucia*.** (Sp) "Dirty war" or governmental use of military-like measures to counterbalance and eliminate conflict, which was widespread in Latin America during the Cold War.

***In dubio pro reo*.** (L) Principle applicable to trials in civil law countries that states that whenever there is any discrepancy or doubt, the decision adopted has to be the most favorable to the defendant.

***Ius cogens* (also *jus cogens*).** (L) Rules of international law that every country has to uphold because, notwithstanding contrary practice, these norms have acquired compulsory status.

***Huevera*.** (Sp) Literally it refers to a place (object) used to keep eggs. "La huevera" was a room in the Argentinean Mechanized School of the Navy (ESMA) where numerous illegally detained individuals suffered torture during the Argentinean military dictatorship (1976-1983). The name comes from its prior use as a warehouse but some indicate that egg cartoons covered the walls to muffle the sounds made by torture victims.

Juez instructor. (Sp) An investigative judge. Spanish criminal processes have two main phases, i.e., investigative (of the facts) and the trial (ending with the verdict).

***Juicio oral*.** (Sp) Oral phase of a Spanish criminal case.

***Juzgado*.** (Sp) Court constituted by one judge.

***Juzgados Centrales de Instrucción*.** (Sp) Spanish courts in charge of the investigative phase of criminal proceedings to be tried before the *Audiencia Nacional* or the *Juzgados Centrales de lo Penal.*

Juzgados Centrales de lo Penal. (Sp) Spanish courts in charge of the trial phase of criminal proceedings involving crimes whose punishment does not exceed five years of prison.

Ley orgánica. (Sp) Spanish law, usually referring to crucial matters, which needs a qualified majority to be passed and/or repealed.

Magistrado. (Sp) Judge belonging to a court in which several judges participate in the decision-making process.

Margin of Appreciation Doctrine. Legal presumption affirming that a state is the best judge of what measures to apply in cases of internal conflict.

Operación Cóndor. (Sp) Known as the "Condor plan" in English, it was established in Santiago de Chile on 21 October 1975 to foster cooperation in the fight against subversives among the secret services of several Southern American countries—including Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay. Apart from exchanging information, these different governments supported heinous violations of human rights and impunity for such crimes.

Procurador. (Sp) An individual that acts as a proxy for others before the courts in Spain.

Providencia. (Sp) Ruling or decision of the courts.

Querella. (Sp) Document presented by private citizens in which the court is asked to start a process. They are not the acts of the prosecution like in the U.S.

Recurso de amparo. (Sp) Appeal to defend basic rights.

Recurso de casación. (Sp) Appeal to annul a decision of a lower-level court that can only be lodged before the *Tribunal Supremo*.

Recurso de reforma. (Sp) Appeal used at the lower levels of the judicial hierarchy.

Reformatio in peius. (L) Statement relative to the worsening of the position (for example, steeper punishment or fines) of any party in an appeals process.

Respondent state. The state against which there are allegations of violations of the European Convention of Human Rights or of the Inter-American Convention of Human Rights.

Saramacas. (Sp) Tribe of bushnegroes living in Suriname.

Sentencia. (Sp) Decisions of Spanish courts.

Sumario. (Sp) Investigative phase of the criminal process in Spain.

***Traslado*.** (Sp) Euphemism used by the Argentinean military to refer to moving the illegally detained to face death.

Trial *in absentia.* (L) Trial in which, notwithstanding the absence of the accused, a verdict is reached. It is not common but countries such as France recognize its legality.

***Tribunal Constitucional*.** (Sp) It is the Spanish Constitutional Court or the highest court for constitutional matters.

***Tribunal Supremo*.** (Sp) It is the Spanish Supreme Court or the highest court in Spain except for constitutional matters.

***Tribunales*.** (Sp) Courts in which more than one judge participates in the decision-making process.

***Vuelos de la muerte*.** (Sp) "Death flights" used in Argentina to dispose of the detained after being tortured. The detained were thrown alive from planes and into the sea. Although the victims were usually drugged, many times they were conscious.

CHAPTER I

INTRODUCTION

The puzzle that the dissertation is going to examine is how human rights norms are being implemented in the post-Cold War era through an analysis of the jurisprudential developments of the Inter-American Court of Human Rights (international/regional level) and of the Spanish court system (national level) regarding the violations of the ban on torture and on disappearances that occurred in Latin American during the Cold War.

The fostering of human rights—a matter that belongs to a growing subfield of international relations (IR) which is steadily incorporating the insights, concepts and methods of international law—is relevant to IR because it shows that first, the work of intergovernmental networks of judges and other court officials is weakening state sovereignty; second, states are better analyzed as disaggregates with diverse and contending interests, including the fostering of human rights; and third, certain human rights norms—including ending impunity, *ius cogens* status of the ban on torture and on disappearances, centrality of the individual as the beneficiary of these norms, and legitimacy of the use of universal jurisdiction to prosecute the worst violations of human rights norms—are currently becoming entrenched into the practices of the state.

The protection of human rights is not new. It has clear antecedents in the 1700s (protection of religious minorities in Europe mainly),[1] the 1800s (fight against slavery),[2]

[1] Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge, England: Cambridge University Press, 1997): Ch. 2, "From Augsburg to Paris."

and the first decades of the 1900s (minority treaties and the various provisions of the Charter of the League of Nations protecting women, children, and workers).[3] However, it is only at the end of World War II when human rights acquired clear relevance due to the atrocities committed from 1939 to 1945[4] and the efforts, after the war, to prosecute criminally the Axis powers based on charges of crimes against the peace, crimes of aggression, war crimes, and crimes against humanity.

World War II produced the momentum to pass the Universal Declaration of Human Rights and for the implementation of human rights through the Nuremberg and Tokyo tribunals[5] and the domestic trials against former Nazis and their allies. Nuremberg and Tokyo at the international level, and Eichmann and Demjanjuk domestically pierced through the sovereignty of the state[6] by establishing the precedent that certain crimes are so heinous that they can be prosecuted anywhere without any statute of limitations. Thus the need for order cannot shield alleged violators of human rights from justice.

Nevertheless, these tribunals were established mainly to prosecute war crimes; a type of crime for which members of the armed forces had been prosecuted traditionally,

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[2] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, PA: University of Pennsylvania Press, 1998): 38-45.

[3] See: LeRoy A. Bennett, *International Organizations: Principles and Issues*, 6th Ed. (Englewood Cliffs, NJ: Prentice Hall, 1995) and David Armstrong, Lorna Lloyd, and John Redmond, *From Versailles to Maastricht: International Organization in the 20th Century* (New York, NY: St. Martin's Press, 1996).

[4] Especially the Holocaust. See: Lauren, *The Evolution of International Human Rights*: 2-3.

[5] Richard A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York, NY: Routledge, 2000): Introduction.

[6] Judicial implementation affords individuals the possibility of using the courts to confront violations of human rights, a novelty showing that "[t]he international human rights program . . . shift[s] the fulcrum of the system from the protection of sovereigns to the protection of people, . . . [and thus] works qualitative changes in virtually every [one of its] component[s]." In W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* vol. 84, no. 4 (1990): 872, as reproduced in *International Human Rights in Context: Law, Politics, and Morals,* Eds., Henry J. Steiner and Philip Alston (Oxford, England: Clarendon Press, 1996): 159.

at least in Western Europe.[7] Therefore, the implementation of human rights—via the prosecution of crimes against humanity—was of a secondary importance at the time but is especially relevant for the dissertation because it was the first time that it happened.

This success of judicial implementation notwithstanding, it remained as a one time event dismissed during most of the Cold War[8] until it was rekindled with the 1980 *Filártiga* case, in which a domestic court exercised for the first time universal jurisdiction to decide a civil suit based on the violation of human rights.[9] This justice option has increased in relevance with the end of the Cold War.[10] A known realist, Henry Kissinger, confirms it: "In less than a decade, an unprecedented movement . . . emerged to submit international politics to judicial procedures."[11]

Although the latest developments in the subject show the increase in the establishment and use of judicial mechanisms, not all scholars agree on the relevance or on the benefits of using the judiciary for human rights implementation. The most common criticism among detractors of judicial mechanisms is to focus on the limited scope of the courts. For example, Malcolm D. Evans criticizes the use of domestic

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[7] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000): Chs. I-IV.

[8] "For many years after the Universal Declaration and the covenants that followed, implementation … lay dormant." In Jerome J. Shestack, "Session 4: The Legal Profession and Human Rights: Globalization of Human Rights Law," *Fordham International Law Journal* vol. 21, no. 2 (December 1997): 560. Proven in the chapter outline of Bass, *Stay the Hand of Vengeance*, in which the chapter on Nuremberg is immediately followed by the one on the ICTY—established almost half a century later.

For the dissertation, implementation refers to using a process to bring forth the right. Thus, it goes beyond mere transcription of the right into the legal system of a given country. See: Below, Subsec. 1.A.

[9] *Filártiga v.Peña-Irala,* 630 F. 2d (2d Cir 1980). A case I do not analyze in-depth but refer to when relevant. On its significance, see: Reed Brody, "Universal Jurisdiction," *Justice & the Generals,* http://www.pbs.org/wnet/justice/world_issues_uni.html (Accessed: October 20, 2005).

[10] Although authors place it at the end of the 1980s with the fall of the Berlin Wall, the Cold War ended officially in 1991 with the dissolution of the Soviet Union.

[11] Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs* vol. 80, no. 4 (July/August 2001): 86.

jurisdiction for stressing individual responsibility in detriment of that of the state.[12] Others, with the goal of order in mind—as the best milieu to foster human rights, which can be threatened when instability is widespread in a given country—underline the supplementary role of judicial mechanisms in implementing human rights[13] And some, while denying their innovative role—"[n]o human rights revolution was ever achieved by court decree"—recognize an increase in "the significance of . . . courts"[14] in the 1990s but limited geographically to Western Europe where "courts play a leading role in resolving . . . controversies and developing human rights norms."[15] [Emphasis added].

Notwithstanding the aforementioned reluctance of some scholars to consider the importance of courts for international relations, judicial implementation of human rights is still of interest to study because the proliferation and use of judicial mechanisms are raising questions as to the interests of the state—governments are spending time and money in them—and as to their potential impact on outcomes. For example, what are their contributions to the rule of law during transitions?[16]

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[12] Malcolm D. Evans, "International Wrongs and National Jurisdiction" in *Remedies in International Law: The Institutional Dilemma,* Ed., Malcolm D. Evans (Oxford, England: Hart Publishing, 1998): 173.

[13] "A tribunal can be but one step in a process seeking to ensure peace, to make those in power responsible to law, and to condemn aggression." See: Martha Minow, "Between Vengeance and Forgiveness" as reproduced in *International Human Rights in Context: Law, Politics, and Morals,* Eds., Henry J. Steiner and Philip Alston, 2nd Ed. (Oxford, England: Oxford University Press, 2000): 1144.

[14] Henry J. Steiner and Philip Alston, *International Human Rights in Context*, 2nd Ed.: vii.

[15] Ibid: vi. The authors continue affirming that, "in most states, particularly authoritarian and politically repressive ones, courts play a reduced or insignificant role. . . . Nor have international tribunals of a universal character played a major role . . . The prominence of the court in the European human rights system stands as the . . . exception."

[16] Héctor Fáundez Ledesma, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales* (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1996): 19-20. Moreover, it is still a fragmentary study. See: Jenny S. Martínez, "Towards an International Judicial System," *Stanford Law Review* vol. 56, no. 2 (November 2003): 429.

The dissertation focuses on the use of judicial mechanisms to implement human rights law or "judicialization," a subset of a recent world-wide phenomenon known as "legalization"—a more common and, *prima facie*, more legitimate way to implement such law than the use of force.[17] A well known working definition of "legalization" considers it "a particular form of institutionalization characterized by three components: obligation, precision, and delegation."[18] Regardless of the increasing literature on judicial mechanisms, there is still a need to go beyond piecemeal endeavors focusing on one or two courts, and to analyze how courts, at the international and at the domestic levels, implement human rights.[19] For that purpose it is essential to study not only the decisions of the courts in a vacuum, but also their interactions with other branches of the government (executive, legislative, and judiciary) domestically and abroad.

Judicialization is an uneven process that in the last fifteen years has affected a variety of human rights. However, since implementation of rights relative to the physical and mental integrity of the person is crucial[20] as the basis for the exercise of other rights,

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[17] Armed intervention, also called humanitarian intervention, has been relatively less successful in implementing human rights. Somalia is considered the first instance of legitimate humanitarian intervention because it was UN sponsored. See: Thomas G. Weiss, David P. Forsythe, Roger A. Coate, and Kelly-Kate Pease, *The United Nations and Changing World Politics*, 5th Ed. (Boulder, CO: Westview Press, 2007): 69-71 and W. Ofuatey-Kodjoe, "Human Rights and Humanitarian Intervention," in *The State of the United* Nations, Eds., Albert Legault, Albert, Craig Murphy and W. Ofuatey-Kodjoe (Providence, RI: Academic Council on the United Nations System, 1992): 33-47.

[18] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," *International Organization* vol. 54, no. 3 (Summer 2000): 401.

[19] Book reviews confirm it. See: Frédéric Mégret, "The Politics of International Criminal Justice," *European Journal of International Law* vol. 13, no. 5 (2002).

[20] The debate on basic rights is a lengthy one outside the focus of the dissertation. However, life consistently appears as a basic right. See a brief reference to the debate in Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd Ed. (Ithaca, NY: Cornell University Press, 2003): 57-8.

For an in-depth study of a basic right beyond the scope of my dissertation, see: Lawrence M. Ladutke, *Freedom of Expression in El Salvador: The Struggle for Human Rights and Democracy* (Jefferson, NC: McFarland, 2004).

to explore the advance and impact of judicialization, the dissertation centers on the judicial implementation of the violations of the international bans against torture and disappearances in Latin America by examining the jurisprudence of the Inter-American Court of Human Rights, and the Spanish court system. The use of domestic courts—in the dissertation circumscribed to Spanish courts—to prosecute violators in cases where the crime did not take place on the soil of the state, and neither the accused nor the victims are nationals of that state is an innovation of the Post-Cold War era.

Torture and disappearances are two central cases. Torture—a crime against humanity based on treaty law—has come with renewed strength to the forefront of human rights concerns after 9/11 because the absolute nature of the ban on torture has been compromised,[21] and democratic states have increasingly sent prisoners to countries which practice torture—an outsourcing of torture called "extraordinary renditions"—[22] and to secret prisons. Disappearances—close to reaching the status of crime against humanity beyond international customary law—remain relevant because governmental authorities (past and present) are yet to provide any information regarding the wherabouts of numerous victims, and new disappearances are occurring in our days.

This chapter is divided into four sections. The first one establishes the meaning of the main concepts used in the dissertation.[23] The second comprises a review of the main literature on the subject, including the current four main approaches in international

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[21] "Ticking-bomb" justification. See: Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," *Minnesota Law Review* vol. 88, no. 6 (June 2004): 1481.

[22] For a relatively comprehensive report notwithstanding the paucity of the available data, see: Parliamentary Assembly of the Council of Europe, "Secret Detentions and illegal Transfers of Detainees Involving Council of Europe Member States: Second Report," [Rapporteur: Mr. Dick Marty, Explanatory Memorandum] (7 June 2007), http://assembly.coe.int

[23] Those of secondary importance are reserved to each individual chapter.

relations—realism, liberal institutionalism, the English school, and constructivism—with an emphasis on interdisciplinary and legal approaches. The third section describes and justifies the method adopted—mainly content analysis of a variety of documents including UN-sponsored treaties and court decisions. Finally, I develop my key assumptions and present an outline of the rest of the chapters of the dissertation.

A. CONCEPTUALIZATION

Concepts used in political science—as happens in other disciplines—can have several meanings that can also differ from common usage. That is why a fruitful discussion in this field demands establishing the exact meaning of the significant concepts used.[24] Furthermore, since the subject of the dissertation is part of international law—whose concepts are not fully understood by many political scientists beyond norm formation approaches—the need for specificity increases.

Based on the examination of the most significant literature and documents on the subject, I will explain the following main concepts: international human rights law; criminalization and judicial implementation; international crimes with a special reference to crimes against humanity; states of emergency and the "margin of appreciation doctrine;" jurisdictional issues underlining universal jurisdiction; torture in its international dimension; and disappearances including disappeared children.

1. INTERNATIONAL HUMAN RIGHTS LAW[25]

Human rights law is a corpus of every person's rights that the state has the legal obligation to protect. It is a corpus and not a fixed code for two key reasons linked to the

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[24] Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press, 1994): 109-10.

[25] From now on: Human rights or human rights law. It is also called universal human rights law.

nature of international law: first, custom plays a role in establishing human rights. Thus new rights appear, or the content of already established ones changes.[26] And second, states have rejected a code typifying the violations of these rights. However, human rights scholars have overcome both obstacles by delimiting such law's content. [27]

The beneficiary of human rights is every human being[28] with independence of physical, mental, or cultural characteristics. Thus human rights law is universalist. In addition, human rights are unalienable; they cannot be given up. As all rights, they impose a parallel obligation to respect them and such obligation is legal in nature, i.e., it transcends morality or religion.[29] As a consequence, in case of violation, the beneficiary of the right is entitled to full legal protection, including judicial implementation.

Nevertheless, human rights are different from other legal rights because the state—an abstract entity—[30]is solely responsible when they are violated; final responsibility rests with individual authorities and agents of the state.[31] I recognize that

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[26] Jordan J. Paust, "The Significance and Determination of Customary International Human Rights Law: The Complex Nature, Sources and Evidences of Customary Human Rights," *Georgia Journal of International and Comparative Law* 25, nos. 1 & 2 (Fall 1995 - Winter 1996): 147.

[27] Jean Allain and John R.W.D. Jones, "A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind," *European Journal of International Law* vol. 8, no. 1 (1997): 100-13; Richard B. Lillich, "Introduction: The Growing Importance of Customary International Human Rights Law," *Georgia Journal of International and Comparative Law* vol. 25, nos. 1 & 2 (Fall 1995 - Winter 1996): 1; and Steiner and Alston, *International Human Rights in Context*, 2nd Ed.: Ch. 2.

[28] Donnelly, *Universal Human Rights*: 7.

[29] Ibid: 8-11. However, their origins are linked to religion. See: Lauren, *The Evolution of International Human Rights*: 5-9.

[30] I opt for Weber's well-known definition of the state as an organization that controls the legitimate use of force over persons living in a territory with somewhat fixed borders. For an in-depth analysis of the state, see: Anthony Giddens, *A Contemporary Critique of Historical Materialism*: *The Nation-State and Violence*, vol. 2 (Berkeley and Los Angeles, CA: University of California Press, 1987).

[31] See: Fáundez Ledesma, *El sistema interamericano de protección de los derechos humanos*: Introduction, 22-7.

non-state entities violate human rights but even in these cases the state is responsible for such abuses.[32] Therefore, the dissertation focuses on state violations.

The following is a definition of international human rights law that underlines the state's double role as main violator and main protector of human rights:

> A collection of international instruments signed and ratified [and customs accepted] by states in order to recognize the equal and unalienable rights of all the members of the human family and to adopt the mechanisms necessary to provide them protection in the supranational realm. The primary goal of this legal system is to protect the universal rights of the person from [violations derived from] the exercise of the power of the state.[33] [Translation].

2. CRIMINALIZATION AND JUDICIAL IMPLEMENTATION

The high degree of legalization human rights have experienced since the end of World War II,[34] has turned in the last two decades into a focus on providing measures to counteract the violations of those rights. Thus, international criminal law has been promoted to central stage in international law.[35]

Criminalization[36] is necessary to protect human rights because after the violations of these rights are criminalized, judicial mechanisms can be used to foster accountability. Such judicial implementation means the civil and/or criminal prosecution, a guilty verdict

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[32] Although the increase in the number of human rights violations NGOs and TNCs perpetrate implies change in the discipline, I follow the still relevant traditional state-centered position. Algeria proposed expanding this definition to include violations by non-state actors but the European Union and the United States rejected it, see: Michael J. Dennis, "The Fifty-Seventh Session of the UN Commission on Human Rights," *American Journal of International Law* vol. 96, no. 1 (January 2002): 183-4.

[33] J.C. Gutiérrez and Myrna Villegas Díaz, "Derechos Humanos y Desaparecidos," http://www.nuncamas.org-investig-bilbio_contreras_diaz.htm (Accessed: June 1, 2004): Sec. 2.1. (Unless otherwise stated, translations from Spanish into English are my own).

[34] Including the ratification and entry into force of the two 1966 International Covenants.

[35] The International Criminal Court (ICC) symbolizes its relevance. See: "Developments in the Law: International Criminal Law – the Promises of International Prosecution," *Harvard Law Review* vol. 114, no. 7 (May 2001): 19.

[36] The main sources of these rights are conventions and custom. General principles of law and jurisprudence are also sources but they usually need conventional or customary ones to back them up.

is unnecessary, of alleged perpetrators of violations of human rights law. In addition, judicial implementation recognizes the right of the victims and/or their families to restitution and could prevent further violations of human rights by acting as a deterrent.[37]

Despite similarities, the process of criminalization at the international level is more complex than adopting criminal laws domestically: internationally, states must reach a consensus to criminalize certain activities which is difficult because states usually cling to their sovereignty tightly. Thus, criminalization has included only the violations of certain rights typified as crimes against humanity and transnational crimes.[38]

3. INTERNATIONAL CRIMES: CRIMES AGAINST HUMANITY[39]

International crimes are acts and omissions in violation of international law.[40] Some are international crimes due to their nature—piracy or hijacking—but most of them parallel crimes regulated at the domestic level. For these last ones to become international, they must have at least one of the following two characteristics: (1) either their scope is so broad—no quantification—that it provokes horror in any law abiding citizen,[41] or (2) their effects are felt in more than one country—transnational crimes.

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[37] Different goals include "retribution and deterrence . . . restorative initiatives, local values, the needs of victims, rectification, restitution, collective and foreign responsibilities, [and] distributive justice" among others. In Mark A. Drumbl, "Toward a Criminology of International Crime," *Ohio State Journal on Dispute Resolution* vol. 19, no. 1 (2003): 271 and 274. Deterrence is difficult to prove.

[38] See: Sigrun I. Skogly and Mark Gibney, "Transnational Human Rights Obligations," *Human Rights Quarterly* vol. 24, no. 3 (2002): 781-98.

[39] For the pre-World War II era, see: Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht, Holland: Martinus Nijhoff Publishers, 1992): 41-4; for a general and comprehensive but dated study, see: M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, Holland: Martinus Nijhoff Publishers, 1992); and for a helpful synopsis of these crimes, see: Steiner and Alston, *International Human Rights in Context,* 2nd Ed.: 1134-8.

[40] Theodor Meron, "International Criminalization of Internal Atrocities," *American Journal of International Law* vol. 89, no. 3 (July 1995): 567.

[41] The Martens clause (Preamble to the IV Hague Convention Respecting the Laws and Customs of War on Land) remains useful. It affirms that those in occupied territories must be treated "under the

A category of international crimes relevant for the dissertation is that of crimes against humanity, which have achieved the status of *ius cogens*, i.e., the state has the responsibility to protect the right even though that same state has refused to ratify the international conventions that typify a given activity as a crime against humanity and regardless of the widespread violation of the prohibition.[42] For example, torture is commonly practiced but there is an agreement that torture has been banned legally at the international and domestic levels.[43] Thus, those who torture can be prosecuted in court.

Even though the specification of the acts that constitute crimes against humanity is in a state of flux, article 7 of the Statute of the International Criminal Court (ICC)[44] provides a catalogue of such crimes, including torture—art. 7 (f)—and disappearances—art. 7 (i). The catalogue protects the accused from *ex-post facto* laws and facilitates the prosecution's work of matching proven actions to crimes. Furthermore, the statute has improved prior definitions of crimes against humanity[45] by, first, eliminating the requirement of the war-nexus to prosecute. Therefore, from now on crimes against

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protection and the rule of the principles of the law of the nations, as they result form the usages established among civilized peoples [and] from the laws of humanity" See: Adam Roberts and Richard Guelff, *Documents on the Rights of War*, 3rd Ed. (Oxford, England: Oxford University Press, 2000): 70.

[42] A.k.a. peremptory norms. The first treaty mention is on art. 53 (1) of the Vienna Convention on the Law of Treaties. For the problematic meaning and scope of *ius cogens*, see: Christopher A. Ford, "Adjudicating Jus Cogens," *Wisconsin International Law Journal* vol. 13, no. 1 (Fall 1994): 145 and Menno T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Right Offenses," *Human Rights Quarterly* vol. 23, no. 4 (2001): 940-74.

[43] The Abu Ghraib case is problematic due to official documents denying that certain acts are torture. For further attacks on the *ius cogens* status of the crime of torture, see: Below, Chs. III, IV and VII.

[44] First comprehensive multilateral treaty definition of these crimes; based on the jurisprudence of the two international *ad hoc* tribunals and the ICJ. On the *ad hoc* tribunals' contributions, see: Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes Against Humanity," *Duke Journal of Comparative and International Law* vol. 10, no. 2 (Spring - Summer 2000): 307.

[45] However, due to its temporal jurisdiction, the ICC cannot prosecute them.

humanity committed during peacetime can be prosecuted.[46] And, second, by eliminating the requirement of an "extraneous motive" to convict because the Statute "does not require proof of a discriminatory motive."[47] As a result, crimes against humanity have two elements: a pattern of action—"part of a widespread or systematic attack"—and a personal requirement for the accused—"with knowledge" of the said attack.[48]

4. STATES OF EMERGENCY AND THE "MARGIN OF APPRECIATION" DOCTRINE

States of emergency are exceptional situations of unrest that affect partially or totally the territory of a state, and are declared as such by the pertinent authority, which can be any branch of the government at the national or local level. Once the state of emergency is officially declared, the government is allowed a higher degree of discretion in applying the rule of law than under normal circumstances. As a consequence, certain rights can be suspended. However, from the perspective of international human rights law, in order for the suspension of rights to be legitimate, it is necessary not only that the unrest "threatens the life of the nation and [its] existence . . . is officially proclaimed," but also that the suspension of rights must be "strictly required by . . . the situation."[49]

Moreover, according to art. 4 (2) of the International Covenant on Civil and Political Rights (ICCPR) certain rights—called non derogable—can never be suspended.

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[46] The U.S. delegation to the Prep-Com supported the no-nexus approach because it believed that such crimes should be deterred in times of peace as well as in times of war. See: Meron, "War Crimes Comes of Age": 466. Meron, as a member of the delegation, knows firsthand. See: Ibid, 468.

It is especially relevant to the dissertation because human rights abuses in Argentina, Chile, and Uruguay perpetrated during the 1970s and 1980s would qualify now as crimes against humanity and could be prosecuted legally at the domestic level. Domestic and national are used interchangeably.

[47] Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," *American Journal of International Law* vol. 93, no. 1 (January 1999): 43.

[48] Art. 7 of the International Criminal Court (ICC) Statute.

[49] See: Article 4 (1) of the 1966 International Covenant on Civil and Political Rights (ICCPR).

These non-derogable rights include life; freedom from torture or to cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; freedom from *ex-post facto* criminal laws; freedom from imprisonment in case of debt; recognition as a person before the law; and freedom of thought, conscience and religion.

In practice, and notwithstanding the legal provisions approved—domestically and internationally—to guarantee individual rights during states of emergency,[50] abuses may occur. Thus, certain states and their representatives could end up in court. As a rule, courts solve these types of cases using the doctrine of the margin of appreciation. When this doctrine is applied, it means, first, that the courts consider that individual states—usually democratic ones—are the best judges of whether the situation of unrest in their territory has reached a degree of urgency demanding the application of exceptional rules and, second, that the courts assume that the measures adopted during the state of emergency are legitimate means to end the strife.[51]

Although not applicable in principle to the violation of non-derogable rights, the courts have used the doctrine of the margin of appreciation in torture-related cases. For example, in *Ireland v. U.K.* in which the European Court of Human Rights (ECtHR) disagreed with the European Commission's findings that the British authorities had practiced torture against Catholic detainees during the state of emergency in Ulster.

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[50] At the regional level, see: Art. 27 (2) of the American Convention on Human Rights and art. 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR].

[51] "The margin of appreciation . . . helps the Court [ECtHR] to show' the proper degree of respect 'for member states' objectives while 'preventing unnecessary restrictions' on the [ECHR] rights." In Ronald St. J. Macdonald, "The Margin of Appreciation," in Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold, Eds., *The European System for the Protection of Human Rights* (Dordrecht, Holland: Martinus Nijhoff Publishers: 1993): 122, as reproduced in Steiner and Alston, 2nd Ed.: 856.

Even though the "margin of appreciation" doctrine is used in decisions encompassing a wide variety of subject matter, for the dissertation its significance is limited to state of emergency cases. For further details on the judicial findings of the ECtHR in torture cases, see: Below, Ch. III, Sec. D.2.d.

5. JURISDICTIONAL ISSUES: UNIVERSAL JURISDICTION

Since the violation of certain human rights has been criminalized, the victims of these violations have the right to access the courts to seek justice, as aforementioned. However, from which court are the victims going to demand justice? Usually courts only decide cases that are within the scope of their territorial, and subject—active or passive—jurisdiction.[52] That means that courts will adjudicate cases involving crimes committed within the territory to which their authority extends (territorial jurisdiction), and crimes committed by a national of their country (active subject jurisdiction) or against a national of their country (passive subject jurisdiction).

Nevertheless, certain international crimes can be prosecuted via the use of universal jurisdiction. As a result, courts can decide cases involving crimes committed abroad with independence of the nationality of the perpetrator or of the victim. In principle, courts do not have the obligation to exercise this type of jurisdiction[53] but they cannot prevent other courts from using universal jurisdiction: "[I]nternational law *permits* any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim . . . offenses that are recognized by the community of nations as of universal concern, and as subject to universal condemnation."[54]

Traditionally, universal jurisdiction was limited to crimes committed on the high seas, outside the sovereignty of any country, i.e., piracy and slavery. The atrocities of

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[52] Effects jurisdiction or prosecution of presumed violations in other countries as long as the crimes have repercussions in the country exercising jurisdiction is rarely used.

[53] A mere "authorization." See: Sunga, *Individual Responsibility in International Law*: 114.

[54] Meron, "International Criminalization of Internal Atrocities," 1995: 570.

World War II—especially the Holocaust—expanded the use of universal jurisdiction to include the prosecution of crimes that shocked humanity due to their scope and nature.[55] The use of the principle of universal jurisdiction to prosecute human rights violations unrelated to World War II began in the 1980s.[56]

6. THE CRIME OF TORTURE

Throughout history authorities have used a variety of methods—including the rack, irons, flogging, burning, and sleep deprivation—[57]which can be referred to as torture, to obtain confessions on which to base the prosecution of suspects.[58] Nevertheless, there has been a successful movement to ban its use. As a result, nowadays torture is a crime against humanity, which can never be justified.[59] In addition, impunity in torture-related cases is being eroded because the existence of a binding conventional definition provides a firmer basis for the civil and criminal prosecution, domestically and internationally, of the violation of the ban against torture:

> For the purposes of this Convnetion, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

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[55] Sunga, *Individual Responsibility*: 102-7. It refers to pre-1945 legal history and also to post World War II significant cases up to the 1990s, i.e., *Eichmann* and *Filártiga v. Peña-Irala*, ibid: 108-13.

[56] The *Barcelona Traction* case [1970 ICJ] already established that human rights created obligations *erga omnes* and therefore, the use of universal jurisdiction was a possibility.

[57] For a description of several torture methods used in Western Europe since Roman times, see: Edward Peters, *Torture,* expanded Ed. (Philadelphia, PA: University of Pennsylvania Press, 1996). For example, in Ancient Rome "the victim was placed with hands and feet fastened in such a way that the joints could be distended by the operation of a complex system of weights and ropes." In ibid: 35.

[58] For an analysis of torture as part of a criminal system and its effects on the innocent, see: Cesare Beccaria, *Dei delitti e delle pene,* 9th Ed. [Prefazione di Stefano Rodotà, cura di Alberto Burgio] (Milan, Italy: Feltrinelli, 2003): 60-5. A more recent and well-documented in-depth study appears in Peters, *Torture*, ibid.

[59] Articles 7 and 4.2 of the International Covenant on Civil and Political Rights [ICCPR]. See: Iván Bazán Chacón, "El Delito de Tortura como Crimen Internacional," Equipo Nizkor, http://www.derechos.org/nizkor/doc/articulos/bazn1.html (Accessed: March 29, 2004).

> suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[60]

Moreover, in order to ban as many acts as could possibly be devised, the Convention accepts even broader definitions from "any international instrument or national legislation which does or may contain provisions of wider application."[61] And more recently, the evolving jurisprudence of the two *ad hoc* tribunals for the former Yugoslavia and for Rwanda has stated that the crime of torture can be committed in the absence of "the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[62]

Although the statement relative to the *ius cogens* nature of the prohibition against torture is still valid—proven by the fact that no state admits practicing it—"the War on Terror/Terrorism" (WOT) after 9/11 has weakened the ban on torture: first, some persons are declared "enemy combatants," a non international law category, so they are beyond the full protection of the law. And second, the theory of imminent danger—"the ticking-bomb scenario"—has been reintroduced into the vocabulary of the security forces, facilitating the practice of torture.[63]

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[60] Art. 1 (1) of the United Nations (UN)-sponsored Convention against Torture (CAT).

[61] Art. 1 (2) of ibid.

[62] For example: *Simic, Tadic, and Zaric* (Trial Chamber) (October 17, 2003): Par. 82 and *Kvocka et al.* (Trial Chamber) (November 2, 2001): Par. 139.

[63] Lawyers Committee for Human Rights, "Assessing the New Normal: Liberty and Security for the Post-September 11 United States," http://www.lchr.org/us_law/loss (Accessed: January 11, 2004): Chs. IV and V; and Jonathan Mahler, "Commander Swift Objects," *The New York Times Magazine* (13 June 2004): 44.

7. THE CRIME OF DISAPPEARANCES: DISAPPEARED CHILDREN

I have established two main limitations for cases similar to those on which this dissertation focuses, because the concept of disappearances as a general category is too wide and remains in flux.[64] First, the crime of disappearances refers to non-combat situations because when this crime is committed against soldiers, the soldiers are not in a traditional war situation but outside the battlefield. Second, it refers to disappearances as a crime against humanity. Thus, it is systematic and/or part of a preordained plan.[65] However, I include temporary and final outcome disappearances because both differ from an illegal detention in that the direct victim vanishes, even for a short period of time, and the authorities deny any knowledge of the victim's whereabouts.[66]

Therefore, disappearances occur when "a person has been kidnapped by any group linked to the government of one's own country or of other country"[67] without real confrontation, and the state denies knowledge of the person's seizure. It can include "the kidnapping of political opponents, used also as a method of institutionalized repression

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[64] A.k.a. "forced or involuntary disappearances" but disappearances is the closest to the original Spanish word *desaparecidos*; it is widely used—even in French (*disparus*) and German texts (*Vermisste*), and it conveys the victim's ultimate fate. See: Georgina Elustondo, "Desaparecidos, un drama que castiga a más de 100 países," *Diario Clarín* (Argentina, 11 Agosto 2003), http://www.icrc.org/Web/spa/sitespa.nsf (Accessed: May 28, 2004). Sometimes English texts refer to "the Missing"—also a movie which focuses on the disappearance of an American citizen during the 1973 coup against Salvador Allende.

The most relevant contributions to the concept are those of the UN Working Group on Disappearances, the OAS and the IACtHR (the *Velásquez-Rodríguez* case). See: Below, Chs. V and VI.

[65] According to art. 7 of the Statute of Rome (ICC) and the OAS declaration. For additional analysis, see: Ricardo Colombres, "La desaparición de personas y la transición democrática posterior," in *Jornadas sobre el Tratamiento Jurídico de la Desaparición Forzada de Personas*, Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Buenos Aires, 24 y 25 de Enero de 1987 (Buenos Aires, Argentina: Asamblea Permanente por los Derechos Humanos, 1987): 45.

[66] Leo Valladares Lanza, *Los hechos hablan por sí mismos: informe preliminar sobre los desaparecidos en Honduras 1980-1993* (Tegucigalpa, Honduras: Editorial Guaymuras, 1994): 21.

[67] See: Elustondo, "Desaparecidos, un drama que castiga a más de 100 países."

and practiced systematically,"[68] but since for the perpetrators any activity can be perceived as subversive, victims are not necessarily involved in political activities.

All disappearances instill terror, increased by secretiveness, in victims, their families, and in society at large;[69] usually leave no physical evidence,[70] which produces a "total material, social, and legal extinction of the disappeared;"[71] and continue to be committed until the discovery of the remains of the disappeared.

A category of disappearances that presents certain specific characteristics—the most important being that it affects individuals toward which the state has a greater duty of protection and that the purpose of the crime was reeducating the minor in the regime's ideology—is that of children who survived their parents' disappearance and whose birth or residence may be unknown to their relatives. The Mothers of the Plaza de Mayo[72] provide a helpful, albeit non-legal definition:

> What does it mean to be a disappeared child? . . . not knowing it . . . believing that the one who tells you to call her 'mom' is your mom . . . that the one who tells you to call him 'dad' is your dad . . . to be born between 1975 and 1980 . . . believing that if there are no photos of your mother being pregnant or of you as a baby is because they were not taken … not looking too much like the rest of the family. …
>
> A disappeared child does not know that he/she is one . . . that when he/she was really young he/she was kidnapped with his/her parents or was born in a concentration camp . . . that while his/her family was seeking him/her, somebody

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[68] See: Simón A. Lázara, "Desaparición forzada de personas, doctrina de la seguridad nacional y la influencia de factores económico-sociales," in *Jornadas sobre el Tratamiento Jurídico*: 31.

[69] See: Colombres, "La desaparición de personas": 44.

[70] British forces filmed human remains on the Argentinean ocean floor, see: Simón A. Lázara, "Desaparición forzada de personas, doctrina de la seguridad nacional": 34.

[71] Colombres, "La desaparición de personas": 45. For him it is worse than the extermination using crematoria because the crematoria at least left some evidence.

[72] V. M. Abreu Hernandez, "The Mothers of La Plaza de Mayo: A Peace Movement," *Peace & Change* vol. 27, no. 3 (July 2002): 385-411.

chose for him/her other parents, name, … [and] life … [I]t is to lose … your ancestry, history, identity.[73] [Translation].

C. THEORETICAL BACKGROUND

According to some authors, international law plays a relevant role in world politics and the increase of the judicial implementation of such law, and more specifically of human rights,[74] is used as evidence of their position. Others, dismissing this evidence, consider international law a mere "epiphenomenon."[75] The latter position is defended by neorealists, who believe that any instance of judicial implementation merely reflects the interests of powerful states, and thus relegate the study of law to the domestic realm.[76]

Nevertheless, liberal institutionalists, solidarists, and constructivists underline the role of international law and more specifically of human rights in international relations. Similarly, international lawyers emphasize how international law affects[77] (and is affected) by the international environment that has established and developed it, and in which it is applied. However, as happens with political science, international law is not a

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[73] "¿Qué es ser un chico desaparecido?" in *Niños desaparecidos, jóvenes localizados en la Argentina de 1976 a 1999* (Buenos Aires, Argentina: Abuelas de Plaza de Mayo: Temas, 1999): 15.

[74] Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* vol. 87, no. 2 (1993): 206 and Bass, *Stay the Hand of Vengeance*.

[75] John J. Mearsheimer, "The False Promise of International Institutions," *International Security* vol. 19, no. 3 (Winter 1994 - 1995): 5-49. For a liberal institutionalist reply, see: Below, Fn. 88.

[76] Classical realists such as Hans J. Morgenthau consider international law (IL) as a relevant part of international relations (IR). See: Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 3rd Ed. (New York, NY: Knopf, 1960). For a limited but insightful attempt to distinguish classical or neoclassical realism and neorealism or structural realism, considered part of a "continuum," see: Jeffrey W. Taliaferro, "Security Seeking under Anarchy: Defensive Realism Revisited," *International Security* vol. 25, no. 3 (Winter 2000 - 2001): 132-5.

For a brief description of the relation between IL and IR, see: Stephen D. Krasner, "What's Wrong with International Law Scholarship? International Law and International Relations: Together, Apart, Together?" *Chicago Journal of International Law* vol. 1, no. 1 (Spring 2000): 93.

[77] "Providing the rules of the game [and] . . . standards . . . by which . . . governments . . . can act reasonably and justify their action . . . enhancing compliance . . . and fostering routinized 'habits of compliance." In Slaughter Burley, "International Law and International Relations Theory": Table 1.

monolithic theory either. Some scholars follow a positivist approach, i.e., they focus on the interpretation of the written law; others go beyond rules and focus on processes which provide "communication, reassurance, monitoring, and routinization."[78] In addition, interdisciplinary approaches that combine the insights of political science and of international law are relevant to the analysis of judicial implementation of human rights.

1. POLITICAL SCIENCE APPROACHES[79]

a. Neorealism

For neorealists, states' interests—especially those of the most powerful states—are the only explanatory variable in international relations. Thus, neorealists believe that international law does not constrain states to do what is against their interests and that it will only be implemented when it coincides with the interest of the states.[80] For example, neorealists interpret the prosecution of crimes against humanity in the Nuremberg and Tokyo tribunals as "victors' justice"[81] or fulfilling the Allies' interest in punishing the defeated. From the neorealist perspective, since the victors' excesses remained unpunished, Nuremberg and Tokyo were not judicial implementation of international law *per se*. A similar argument has been used recently to explain the creation of the *ad hoc* tribunals for Yugoslavia and Rwanda by the UN Security Council.[82]

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[78] Slaughter Burley, "International Law and International Relations Theory": 210.

[79] On the shortcomings of realism and liberal institutionalism, and the advantages of constructivism, see: Anthony Clark Arend, "Do Legal Rules Matter? International Law and International Politics," *Virginia Journal of International Law* vol. 38, no. 2 (Winter 1998): 107.

[80] Basically power or security—obtained through power. See: Kenneth Waltz, *Theory of International Politics* (New York, NY: McGraw-Hill, 1979).

[81] Bass, *Stay the Hand of Vengeance*: 8-16.

[82] Christopher L Blakesley, "Atrocity and its Prosecution: The Ad hoc Tribunal for the Former Yugoslavia and Rwanda," in Timothy L.H. McCormack and Gerry J. Simpson, Eds., *The Law of War Crimes: National and International Approaches* (The Hague, Holland; London, England; and Boston, MA:

Nevertheless, neorealism cannot explain cases in which the self-interest of the state is vague or non-existent,[83] i.e., those instances in which violations of international human rights have been prosecuted, through the use of universal jurisdiction,[84] in the absence of a direct connection with the violation.

Furthermore, neorealists deny the legal character of international law. Since the law is a set of rules approved by the legitimate authority of the state according to a set of pre-established procedures, and the basic ordering principle of neorealists relative to international relations is anarchy[85] or the absence of an overall authority capable of imposing its decisions over all the states in the world using force, it is logical for followers of neorrealism to dismiss international law as wishful thinking. But why then do states comply with international law most of the time?[86] As a consequence, there are authors who ask whether "anybody is still a realist."

b. Liberal Institutionalism

Due to the deficiency of neorealism to explain the aforementioned cases, there is a need to look for other political science perspectives in order to study issues relative to

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Kluwer Law International, 1997): 189-228.

Serbs have complained that the ICTY is victor's justice. See: Aleksandar Fatić, *Reconciliation via the War Crimes Tribunal?* (Aldershot, Hants, England and Brookfield, VT: Ashgate Publishing, 2000).

[83] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference? *Yale Law Journal* vol. 111, no. 8 (June 2002): 1938.

[84] The application of the Alien Tort Claims Act [ATCA] by domestic courts in the U.S., more specifically in the *Filártiga v. Peña-Irala* case. Jordan J. Paust, "The History, Nature, and Reach of the Alien Tort Claims Act," *Florida Journal of International Law* vol. 16, no. 2 (June 2004): 249.

[85] See: Waltz, *Theory of International Politics*: Ch. 6; Joseph M. Grieco, "Realist International Theory and the Study of World Politics," in *New Thinking in International Relations Theory*, Eds., Michael W. Doyle and G. John Ikenberry (Boulder, CO: Westview Press, 1997): 164-5; and Jeffrey W. Legro and Andrew Moravcsik, "Is Anybody Still a Realist?" *International Security* vol. 24, no. 2 (Fall 1999): 12.

[86] A tentative answer in Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home," *Houston Law Review* vol. 35, no. 3 (Fall 1998): 623.

international human rights law.[87] Among them, the perspective that seems more appropriate is that of liberal institutionalism—currently known as institutionalist theory —[88]which has been the leading school in international relations during more than a decade and a half.

For liberal institutionalists, states are not monolithic entities but are made up of different agents with a variety of interests, including security, economic progress, and spreading human rights.[89] Institutions help not only to fulfill state interests but also to change them. For example, Robert Keohane affirms that "[i]nstitutions need to be consistent with . . . patterns of power and interests. But they also need to be consistent with the basic normative commitments of their members, so that having a reputation for supporting the institution has intrinsic, as well as instrumental, value."[90] For the dissertation, the relevant institutions are courts and the basic normative commitments are the advancement of human rights.

Institutionalists have considered international law as a valid topic for political science that has been studied by important sectors in the field.[91] More recently, this interest in international law and in bridging the divide between international relations and

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[87] Taking into account that the foreign policy of many states, including the United States, begun to include human rights by the end of the 1970s, institutionalists are better prepared to examine this phenomenon.

[88] A concise defense as a reply to Mearsheimer's attack, in Lisa Martin and Robert O. Keohane, "The Promise of Institutionalist Liberalism," *International Security* vol. 20, no. 1 (Summer 1995): 39-51.

[89] Neorealists will cynically say human rights are used as a ruse to calm down constituencies in democratic countries; but the fact is that if they were not relevant, they would not be mentioned at all.

[90] Robert O. Keohane, "Comment: International Relations and International Law: Two Optics, *Harvard International Law Review* vol. 38 (Spring 1997): 502.

[91] Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" *American Journal of International Law* vol. 92, no. 3 (July 1998): 373.

international law is shown by the examination of the phenomenon of international "legalization," which means that institutions have three characteristics, i.e., obligation, precision, and delegation.[92] The contribution of "legalization" theorists is, in the authors own words that "[o]ur conception of legalization creates common ground for political scientists and lawyers by moving away from a narrow view of law as requiring enforcement by a coercive sovereign."[93]

Another promising strand of liberal institutionalism, connected to legalization, studies transgovernmental networks as a means to spread implementation of human rights.[94] The centrality of networks is a logical result of the interest in the phenomenon of globalization, which has also reached the realm of international law.[95] For the most part the focus of the experts has been on governmental networks because the state is still the most relevant actor in international relations.[96] Among the networks studied, those of judges and other governmental officials are especially relevant for the dissertation.[97]

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[92] Abbott, Keohane, Moravcsik, Slaughter, and Snidal, "The Concept of Legalization": 17-8.

[93] Ibid: 18.

[94] For a helpful review of relevant contributions in this area, see: Don Suh, "Note: Situating Liberalism in Transnational Legal Space," *Duke Journal of Comparative and International Law* vol. 12, no. 2 (Spring 2002): 605. Transnational space involves the participation of non-governmental actors. Nevertheless, intergovernmental networks can be considered a category of transnational networks.

[95] Anne-Marie Slaughter, "Sovereignty and Power in a Networked World Order," *Stanford Journal of International Law* vol. 40, no. 2 (Summer 2004): 283-327; expanded version in Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

[96] I agree with the general argument of Slaughter against "the new medievalists." See: Anne-Marie Slaughter, "The Real New World Order," *Foreign Affairs* vol. 176, no. 5 (September - October 1997): 183.

[97] See: Slaughter, *A New World Order:* Ch. 2, "Judges: Constructing a Global Legal System." However, sometimes these networks can hinder the implementation of human rights. See: Below, Ch. IV, Sec. D relative to the cases before the Spanish court system.

NGOs or private companies also form them but their role is beyond the scope of the dissertation.

c. English School or International Society: Solidarist Version

The English School[98] demands a separate analysis because it "treat[s] the international system as a society governed by shared norms,"[99] but the importance and role such norms play differ among the members of this school. Thus, for the purpose of the dissertation, it is relevant to distinguish between two main strands, i.e., classical pluralists and solidarists, also known more recently as constructivist solidarists.

Classical pluralist authors are represented by Hedley Bull's ideas as expressed in *The Anarchical Society*.[100] For Bull, John Vincent and Robert Jackson, international law is valuable as long as it does not interfere with order, which is the goal our international society should try to fulfill: "[K]eep conflict limited and the overall system stable, moderate, and durable."[101] Hidemi Suganami considers such a position as pessimistic because "according to [Jackson] . . . [the pursuit of order] . . . is all that we should aim for internationally, even if it were possible to do otherwise."[102] Thus, pluralists emphasize state sovereignty and view human rights demands as a potential threat to order.[103]

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[98] Tim Dunne, *Inventing International Society: A History of the English School* (Basingstoke, England: Macmillan, 1998).

[99] Alexander Wendt, *Social Theory of International Politics* (Cambridge, England: Cambridge University Press, 1999): 31. "Timothy Dunne has argued convincingly that it is a forerunner of contemporary constructivist IR theory."

[100] New York, NY: Columbia University Press, 1977.

[101] Falk, *Human Rights Horizons:* 228.

[102] Hidemi Suganami, "Sovereignty, Intervention, and the English School," [Paper prepared for the 4th Pan European Conference, University of Kent, Canterbury, 8-10th September 2001] (22 August 2001), http://www.leeds.ac.uk/polis/englishchool/suganami-sovereignty01.htm (Accessed: July 14, 2004).

[103] Barry Buzan, "The English School as a Research Program: An Overview, and a Proposal for Reconvening," [Draft, Paper for the Panel 'A Reconsideration of the English School: Close or Reconvene?' BISA (British International Stidies Association) Conference, Manchester, December 1999] (15 October 1999), http://www.leeds.ac.uk/polis/englishchool/buzan99.htm (Accessed: July 17, 2006).

Solidarists, inspired by Martin Wight—one of the founders of the English School who distinguished three strands in international relations, i.e., Machiavellian or realism, Grotian or rationalism, and Kantian or revolutionism—[104]focus on the last one and as a result underline the transformative role of international law, i.e., norms do more than constrain states. Although according to Barry Buzan "a solidarist international society is not the same as a world society,"[105] solidarists are more optimistic about adding human rights to the list of goals of our international society;[106] order is not central for solidarists.

d. Constructivism

Constructivism has gone beyond the institutionalists' emphasis on the relevance of rules as part of international relations; constructivists consider that international law not only can constrain states' behavior but it can also change states' identities and interests.[107] Applied to international human rights law, the constructivist focus on how ideas can shape state identity will mean that states could internalize the idea that implementing human rights is part of their interests by being engaged in the implementation of human rights.

As a result, each instance of implementation will transform a state closer to a champion of human rights, and further the protection of human rights. Thus, the main contribution of constructivism here is rediscovering the power of ideas for political

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[104] Chris Brown, *International Relations Theory: New Normative Approaches* (New York, NY: Columbia University Press, 1992): 25.

[105] Barry Buzan, "The English School as a Research Program."

[106] Hidemi Suganami, "Sovereignty, Intervention, and the English School."

[107] Jutta Brunnée and Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law," *Columbia Journal of Transnational Law* vol. 39, no. 1 (2000): 19, and Alexander Wendt, *Social Theory of International Politics*: Ch. 6.

For a catalogue of different strands of constructivism, see: Peter J. Katzenstein et al., "International Organization and the Study of World Politics," *International Organization* vol. 52, no. 4 (Autumn 1998): 645 and 670-2.

science,[108] which is relevant for human rights because the strength of international law rests on being considered as compulsory by the states that ratify the different treaties.[109]

As a consequence, the constructivist approach is a normative one. Nevertheless, it can also have relevance for empirical work in the sense that it favors a more in-depth analysis of reality because "for constructivists what counts as interesting is what actors actually do (their 'practice'), but doing includes saying."[110] Therefore, their analysis extends not only to actions of the state, but also to its "discourse" and international law partakes of both, i.e., it is a "practice" and a "discourse."

The constructivist project is highly demanding,[111] especially due to the need for accurate description. This means that before scholars can analyze the internalization of the idea of implementation of international human rights law, scholars must know what the courts have done in reality on the issue of implementation. Then it will be possible to reach general conclusions relative to when internalization happens and why.

After the analysis of the four leading approaches in international relations, I must underline the importance of the institutionalists,[112] solidarists, and constructivists for the dissertation—even with their shortcomings—because of their relevant examination of

[108] Constructivist interest in international law comes from their focus on internalization of ideas by the actors they study; an issue beyond the scope of this dissertation.

[109] "The notion that norms, understandings, and discourse shape state behavior is hardly news to many outside political science. International legal scholars have always known this." In Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1999): 139. For Constructivism and International Law, see: Ibid, 139-43.

[110] Jutta Brunnée and Stephen J. Toope: "International Law and Constructivism."

[111] Some of their basic concepts—internalization—have not been operationalized: how do you show states' internalization of ideas?

[112] As regime theorists, they realized its relevance in the late 1970s, see: Slaughter Burley, "International Law and International Relations Theory": 206.

international law which shows the intersection between the two disciplines. Nevertheless, the constructivist framework is beyond the purpose of the dissertation and is reserved for a future endeavor, in which the internationalization of norms and the reasons behind the court decisions will be examined. Moreover, it is necessary to briefly study international law and interdisciplinary approaches, due to their significance for my dissertation.

2. INTERNATIONAL LAW APPROACHES

a. Positivism

The discipline of international law is also relevant because it is increasingly concerned with human rights and "human rights experts and bodies have moved recently to affirm the primacy of human rights over other international legal regimes and to insist that international economic policies, in particular, cannot be exempt from conformity to international human rights law."[113]

Proponents of legal positivism—with a history dating back at least to Cicero—focus on the law as "rules applied and enforced by governments."[114] Its simplicity is deceptive because the law is unclear. Thus, implementing the law implies interpretation, which is regulated through "three phases: [. . .] the literal [one] . . . explain[s] the law according to the actual meaning of the words. The real [one] . . . compares the literal . . . with . . . other methods [teleological, psychological, and historical] . . . to ascertain the real . . . sense. The logical exposition . . . extract[s] what is there by implication."[115]

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[113] Dinah Shelton, "Human Rights and the Hierarchy of International Law Sources and Norms: Hierarchy of Norms and Human Rights: Of Trumps and Winners," *Saskatchewan Law Review* vol. 65, no. 2 (2002): 301.

[114] Mieczyslaw Maneli, *Juridical Positivism and Human Rights* (New York, NY: Hippocrene Books, circa 1981): 6.

[115] Ibid: 107.

Legal positivism can be criticized due to its "neglect to take into consideration the social environment and the subjectivity of those who apply the law"[116] and the threat posed by the codification of laws legalizing some of the worst atrocities known to humankind. For example, Nazi Germany approved the Nuremberg laws. However, since human rights have been positivized in the post-World War II period through the efforts of the United Nations, the vilification of positivism has lost its previous thrust.

Due to the recovered confidence in positivism, i.e., the importance awarded to codified laws, and due to the role interpreting the law plays in judicial implementation, I find the positivist approach helpful to know what the courts are doing. Such knowledge is a necessary step to study later the reasons behind judicial implementation of human rights and to be able to evaluate the activities of thes different courts.

b. The New Haven School and International Legal Process

The New Haven School, started by Myres McDougal and Harold Lasswell, represents an advance with respect to positivist approaches because the main authors took into consideration the process of law formation—law for them was dynamic—and established a normative objective for the law, i.e., to strive for "human dignity." [117] Consequently, for them the contextual and teleological elements are central to the study of the law. Thus, they differ from the positivists' contention that contextual and teleological elements are mere methods for the real interpretation of the law.

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[116] Mieczyslaw Maneli, *Juridical Positivism and Human Rights* (New York, NY: Hippocrene Books, circa 1981): 112-3.

[117] Myers McDougal criticized Morgenthau's depiction of international law in *Politics among Nations* by affirming that "Law is not merely a 'limitation' upon power but is also a conscious, creative instrument in promoting both order and other values . . . not to include demands for and expectations of 'legitimacy' among the most pervasive, dependable, and economical bases of power even in international politics is most unreal." In Myers S. McDougal, "The Realist Theory in Pyrrhic Victory," *American Journal of International Law* vol. 49, no. 3 (July 1995): 378.

Based on the New Haven School, Richard A. Falk, Abram Chayes and Thomas Ehrlich constructed the international legal process approach. I agree with the latter's statement that international law is relevant but not determinative[118] because it does not work in a vacuum and does not remain unchanged. These scholars show that the days when international lawyers defended an imperialistic view of international law are gone but at the same time they underline the importance of international law in the study of international relations.

Falk "suggests that there is both a process and a set of ideals which have autonomous claims on the international legal order, in addition to what states have established as binding."[119] The existence of a set of ideals makes possible for the excluded to legitimately contest certain rules established in international law. Thus, for him, international law is dynamic and has to focus on the rights of the victims.[120] Human rights, therefore, are relevant to the research agenda of these scholars. Although this approach is relevant because of the central role given to human rights, its focus on process and ideals to contest the system is beyond the purpose of the dissertation which centers on what the courts are doing within the boundaries of established law.

3. INTERDISCIPLINARY APPROACHES

Another approach that presents some promise for the dissertation has already been mentioned, i.e., the attempt to develop an interdisciplinary scholarship that combines

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[118] Slaughter Burley, "International law and International Relations Theory": 214.
According to Ehrlich, "the strength of the rules is often underestimated. They are deeply rooted in the psychology of leadership as well as in history." In Thomas Ehrlich, "The Legal Process in Foreign Affairs: Military Intervention – a Testing Case," *Stanford Law Review* vol. 27, no. 3 (February 1975): 640.

[119] Henry F. Carey, "The Grotian Eclectic and Human Rights: Four Recent Books by Richard A. Falk," *Human Rights Quarterly* vol. 24, no. 3 (2002): 802.

[120] Falk, *Human Rights Horizons:* 173. "With some notable exceptions, world order has been analyzed for centuries as if human suffering were irrelevant."

international law and international relations.[121] Although interdisciplinary approaches contribute to how different courts in the world interact—for example, they study obedience to the law as a "transnational legal process"—[122]they present a serious drawback when the findings of one of the two combined disciplines are ignored, or superficially examined, in order to underline the similarities between the two perspectives.[123] This is a disservice to both disciplines because it ignores the knowledge accumulated by each of them.

Sidelining one of the disciplines in an interdisciplinary endeavor is of concern in my dissertation because international law has some basic assumptions that are required to understand the discipline; their dismissal by scholars from other disciplines produces flawed insights into the workings of international law. Two relevant assumptions relative to international law are that, first, international law is based on "consent and state responsibility."[124] As Michael Byers maintains, the rules of treaty law are binding not because of the iterative process [game theory concept] [125] but because a state, "by consenting, binds itself to behave in a certain manner even *if* it subsequently changes its mind about the desirability of that behavior."[126] And second, international law includes a

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[121] Richard A. Falk is a precursor of this approach and one of its more important representatives.

[122] It consists of "interaction, interpretation and internalization." In Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home": 623.

[123] "[Setear] . . . mishandles or ignores several concepts which are basic to international law . . . in favor of an 'iterative' perspective." In Michael Byers, "Response: Taking the Law out of International Law: A Critique of the 'Iterative Perspective," *Harvard International Law Journal* vol. 38, no. 1 (Winter 1997): 201.

[124] In Michael Byers, "Response: Taking the Law out of International Law: A Critique of the 'Iterative Perspective:" 201.

[125] Ibid.

[126] Ibid: 202.

type of norms called *ius cogens* that overrides the legality of all other norms that are contrary to them; a preeminence not understood by many political scientists that can be lost in interdisciplinary endeavors. This is why the interdisciplinary approach is not as adequate as it seems at first.

Furthermore, interdisciplinary approaches that dismiss an in-depth analysis of the context in which international law emerges and is applied[127] are also inadequate to advance knowledge in the discipline. Although Byers is referring his critique to one specific article whose subject is treaty law, it can be considered as a critique applicable to any interdisciplinary enterprise whenever solid knowledge of each of the disciplines involved is lacking: interdisciplinary study can "reinforce the misplaced assumptions of international relations scholars rather than contribute to their correction. By failing to communicate the subtle fact of legal specificity and the unique effects of obligation, he [applicable to all interdisciplinary scholars] risks losing the very essence of law."[128]

4. CONCLUDING REMARKS

After studying the advantages and shortcomings of the main approaches in political science and international law, and of the latest interdisciplinary efforts, I conclude that the two political science approaches crucial to examine the judicial implementation of international human rights law are liberal institutionalism and the solidarist version of the British school.

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[127] Specific regulations appear to confront specific problems. However, since rules cannot be changed all the time, knowing under which circumstances they appeared helps in assessing their applicability in the future. For example, the Convention on Torture was developed to confront the widespread and/or systematic torture of the Cold War. As a consequence, the international level of protection will only be activated when torture is widespread, not when there is a single instance of it.

[128] Byers, "Response: Taking the Law out of International Law": 205.

Liberal institutionalists have taken into account the growing intersection between international law and international relations.[129] As a result, they have developed a research agenda in which international law plays a significant role[130]—including the study of legalization, of which judicial implementation is a subset, and of intergovernmental networks of which those of judges and prosecutors are significant for the dissertation. Moreover, the institutionalist view of the state is helpful to analyze how the implementation of human rights and the respect for the rule of law is now included among the interests of the state—see Chapters IV and VI on the relationship between the Spanish courts and the domestic and foreign executive, legislative and judiciary branches.[131]

Solidarists are important for my dissertation not only for the primacy they give to international law but also for their emphasis on analyzing the historical context—present in E. H. Carr, a forerunner of the school, and Martin Wight. For example, the Nuremberg and Tokyo trials provide "critical insights which are necessary both to the understanding of the existing situation [i.e., proliferation of judicial mechanisms and their contributions] and to the realization of the values which [our generation] hold."[132] In addition, solidarists embrace the transformative power of human rights as non-threatening to the

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[129] Slaughter Burley, "International Law and International Relations Theory": 205-20.

[130] Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder, CO: Westview Press, 1989) and Slaughter, Tulumello and Wood, "International Law and International Relations Theory."

[131] "The results [of the next wave of liberal IR scholarship] will directly implicate the importance of domestic legal structures and the relationship between domestic and international law." In Slaughter, Tulumello and Wood, ibid: 374.

[132] E. H. Carr, *The New Society* (Boston, MA: Beacon Press, 1966).

overall international system, which is relevant to appreciate the jurisprudential contributions of the court decisions examined in the dissertation.[133]

To these two political science approaches, I have added one legal approach, i.e., positivism. Since the bulk of judicial implementation entails international legislation and court decisions, I will benefit from using the literal, real and logical interpretation of texts used by positivism. It will be particularly useful to assess the compatibility between court decisions that have modified the traditional understanding of certain laws—rejected established precedent, from a common law perspective—and the rule of law.

C. METHODOLOGY

How human rights norms are being implemented is examined using four contemporary case studies and a historical case study. More specifically, the dissertation analyzes the developing jurisprudence of the Inter-American Court of Human Rights and of the Spanish court system relative to the implementation of the prohibitions against torture and disappearances. Since my approach to study the judicial implementation of human rights is based largely on international law, the methods used are "unobtrusive or nonreactive"[134] and have an important historical component due to the value of

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[133] Especially its more recent constructivist stance which is connected to Richard Falk's Type III morality of ends in which "global security . . . relies on social activism, oppositional tendencies, and transnational initiatives to give weight to moral aspiration." In Falk, *Human Rights Horizons*: 229-30.

"According to Hurrell . . . [the English School] differs from constructivism in its interest in the actual historical evolution of the institutions of international society, the special importance it attaches to international law as a concrete historical practice, and the extent to which it draws attention to the brute material facts as constraints on practice as well as its analysis." In "The English School on 'International Relations as an Intellectual Pursuit,'" in *The English School of International Relations: A Contemporary Reassessment,* Andre Linklater and Hidemi Suganami (Cambridge, England: Cambridge University Press, 2006): 83, Fn. 1.

[134] Earl Babbie, *The Practice of Social Research*, 8th Ed. (Belmont, CA: Wadsworth Publishing Company, 1998): Ch. 12.

precedent. Thus, the methods include content analysis,[135] study of existing statistics, and historical and comparative analysis. Moreover, an important proportion of the documents examined are not available in English. Thus, considerable attention has been paid to distilling the most relevant aspects of court decisions and other official documents—including cooperation requests between Spanish-speaking countries.

1. CASE STUDIES: JUDICIAL IMPLEMENTATION OF TORTURE AND DISAPPEARANCES AT THE INTERNATIONAL AND DOMESTIC LEVELS

a. Substantive Issues: Torture and Disappearances

From the variety of substantive issues—death penalty, slavery, gender discrimination, or child labor—that could be used to study judicial implementation of human rights, I focus on two, i.e., torture and of disappearances. Both are crimes against humanity banned at the international and domestic levels and are *ius cogens* but while the banning of torture is part of treaty law, the banning of disappearances is still customary.[136] Since implementing judicially the prohibition against torture and against disappearances involves also a respect for the principles of a fair trial, these two case studies are going to be examined from a procedural perspective too. Judicial implementation without procedural safeguards is useless to advance human rights.

b. The Inter-American Court of Human Rights (IACtHR) and the Court System of Spain: Justification, Differences and Commonalities

Both prohibitions, against torture and disappearances, have been the object of implementation in different parts of the world but I have chosen as my case studies the

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[135] Babbie, *The Practice of Social Research*: 309-19.

[136] For the Convention on Torture, see: GA Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, UN Doc. A/39/51 (1984) at 197 (entered into force 26 June 1987). Relative to disappearances, see: Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," *International Organization* vol. 54, no. 3 (Summer 2000): 249-75.

IACtHR[137] and the court system of Spain—concentrating on the courts of last resort located in Madrid whose decisions are enforceable by the state and whose doctrine in favor of the implementation no court is going to contradict domestically.[138] Based on the analysis of the implementation in these two systems, it is possible to evaluate the effectiveness of the international and national levels in general: do they implement the violations of human rights studied in the same way? How does the existence of treaty law influence judicial implementation?

The IACtHR is considered the leading model in deciding cases involving disappearances,[139] a violation of *ius cogens* that has been more widely prosecuted in the Americas where there was a high incidence of this type of violation during the 1970s and 1980s. Since the "compliance [of the countries] with the legally-binding judgments of the Court seems to be good,"[140] the way the Court implements international human rights is extremely relevant for the purpose of my dissertation.

The case of the Spanish court system is significant because it has provided several decisions involving the use of extraterritorial and universal jurisdiction, including an important instance of non implementation when the *Audiencia Nacional* or Spanish National Court rejected the prosecution of a case presented by the "Rigoberta Menchú

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[137] For the Court's statutes and case law, see: http://www.corteidh.or.cr

[138] Although Spain is a quasi-federal system the cases dealing with international human rights have been prosecuted before courts located in Madrid. In addition, Spain is a member of the European Union (EU) and of the Council of Europe, thus the decisions of its courts, under certain conditions, can be appealed before the European Court of Justice and of the European Court of Human Rights.

[139] Starting with the 29 July 1988 *Velásquez-Rodríguez*, partially reproduced in Richard B. Lillich and Hurst Hannum, Eds., *International Human Rights: Problems of Law, Policy, and Practice,* 3rd Ed. (Boston, MA: Little, Brown and Company, 1996): 799-802. Also, see: Irum Taqi, "Note: Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach," *Fordham International Law Journal* vol. 24, no. 3 (March 2001): 940.

[140] Lillich and Hannum, Eds., *International Human Rights*, ibid: 799.

Foundation" against alleged gross violations of human rights in Guatemala.[141] However, on September 2005 the Spanish Constitutional Court rejected this decision and reaffirmed Spanish jurisdiction.

The two court systems differ on the scope of their jurisdiction and individuals' access to the court. First, one acts at the international/regional level, the other at the domestic level. Second, the IACtHR specializes in human rights, while the Spanish court system deals with any type of matter.[142] And third, the court system of Spain grants easier access to individuals because its legal system allows petitions *ex parte*;[143] individuals need the mediation of the Inter-American Commission of Human Rights or of a state to access the IACtHR.[144]

At the same time, the IACtHR and the Spanish court system have in common certain elements, including legal background and language of the judges, working experience, and interaction; those commonalities make feasible my project of comparing the implementation of the substantive issues in both court systems.[145] First, both systems have judges with a similar legal background, i.e., civil law with the exception of the

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[141] AI Index: AMR 34/052/2000.

[142] Art. 4 of the LOPJ 6/1985 (July 1) [BOE 157, July 2nd].

[143] Art. 24 (1) of the Spanish Constitution grants access to every human being.

[144] See: Janusz Symonides, "Access of Individuals to International Tribunals and International Human Rights Complaints Procedures," in Corte Interamericana de Derechos Humanos, "Memoria del Seminario: El Sistema Interamericano de protección de los Derechos Humanos en el Umbral del Siglo XXI, San José, Costa Rica: 23 y 24 de Noviembre de 1999," Tomo I (San José, Costa Rica: n.p., 2001): 483-4.

[145] Differences and commonalities are needed for meaningful comparisons. In Giovanni Sartori, "Comparing and Miscomparing," as reproduced in *Comparative Politics: Notes and Readings*, 8th Ed., Eds., Bernard E. Brown and Roy C. Macridis (Belmont, CA: Wadsworth Publishing Company, 1996): 20-30.

judges of the IACtHR that come mainly from the Caribbean.[146] Thus, both follow an inquisitorial system of justice in which an investigative judge plays a relevant role in amassing evidence during the pre-trial phase. In addition, the institution of the jury is absent for the most part.[147] Second, Spanish is the working and authoritative language for both courts.[148] Thus, documents in other languages are usually translated into Spanish.[149]

Second, their working experience can be considered similar because the Spanish Constitution was approved in 1978, the same year the Inter-American Convention on Human Rights was signed and ratified[150] and by the end of the Cold War—I am examining here judicial implementation in the post-Cold War era—both courts had the experience of a decade, so we cannot consider that their decisions were still tentative

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[146] Martin Shapiro, "The Civil Law System and Preexisting Legal Rules," in *Courts: A Comparative and Political Analysis* (Chicago, IL: University of Chicago Press, 1981).

For a in-depth insight into the Spanish legal system, see: Andrés de la Oliva Santos, *Derecho procesal civil*, 4ª Ed. Comp. y act. [4 vols] (Madrid, Spain: Centro de Estudios Ramón Areces, 1995, 1996 imp.); Andrés de la Oliva Santos et al, *Derecho procesal penal*, 5ª Ed. (Madrid, Spain: Centro de Estudios Ramón Areces, 2002); and Juan Montero Aroca et al., *Derecho jurisdiccional* [3 vols.] (Valencia, Spain: Tirant lo Blanch, 1998). On the legal system of Caribbean members, see: Yemisi Dina, "Guide to Caribbean Law Research," http://www.llrx.com/features/caribbean.htm (Accessed: October 21, 2005).

[147] Although the figure of the juror was reintroduced in the Spanish legal system in 22 May 1995, Ley Orgánica 5/1995 del Tribunal del Jurado (LOTJ), it only plays a role at the provincial level—art. 1 (3) of the LOTJ—and thus it is irrelevant for the cases examined in the dissertation, which were brought before the *Audiencia Nacional* and other courts with jurisdiction over the whole Spanish territory.

Further details of the differences between the common law (U.S.) and the civil or continental law systems will be provided, when relevant, in Chs. III-VI of the dissertation.

[148] Except for the use in Spanish courts of the other official languages—basically Basque, Catalonian, or Galician—which is not the case here. See: Art. 231.2, 3 and 4 of the LOPJ, ibid. For the IACtHR, see: Fáundez Ledesma, *El sistema interamericano*: 159-61.

[149] Fáundez Ledesma, ibid.

[150] The Spanish Constitution became effective on December 29, 1978, which marks the re-establishment of a democracy in Spain. See: Below, Sec. D. 2.

On the IACtHR, see: Steiner and Alston, 2nd Ed.: 869.

because by this time they were already used to the laws they had to apply and the process of democratization was on its way in Spain and in most of Latin America.[151]

Third, since citizens of countries that are under the jurisdiction of the IACtHR have, in several cases, initiated judicial proceedings before Spanish courts—the Pinochet case being the most famous—both systems have been forced to interact in relation to violations of human rights law which occurred in Latin America during the 1970s and 1980s. It is possible to find references to each other's decisions in both systems. For example, on the issue of disappearances, *Velásquez-Rodríguez* (IACtHR) set a precedent internationally.

c. Time-frame: Mainly Post-Cold War Era Up to January 2006

The time-frame of the dissertation is limited to the post-Cold War era because in this period of history the political justification for the inaction of the courts based on the ideological divide of the world in two main camps no longer exists and human rights issues have acquired more relevance and because the courts have had time to develop the implementation of the Convention against Torture which came into force in 1987 and this implementation can be compared to the implementation of the regime against disappearances that has been developed with greater detail in Latin America.

As a result, implementation of human rights is analyzed through four main case studies: the prohibition of torture in the IACtHR and in the Spanish court system, and the prohibition of disappearances in the IACtHR and in the Spanish court system. The case studies are geographically circumscribed to atrocities committed in Latin America.

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[151] Except for Costa Rica, the main Latin American countries were non-democracies. Nevertheless, by the end of the Cold War the process of democratization was well advanced in this continent. Spain was considered a consolidated democracy by 1981-2. See: Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: The Johns Hopkins University Press, 1996): Chs. 6 and 10-14.

Moreover, each case study includes a brief reference to the historical context in which the violations and the subsequent demands for accountability took place.

Since both court systems are permanent, I need to set up a cut-off date for the cases analyzed, which is January 31, 2006. That way I can study the immediate aftermath of the September 2005 decision of the Constitutional Court of Spain stating clearly that Spanish courts can use universal jurisdiction without deferring to the authorities of the country where the abuses were committed.[152] This decision can be seen as the harbinger of a new era which should be analyzed in the future. Similarly, I end the analysis of the decisions of the IACtHr before the beginning of the 2006 session for continuity purposes. However, I will also refer briefly to decisions central to relevant cases which remained unresolved by the aforementioned cut-off date.

2. CONTENT ANALYSIS AND STUDY OF PREEXISTENT STATISTICS

The type of relevant documents that are going to be the object of content analysis is mostly confined to judicial decisions from international and domestic courts,[153] and treaty and customary international human rights law. Nevertheless, I will also analyze newspaper articles, documents produced by the executive and legislative branches, reports from Non Governmental Organizations (NGOs) such as Amnesty International (AI) and Human Rights Watch (HRW) and scholarly works. Content analysis is

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[152] Tribunal Constitucional, Sentencia 237/2005, de 26 de Septiembre, Fallo. BOE [Spanish Official Gazette] no. 258 Suplemento (Viernes, 28 October 2005): 45-57.

[153] Although mere subsidiary sources of international law, they have precedent value for domestic and international courts alike. See: Burns H. Weston, Richard Falk, and Hillary Charlesworth, Eds., *International Law and World Order: A Problem-Oriented Coursebook,* 3rd Ed. (St. Paul, MN: Thomson West Group, 1997): 148-50.

Whenever possible, documents will be examined in their original/authoritative language.

primarily a qualitative approach[154] and it will guarantee a nuanced study of how the courts have implemented human rights. Occasionally, I will use available statistics relative to the scope of the violations of human rights.[155]

International and regional human rights treaties are examined to assess the duties of the states to implement the bans on torture and disappearances, and the rights of the victims and of the accused to protection. Domestic law, especially Spanish law, is analyzed in detail when it specifies the duties of the states and the rights of the victims and the accused. Howeever court decisions are the core of the dissertation. They are especially relevant when they refine concepts, create new precedents, and attack those newly created precedents. In addition, dissenting and concurring opinions are also important to discern whether certain precedents are solidly grounded. Furthermore, the legal approach means analyzing statutes regulating the role of the courts: what they are allowed to do, their obligations and their interpretation of their obligation relative to the implementation of human rights law. This approach is relevant to examine the contributions of the courts to further human rights norms and to find out whether they have gone beyond their legal obligations, either to further or to hinder the implementation of such norms.

Documents produced by the three branches of the government in different countries are useful to evaluate the level of cooperation between states in fostering human rights implementation and to produce evidence of the abuses committed. Last but not least, reports from NGOs and newspaper articles are instrumental as evidence of the

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[154] Jennifer Mason, *Qualitative Researching*, 2nd Ed. (London, England & Thousand Oaks, CA: Sage, 2002) and B. Guy Peters, *Comparative Politics: Theory and Methods* (New York, NY: New York University Press, 1998).

[155] Babbie, *The Practice of Social Research*: 319-24.

abuses that occurred, of the improvements in the protection of rights, and of the legitimacy of the efforts to foster the judicial implementation of human rights.

3. HISTORICAL/COMPARATIVE METHOD

Although the aforementioned contemporary case studies constitute the bulk of the dissertation, judicial implementation of human rights has not appeared in a vacuum. That is why I am going to analyze its main antecedents at the international and domestic level. The historical case studies[156] are limited to the International Military Tribunals for Nuremberg and Tokyo, and the trials against Eichmann and Demjanjuk in Israel.

At the international level the choice was clear; the domestic ones have been chosen because they were brought before the same domestic court and have direct relation to World War II crimes. In addition, they provide a significant variation from the perspective of human rights implementation: Eichmann was kidnapped to bring him to Israel, where he was executed after being found guilty; and Demjanjuk was extradited to Israel, where he was found not guilty by the appeals. Overall, the historical cases are benchmarks against which the implementation of human rights nowadays can be evaluated and they provide insights into what to do and what to avoid in implementing human rights.

In addition to comparing the judicial implementation of the ban against torture and against disappearances at the international and domestic levels through the decisions of the IACtHR and the Spanish judicial system, I analyze relevant contributions of other international level courts—European Court of Human Rights, International Court of Justice (ICJ), and the *ad hoc* tribunals for the former Yugoslavia and for Rwanda—when

[156] For a brief reference to this type of case studies, see: Babbie, *The Practice of Social Research*: 325-30.

pertinent to the dissertation and in order to assess the existence and degree of judicial cross-fertilization regarding human rights implementation.

D. RELEVANT ASSUMPTIONS AND OUTLINE OF THE DISSERTATION

From the introductory section, the relevance of the judicial implementation of international human rights to the discipline of political science should be very clear. As a result, the only task remaining prior to analyzing the subject at hand—as happens with any scholarly enterprise and in order to contribute as objectively as possible to the advancement of knowledge—is to state the main assumptions that characterize this analysis.[157] Moreover, it is important to establish an outline to provide readers with an overall picture of the dissertation.

1. RELEVANT ASSUMPTIONS

My main assumptions refer to the sources and nature of international law, and to the independence of judicial mechanisms. First, regarding the sources and nature of international law, I consider that decisions from domestic courts are included among such sources whenever they deal with international issues and that international law—including human rights—is legally binding. Although a sector of political science persists in denying their legal dimension,[158] human rights are legally binding.[159] The fact

[157] On objectivity and ideology, see: Babbie, *The Practice of Social Research*: 450.

[158] Many neorealists refer to International law as rules, not as law. According to Anthony Clark Arend, "Given their understanding of the nature of international relations, structural realists have generally denied any really independent force to 'rules,' 'norms,' and 'institutions [which are their euphemisms for international law]." In Arend, "Do Legal Rules Matter? International Law and International Politics": 115.

[159] Jenny S. Martínez, "Towards an International Justice System." I consider that human rights are individual and universal too.

that governments try to change the rules is evidence that authorities perceive that international law constrains them to act in a certain way.

For example, the Bush administration has continuously expressed the opinion that there is a vacuum in international law and thus, new rules—such as the creation of the category of "enemy combatants"—are needed after 9/11. Although detractors of the notion that human rights are legally binding will say that the state determines (here the Bush administration) who is protected by these rights, it seems that this administration does not want to directly say that they were/are intentionally violating their obligations under international law. In addition, actual violations of human rights do not necessarily preclude their legality. For example, killings violate penal law domestically and their repeated commission does not detract from their categorization as crimes.

Second, although politics influences the decisions of the courts, courts "to some extent … are assumed to be almost independent of the setting within which they occur."[160] As a result, my focus is on the work of the courts, not the reasons behind the decisions. The independence of the courts is applicable to democratic states only[161] because in dictatorships there is a presumption of no independence.[162] Even in democracies the independence of the courts is not total, i.e., they depend on the other branches of the government for resources and cooperation. However, there is independence enough for the courts to be able to overcome outside pressures and decide

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[160] Peters, *Comparative Politics: Theory and Methods*: 13.

[161] Liberal democracies require "an independent, nondiscriminatory judiciary, whose decisions are enforced and respected by other centers of power." In Larry Diamond, *Developing Democracy: Toward Consolidation* (Baltimore, MD: The Johns Hopkins University Press, 1999): 12.

[162] The case studies of the dissertation provide exceptions, i.e., while in Chile the whole court system was co-opted because those who rebelled against the executive were expelled and replaced or their decisions were overturned; in Argentina some judges acted independently.

according to the law.[163] Nevertheless, these outside pressures can be more effective when the courts are trying to advance certain areas of human rights which are not entrenched in domestic law/practice.

2. OUTLINE OF THE DISSERTATION

The judicial implementation of human rights is analyzed through seven chapters. After this introduction, the second chapter examines the main contributions to the implementation of human rights law of relevant antecedents at the international—Nuremberg and Tokyo—and domestic—Eichmann and Demjanjuk—levels. For that purpose the chapter is divided into a historical description of the cases, an examination of their positive and negative aspects and conclusions relative to their contributions as antecedents to judicial implementation of human rights. The historical case studies show that power is not the only interest of the state and also that the state is better understood in a disaggregated form as when the prosecutor in the Demjanjuk case brought forth evidence in favor of the defendant and undermined the Israeli "official" position.

In the third to sixth chapters of the dissertation, I develop the case studies on how courts foster the implementation of human rights norms to confront abuses that occurred in Latin America mainly during the Cold War with a focus on the international, regional and domestic applicable law; an analysis of the main decisions of the courts; the courts' relationship with other institutions; an assessment of the contributions of the international and national levels toward implementation; and relevant recommendations to further these contributions. Chapters three and five analyze the jurisprudence of the IACtHR regarding the ban on torture and on disappearances respectively. And chapters four and

[163] See: United Nations, "Basic Principles on the Independence of the Judiciary," Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985 (U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985)).

six examine the jurisprudence of the Spanish court system regarding the ban on torture and on disappearances respectively.

The seventh and final chapter offers general conclusions supporting the institutionalists' disaggregated conception of the state—which makes it possible for transnational networks of judges and prosecutors to have an impact in the implementation of human rights norms—and the solidarists' belief on the compatibility between the fostering of human rights norms and order because the case studies show no significant indication of instability derived from this type of implementation. For this purpose, the chapter is divided into first, an assessment of whether the international, domestic or a combination of both levels is better to foster implementation—including an overall conclusion on how human rights norms are being implemented. Second, an analysis of the main trends in judicial implementation of human rights norms. And finally, a brief examination of five relevant recommendations to further the judicial implementation of international human rights norms.

CHAPTER II

INTERNATIONAL AND DOMESTIC PRECEDENTS OF THE JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW: NUREMBERG AND TOKYO; EICHMANN AND DEMJANJUK

Although judicial implementation of international human rights law is perceived as a phenomenon distinctive of the post-Cold War era,[1] there are several relevant historical antecedents at the international and national or domestic levels. Among those antecedents, I will focus on cases directly linked to World War II because they were the first trials to successfully[2] set forth the foundation of the actual system of judicial implementation of human rights and to provide a pool of cases sufficient to show the historical evolution of such implementation.

The analysis of the different cases acknowledges their importance not only relative to substantive issues such as the incorporation of crimes against humanity[3] to

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[1] The upsurge of implementation is connected to the erosion of sovereignty too. Nowadays it is rare for government representatives to declare that human rights are exclusively a matter of domestic jurisdiction; before their justification was art. 2 (7) of the UN Charter ("Nothing . . . shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state").

[2] The first attempts to prosecute crimes against humanity failed. No international criminal court prosecuted Kaiser Wilhelm or most of the lesser-rank German officials that participated in World War I. In addition, the German Supreme Court acquitted those prosecuted. Similarly, the 1923 Treaty of Lausanne granted amnesty to the Turkish officials accused of the Armenian genocide. See: Tina Rosenberg, "Tipping the Scales of Justice," *World Policy Journal* 12, no. 3 (Fall 1995): 55.

For a detailed account of the failure to prosecute World War I crimes despite the Allied powers' initial idea to do so, see: James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War,* Contributions in Legal Studies, no. 20 (Westport, CT: Greenwood Press, 1982); and Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NY and Oxford, England: Princeton University Press, 2000): 58-146.

[3] For the definition of these crimes, see: Above, Ch. I, Sec. A.3.

positive law but it also takes into account the process through which the judiciary managed to guarantee a fair trial to defendants accused of violating human rights, which is crucial for the implementation of international human rights law;[4] a trial lacking basic procedural safeguards of fairness will compromise the precedent value of any decision. Therefore, the substantive and procedural aspects of such foundation are interrelated.

The cases examined in the first section of this chapter are limited to the decisions handed down at the two first international criminal tribunals until the 1990s:[5] Nuremberg—the reference is to the officially called International Military Tribunal (IMT) for the Prosecution of Major German War Criminals; and Tokyo—the International Military Tribunal for the Far East (IMTFE). The decisions from the trials of Adolf Eichmann and John Demjanjuk, at the national level, will be analyzed in the next section.

The decisions of the IMT and the IMTFE laid down the general guidelines for successive judicial implementation endeavors—[6]including the establishment of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda in the 1990s. Although the Nuremberg trial deserves more attention due to its status as the first precedent that even

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[4] What a fair trial entails is now clearer than in the aftermath of World War II due to articles 10 and 11 of the Universal Declaration of Human Rights (UDHR), which were given legal status through the ICCPR. (The Nuremberg precedent influenced their content): Art. 10 sets forth the principles of equality, publicity, independence, impartiality, and communication of charges; art. 11 (1) acknowledges the principle of presumption of innocence; and art. 11 (2) bans *ex-post facto* criminal laws.

[5] Prior to World War II there are only showcase processes such as Leipzig. See: Above, Fn. 2. Not all scholars agree on their international character. Nevertheless, for a good review of arguments supporting their internationality, see: Robert K. Woetzel, *The Nuremberg Trial in International Law* (London, England: Stevens & Sons, 1960): 43-57.

[6] "[M]any of the proceedings and duties of the twelve United States tribunals [in Nuremberg] were adopted . . . without modification, from the International Military Tribunal," in John Mendelsohn, *Trial by Document: The Use of Seized Records in the United States Proceedings at Nürnberg*, [Ph.D. Thesis awarded at the University of Maryland, 1974] (New York, NY: Garland Publishing, 1988): 7. Such statement can be applied to the prosecution of war crimes and crimes against humanity until our days.

the judges at Tokyo took into consideration and to the wider guarantees afforded to the accused, Tokyo is useful where it differed from Nuremberg, especially to avoid repeating relevant mishandlings of justice.

Among the variety of domestic level cases available, I have set aside those occurring immediately after World War II mainly because the so-called "subsequent trials" were military in nature and their use of the Nuremberg precedent was the direct result of the Allied victory.[7] Thus, in order to have a more complete picture of judicial implementation, I opted for two cases involving non-military courts, which can be compared due to the role played by the Israeli court system; in Demjanjuk, the U.S. courts are relevant too. Eichmann is significant because it was the first time the crimes of the Holocaust were central to a judicial process and universal jurisdiction was used to prosecute crimes committed against non-citizens in a time when the prosecuting state did not exist yet. Similarly, Demjanjuk is important for underlining the use of universal jurisdiction and the usefulness of appeals to overcome the mishaps of justice.

Since these domestic level cases took place in two different decades, they give a sense of continuity to the judicial implementation of human rights. Eichmann was prosecuted in the early 1960s; the process against Demjanjuk started in the mid-70s, peaked in the 1980s and had an aftermath in the 1990s and in the present century. Therefore, the domestic cases bring forth judicial implementation to the time-frame of the case studies of chapters III to VI—late 1980s and up to our days.

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[7] In addition, they are too numerous, which makes their study impracticable for the purposes of the dissertation. For example, the U.S. military court at Nuremberg decided more than twelve processes against 185 defendants. See: *Trials of War Criminals before the Nürenberg Military Tribunals under Control Council Law No. 10: October 1946 to April 1949,* 15 vols. (Washington: Government Printing Office, 1950-1953); and "[i]n West German courts alone more than seventy-thousand persons were tried … by January 1, 1969," in Mendelsohn, *Trial by Document*: 163. For other countries' trials, see: Ibid, 164.

Before analyzing the contributions of the aforementioned cases to the implementation of human rights, it is necessary to make explicit a caveat applicable to the international level processes mainly, i.e., the central purpose of these tribunals was to prosecute aggression and war crimes; the prosecution of crimes against humanity played a minor role,[8] albeit relevant as precedent. The domestic cases focused on crimes against humanity, specifically crimes against the Jewish people. Consequently, their relevance to the implementation of human rights is more direct.

The chapter is organized into five main sections. First, the historical context of Nuremberg and Tokyo; second, the conclusions relative to the precedent value of both cases; third, a study of the domestic level; fourth, an examination of the significant contributions of these domestic level cases to the implementation of human rights; and finally, the conclusions relative to the role of international and domestic judicial mechanisms in the implementation of human rights, based on the previous historical precedents. Since the international cases were the only precedents available to the domestic prosecutions, the domestic cases are analyzed last.

A. THE INTERNATIONAL LEVEL: NUREMBERG AND TOKYO

First, the brief reference to the historical context of the trials is used to understand the obstacles they faced and the reason justice was adopted instead of vengeance.[9] Second, a summary of the common characteristics that made Nuremberg and Tokyo valid precedents for the judicial implementation of human rights. Third, an in-depth analysis

[8] Although peace is necessary to foster human rights, the subject of the dissertation is crimes against humanity, which can be committed by a state against its own citizens. Precisely what happened in the contemporary case studies that I will analyze in chapters III to VI.

[9] Those obstacles affected the way the processes were conducted and their outcome. The historical context is helpful to understand the advantages of choosing the judicial option.

of the trials' specific substantive and procedural contributions and shortcomings toward implementing human rights. Finally, the conclusions focus on an overall positive balance of Nuremberg and Tokyo as precedents.

1. THE NUREMBERG AND THE TOKYO TRIBUNALS: THEIR HISTORICAL CONTEXT[10]

After complex negotiations, the Allied countries[11] established such tribunals at the end of World War II—a conflict credited with the worst crimes recorded.[12] Despite the agreement on the judicial solution, the legitimacy of these tribunals has been questioned since their inception.[13] That is why the historical context under which the tribunals and the law governing them appeared will prevent an oversimplified criticism.

For that purpose this subsection examines briefly two interrelated issues: first, the accusation against the tribunals of being just another case of victors' justice—reinforced by the Allies' dismissal of charges of criminality against themselves; and second, the different treatment afforded, depending on their country of origin, to alleged perpetrators of the crimes established in the Charters of Nuremberg and of Tokyo.

a. Victors' Justice? Concept, Arguments and Counterarguments, and Conclusion Relative to the Legitimacy of Nuremberg

Simply stated victors' justice means that the winner imposes its version of justice over the loser once the war ends. "The kind of justice one gets depends on the nature of

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[10] Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, NC: The University of North Carolina Press, 1998).

[11] Since Philippines and India took part in the negotiations that led up to the Tokyo Tribunal while under the dominion of United States and Great Britain respectively, the term is used loosely.

[12] The extermination of the Carthaginians was similar but World War II crimes were more shocking because people believed they were more civilized.

[13] The London Charter that established such solution was agreed upon the same day as the dropping of the bombs in Hiroshima, i.e., August 8, 1945.
See: Judge Charles E. Wyzanski, Jr., "Nuremberg: A Fair Trial? Dangerous Precedent" (April 1946), http://www.theatlantic.com/unbound/flashbks/hurember/wyprec.htm (Accessed: March 6, 2003).

the conquering state."[14] Thus, as long as the victors respect the international law in place during the war, it is considered a legitimate way of exacting justice because in a future confrontation the losers could be the winners and they will want to impose their own type of justice. However, the defeated are always going to perceive it as too harsh.

Since in the abstract victors' justice is not synonymous with illegality and/or illegitimacy, this expression must have another meaning related to the respect to the rule of law. First, when the Allies decided to "stay the hand of vengeance,"[15] they rejected the prosecution of their own crimes[16] and of those of certain Axis countries.[17] Thus, the carpet bombing of Dresden (by the U.K. and the U.S.),[18] the Katyn massacre (by the U.S.S.R.),[19] and the atomic bombing of Hiroshima and Nagasaki (by the U.S.)[20] were not prosecuted. As a result, the justice served at these tribunals *prima facie* seems biased.

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[14] Bass, *Stay the Hand of Vengeance*: 16.

[15] Robert H. Jackson, the U.S. prosecutor, opened Nuremberg as follows: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason." Reproduced in *The Case against the Nazi War Criminals: Opening Statement for the United States of America by Robert H. Jackson and Other Documents* (New York, NY: Alfred A. Knopf, 1946): 3.

[16] The "Nuremberg Consensus whereby Axis atrocities were . . . absolutely evil, while Allied atrocities were . . . necessary, patriotic, and even providential." In Bard College, "Atrocities Conference: Panel 2: The Tokyo Trial," http://www.bard.edu/hrp/atrocities/paneltwo.htm (Accessed: December 6, 2003): Philip Nobile's Statement.

From a human rights perspective Allied crimes should have been prosecuted because it does not matter whether the Allied crimes named here, with the exception of Katyn, were responses to prior Axis attacks.

[17] For a brief enumeration, see: M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht, Holland: Martinus Nijhoff Publishers, 1992): 231-3.

[18] For an analysis of RAF area bombing and its illegality, see: Stephen A. Garret, *Ethics and Air Power in World War II: the British Bombing of German Cities* (New York, NY: St. Martin's Press, 1993).

[19] The Russians accused the Germans of their crime. See: Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, Rev. Ed. (Dallas, TX: Southern Methodist University Press, 1999): Ch. 22.

[20] And use of incendiary bombs. In Bard College, "Atrocities Conference": Conrad Crane's Statement.

But does this bias taint the whole process? Complete justice is impracticable and it would be naïve to expect any tribunal, least of all the forerunners, to prosecute every crime.

Second, another criticism is that all the judges from Nuremberg and Tokyo Tribunals were nationals of the countries that had won the war and suffered the crimes committed by the Axis powers. When the Allies named the judges for Nuremberg "it would have been wise to select [one or more] from other nations . . . or even of German nationality, whose integrity was obvious"[21] However, professionalism can provide legitimacy in the presence of what can be perceived as biased judges.

Nevertheless, two main arguments contradict their characterization as victors' justice. First, the decision to establish the tribunals was not preordained; it was a historical and onerous anomaly.[22] Although officials who favored a judicial solution knew of the problems it entailed—[23]political difficulty to reach an agreement among the Allies and practical obstacles to gather evidence, translate documents and provide interpreters—they also understood that a judicial prosecution provided legitimacy.[24]

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[21] Woetzel, *The Nuremberg Trial in International Law*: Preface, xi-xii. Naming judges from the Axis countries would have angered the citizens of the Allied nations without providing more appearance of impartiality due to suspicion of collaboration. Thus, I only agree with naming judges from neutral countries.

[22] Vengeance was common. On historical milestones of judicial or quasi-judicial solutions to confront war crimes, see: Bass, *Stay the Hand of Vengeance*.

Shooting is more expeditious and cheaper. For the victims or their families the automatic and sure results seem more advantageous than a long judicial process that could end freeing the accused.

Peace negotiations showed lack of agreement. For example, for Germany, Churchill recommended summary executions of the main leaders, the Soviets extended the suggestion to a couple thousand of lesser ranking figures and Morgenthau wanted to return the country's economy to a pre-industrial state. For Japan, the solution was U.S. occupation. For a detailed account of the negotiations, see: Kochavi, *Prelude to Nuremberg*: Introduction.

[23] More complicated in Japan due to prosecution from eleven different countries.

[24] It 'would command maximum public support in our own times and receive the respect of history. . . .' In "Memorandum to President Roosevelt from the Secretaries of State and War and the

Second, despite Russian efforts to the contrary, the cases did not have a predetermined outcome and the defense had room to be effective. In Nuremberg, although those subjected to trial were handpicked among a pool of presumed criminals in order to facilitate prosecution,[25] some of the accused were acquitted—with Russian dissent—due to insufficient evidence.[26] However, since in Tokyo unanimity was not required for a guilty verdict, the Tokyo trial is considered by some as an unfair process. As a conclusion, in relation to Nuremberg the accusation of victors' justice is unsuitable because the trial was mostly fair.[27] And Tokyo is also a legitimate precedent as long as it agrees with Nuremberg.

b. Link between Allied Positions toward Judicial Means to Confront the World War II Crimes and the Types of "Aggressions"[28] They Suffered in Their Own Soil

Axis behavior toward Allied nationals, which does not include the Jewish and the Roma, varied widely. In Europe, the Germans reserved the worst treatment to peoples qualified as subhuman. Thus, they never granted Russian soldiers Prisoner of War (POW) status—leaving them totally unprotected—and forced Russian civilians to work

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Attorney General, January 22, 1945," in *London Conference*: 6 as quoted in Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971): 10 and Fn. 9.

[25] Done also domestically, see: H. Richard Uviller, "The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA," *Michigan Law Review* vol. 71, no. 6 (May 1973): 1146.

[26] Bassiouni disagrees: "[T]he process had to clearly be for the defeated only . . . this new legal process had to have all the appearance of legality and fairness, even though it was designed to insure a pre-ordained result, and at the same time, to serve as a valid legal precedent for the future. These goals were difficult to reconcile" In Bassiouni, *Crimes Against Humanity*: 585. See also: Ibid, 589, Table 4.

[27] "[T]hree quarters of the German nation at the time said they found the trial 'fair' and 'just.'" See: Stephen G. Breyer, "A Call for Reasoned Justice," in U.S. Information Agency, "Issues of Democracy: Confronting Human Rights Violations," *Electronic Journal* vol. 1, no. 3 (May 1996): 18. However, it would have been relevant to assess the degree of freedom under which the polls were conducted in occupied Germany.

[28] Term used here in a lax way to include any violation of international criminal law.

under conditions that led to the death of many with the ultimate goal of repopulating Russia with pure bred Germans.[29] Western Europeans and Americans were treated less harshly because the Germans considered them human beings similar to them. The English,[30] and especially the Americans, suffered mostly through their military. In the Far East, the Japanese—who forced the U.S. into the war after Pearl Harbor—[31]abused non-Europeans, especially the Chinese and Filipinos,[32] more heinously.

As a result, the Allied powers approached Nuremberg and Tokyo differently. While England, France and Russia had an interest in the prosecution and punishment of the Germans; for the U.S., Japanese crimes were more present than German ones. In addition, all the Allies believed that crimes against their own nationals were more relevant than crimes committed against German or Japanese citizens or against other third-country citizens.[33]

Moreover, current events such as the start of the Cold War shaped the tribunals' scope too. Instead of continuing to seek justice until all the alleged criminals were tried, the Allies began the reconstruction of the defeated countries. For example, the U.S., as the only occupying power in Japan, decided against the prosecution of the Emperor—

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[29] *The Judgment of Nuremberg, 1946: The International Military Tribunal for the Trial of German Major War Criminals* (London, England: The Stationery Office, 1999): 99 and 102 respectively.

[30] The British also suffered bombing in their own soil. Not so the U.S.

[31] See: Roberta Wohlstetter, *Pearl Harbor, Warning and Decision* (Stanford, CA: Stanford University Press, 1962). Furthermore, Japanese violations of the Hague Convention continued during the war.

[32] For China, see: Timothy Brook, Ed., *Documents on the Rape of Nanking* (Ann Harbor, MI: University of Michigan Press, 1999). For the Philippines, see: The Bhatan march and acts of cannibalism as documented in *Yamashita v. Styer*, 327 U.S. 1 (1946), 66 S. Ct. 340; and Bruce D. Landrum, "Note: The Yamashita War Crimes Trial: Command Responsibility Then and Now," *Military Law Review* vol. 149 (Summer 1995): 293-301.

[33] Kochavi, *Prelude to Nuremberg*: Conclusion, 231.

dismissing abundant evidence of his role in the war of aggression—[34]and the main industrialists.

No effort was made to prosecute Italy, an Axis country, for two main reasons. First, its crimes did not affect the major Powers;[35] and second, it furthered Allied interests toward the end of the war because Italian partisans overthrew Mussolini in 1943 and killed him in 1945, provided military support to the advancing Allied troops against the Germans, and its government declared war against Japan.[36]

2. NUREMBERG AND TOKYO AS VALID PRECEDENTS FOR JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW: COMMON CHARACTERISTICS

Notwithstanding the context-specific criticisms examined in the prior section, several legal issues of a more general nature could affect the precedent value of both tribunals.[37] These issues can be reduced to the legality of the process and to the

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[34] It includes the invasion and occupation of Manchuria in the 1930s. Althoug the Japanese emperor—who controlled ultimate power in Japan—did not surrender unconditionally, he ordered his highest ranking officials to do so. See: *Foreign Relations of the US*, vol. VI (Washington DC: US Printing Office, 1969): 647-9. However, the words "unconditional surrender" appeared in enclosure no. 2 of "the Directive to the Supreme Commander for the Allied Powers, from Truman to Mac Arthur."

[35] But "[t]he UNWCC listed some 750 Italians as accused war criminals . . . requests for surrender . . . by Yugoslavia and Ethiopia were never granted." In Bassiouni, *Crimes Against Humanity*: 85.

[36] Foreign Relations of the United States: Diplomatic Papers, "The Conference of Berlin" (The Postdam Conference) (1945 in two volumes), (Washington DC: United States Government Printing Office, Washington, 1960): vol. 1, 298-301, Nos. 236-8.

[37] For a brief comparison, see: Woetzel, *The Nuremberg Trial in International Law*: 226-32. And for a comparison underlining Tokyo's advantages, see: John R. Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances," *Military Law Review* vol. 149 (Summer 1995): 25-35.

Since 1915 lacks legality on individual responsibility, due process and crimes against humanity, I disagree with Bass' contention that 1915 was the precedent. Bass, *Stay the Hand of Vengeance*: 114-5.

"[T]he precedent is . . . they [enemies] shall not be killed without proof of crime and fair hearings." In Robert H. Jackson, "The Significance of the Nuremberg Trials to the Armed Forces: Previously Unpublished Personal Observations by the Chief Counsel for the United States," *Military Affairs* vol. 10, no. 4 (Winter 1946): 2-15. Speech delivered at the National War College, Washington, D.C. (6 December 1946). Such precedent value is present in the implementation of the ATCA through civil lawsuits in the U.S., and in the ICTY and the ICTR—producing now a significant number of decisions that further the system.

procedural guarantees provided to the accused. In order to evaluate their legality, it is necessary to discuss how the trials respected the principle of non retroactivity of the penal law—*nullum crimen sine lege*—and how they applied jurisdictional principles because Nuremberg and Tokyo relied on the use of universal jurisdiction to prosecute the defendants.[38]

In addition, Nuremberg and Tokyo—to a lesser extent—[39]were established with a minimum set of procedural guarantees in order to provide the defendants with the barebones of what a fair trial should be. The analysis centers on the impartiality of the participating judges and prosecutors, the defendants' entitlements to the presumption of innocence and to a lawyer, and the neutrality of the evidentiary rules.

a. Expansive Meaning of the Principle of Legality: The Effects of the Principle of Retroactivity in the Legitimacy of the Tribunals, and the Use of Universal Jurisdiction beyond Piracy and Slave Trade

From the perspective of domestic law, the principle of legality protects citizens from the whims of those in power who could create new crimes, decide arbitrarily whom to subject to trial, or worsen the punishment for a given crime, but it cannot be a shield to protect against crimes more heinous than those prosecuted domestically. Here the focus is on how prosecuting individuals[40] for crimes against humanity using universal jurisdiction affected the principle of non retroactivity of the penal law.

The Allies' main concern was to underline that aggressive war was a loathsome practice from which all other abuses derived. Accordingly, they affirmed that the 1928 Kellogg-Briand pact had proscribed this type of war. In addition, they wanted to punish

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[38] Art. 1 of the London Agreement of 8 August 1943.

[39] For a more detailed critique of Tokyo and its shortcomings, see: Below, Subsec. 3. b. ii.

[40] Judgment of the IMT of Nuremberg: Par. 52.

war crimes. Finally, although crimes against humanity were included because of the appalling treatment of civilians during World War II, their prosecution was of secondary importance.

Prosecuting aggression was difficult because since the international community never agreed to a legally binding definition of aggression,[41] for some it did not qualify as an international crime. Such difficulty was compounded by the Allies' hypocritical attitude toward it. Not only could the Allies be considered conspirators of the Axis powers for remaining silent against acts of aggression committed prior to the invasion of Poland on 1 September 1939[42] but Poland was invaded as a consequence of the German-Soviet pact later on broken by the Germans, which does not justify Soviet aggression against Poland.

In general, there was no complaint relative to the Allies' prosecution of war crimes as they were clearly regulated before World War II and there was a consensus on what they meant. Thus, the only obstacle Nuremberg and Tokyo had to face was that the Axis powers did not consider many of their enemies as human beings and therefore they denied that they had committed war crimes against them.

The Allies were less interested in prosecuting crimes against humanity which, in the absence of codification, were justified by the 1899 Martens clause. This clause recognized the centrality of custom in international law and thus the duty of governments to respect "the principles of the law of nations, as they result from the usages established

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[41] The Statute of the recently established International Criminal Court (ICC) does not define it either. See: Marjorie Cohn, "The Crime of Aggression: What Is It and Why Doesn't the U.S. Want the International Criminal Court to Punish It?" [And the replies to it, especially, D'Amato's], *Jurist: Legal Intelligence*, http://jurist.law.pitt.edu/forum/forumnew18.htm (Accessed: October 21, 2004).

[42] No reference to the Japanese invasion of Manchuria, the Italian invasion of Ethiopia, and the German and Italian support to Franco in Spain. See: Judgment, Par. 16. Even the annexations of Austria and Czechoslovakia were met with an appeasement policy by the Allies.

among civilized peoples, from the laws of humanity and the dictates of the public conscience."[43]

According to the original text of art. 6 (c) of the Charter of the Nuremberg tribunal, the following constitute crimes against humanity:

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Thus, it is possible to distinguish between crimes against humanity that can be committed by a country against its nationals ("[m]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war) and crimes against humanity that can only be committed in connection to the war ("persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal").

The Allies were unwilling to provide a legal basis for their own nationals' lawsuits. Thus, they agreed that "the Russian text [of art. 6 (c) of the Charter of the Nuremberg Military Tribunal in which a comma [instead of a semicolon] was placed after war was the right one . . . [so] crimes against humanity . . . could be tried only if they were perpetrated in the execution of or in connection with war crimes or crimes against peace. . . ."[44]

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[43] Adam Roberts and Richard Guelff, Eds., *Documents on the Laws of War,* 3rd Ed. (Oxford, England: Oxford University Press, 2000): 8-9.

The Martens clause appeared in the preamble to the Hague Convention II on land war and was incorporated to the 1949 Geneva Conventions. In ibid: 8.

[44] Kochavi, *Prelude to Nuremberg*: 166.

Nevertheless, the prosecution of crimes against humanity caused severe problems. For some, these crimes were not crimes prior to Nuremberg and as a consequence both tribunals went beyond the principle of legality to create new law.[45] Bassiouni agrees that the tribunals in their inception were illegal but are valid precedents for crimes committed after 1945.[46] Others, like Hans Kelsen, justify morally the retroactivity of crimes against humanity.

> Since the internationally illegal acts of which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.[47]

I agree with those scholars who affirm that such crimes existed prior to WW II because they include murder, torture,[48] and enslavement, which are penalized in most, if not all, the penal codes in the world, even those of the Axis countries. Moreover, the right of "a belligerent . . . to try and punish individuals for crimes which constitute violations . . . of the laws of humanity"[49] is based on conventional and customary law. Thus the judges' just gave further support to the legality of crimes against humanity.[50]

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[45] Minear compares the Charter to Nazi legality. Minear, *Victors' Justice*: 16.

[46] Bassiouni, *Crimes Against Humanity*: 146. This is unclear because if they are illegal from the start, they should be discarded.

[47] Excerpted from his article: "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? *International and Comparative Law Quarterly* 1 (1947) at 164. In Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals* (Oxford, England: Oxford University Press, 2000): 123-4.

[48] Included specifically in Council Law no. 10.

[49] George A. Finch, "The Nuremberg Trial and International Law," *American Journal of International Law* vol. 41, no. 1 (January 1947): 56.

[50] "[D]espite the faults of Nuremberg, one of its great contributions was in establishing that thereafter certain crimes … would be considered crimes against humanity under international law. . . . [A] novelty in international law, though it had certain antecedents." In Arieh Neier, letter, "The Nuremberg Precedent: Reply to Istvan Deak," *New York Review of Books* vol. 40, no. 18 (November 4, 1993).

Once there are allegations that a crime has been committed, which court has the jurisdiction to decide such case? Domestic courts usually base their jurisdiction on the principles of territoriality and nationality of the accused and/or the victim, and sometimes on the effects jurisdiction.[51] However, when confronted with crimes against humanity, domestic courts may reject prosecution. Since crimes against humanity are international crimes or "act[s] committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state,"[52] universal jurisdiction is needed to prosecute crimes against humanity.[53]

Due to its origin—universal jurisdiction was first established to prosecute the crime of piracy because pirates belonged to no country and acted on the high seas outside of the territorial jurisdiction of any country and later on it was applied to end the international crime of slavery—this type of jurisdiction is still controversial for some scholars and practitioners who consider it lacks legal standing and meaning as a result of the irrelevance of piracy. However, they forget the relevance of slavery and the positive precedent set in Nuremberg and the "subsequent trials."[54]

Benjamin Ferencz, "The Nuremberg Precedent and the Prosecution of State-Sponsored Mass Murder," *New York Law School Journal of International and Comparative Law* vol. 11, no. 3 (1990).

[51] On different types of jurisdiction used by courts, see: Above, Ch. I, Sec. A.5.

[52] Quincy Wright, "The Law of the Nuremberg Trial," *American Journal of International Law* vol. 41, no. 1 (January 1947): 38-72.

[53] For a brief list of such crimes, see: Woetzel, *The Nuremberg Trial in International Law*: 65-6.

[54] Benjamin B. Ferencz, "A Nuremberg Prosecutor's Response to Henry Kissinger," (The Nuclear Age Peace Foundation Website), http://www.wagingpeace.org (Accessed: June 3, 2003).

b. Respect for Fair Trial Formalities: Impartiality of Judges and Prosecutors, *In Dubio Pro* Reo, Presumption of Innocence and the Right to Be Represented by a Lawyer, and Evidentiary Rules

In order to assess the fairness of Nuremberg and Tokyo, this section focuses on how the court officials behaved. Did the judges and prosecutors act with impartiality? Did they interpret the rules of their respective charters according to the principle *in dubio pro reo,*[55] a general principle of law that directs judges, in cases of doubt, to interpret the rules in favor of the accused? Were the presumption of innocence and the right to a lawyer respected? And finally, what were the relevant evidentiary rules?

Since the judges in Nuremberg behaved professionally—as stated even by German scholars—[56]the fact that none of them was German did not affect the evenness in applying the rules. In comparison, the judges in Tokyo fared poorly,[57] which justifies the request in favor of naming judges from other nationalities, including those of the prosecuted, at least to avoid the perception of a biased judiciary.

Nevertheless, what I perceive as a more relevant problem is the presence of drafters of the Nuremberg Military Tribunal as judges—Major General I. T. Nikitchenko

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[55] This term does not translate well into English but is related to the U.S. notion that one must be proven guilty "beyond a reasonable doubt."

> The principle '*in dubio pro reo*' comes in as part of the 'careful weighing.' The often misconceived concept of 'in dubio pro reo' is explained by the BGH: it is not an evidence-rule but a principle pertaining to the decision-making. . . . It comes into play after the weighing of evidence has taken place. If at that stage, the judge is not fully convinced of a fact that is relevant for the decision, he has to presume the fact that has the least impact on the accused. . . . The in dubio-principle is therefore not applicable to isolated elements of the evidence, but only after the evidence has been scrutinised in its entirety.

In Christoph Safferling, "Terror and Law–Is the German Legal System Able to Deal with Terrorism?–The Bundesgerichtshof (Federal Court of Justice) Decision in the Case against El Mossadeq," *German Law Journal* vol. 5, no. 5 (HTML-Offprint from: May 1, 2004), http://www.germanlawjournal.com/print.php?id=428 (Accessed: April 25, 2007).

[56] Th. Klefisch, "Thoughts about Purport and Effect of the Nuremberg Judgment," in *Nuremberg: German Views of the War Trials*, Eds., Wilbourn E. Benton and Georg Grimm (Dallas, TX: Southern Methodist University Press, 1955): 202-3.

On naming judges from other nationalities, see: Above, Fn. 21.

[57] See: Below, Sec. 3.b.ii.

(Soviet member) and Robert Falco (French alternate)—and as prosecutors—Justice Robert H. Jackson (U.S. Chief of Counsel) and Sir David Maxwell Fyfe (British Deputy Chief Prosecutor). Although the last case seems less important, it provides a firm ground to attack the trial's legitimacy because Jackson and Fyfe could have redacted the rules to provide a more advantageous position to the prosecution or at least their prior knowledge of the rules meant that the defense lacked a leveled playing field. The impossibility of challenging the judges compounded the problem.[58]

The Nuremberg judges applied correctly the principle of *in dubio pro reo* because whenever they considered there was insufficient evidence, the accused were declared not guilty—three out of all the indicted. For example, regarding Franz von Papen's culpability, the Court stated that "[the charges were] not established beyond a reasonable doubt . . . therefore the Tribunal cannot hold that he was party to . . . the planning of the aggressive wars."[59]

The respect for the presumption of innocence is clearer in Nuremberg than in Tokyo. Although some scholars consider that the judges and prosecutors of Nuremberg and of Tokyo were assuming the defendants' guilt,[60] this criticism is inappropriate if based solely on the fact that the Allies chose those defendants that were more likely to be

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[58] Art. 3 of the Charter of the Nuremberg International Military Tribunal.

[59] *The Judgment of Nuremberg, 1946:* 251.
Similarly, "[t]he case against Schacht . . . depends on the inference that [he] did . . . know of the Nazi aggressive plans . . . The Tribunal . . . comes to the conclusion that this necessary inference has not been established beyond a reasonable doubt" In ibid: 225. And Fritzsche, "subordinate to Dietrich, the Reich Press Chief" was found not guilty of war crimes and crimes against humanity because although "[he] . . . made strong statements . . . in his broadcasts . . . the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples." In ibid: 268.

[60] Minear, *Victors' Justice*: 18.

found guilty.[61] However opportunistic it may seem, the Allies acted correctly based on the abundant documentary evidence at their disposal. From the victims' perspective the careful selection of defendants was more positive than confronting a verdict of non guilty due to lack of proof.

Even though the judges in Nuremberg were awarded wide discretion to evaluate the evidence,[62] it is pertinent to remind the Tribunal's critics that the Allies did not fabricate the evidence but found in Germany abundant documents from the Nazi regime and that the judges heard the testimonies of the accusation and defense witnesses, [63] and of the expert commissions on the mental state of three defendants.[64]

Similarly, in Tokyo the judges were "not bound by technical rules . . . and [could] admit any evidence which [they] deem[ed] . . . to have probative value."[65] But in Tokyo the degree of discretion was greater than in Nuremberg because "[a] document . . . without proof of its issuance or signature" was acceptable.[66] This was a significant difference because the evidence in Tokyo was inferior in quality and quantity to Nuremberg's. Moreover, direct witness testimony in Tokyo was difficult "due to the

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[61] See: Above, Fn. 25.

[62] Charter of the Nuremberg IMT, art. 19. See also: Art. 21.

[63] See: Woetzel, *The Nuremberg Trial in International Law*: 2. He reports that the trial had "403 open sessions. Thirty-three witnesses . . . for the prosecutors who . . . put in evidence over 4,000 documents [,] . . . sixty-one witnesses for the defence in addition to defendants, and 143 witnesses gave evidence."

[64] As a result Krupp von Bohlen was deemed unfit for trial but not Hess or Streicher. See: Wright, *The Law of the Nuremberg Trial*: 52 and Fn. 48.

[65] Art. 13 (a) of the Charter of the IMTFE.

[66] Art. 13 (c) 1 of ibid.

impossibility of simultaneous translation, [thus] affidavits prepared—with help from the prosecution—were accepted in place of courtroom witness testimony."[67]

3. NUREMBERG AND TOKYO AS VALID PRECEDENTS FOR THE JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW: SPECIFIC CONTRIBUTIONS

Each of the two international tribunals produced positive innovations but also had shortcomings regarding the protection of human rights; both relevant as precedents. As a result, this subsection is divided into two parts. First, as seen in the previous subsection, the trials provided certain procedural safeguards for the defendants and also legality to principles already present in international law,[68] of which I focus on the "creation" of crimes against humanity and on the procedural safeguards in favor of the defendant. And second, the main drawbacks of the trials, i.e., the demand for a war nexus and diminished procedural safeguards for the accused due to lack of professionalism and racism.

a. Nuremberg: Contributions and Shortcomings Relevant to Human Rights Protection

The trial, limited to the main one, took place from 20 November 1945 to 1 October 1946 against twenty-two defendants; of which one, Bormann, was tried in *absentia*. Although human rights are not named *per se* in the charter that created the tribunal, there is a direct connection to them, i.e., crimes against humanity, which constitute gross violations of human rights.[69]

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[67] Joshua D. Franklin, "The International Military Tribunals: An Overview and Assessment," Honors Thesis, Carl Goodson Honors Program Ouachita Baptist University (Arkadelphia, AR: April 15, 2001).

[68] Such as the establishment of individual guilt, superior orders as a reason to mitigate punishment, acts of state not a defense, head of state immunity annulled, and universal jurisdiction.

[69] War crimes and crimes against the peace are part of humanitarian law which distinguishes between combatants and non-combatants and are beyond the focus of the dissertation.

The trial has two main contributions to human rights protection.[70] First, it "created" crimes against humanity[71] by giving them specific content for the first time. Previously they had existed only in the abstract. Such category of crimes "embrace[d] the murder, torture, and persecution of minority groups, such as Jews, inside Germany both before and after the outbreak of war."[72] Although the prosecution underlined the crimes against the Jewish people, this is not so clearly reflected in the final judgment.[73]

Crimes against humanity appeared as count four of the indictment and the prosecutors in charge of them were the French and the Russians.[74] "The reference to 'crimes against humanity' . . . was more of an innovation. It reflected the prosecutors' need to adapt the war-crimes concept to conditions of total conflict in which barbarism had become systematized on a scale previously unimagined."[75]

Second, the Nuremberg trial respected the procedural safeguards in favor of the accused. Thus, the judges not only acquitted Hjalmar Schacht, Franz von Papen, and Hans Fritzsche overcoming Russian opposition[76] but also decided against declaring the

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[70] Setting the historical record straight is accessory for implementation but it was one of the goals of the process. As Telford Taylor stated, 'We cannot here make history over again. But we can see that it is written true.' [As quoted in Robert E. Conot, *Justice at Nuremberg* (New York, NY: Harper and Row, 1983): xii-xiii. This reference and quote appears in the following webpage: The Nizkor Group, "The International Military Tribunal Nuremberg," http://www.nizkor.org/hweb/imt (Accessed: June 3, 2003)].

[71] Term used by Ben Ferencz, one of the prosecutors. In Ferencz, "The Nuremberg Precedent."

[72] Wyzanski, Jr., "Nuremberg: A Fair Trial?": 66-70. This piece considers Nuremberg a dangerous precedent because its strict formal safeguards are deceitful. For him it was not a true trial.

[73] But it is in the Eichmann trial. "[T]he 'crime against the Jewish People . . . is nothing but the gravest type of 'crime against humanity.'" In Judgment, http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-058.html (Accessed: December 4, 2003): Par. 26.

[74] Michael Biddiss, "Victors' Justice? The Nuremberg Trial," *History Today* vol. 45, no. 5 (May 1995).

[75] Ibid.

[76] See: Dissenting Opinion of Major General Jurisprudence, I.T. Nikitchenko (Soviet member).

Reich Cabinet, the General Staff and High Command as criminal organizations.[77] In addition, the Nuremberg judges were very strict with the type of evidence they used. Moreover, the documents were translated into English, French and Russian; and interpreters were available for the defendants, the prosecutors, and the judges.[78]

However, the Nuremberg trial presented two main shortcomings. First, since the judges established in the final judgment the need for a war nexus in connection with crimes against humanity, it limited the scope of the prosecutions and thus affected the rights of the victims:

> The policy of persecution, repression, and murder of civilians in Germany before the war of 1939 . . . was most ruthlessly carried out. [Including] [t]he persecution of Jews . . . To constitute Crimes against Humanity, **the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal**. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime . . . but from the beginning of the war in 1939 War Crimes were committed on a vast scale . . . ; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.[79] [Emphasis added].

The consequence of the war nexus requirement was that crimes against humanity committed before the invasion of Poland were not prosecuted because "it had not been satisfactorily proved that they were done in execution of, or in connection with, any such

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[77] Criminal organizations are beyond the scope of the dissertation.

[78] In Tokyo there was a clear lack of means to cope with the difficulty of translating the documents and providing interpretation into more languages, including Chinese, than in Nuremberg. Moreover, the defense had access to a lesser number of documents than the prosecution did. In addition, the quantity and quality of the documents were lower than in Nuremberg because the Japanese were more efficient in destroying them.

[79] *Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945 – 1 October 1946,* 42 vols. (Nuremberg: Germany: [s.n.], 1947-1949): vol. XXII, 498.

crime [aggression or war crimes]."[80] It is important to underline that the judges were not bound by the Charter of the Nuremberg Tribunal to come up with this limitation;[81] the ICTR and the ICTY have already dismissed the war nexus.[82]

What I consider a shortcoming, others perceive as a sign of the judges' respect for the principle of *in dubio pro reo*. "[T]he Tribunal might have found that some of the acts before that date [Sep. 1, 1939] were war crimes or crimes against humanity. . . . Its refusal . . . seems to have manifested its prevailing disposition to give the defendants the benefit of any doubt."[83]

Second, Nuremberg was not a typical court in which the judges and prosecutors were proficient in the same doctrine of law but there were disparate legal backgrounds in action, i.e., common law, French and Russian. Moreover, although the common law and the French systems were/are similar in their respect for the rule of law, the Soviet one[84] was more comfortable with summary executions than with the guarantees of a fair trial.

Since mastering the intricacies of one legal system is already a daunting task, it is clear that the defense was at a disadvantage when confronting the different legal systems. For example, crimes against humanity were in the hands of the French and the Soviet

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[80] *Trial of the Major War Criminals before the International Military Tribunal*: Vol. XXII, 498.

[81] "It is not clear from the reasoning of the Tribunal, in view of its previous holding that it was bound by the Charter as the law of the case, why it felt free to disregard the express terms of the Charter on this particular definition." See: George A. Finch, "The Nuremberg Trial and International Law": 23.

Council Law no. 10 applicable to the "subsequent trials" does not mention the need for a war nexus (See: Art. II (c), describing crimes against humanity). For further comments on the differences between the Nuremberg Charter and Council Law no. 10, see: Bassiouni, *Crimes Against Humanity*: 35.

[82] In Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecution v. Dusko Tadic,* Case No. IT-94-1-AR72, 2 October 1995: Par. 141.

[83] Quincy Wright, "The Law of the Nuremberg Trial": 62.

[84] William E. Butler, Ed., *Russian Law: Historical and Political Perspectives* (Leyden, Holland: A. W. Sijthoff, 1977).

prosecutors. Although all international tribunals are going to be composed by judges coming from different systems, they usually have time to work together on the ground rules. However, this was not what happened in Nuremberg.

b. Tokyo: Contributions and Shortcomings Relevant to Human Rights Protection

The analysis focuses on the judicial phase of the Tokyo trial which took place from 3 May 1946 to 6 April 1948 against twenty-eight defendants. Notwithstanding the Nuremberg precedent, looser standards meant that all the defendants prosecuted before the Tokyo Tribunal were declared guilty of the charges against them.[85] Although it has a relevant contribution, the focus is on its central shortcomings.

The main contribution of Tokyo to the protection of human rights is that it had judges from eleven different countries affected by Japan's actions during World War II. Due to this variety in the composition of the bench, it can be seen as a precursor of the ICC. However, this wide representation had also negative implications because it complicated the process in excess and made it more expensive due to the need for translators and for interpreters into several languages. Nevertheless, it gave the defendants an access to different perspectives and this was shown in the dissenting judgments.

Tokyo's shortcomings are more significant than its contribution to the protection of human rights. First, the judges were too lax in the application of the principle of command responsibility. It followed a different criterion to declare guilt from the one used in Nuremberg and it could be considered less objective. Since the judges in Tokyo

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[85] Joseph Berry Keenan and Brendan Francis Brown, *Crimes against International Law* (Washington DC: Public Affairs Press, 1950). The appeal to General Mac Arthur's authority is beyond the scope of the dissertation. In addition, the U.S. Supreme Court rejected an appeal of Mac Arthur's decision.

were applying criminal law, discretion[86] can be synonymous of lack of guarantee for the defendants. "The prosecution case for Crimes Against Humanity . . . was based largely on the failure of the accused to properly restrain [other actors] . . . [A] dubious application of . . . command responsibility . . . [that] remains controversial."[87]

This laxness makes more evident the unfairness of not prosecuting the Emperor. Although it is true that following orders does not excuse the behavior of the accused, it could have been used to mitigate the punishment awarded. That is why I disagree with Comyns-Carr's opinion, who stated: "I find it difficult to understand how under the circumstances [nobody accused the Emperor to exculpate themselves] the Emperor's absence from the dock can have any bearing upon the cases of those who were there."[88]

Second, the judges were characterized by their partiality, which affected the verdict. Since according to the Tokyo Charter unanimity among the judges was not a requirement to impose the death penalty and the other severe penalties, the trial's inadequacies are compounded. The requirement of unanimity would have meant that Radhabinod M. Pal's dissent[89] or that of Bernard B.A. Röling would have precluded any execution of the defendants.

Richard Minear's depiction of the trial presents anecdotal evidence of the lack of professionalism of several judges. According to Minear the Russian judge could not

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[86] Art. 7 of the Charter, "The Tribunal may draft and amend rules of procedure." And art. 13 (a), "The Tribunal [is] . . . not . . . bound by technical rules of evidence," in the admission of copies of copies.

[87] Franklin, *The International Military Tribunals: An Overview and Assessment*: 4.

[88] A.S. Comyns-Carr, "The Tokyo War Crimes Trial," *Far Eastern Survey* vol. 18, no. 10 (18 May 1949): 111.

[89] Radhabinod Pal, "In Defense of Japan's Case 1 & Case 2," vols. 1 & 2 [Edited and Annotated by Akira Nakamur, Prof. of Kokkyou University, Japan], http://hompage3.nifty.com/kadzuwo/history/Hall-content.htm (Accessed: October 21, 2004). It contains excerpts from Pal's lengthy dissenting opinion.

understand the official languages of the tribunal, John Higgins' long absences showed lack of interest, and Delfín Jaramillo was a survivor of the Bataan Death March. Since they did not care to hear the arguments, it is logical to conclude that they had already made up their minds to condemn the defendants regardless of the evidence. Although none of them stepped down, I am persuaded that they should have been removed.[90]

Third, the perception of prevalent racism in the tribunal is relevant. It seemed as if colonial powers were prosecuting what was deemed to be an inferior race. This view is reinforced by how the accused were treated with less deference than their counterparts in Nuremberg. For example, a majority of seven out of the eleven judges was enough to condemn the accused. Racism has not been an issue, as a rule, in the recent case studies I analyze in chapters III-VI.

In addition, the trial showed discrimination based on sex, linked to race, because it did not prosecute crimes committed against the so-called comfort women.[91] This is a very significant shortcoming due to the high numbers of women affected. The U.S. and the rest of the Allied Nations had the opportunity to prosecute the Japanese who were subjected to American occupation but accountability for the forced prostitution, rape, torture, and killing of hundreds of thousands of women was not among the victors' interests.

Since the bulk of the women affected were non-European and the few Western women abused had been somewhat compensated, the decision not to prosecute those

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[90] For support in favor of this position, see: Minear, *Victors' Justice.*

[91] Shreyas Jayasimha, "Victor's Justice, Crime of Silence and the Burden of Listening: Judgement of the Tokyo Tribunal 1948, Women's International War Crimes Tribunal 2000 and Beyond," *Law, Social Justice and Global Development* no. 2 (2001), http://wlj.warwick.ac.uk/global/issue/2001-1/jayasimha.html (Accessed: October 17, 2004).

responsible can be characterized as racist. Although there was sufficient data available on the type and number of victims, no effort was made to secure the evidence against the perpetrators.[92] In recent years survivors from these atrocities are trying to find justice via compensation but they have to confront Japan's denial of the facts and thus of its responsibility.[93]

B. CONTRIBUTIONS OF THE INTERNATIONAL LEVEL TO THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

This section summarizes the relevant lessons that Nuremberg and Tokyo have taught us in relation to the judicial implementation of human rights. First, Nuremberg is significant on what to foster, i.e., the principles of fair trial, individual responsibility and universal jurisdiction. Second, Tokyo is relevant on what to avoid, i.e., mainly unfairness toward the defendants and toward the victims. And third, conclusions on the valuable precedent set by the two tribunals.

1. NUREMBERG AND LESSONS ON WHAT TO DO: FAIR TRIAL, AND ESTABLISHMENT OF INDIVIDUAL RESPONSIBILITY AND UNIVERSAL JURISDICTION

It is my contention that Nuremberg cannot be accused of being a "sham" trial. Thus, it set valuable principles that can be applied throughout time. Nuremberg as a

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[92] Bonnie B. C. Oh, "The Japanese Imperial System and the Korean 'Comfort Women' of World War II," in *Legacies of the Comfort Women of World War* II, Eds., Margaret Stetz and Bonnie B. C. Oh (Armonk, NY: M. E. Sharpe, 2001): 13-4.

[93] "Women's rights activists in the Philippines and a group of lawmakers in South Korea also denounced the remarks by Japanese Prime Minister Shinzo Abe . . . that there was no proof that 'comfort women' were forced into prostitution during the war." In Carl Freire, "In Asia, Fury Grows Over Sex Slave Scoff: Japanese Premier Told to 'Face the Truth,'" *The Chicago Tribune* (4 March 2007).

For a summary of the rules of international law violated by the establishment and operation of comfort women stations, including the breach of the 1921 Convention for the Suppression of the Traffic of Women and Children ratified by Japan in 1925, see: John Y. Lee, "Placing Japanese War Criminals on the U.S. Justice Department's 'Watch List' of 3 December 1996: The Legal and Political Background," in *Legacies of the Comfort Women of World War* II, Eds., Margaret Stetz and Bonnie B. C. Oh, ibid: 154-6.

precedent has been used by non-military courts since at least the 1960s, including the Israeli court cases against Eichmann and Demjanjuk, the ICTY and the ICTR, and the courts examined in the following chapters of the dissertation. The most valuable lessons include respecting the principles of fair trial by professional judges, underlining individual responsibility, and using universal jurisdiction for the prosecution of crimes against humanity.[94]

Defendants before the Nuremberg court were granted a fair trial. Notwithstanding the amount of evidence, the judges—with the exception of the Soviet representative—proceeded as if the accused were innocent. As a consequence, the prosecution had to produce evidence pertinent to each individual defendant. In addition, the accused had proper counsel and state-of-the art translation and interpretation services.

> From the microphones at the lawyers' lectern, the witness box, and the judges' bench, wires ran to the central interpreters' booth. Whatever was said on an incoming line was instantaneously translated into the other languages by wonderfully skilled interpreters. The interpretations then went out to every chair in the courtroom by other telephonic wires, to be picked up through headphones for which a switch was provided to enable the listener to select the preferred language.[95]

Thus, the language barrier was mostly overcome by a complex system.

Moreover, even though there were prior proposals to exact individual responsibility, Nuremberg is the first time in which individuals were prosecuted for international crimes. Traditionally, domestic courts tried individual soldiers for violating domestic law but, in general, responsibility rested with the state. Intimately related to the establishment of individual responsibility is stating that following orders is no excuse but

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[94] Geoffrey Best, "Justice, International Relations and Human Rights," *International Affairs* vol. 71, no. 4 (1995): 783. Best says its value is context-related but I disagree because of the principles it established.

[95] Harris, *Tyranny on Trial*: 27.

under certain circumstances can mitigate punishment. Thus, the establishment of command responsibility—underlined in Tokyo and common nowadays—is also relevant.

In addition, although crimes against humanity as aforementioned were of secondary importance, Nuremberg used universal jurisdiction to prosecute them effectively for the first time because the attempt to prosecute the Turkish for the 1915 genocide against the Armenians was a failure.[96] Notwithstanding the trials held before an Ottoman court-martial and guilty verdict against two officials based on "facts [that] are against humanity and civilization," Britain's priorities in freeing British soldiers and civilians held captive in Turkey meant that "forty-three Turks [held in custody] . . . accused of Armenian massacres . . . went free."[97] Since the jurisdiction of international tribunals is always universal, Nuremberg, and then Tokyo, legitimized the use of universal jurisdiction to exact individual criminal responsibility. Finally, the Nuremberg trial amassed relevant evidence of the atrocities committed in different parts of Europe. For example, the evidence relative to "medical experiments" under Nazism[98] is relevant to the torture cases that I will examine in chapters III and V.

2. TOKYO AND LESSONS ON WHAT TO AVOID: UNFAIRNESS

As aforementioned, since Nuremberg's drawbacks are of a lesser degree than those affecting Tokyo, Tokyo is especially useful on what not to do. Tokyo shows that implementation of human rights should avoid basically the following: granting immunity to the leaders who ordered or at least consented to the atrocities, relaxing the principles of a fair trial, and using biased standards to select which crimes to prosecute.

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[96] See: Above, Fn. 2 and more specifically Bass, *Stay the Hand of* Vengeance: 112-46.

[97] Bass, *Stay the Hand of Vengeance*: 143.

[98] Harris, *Tyranny on* Trial: 423-42.

Taking into account Emperor Hirohito's central role in the atrocities committed by the Japanese during World War II and prior to it, his absence from the docket is a big blow to judicial implementation. It attacks the principle of equality in applying the law because underlings were prosecuted for following orders emanating from a leader who was granted immunity. More recent efforts of judicial implementation have avoided this pitfall which shows disrespect for the rule of law. Instead of following Tokyo, current efforts for judicial implementation of human rights have followed the Nuremberg trial as a model. Thus, the highest ranking members of the civilian and military leadership are indicted and whenever possible prosecuted and convicted. The most famous examples are those of Milosevic and Pinochet, both deceased now.

In addition, a proper judicial implementation of human rights entails respect to the right of the defendant to a fair trial. Whenever this right is violated the process is tainting the implementation of human rights. As a rule the defendants in Nuremberg had a fair trial but not so in Tokyo, where the presumption of innocence suffered due to biased judges and instances of limited professionalism. In Tokyo, the defendants had to prepare their case for judges coming from eleven different legal systems; to confront unjust standards of proof as in the Yamashita case;[99] and to be subjected to biased judges who perceived the Japanese as an alien race,[100] had suffered at the hands of the Japanese or had partial information due to improper translation and did not recuse themselves.[101]

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[99] No guarantees for the accused. See: Gary Solis, "Atrocities Conference: Panel 2."

[100] See: Pal, "In Defense of Japan."

[101] See: Above, Sec. A.3.b.

Finally, the Charter of the IMTFE recognized that,

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
> (d) *Crimes against Humanity:* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.[102]

However, during the trial there was no mention of crimes against humanity relative to the comfort women who were murdered, enslaved, deported and subjected to other inhumane acts, including torture;[103] a limitation linked to discrimination as most of the women were Asian and their suffering was considered insufficient to justify any type of prosecution.

3. CONCLUSIONS

Nuremberg and Tokyo prosecuted the most important among the accused and set the rules for future trials. Nuremberg spearheaded in 1946 a series of processes of judicial implementation that by means of domestic military tribunals lasted until the early 1950s. The decision of the different countries to end the domestic prosecution against the Nazis and the Japanese had to do with politics and it was not a direct consequence of the positive or negative aspects of the two international military tribunals.[104]

Since Nuremberg and Tokyo were meant as transitory, the accusations of being short-lived and limited to prosecute very few of those guilty are difficult to sustain.

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[102] Art. 5 of the Charter.

[103] Jayasimha, "Victor's Justice, Crime of Silence and the Burden of Listening."

[104] "By 1949 it was all over . . . [N]o more Nazi war crimes prosecutions anywhere in the Western World for over two decades. . . . The past was tucked away, and the moral comfort of the Nuremberg trials gave way to the amoral expediency of the cold war." In Rosalie Silberman Abella, "The Instructive Power of Outrage: Remembering Nuremberg," *McGill Law Journal* no. 46, no. 1 [Speech delivered as the Sharansky-Sakharov Lectureship in Human Rights at the opening of the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 27 January 1999)] (November 2000): 117.

Moreover, it is clear that the Allies believed that international and domestic efforts should be combined. Thus, international trials were reserved for cases in which domestic courts would prove inadequate to prosecute mainly because former leaders could instill either fear or support among the people of their respective countries. The bulk of the prosecution was left to the national level. For example,

> By March 1949 German courts had tried 2,180 defendants on this charge [crimes against humanity committed by Germans against other German nationals or stateless persons]. Of this total, 866 were acquitted, 4 were sentenced to death, 1,249 were sentenced to terms of imprisonment shorter than life, and 61 were fined . . . none of the four death sentences were ever carried out.[105]

C. THE DOMESTIC LEVEL: EICHMANN AND DEMJANJUK[106]

The use of the Nuremberg principles in cases prosecuted domestically in the aftermath of World War II can be explained as a direct effect of the war, i.e., an imposition by the winners of the war. Thus, cases prosecuted later on will be more helpful to examine the strength of such principles beyond mere use of force. To make possible a more objective evaluation, I chose two cases materially similar to Nuremberg, i.e., Eichmann and Demjanjuk.[107]

Although the Eichmann and Demjanjuk cases also have in common the physical availability of the accused to the Israeli judiciary, they differ in relevant ways relating to the manner in which the accused were brought to trial, the position of the indicted in the chain of command, and the punishment handed down to the accused. First, while

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[105] Kochavi, *Prelude to Nuremberg*: 168.

[106] Except for certain parts of the case against Demjanjuk in the U.S., the main decisions are in Hebrew. Thus, I am basing my comments on translations and other secondary sources.

[107] Both were accused of participating in Nazi-sponsored atrocities.

Eichmann's trial began illegally with his kidnapping,[108] Demjanjuk was prosecuted in Israel only after the U.S. granted his extradition.[109]

Second, the position they occupied in the chain of command is quite different too. Eichmann did not participate in the direct physical abuses and extermination of the Jews; he organized the transports and was an official. Demjanjuk was accused of being a guard in a concentration camp, thus he had physical contact with the victims. Third, the outcomes in Israel also differ. The Eichmann trial ended with his hanging after a plea for leniency was denied in appeals but Demjanjuk was declared not guilty in appeals.

This section is divided into four parts. The first one focuses on the legislation applicable in Israel; the second examines the Eichmann case through a brief description of the different stages of the process and its complexities and its positive and negative aspects from the perspective of implementation; the third part studies the Demjanjuk case with the same outline as the prior part; and the final one is an analysis of the main contributions of both cases to the implementation of human rights law.

1. LEGISLATION APPLICABLE IN ISRAEL

Israel became a state only on 14 May 1948. As a result, some scholars affirm its courts lacked jurisdiction to prosecute WW II related crimes which were committed before the date of its statehood. Nevertheless, since the cases analyzed constitute crimes against humanity, which grant any state the use of universal jurisdiction, Israeli courts have jurisdiction based on customary law and on its own domestic law.

In Israel the domestic law supersedes international law. Thus the two significant laws for the case studies examined—the 1950 Nazi and Nazi Collaborators Punishment

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[108] Argentina awarded ex post facto legality to the action of the state of Israel in the UN.

[109] Considered improper by the defense because Demjanjuk was a citizen of the United States.

Law, and the Israeli Penal Code—belong to the domestic level. The 1984 international Convention against Torture (CAT) is inapplicable to the Eichmann case—decided before the CAT was created—but it is tangentially referred to in the Demjanjuk case and will be the object of a more detailed study in the next two chapters of the dissertation.

a. Israel's 1950 Nazi and Nazi Collaborators Punishment Law[110]

Since Israel was created with the purpose of providing a home for all Jewish people, its main concern when prosecuting Nazi crimes is to obtain justice for the crimes committed against the Jewish people regardless of their nationality.[111] That is why the 1950 Nazi Punishment law establishes universal jurisdiction for these crimes and considers crimes against the Jewish people as more heinous than crimes against humanity.

Section 1 (a) of the law recognizes universal jurisdiction to prosecute those who:

> (1) Did, during the period of the Nazi regime, in a hostile country, [this can only mean Germany or territories under German control and also its allies] an act constituting a crime against the Jewish people; [their nationality is irrelevant].
> (2) Did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity; . . . [and] is liable to the death penalty.[112]

This law refers to cases that Israeli courts cannot prosecute according to more traditional jurisdictions. First, the crimes were committed outside Israel, which implies no territorial jurisdiction. Second, the accused were not Israeli nationals, thus there is no subject

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[110] 1950 Nazi Punishment Law or Nazi Punishment Law from now on.

[111] There is widespread agreement that more than six million Jews were killed in the Holocaust.

[112] The text of the law comes from: District Court of Jerusalem: Judgment, "The Attorney-General of the Government of Israel v. Eichmann: Criminal case no. 40/61. Mimeograph, unofficial translation prepared by the Israeli Government for the convenience of the public" (Dec. 11, 1961) as reproduced (excerpted) in Covey Oliver, "Judicial Decisions," *American Journal of International Law* vol. 56, no. 3 (July 1962): 805.

active jurisdiction. And, finally, the victims were nationals from other countries, which precludes subject passive jurisdiction. Thus, it asserts the use of universal jurisdiction.

Although international law subsumes crimes against the Jewish people into the category of crimes against humanity, Israeli law considers the first type as more heinous than crimes against humanity, as aforementioned. This different protection affects implementation negatively because it means that similar crimes against Gypsies, homosexuals, and other categories of people are considered of lesser status, which is contrary to the principle of non-discrimination established in the UDHR.[113] However, Israeli domestic law also showed a particular interest in defending the rights of the Jews when no other jurisdiction seemed to have any interest in prosecuting Nazis crimes.

b. Israeli Penal Code

The Penal Code, as the rest of the Israeli legislation, relies on common law principles due to its past as a British mandate. More specifically, Israel's criminal law used English law as a compulsory interpretative tool until 1972, which means that the Eichmann case was more constrained by such law than Demjanjuk's.[114] As a result, the Court used English law to justify not discussing the illegality of Eichmann's kidnapping and as the basis for Eichmann's trial,[115] which consisted of the following main sections:

> [I]ndictment, opening speech for the prosecution, evidence and cross-examination of the prosecution witnesses, opening speech of defence counsel, evidence and cross-examination of defence witnesses, including . . . that of the accused, the

[113] See: Articles 1 and 2 (equality) and 7 (equality before the law).

[114] Shlomo Guberman, "The Development of the Law in Israel: the First 50 Years," *Israel at Fifty* (MFA), http://www.israel.org/mfa/go.asp?MFAH00610 (Accessed: April 22, 2004).

[115] Only his presence there mattered. See: G.I.A.D. Draper, "The Eichmann Trial: a Judicial Precedent," *International Affairs* vol. 38, no. 4 (October 1962): 492-3.

> closing speeches of defence counsel and of the prosecution, and the judgement . . . The three trial judges were judges of fact and of the law.[116]

It is important to underline that, although "[t]he death penalty for murder was abolished in 1954"[117] in Israel, Eichmann and Demjanjuk were accused of a special category of crimes—crimes against humanity—to which the death penalty continued to be applicable.[118]

2. *ISRAEL V. ADOLF EICHMANN*

The Eichmann case is particularly relevant for two salient reasons. First, it "was the first occasion on which [the Jewish Holocaust, the international paradigm of crimes against humanity] had occupied the central place in the proceedings;"[119] a consequence of the aforementioned secondary importance of these crimes in Nuremberg and Tokyo.

Second, in the 1960s, the Eichmann case was one of the few criminal cases against Nazi crimes prosecuted at the domestic level, outside military tribunals. Thus, since Eichmann was prosecuted in an ordinary court, this case is a model of what to do or to avoid in future processes whose purpose is implementing human rights.[120] After a brief synopsis of the main phases of the prosecution, I will focus on its positive and negative aspects.

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[116] Draper, "The Eichmann Trial": 486.

[117] Guberman, "The Development of the Law in Israel."

[118] See: Above, Subsec. 1.a.ii. Section 1 (a) 2 of the Nazi Punishment Law.

[119] Lord Russell of Liverpool, Edw. F. L. R., *The Trial of Eichmann* (London, England: William Heinemann Ltd., 1962): 271; and Michael R. Marrus, "The Adolf Eichmann Trial, 25 years Later Israel Prosecuted the Nazi Mass Murderer 'to Let All the Nations of the World Know,'" *The Toronto Star* (25 April 1986): "Before . . . the word Holocaust was seldom used."

[120] Comité Internacional de la Cruz Roja (CICR), "El régimen de consentimiento del Estado contra la jurisdicción universal," http://www.icrc.org/Web/spa/sitespa0.nsf/ (Accessed: April 15, 2004).

a. Main Phases of the Prosecution[121]

The analysis of the central phases of the prosecution against Eichmann—how he was brought under the jurisdiction of Israeli courts, main characteristics of the process proper, judgment and appeals—shows that in some instances the requirements for a fair trial established by international law were followed—right to an attorney and to appeal unfavorable judgments—and in others there was a clear breach—kidnapping.[122] However, both respect and breach of the requirements are valuable as learning tools.

After the war, Eichmann, who was a Nazi SS Lieutenant Colonel and the Chief of the Jewish section of the Gestapo, adopted a new identity and established his residence in Argentina, a safe-haven for Nazis. A team working for the Mossad[123] was able to locate Eichmann and bring him to Israel.[124] Although during the trial Eichmann insisted that he left Argentina of his own free will, the circumstances under which he lived the week before reaching Israel—with his kidnappers—[125]necessarily influenced him because previously he never tried to surrender voluntarily to the authorities to pay for his crimes.

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[121] For a record of the proceedings, see: The Nizkor Project, "The Trial of Adolf Eichmann," http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts (Accessed: March 8, 2004).

[122] For a detailed examination of the legal issues raised by the kidnapping and Argentina's denounce before the Security Council, see: Helen Silving, "In Re Eichmann: A Dilemma of Law and Morality," *American Journal of International Law* vol. 55, no. 2 (April 1961): 307-58.

[123] Jean-Luc Renaudie, "Israel Loses Legendary Spy Who Captured Eichmann," *Agence France Presse* (February 19, 2003), http://www.web.lexis-nexis.com/universe/document? (Accessed: May 15, 2004).

[124] See: "The Trial of Adolph Eichmann," http://www.usd.edu/honors/HWB/1999/1999d/Eichmann.htm (Accessed: June 5, 2003).

[125] Clarín.com, "Murió el hombre que planificó el secuestro de Eichmann en Argentina," no. 2516 (February 19, 2003,), http://old.clarin.com/diario/2003/02/19/i-02601.htm (Accessed: April 15, 2004).

Once in Israel, the process against Eichmann followed the pre-established rules summarized in prior section 1.b.[126] The Court sentenced Eichmann to death after founding him guilty of crimes against the Jewish people,[127] crimes against humanity[128] and war crimes. The guilty verdict was based on the evidence that proved that Eichmann was in charge of organizing the rounding up and transportation of Jewish and other people to the concentration camps. Thus, he was the intellectual author of the crime but had no direct participation in the physical elimination of the victims.[129]

The Israeli system provided for the review of the guilty verdict, of which Eichmann's lawyer took advantage. He based the appeal of the judgment[130]on a variety of issues, reduced for the purpose of the dissertation to two relevant allegations, i.e., the judges were necessarily biased and Israeli courts lacked jurisdiction to decide the case. First, even though the defense recognized that "the Judges . . . made efforts to elevate themselves above any sentiment which would preclude an unbiased judgment of the facts of the case," it also considered that "there are psychological limits to such sincere efforts."[131] Second, the lack of jurisdiction was based on Eichmann's kidnapping,

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[126] Judgment, http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-058.html (Accessed: December 4, 2003): Pars. 213-31.

[127] Judgment, ibid: Par. 181

[128] Counts 5-12 of the indictment. In Judgment, ibid: Par. 181. On appeals Dr. Sevatius considered the courts incompetent to decide cases involving crimes against non Jews (Appeals: Session 1).

[129] Barry Clarke, "The Banality of Evil," *British Journal of Political Science* vol. 10, no. 4 (October 1980): 418.

[130] For the complete text in English, see: The Nizkor Project, "The Trial of Adolf Eichmann: Judgment," http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-001.h ... (Accessed: March 8, 2004).

[131] The Nizkor Project, "The Trial of Adolf Eichmann: Written Pleadings Submitted by Counsel for the Appellant Adolf Eichmann on January 31, 1962," http://www.nizkor.org/hweb/people /e/eichmann-adolf/transcripts/Appeal/Appeal-Pleading-0 ... (Accessed: March 8, 2004).

charges based on ex post facto law, the superseding value of the domestic law, acts of state doctrine, and Eichmann's status as a follower of orders.

b. Positive Aspects of the Case

From the perspective of the implementation of human rights, the Eichmann case is important because it provides a precedent for the use of the principle of universal jurisdiction, it mostly respected fair trial requirements and it confirmed significant aspects of the Nuremberg principles, i.e., the doctrine of acts of state, following orders can only act as a mitigation factor, and individual responsibility.

First, Israeli courts had jurisdiction, as did the "subsequent trials," because Eichmann was accused of crimes against humanity whose victims were Jewish.[132] Since the acts prosecuted occurred outside Israel, Arendt's contention that Israel's jurisdiction was basically territorial is false. Israeli courts based their jurisdiction on two non-territorial principles: (1) subject passive jurisdiction broadly understood because they prosecuted crimes against the Jews, which regardless of their nationality are considered citizens of Israel. And (2) the universality principle, applicable whenever crimes against humanity are involved.[133]

Second, Israeli courts respected fair trial principles. Although Hebrew was the official language of the trial, Eichmann was provided with competent interpretation and in occasions was talked to directly in German so what he suffered could be classified as

[132] And Israel represented the Jews. See: Hannah Arendt, *Eichmann in Jerusalem*: *A Report on the Banality of Evil* (New York, NY: Viking Press, 1963): 239.

[133] Arendt, *Eichmann in Jerusalem*: 241.

inconvenience[134] but not unfairness. Although the defense and critics of the process suggested German courts as more adequate, Germany lacked the will to prosecute him.

Moreover, the accused was represented by a German-speaking lawyer, Dr. Sevatius, who was able to prepare the defense and the appeal. The defense lawyer had the opportunity to intervene in the process, to access available evidence, to examine the witnesses of the defense, and to cross-examine those of the prosecution. Of special relevance is the appeal of the guilty verdict against Eichmann because although it did not alter the verdict, it provided a chance to review the reasons for the verdict—and in occasions could mean its reversal. The Demjanjuk case showed it is the ultimate safeguard for the accused.

Third, this case confirmed the Nuremberg principles that affirmed that since acts of state and the defense of following orders—inadmissible in Nazi Germany too—[135]can only be used for mitigation of punishment, neither one excuses totally illegal behavior. The judges reminded Eichmann of rules, including international law and his own morality, compelling him to behave differently.[136] Sections 10 and 11 of Israel's 1950 Nazi Law allowed the judges to minimize punishment when the accused acted "in order to save himself from the danger of immediate death and to minimizing the 'consequences of the offense' and 'superior orders.'"[137] However, Eichmann's actions preclude the use

[134] National courts use territorial jurisdiction to prosecute "regular" crimes against foreigners who do not speak the court's official language. Are these trials unfair and therefore should they be discouraged?

[135] Russell of Liverpool, *The Trial of Eichmann*: 249; and Judgment, Par. 220 (2nd).

[136] In Eichmann's own words: 'I see in this murder, in the extermination of Jews, one of the gravest crimes in the history of mankind.' Judgment: Par. 221.

[137] Arendt, *Eichmann in Jerusalem*: 85. Mitigation was not applied to Eichmann.

of mitigation factors because as a decision-making official he could have opted for an alternative behavior as when he treated properly his stepmother's Jewish family.[138]

Although Eichmann tried to portray himself as a low level bureaucrat who only followed orders,[139] there are testimonies of central actors in Nuremberg[140] and the subsequent processes that show his importance. According to Dieter Wisliceny:

> Eichmann . . . was in charge of the solution to the Jewish problem in Germany and in all the countries it [Germany] occupied. . . .
>
> The second phase . . . was the concentration of all the Jews in ghettos . . . which lasted until the beginning of 1942 more or less . . . The third period is what was called the final solution to the Jewish problem, that is, the organized extermination and suppression of the[m].[141]

Eichmann was indirectly guilty of widespread torture. He gave orders to transport the Jewish people and thus, is responsible for the acts of those who transported the victims. He is responsible because he knew what was happening or could happen to individuals stripped of the condition of citizens, i.e., they had no rights as when "[SS members] searching the convoys for hidden valuables … tortured the occupants and beat them mercilessly."[142]

c. Negative Aspects of the Case

The relevant negative aspects specific to the Eichmann case are the perception of partiality on the part of the judges, the insufficient quality of the defense, and the

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[138] Judgment: Pars. 180 and 220 and Russell of Liverpool, *The Trial of Eichmann*: 250.

[139] For Eichmann his orders came from "the source from which the law sprang . . . [i.e.,] the will of the Führer." So, Eichmann considered his conduct legal. In Arendt, *Eichmann in Jerusalem*: 121-2.

[140] Ibid: 215.

[141] Henri Monneray, Ed., *La Persécution des Juifs dans les Pays de l'est présentée à Nuremberg* [Introduction by René Cassin and Préface by Telford Taylor] (Paris, France: Éditions du Centre 1949): 95.

[142] Russell of Liverpool, *The Trial of Eichmann*: 168.

excessive leeway granted to the prosecution's witnesses. All of them made worse because the presumption of innocence, a main hallmark of a fair trial, was sidestepped.[143]

First, district judges tried to be as impartial as possible and they even had "to defend the accused." [144] Nevertheless, there is a tint of partiality due to the ethnic/religious background of the judges—they were Jewish—and the forum in which Eichmann was judged—a Jewish state. Even misperception can affect the administration of justice. That is the reason why the ICC, in which pre-appointed judges from different countries guarantee a more neutral forum for the accused, is necessary. In addition, the ICC could be used as a court of last resort for the protection of the defendant's rights.

Second, the defense lawyer, paid in part by the government of Israel, complained of insufficient pay,[145] which had to affect the quality of the defense. A high profile case in which the prosecutor has access to the full backing of the state demands a full-fledged defense. Eichmann needed a lawyer willing to take an extra step to wade through the abundant documentary evidence available to the prosecution;[146] to force the Court to halt the repetitious, never-ending testimonies of the witnesses for the prosecution; and to persuade the Court in appeals to be lenient with the accused.

Third, the witnesses for the prosecution were granted too much leeway because they "could talk almost as long as they wished, and it was a rare occasion when they were

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[143] Arendt, *Eichmann in Jerusalem*: 191: "If he had not been found guilty before he appeared in Jerusalem . . . the Israelis would never had dared, or wanted, to kidnap him."

[144] Ibid*:* 193. In general, ibid: 90-193. And Draper, *The Eichmann Trial*: 491 and 493, who underlines their objectivity and professionalism.

[145] Arendt, *Eichmann in Jerusalem*: 202.

[146] Ibid: 130, 222 and 226.

asked a specific question,"[147] which gave the trial an air of a truth commission[148] or a forum where the victims mainly expressed their feelings toward the heinous crimes of the Nazis. Although a relevant part of a process is establishing facts, it has to respect the rights of the accused too, i.e., the truth sought must be linked directly to specific crimes and to the degree of responsibility of those accused. In addition, some of the witnesses the defense needed were unavailable.[149] As a result, the concrete crimes of the accused seemed irrelevant. Thus, the case shows the importance of following due process requirements including the presumption of innocence and balancing existing evidence. Otherwise, the result is preordained, justice will be lost and the trial becomes a sham.

3. PROCESS AGAINST JOHN DEMJANJUK[150]

The Demjanjuk case is useful to study the judicial implementation of human rights because it shows that the interest in prosecuting crimes committed by the Nazis subsisted more than three decades after World War II ended. Such lapse of time guaranteed a more objective approach to accountability and could explain the different end result in Eichmann and Demjanjuk.

Demjanjuk's right to a fair trial has been respected as we will see in this subsection, divided into first, the steps taken in the U.S. to extradite the accused to Israel. Second, the process in Israel. Third, the administrative processes in the U.S. to restore and revoke again his citizenship, and the latest developments according to which he can

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[147] Arendt, *Eichmann in Jerusalem*: 107 and, in general, Ch. XIV.

[148] Ibid: 191.

[149] Ibid: 114.

[150] Much more complicated than Eichmann's because of the different processes in U.S. and Israeli courts and new ones started after 1999. For a brief account, see: "The Demjanjuk Case: Factual and Legal Details," (July 28, 1993), http://www.israel.org/mfa/go/asp? MFAH0azi0 (Accessed: April 15, 2004).

be extradited to stand trial outside the US. And finally, the main legal issues beyond those of extradition.

a. Beginning of the Process in the United States: Loss of Citizenship and Extradition to Israel

John Demjanjuk, born in Ukraine, entered the United States in 1952 and in 1958 he had become an American citizen.[151] But in the mid 1970s his name appeared in "a list of . . . alleged Nazi war criminals . . . circulated amongst members of the US senate."[152] Instead of starting a process against Demjanjuk based on crimes against humanity and war crimes—and to avoid appearing as a safe-haven for Nazi criminals—[153]the U.S. contacted the Israeli government for extradition talks.

Thus, the U.S. government followed the legal procedure to extradite a naturalized American citizen,[154] i.e., revoking Demjanjuk's his citizenship. "The complaint for denaturalization was filed in August 1977. . . . A trial was held in February 1981. On June 23, 1981, Chief Judge Battisti entered a judgment of denaturalization."[155] His citizenship was revoked in 1982; a decision "the Court of Appeals unanimously confirmed."[156]

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[151] See: Monroe Leigh, "Judicial Decisions: Demjanjuk v. Petrovsky. 776 F. 2d 571," *American Journal of International Law* vol. 80, no. 3 (July, 1986): 656.

[152] "The Holocaust Reviewed: Part Six: the Theater of Lies – The Demjanjuk case," http://www. white-history.com/demjanjuk.htm (Accessed: November 22, 2003).

[153] Argentina was perceived as one. Not so the U.S. whose "authorities have deported or revoked the citizenships of more than 60 people, and are investigating more than 160 others." In Dean Schabner, "No Place to Hide: U.S. Still Focused on Tracking Suspected Former Nazis," *ABC News* (New York, 15 May 2002), http://printerfriendly.abcnews.c.../Print? (Accessed: December 2, 2003).

[154] In re Extraditon of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985).

[155] United States of America vs. John Demjanjuk, in http://www.ukar.org/matia01.shtml (Accessed: November 22, 2003): Fn. 2. *United States v. Demjanjuk*, 518 F. Supp 1362 (N.D. Ohio 1981).

[156] Leigh, "Judicial Decisions: Demjanjuk v. Petrovsky": 656-8.

b. Case in Israel: Demjanjuk's Release on Appeals

Demjanjuk was "deported to Israel in 1986."[157] The Israeli prosecution based its case on an identification card with Demjanjuk's name which later on was proven to be a forgery. The witnesses of the prosecution mistakenly identified Demjanjuk with "Ivan the Terrible," a guard at several concentration camps known for his brutality. As a result, Demjanjuk's defense basically denied that Demjanjuk was "Ivan the Terrible." After hearing the testimony of witnesses and analyzing other evidence, "the Israeli District Court found Demjanjuk guilty on . . . April 18, 1988, and a week later, sentenced him to death for the only crime in Israel which carries the death penalty–being a Nazi."[158]

The guilty verdict was appealed. Such appeals process before the Israeli Supreme Court is a clear example of how to provide a fair trial. Thus, the principles applied could be followed nowadays. The defense not only presented the appeal during 10 sessions but had three more added to end the appeals. The prosecution had twelve sessions. Moreover, the arguments of the defense were the last to be heard, which is important because these arguments are fresher in the minds of the justices.[159]

In addition, the Attorney-general provided evidence that helped the defense, i.e., during the appeals, the Soviet authorities recognized that "the Trawniki certificate had been forged. . . ."[160] Due to that doubt, "the Israeli Supreme Court . . . acquitted him in

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[157] "The Holocaust Reviewed: Part Six."

[158] Ibid.

[159] See: The Nizkor Project. "The Demjanjuk Case: The Appeal – Stage I, 1988-1990," http://www.nizkor.org/hweb/people/d/demjanjuk-john/israeli-data/demjanjuk-s1-4.html (Accessed: December 4, 2003): Par. 3, B.

[160] "The Holocaust Reviewed: Part Six." There were doubts relating to his identity, see: "The Legal Perils of Nazi Hunting," *US News & World Report* vol. 115, no. 6 (9 August 1993), http://www.web4.epnet.com/citation.asp? (Accessed: April 15, 2004).

July 1993"[161] but still kept him eight weeks more in jail.[162] Finally, after a seven-year process, he was released on 22 September 1993.[163]

c. Epilogue? Citizenship Awarded and Revoked Again

The case against Demjanjuk did not end with his return to the U.S. but is still open. He recuperated his citizenship, only to see it taken away again. Moreover, pending the appeals process before the federal courts, Demjanjuk continues facing the possibility of extradition to several countries including Ukraine, where he was born.

After Israel discovered that Demjanjuk was not Ivan the Terrible, the reason to deprive him of the U.S. nationality disappeared. That is why, in 1993, the United States Court of Appeals for the Sixth circuit decided to "vacate the judgment of the district court and the judgment of this court in the extradition proceedings on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court."[164]

From the perspective of Demjanjuk's interests, the drawback of the court decision is that it granted "John Demjanjuk's motion to set aside the judgment of this Court dated June 23, 1981,"[165] but it did it without prejudice. Thus, the government may reopen the denaturalization process if they find it convenient. As a result, although Demjanjuk

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[161] "The Holocaust Reviewed: Part Six," ibid.

[162] Alfred de Zayas, "Demjanjuk: Examining his Human Rights Violations," *Human Rights: Journal of the Section of Individual Rights and Responsibilities* vol. 21, no. 1 (Winter 1994): 28-29.

[163] "The Holocaust Reviewed: Part Six."

[164] *Demjanjuk v. Petrovsky*, 10 F. 3 d 338, Sept. 3, 1993, argued; Nov. 17, 1993, decided and Nov. 17, 1993, filed, http://www.nizkor.org/hweb/people/d/demjanjuk-john/circuit-court/ (Accessed: December 4, 2003).

[165] *United States of America v. John Demjnajuk*, Case no. C77-923, http://www.ukar.org/matia01.shtml (Accessed: November 22, 2003).

recuperated his citizenship in February 1998, new information could mean—in practice it did—the beginning of a new process against him.[166]

In May 19, 1999 the U.S. government asked again for the revocation of Demjanjuk's citizenship[167] based on the aforementioned decision of the court that granted Demjanjuk's petition without prejudice. The decision of the court stated:

> The Court believes that simply vacating the judgment is not sufficient sanction in light of the magnitude of the offense. Doubt cast upon the fairness of one judicial proceeding infects the whole justice system. . . . The sanction for it must be appropriately severe. Yet, in fashioning a response, a court must be vigilant that it not allow unspeakable horrors to go unpunished in the name of preserving the abstract principle of justice. Just as the government should not be able to profit from its misbehavior, neither should a defendant be insulated from the consequences of his alleged moral turpitude because he becomes the inadvertent beneficiary of sanctions against the government.[168] [Emphasis added].

Although he was not "Ivan the Terrible," Demjanjuk's past had ties to the Nazis, which was a ground to revoke his American citizenship. Thus, in this second process of denaturalization, Chief Judge Paul R. Matia of the U.S. District Court for the Northern District of Ohio, used evidence relative to Demjanjuk's role as a guard in Sobibor, Majdanek and Flossenbürg to revoke on February 2002 his citizenship—obtained through fraud.[169] The revocation became final on April 30, 2004.[170]

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[166] In UCCLA, "Issues: Accusations of War Crimes Against Ukrainian Canadians, OSI Again Goes after Demjanjuk," *The Ukrainian News* (Reprinted Article, June 2, 1999), http://www.uccla.ca/issues /warcrimes/i_wrcrms_050.html (Accessed: December 2, 2003); and Schabner, "No Place to Hide."

[167] *United States of America v. John Demjanjuk*, Case no. C77-923, http://www.ukar.org/matia01.shtml (Accessed: November 22, 2003); and UCCLA, "OSI again Goes after Demjanjuk."

[168] *United States of America v. John Demjnajuk*, Case no. C77-92.

[169] Paul Singer, Associated Press, "Federal Judge Revokes Citizenship of Accused Nazi Guard," (21 February 2002), http://www.fortywayne.com/mld/journalgazette/2717763.htm (Accessed: December 2, 2003).

[170] In appeals. See: Department of Justice, "Former Nazi Guard John Demjanjuk is Ruled Removable from the United States" (Monday, June 20, 2005).

Once more the U.S. decided against prosecuting Demjanjuk and in favor of extraditing him, now to Ukraine. Confronted with this possibility, Demjanjuk's defense argued that he could be subjected to torture in his country of origin.[171] However, in December 28, 2005, Chief U.S. Immigration Judge Michael J. Creppy decided that Demjanjuk could be extradited without fear of prosecution or torture because "Ukraine has yet to prosecute . . . 'a single person as a Nazi war criminal'" and "Ukraine was 'engaged in a significant effort to . . . meet international human rights standards.'"[172]

d. Legal Issues

The most relevant legal issues are those related to extradition—double criminality—which guaranteed the extradition of Demjanjuk to Israel, and more recently the possibility of torture in Ukraine;[173] the problems caused by the witnesses for the prosecution; and the use of universal jurisdiction.

First, extradition was limited to the crime of murder. The U.S. Appeals court considered that "the principle of specialty does not impose any limitation on the particulars of the charge so long as it encompasses only the offence for which extradition was granted."[174] That is why there was double criminality. Murder is a crime in the United States and in Israel, despite the contention of the defense that "there is no

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[171] M. R. Kropko, Associated Press, "Judge Orders Demjanjuk Deported: Accused Nazi Guard Expected to Appeal Immigration Ruling," *The Beacon Journal* (29 December 2005), http://www.ohio.com /mld/ohio/news/13506396.htm?template (Accessed: January 12, 2006).

[172] Department of Justice, "Chief Immigration Judge Orders Former Nazi Guard John Demjanjuk Removed to Ukraine" (29 December 2005), http://www.usdoj.gov/opa/pr/2005/December/05_ crm_696.html (Accessed: January 12, 2006). And such decision has been upheld in December 2006.

[173] In Leigh, "Judicial Decisions": Par. 583.

[174] Jewish Virtual Library, "The Demjanjuk Appeal: Summary by Asher Felix Landau," (July 29, 1993), http://www.us-israel.org/jsource/Holocaust/Demjanuk3.html (Accessed: November 22, 2003).

separate, discrete crime for such acts [killing of Jewish people] in the US."[175] It does not matter the legal term used as long as the actions are the same, i.e., killing another human being.

With the opening of the new extradition process, Demjanjuk's psychological and/or physical integrity at the hands of the Ukrainian authorities is a significant legal issue. Since the U.S. has a constitutional mandate to abide by international law including the Convention Against Torture (CAT),[176] Demjanjuk cannot be extradited to a country which is suspected of practicing torture. Nevertheless, the Chief Immigration Judge concluded that Demjanjuk had nothing to fear due to his high profile.[177] In addition, Ukraine does not have outstanding torture cases pending before the ECtHR.[178]

Second, the evaluation of the evidence by the Israeli district court was problematic because they relied on witness' testimony, which regrettably were mistaken, i.e., they confused the accused with Ivan the Terrible. Such confusion was the result of the length of time that had passed since the violations happened and of the trauma the abuse caused to the survivors.[179] Nevertheless, the Israeli court system worked adequately to defend the rights of the accused. Even though Demjanjuk spent time in prison, the existence of the appeals process guaranteed a new chance to review the

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[175] Leigh, "Judicial Decisions": Par. 583.

[176] Art. 6 (2) of the U.S. Constitution.

[177] Department of Justice, "Chief Immigration Judge Orders Former Nazi Guard John Demjanjuk Removed to Ukraine" (29 December 2005).

[178] From the examination of the cases of the ECtHR up to January 1, 2006.

[179] Others think the mistakes were purposeful. "If the 'survivors' could lie so blatantly in identifying [him], then it is fair to ask what else . . . [they] fabricated?" In "The Holocaust Reviewed: Part Six."

evidence available and his subsequent freedom. As aforementioned, the prosecutor served the rule of law by presenting evidence proving that the witnesses were wrong.[180]

Third, since the U.S. has not prosecuted him, the issue of universal jurisdiction refers to Israel. Although the defense considered that Israel had no jurisdiction to prosecute Demjanjuk using the same arguments argued previously in the Eichmann case—i.e., Israel's lack of statehood in World War II and the fact that Demjanjuk was not a citizen of Israel—the court applied universal jurisdiction to the case because it was allowed by the law governing the extradition.[181]

The crimes for which the accused was prosecuted in Israel, including torture, granted the use of universal jurisdiction according to well established precedents at the international—Nuremberg and Tokyo trials—and the domestic—Eichmann case—levels. Nevertheless, Ukraine can use subject active jurisdiction to prosecute him; it does not need to exert universal jurisdiction.

D. CONTRIBUTIONS OF THE DOMESTIC LEVEL TO THE JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

1. LESSONS ON WHAT TO DO

Apart from promoting further the Nuremberg principles, both cases play an important role relative to four main issues including avoiding illegality from the beginning; approving laws for the prosecution of crimes against humanity; promoting the use of universal jurisdiction, especially when alternative jurisdictions are unavailable; and always guaranteeing access to an appeal process to the accused.

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[180] See: Above, Fn. 160.

[181] The Appeals court "concluded that the statute … included also 'universal jurisdiction,' which is part of … the law of the United States." In Leigh, "Judicial Decisions": Par. 583.

First, the U.S. stripped Demjanjuk of his U.S. nationality in order to facilitate his extradition to Israel. Then the U.S. was proactive in contacting Israel to inquire about their interest in prosecuting Demjanjuk for alleged crimes against the Jewish people committed during World War II. Although Demjanjuk was originally from Ukraine,[182] Israel was chosen as the probabilities of Demjanjuk being prosecuted in Ukraine were minimal because he was perceived as a partisan that defended the interests of Ukraine.[183] Finally, after the Israeli government agreed to his prosecution, Demjanjuk was extradited.

Second, although the problematic of Nuremberg remains, i.e., the law applied to the alleged facts—Israel's Nazi and Nazi Collaborators (Punishment) Law of 1950—[184]was approved after the actions prosecuted happened, from the perspective of customary law those facts constituted international crimes prior to the Nazi period. The Israeli Law is significant for future prosecutions of crimes committed after WW II because they regulate crimes against humanity. For example, such laws could justify the prosecution, in Israel, of the abuses committed by the Argentinean Military Junta against Jewish people.

Third, notwithstanding the defense's contention in both cases that Israeli courts lacked jurisdiction because Israel only acquired the status of a state after the commission of the crimes prosecuted—"[T]he Israeli law, by inflicting punishment for acts . . . before [Israel's] establishment, against persons who were not Israel citizens, . . . conflicts with

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[182] It became a constituent republic of the Soviet Union in 1929, briefly independent between 1939 and 1944. It is an independent State since December 1991.

[183] Thus he helped "to rid their homeland . . . of Stalinism." In Schabner, "No Place to Hide."

[184] In Demjanjuk, the court also applied the Penal Law of 1977. See: Jewish Virtual Library, "The Demjanjuk Appeal: Summary by Asher Felix Landau."

international law and exceeds the powers of the Israel legislator—"[185]this criticism is invalid because crimes against humanity grant universal jurisdiction. Thus, the status of the state at the time of the crime is irrelevant: any state that comes to be has the right—duty would be too strong a word—to prosecute crimes against humanity.

Finally, Eichmann and Demjanjuk used their right to appeal, which proved central in saving the latter[186] because the prosecution brought forth evidence in favor of Demjanjuk, i.e., his indictment was based on forged documents.[187] Since witnesses' testimonies were insufficient to overcome the reasonable doubt regarding his true identity, he was freed. What explains the different outcome in each case? Could it be that in Demjanjuk the time elapsed since the war had softened the prosecution? This is plausible, but not sufficient; other factors carry more weight: (1) Eichmann was named in Nuremberg. (2) A solid document trail linked him to the extermination of the Jewish people. And (3) Eichmann, proud of his efficiency, confessed to this crime.

2. LESSONS ON WHAT TO AVOID

To have a useful implementation of human rights it is necessary to avoid even the perception of impropriety. The main lessons from the Eichmann and Demjanjuk cases include avoiding kidnapping the accused,[188] reducing the possibility of bias on the part of

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[185] Eichmann trial, Judgment: Par. 8 (a). The Court rejects it, especially in pars. 30-8.

[186] *Ivan (John) Demjanjuk v. the State of Israel* (Cr. A. 347/88).

[187] As explained by Justice Gabriel Bach, former Assistant Prosecutor at the Eichmann trial, in "Judging Nuremberg: The Laws, The Rallies, The Trials: Returning to Courtroom 600 on the 60th Anniversary of the Nuremberg Trials" (17-20 July 2005): July 19, Morning Session. [Conference organized by Touro College].

[188] Nevertheless, the U.S. Supreme Court in *United States v. Álvarez-Machain* 504 U.S. 655 (1992) decided—by a vote of 6 to 3—that the U.S. courts had jurisdiction to prosecute the Mexican defendant who was kidnapped from his country.

the judges which can taint the whole process, and minimizing the interference of other authorities with the activity of the courts.

First, even though Arendt seems to believe that Eichmann traveled to Israel voluntarily,[189] what were his incentives? If he was remorseful, he could have awaited prosecution in Germany. Thus, he was kidnapped,[190] which constitutes a negative precedent that would justify the use of illegal means in the future. If human rights are to be respected, should not illegal acts be avoided at all costs?[191]

Second, since both prosecutions took place in Israel, the country representing the bulk of the victims of the abuses prosecuted, the criticism of bias is ever present. That is why, as aforementioned, the best venue for accountability is an international tribunal or —in its absence—a domestic court that can be perceived by most as impartial. As a result, the lesson is a justification for the ICC more than an indictment of the trials in Israel. After reading the judgments, there is a near absolute agreement on the judges' professionalism; the prosecutor in Demjanjuk's appeals merits a special mention.

Finally, the independence of the judiciary in democratic countries is subjected to numerous pressures. For example, the Israeli judges in Demjanjuk received threats, which can be interpreted as evidence that certain sectors of the Israeli society expected the trial to end with a guilty verdict.[192] Similarly, it can be assumed that the judges in

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[189] Arendt, *Eichmann in Jerusalem*: 218.

[190] Argentina's subsequent acquiescence to the kidnapping was insufficient to legitimize it.

[191] On hindsight, Israel was the most appropriate forum to prosecute Eichmann because Argentina's links to the former Nazis prevented his prosecution and Germany had no interest in prosecuting Eichmann.

[192] "Minister Liba'i strongly condemns threats . . . against the Justices of the Supreme Court and warned that respect for judges and acceptance of their judgments are vital to the rule of law." In The

Eichmann were expected to decide against him because of what was at stake at his trial, i.e., bringing the Jewish Holocaust to the forefront of history. "The Israeli authorities were determined to retell the entire story of the massacre of European Jewry."[193]

Although threats were unsuccessful in the trial against Demjanjuk, who was found not guilty in appeals; Eichmann was condemned without any in-depth analysis of the illegality of the manner in which the accused was brought before the court, a sign of excessive deference to the state. Similarly to his Israeli counterparts in Eichmann, the American judge who decided "without prejudice" in favor of Demjanjuk recuperating his U.S. citizenship, could be perceive as showing too much deference to the state, which held in its hands (and has used) the right to prosecute Demjanjuk again when new evidence against him was found.

3. CONCLUSIONS

These two domestic level cases increased the relevance of the international precedents because, regardless of the passing of time, they applied what was learned in Nuremberg—and to a lesser extent in Tokyo. Consequently, the principles of Nuremberg seem to be rooted strongly in international law. Moreover, the prosecution of crimes against humanity was more present in Eichmann and Demjanjuk than in Nuremberg and Tokyo.

Thus, did the procedural safeguards work properly for the accused? Since respect for the rule of law is of the outmost importance in a criminal case in which the life and/or

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Nizkor Project, "The Demjanjuk Decision: Statement by the Minister of Justice Professor David Liba'i," (Jerusalem, 29 July 1993), http://www.nizkor.org/hweb/people/d/demjanjuk-john/israeli-data/demjanjuk-s3.html (Accessed: December 4, 2003).

[193] Michael R. Marrus, "The Adolf Eichmann Trial, 25 years Later Israel Prosecuted the Nazi Mass Murderer 'To Let All the Nations of the World Know,'" *The Toronto Star* (25 April 1986): A 19.

freedom of the accused is at stake, any deviation from pre-established procedures should be avoided. That is why it can be affirmed that the procedural safeguards were insufficient in Eichmann—the defendant was brought to justice through kidnapping and during the trial was subjected to an accusation that forgot the specifics of the case in order to present a meta-narrative of what happened during the Holocaust—but effective in Demjanjuk—who was declared not guilty in appeals.

E. CONCLUSIONS: THE INTERNATIONAL AND THE DOMESTIC LEVELS IN THE JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

Nuremberg and Tokyo are relevant as the first cases in history in which individuals, including top ranking civilian and military officials, were criminally prosecuted for offenses ranging from aggression and war crimes to crimes against humanity. In addition, their precedent value—muted during the Cold War with the exception of prosecutions of Nazi criminals such as Eichmann and Demjanjuk—has been fostering a discourse characterized by the urge to end impunity for gross abuses of human rights, to recognize individual responsibility for such abuses, and to use judicial mechanisms to foster the implementation of human rights norms.

Although it is a fact that human rights violations were of secondary importance at Nuremberg and Tokyo, both tribunals acknowledged the suffering of civilians during the war and thus, their proceedings provided the basis for not only the domestic trials against war criminals from the Axis countries—in which human rights violations were the crux of the indictments as in Eichmann and Demjanjuk—but also for the post-Cold War era international judicial redress of human rights abuses through a variety of courts starting—with some notable exceptions such as the *Filártiga case*—with the *ad hoc* tribunals for

the former Yugoslavia and for Rwanda, and including hybrid courts, the ICC and domestic courts using universal jurisdiction.

The case studies of chapters IV and VI—which examine how Spanish courts advance human rights norms relative to, respectively, the ban on torture and on disappearances—reinforce the centrality of the Nuremberg precedent while showing at the same time that human rights norms are more entrenched in our world due to the cross-fertilization of ideas produced by intergovernmental networks. For example, Spanish judges, prosecutors and lawyers involved in advancing human rights norms are able to continuously interact, in their official capacity, with their colleagues and other governmental officials around the world. Therefore, implementing human rights is increasingly considered less as a threat to order and more as part of state interest. The judges, prosecutors and lawyers that took part in the Nuremberg and Tokyo tribunals had a limited impact in advancing the precedent they helped to establish because the tribunals' temporary nature underlined their exceptionality.

Similarly, the impact of these four historical precedents can be seen in the case studies of chapters III and V, which focus primarily on how the Inter-American Court of Human Rights (IACtHR) has advanced the implementation of human rights norms relative to the ban on torture and disappearances, respectively. Even though the IACtHR has only civil jurisdiction and, as a consequence, only addresses the responsibility of the state, its establishment and its work reflect the goal of protecting individuals from the violation of human rights and underscores in its decisions the duty of the state to prosecute criminally the alleged violators. In this respect the Court's overarching goal coincides with that of the European Court of Human Rights (ECtHR), which implements

the European Convention of Human Rights, approved as a direct result of the heinous abuses of World War II. The examination of relevant decisions of these two courts shows the impact that networks of judges are having in spreading human rights norms. For example, the ECtHR refers to the jurisprudential findings of the IACtHR in cases involving disappearances, and the IACtHR refers to those of the ECtHR in cases of torture.

Nuremberg and Tokyo at the international level, and Eichmann and Demjanjuk domestically pierced through the sovereignty of the state by establishing the precedent that certain crimes are so heinous that they can be prosecuted anywhere without any statute of limitations. Thus, the need for order cannot shield alleged violators from justice. The following four case studies of the dissertation will give support to the solidarist contention that order is compatible with human rights. Individuals have now a claim to be protected from human rights abuses and states have changed their attitude toward human rights because more states are including human rights as part of their national interest.

CHAPTER III

THE JUDICIAL IMPLEMENTATION OF THE INTERNATIONAL BAN ON TORTURE: THE INTER-AMERICAN COURT OF HUMAN RIGHTS

States and their agents have tortured those subjected to their jurisdiction[1] and frequently this practice has been sanctioned legally as a means either to save a person's soul or to extract a confession from the accused.[2] This does not mean everybody agreed to its legality.[3] Thus, after generations of scholars and laypeople had been demanding the end of this heinous activity, the atrocities of Nazi Germany gave a final impulse to the explicit proscription of torture at the international level:[4] generally by the approval of the 1948 Universal Declaration of Human Rights (UDHR) and the legally binding International Covenant on Civil and Political Rights (ICCPR);[5] and for wartimes—including internal conflict—via the 1949 Geneva Conventions. The 1984 Convention against Torture provided the specific regulation regarding torture.

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[1] Amnesty International, *Report on Torture*, 1st American Ed. (New York, NY: Farrar, Straus and Giroux, 1975): 27-33; and Edward Peters, *Torture*, expanded Ed. (Philadelphia, PA: University of Pennsylvania Press, 1996).

[2] Edward Peters, ibid: Ch. 2.

[3] On denouncing it as a legal means since the XVI c., see: Edward Peters, ibid: Ch. 3.

[4] It is linked to the effort in favor of human rights in general. See: Johannes Morsink, "World War Two and the Universal Declaration," *Human Rights Quarterly* vol. 15, no. 2 (May, 1993): 358.

[5] Art. 7, a verbatim reproduction of art. 5 of the UDHR, adds that "no one shall be subjected without his free consent to medical or scientific experimentation."

Although different states in Latin American were part of the aforementioned conventions and some of these states even outlawed torture in their respective constitutions,[6] starting in the 1960s and peaking in the 1970s and 1980s torture affected substantial numbers of people accused by their respective governments of being enemies of the state or subversives.[7] Since torture was widely and systematically practiced against many persons under state custody in that region,[8] it had the characteristics of a crime against humanity,[9] which can be prosecuted using universal jurisdiction.

The scope of the violations was the result of the ideological triumph of the doctrine of national security among the Latin American armed forces in the 1960s[10] and the implementation of "scientific" techniques of torture, which underscores the

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[6] Chile, Colombia, Costa Rica, Ecuador, and Uruguay were parties to the International Covenant on Civil and Political Rights by the date it entered into effect, i.e., on 23 March 1976. Suriname since 28 March, 1977; Guyana since 15 May 1977; Panama since 8 June 1977; Peru since 28 July 1978; Venezuela since 10 August 1978; El Salvador since 29 February 1980; Nicaragua since 12 June 1980. Argentina, Bolivia and Brazil only became parties after transitioning to democracy. For a complete list of the dates in which Latin American countries become parties to the ICCPR see: Appendix A, Table A.1.

At the domestic level, art. 18 of the Argentinean Constitution of 1 May 1953; and art. 43 of the Guatemalan Constitution of 15 September 1965—in effect until it was unconstitutionally derogated by Decree-Law No. l 24-82 of 26 April 1982 after Efraím Ríos Montt's coup established a military regime in Guatemala—banned torture.

[7] See: IACHR, "Annual Report" (1976), http://www.cidh.org/annualrp/76eng/section.2.htm (Accessed: June 23, 2005): Sec. II. In Guatemala and Peru widespread torture, among other abuses of human rights, continued during the 1990s. For Guatemala, see: IACHR, "Annual Report 1996," http://www.cidh.oas.org/annualrep/96eng/chap5b.htm (Accessed: April 18, 2007): Ch. V, Par. 1. In Guatemala, it lasted at least until the peace accords of 29 December 1996. And for Peru, see: IACHR, "Annual Report 1996," http://www.cidh.oas.org/annualrep/92eng/chap.5c.htm (Accessed: April 18, 2007): Ch. 5.c. Neither country is named in the 1998 and 1999 reports.

[8] See: IACHR, "Informe Anual" (1977), http://www.cidh.org/annualrep/77sp/sec.2b.htm (Accessed: June 23, 2005): Sec. II, Subsec. 2. The report also mentions that torture was commonly used against individuals accused of non political crimes, see: Ibid.

[9] Also a war crime; dimension not emphasized in the dissertation. See: Art. 1 (a) and (b) of General Assembly Resolution 2391 (XXIII) of 26 November 1968, which entered into force on 11 November 1970, annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

[10] See: Juan Somavía A., "Fuerzas armadas y sociedad: nueva situación en América del Sur," in Centros de Estudios del Desarrollo, "Seminario: Fuerzas Armadas, Estado y Sociedad," *Cuaderno del CED*, no. 2 (November 1988): 87-8. For added bibliography, see: Below, Ch. VI, Sec. C.1.a.i.

premeditated nature of torture in this part of the world. "The major function of torture [was] … to inculcate a climate of fear and political apathy in the general population."[11] Nowadays torture is still present in Latin America but it is of lower intensity and its punishment is in the hands of the domestic judiciary.[12] Thus, the focus of the dissertation is mostly on torture practices before these states transitioned to democracy. However, I will also include in the analysis cases in which domestic mechanisms are incapable of ending impunity derived from torture practiced under the democratic regime.

The absence of domestic mechanisms of redress during the reign of authoritarian regimes in Latin America meant that torture victims and their families had to seek justice outside the domestic realm. However, accountability was deferred until the 1969 Inter-American Convention on Human Rights established the Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Once in place, the American system of protection of human rights worked first through shaming techniques[13] and then through judicial implementation, starting with the 1987 *Rodríguez-Velásquez* decision—in which the Court stated that disappearances constitute torture.[14] Such a system of protection is being used nowadays to confront cases of impunity derived from crimes committed during the transition, and consolidation, of democracy in different Latin American countries.

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[11] Matthew Lippman, "The Protection of Universal Human Rights: The Problem of Torture," *Universal Human Rights* vol. 1, no.4 (October - December 1979): 30.

[12] As democracy is being consolidated, the rule of law will be strengthened and the domestic judiciary will administer justice independently.

[13] See: Below, Sec. B.1.

[14] See: Below, Ch. V, Sec. C.1.c.

During the Cold War torture was not specifically linked to Latin America as disappearances were but affected also Western Europe—characterized after World War II with the highest level of respect for human rights. The best-known case is that of Greece—where a military coup d'état established an authoritarian regime similar to those in Latin America.[15] These violations were confronted first with non juridical means of which the role the European Commission of Human Rights (ECHR)[16] is significant for the dissertation because its findings served as the blueprint for the subsequent torture-related jurisprudence of the European Court of Human Rights (ECtHR), which started with the 1980 *Ireland v. United Kingdom* case.[17]

This chapter is divided into five sections. First, an examination of the international regulation of the prohibition against torture focusing on the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture with pertinent references to the UN-sponsored Convention against Torture (CAT). Second, a brief examination of the shortcomings of the mechanisms of the system with quasi-judicial—IACHR—or judicial functions—IACtHR. Third, a chronological study of the main IACtHR's decisions on torture up to 31 January 2006 underscoring the court's contributions toward implementation. Fourth, an assessment of the relationship between the jurisprudence of the IACtHR and the ECtHR on the issue.

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[15] Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton, NJ: Princeton University Press, 2001): 39. Starting in 1967 "[w]idespread arrests were made in the name of internal security and moral purification . . . the junta ordered mandatory Sunday church attendance for children . . . rules of the state of siege imposed media censorship . . . permitted arrest and detention without charges, and replaced all ordinary trial procedures by courts martial. Thousands of people suspected of leftist sympathies were detained and exiled."

[16] Report adopted on November 5, 1969. See: Amnesty International, *Report on Torture* (1975): 97. For further details on the European response, see: Ibid, 79-105.

[17] App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980).

And finally, an evaluation of the contributions of the jurisprudence of the IACtHR to advance the implementation of the ban on torture and a list of relevant recommendations to further the role of the Court in the implementation of this ban.

A. INTERNATIONAL REGULATION: RELEVANT OAS-SPONSORED CONVENTIONS

OAS members have to comply with UN- and OAS-sponsored treaties on torture. Universally, the UDHR and the ICCPR banned torture generally and the 1984 CAT[18] specified such prohibition. Regionally—primary interest of this chapter—although the American Declaration of the Rights and Duties of Man banned torture,[19] a legally-binding prohibition appeared only in the 1969 American Convention on Human Rights and the 1985 Inter-American Convention to Prevent and Punish Torture.

This section examines first, the concept of torture and the duties of the states to implement the prohibition against torture as established in the American Convention on Human Rights and the Inter-American Convention on Torture. And, second, it evaluates the main advantages and shortcomings of both of them toward such implementation.[20]

1. THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS

The Convention was signed in San José, Costa Rica on 21 November 1969 but it only came into effect on 18 July 1978.[21] The Convention's Preamble underlines the

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[18] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Holland: Martinus Nijhoff Publishers, 1988).

[19] Articles I (right to personal security) and XXV (right of protection from arbitrary arrest).

[20] I reserve the comparison to the European Convention on Torture to: Below, Sec. D.

[21] Fifteen countries ratified the Convention in the 1970s, i.e., Bolivia (19 July 1979), Colombia (31 July 1973), Costa Rica (8 April 1970), Dominican Republic (19 April 1978), Ecuador (28 December 1977), El Salvador (23 June 1978), Grenada (18 July 1978), Guatemala (25 May 1978), Haiti (27 September 1977), Honduras (8 September 1977), Jamaica (7 August 1978), Nicaragua (25 September 1979), Panama

significance of "essential rights" that everybody has because they are human beings, which "justif[ies] international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."[22]

a. Torture and its Relation to the Violation of Procedural Rights

Article 5 of the Convention acknowledges everyone's right to humane treatment or to "his physical, mental, and moral integrity" and the ban against "torture or . . . cruel, inhuman, or degrading punishment or treatment."[23] Such protection is inclusive of anyone in jail or under police custody,[24] who "shall be treated with respect for the inherent dignity of the human person."

The special reference of the Convention to those in state custody is relevant because although in Argentina and Chile the most widespread abuses happened in illegal detention centers where citizens were deprived of basic procedural rights, in some Latin American states—Uruguay being the best-known example—torture was practiced systematically against legally-detained persons.

b. Duties of the State

The Convention establishes a general duty to respect all the rights it protects and to compensate the victims of any human rights abuses. The duty to respect the

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(22 June 1978), Peru (28 July 1978), Venezuela (9 August 1977). Six countries ratified it in the 1980s, i.e., Argentina (5 September 1984), Barbados (27 November 1982), Mexico (3 April 1983), Paraguay (24 August 1989), Suriname (12 November 1987), and Uruguay (19 April 1985). And the remaining four parties to the Convention, i.e., Brazil (25 September 1992), Chile (21 August 1990), Dominica (11 June 1993), and Trinidad & Tobago (28 May 1991), ratified it in the 1990s. See: IACHR, "Basic Documents: Signatures and Current Status of Ratifications: American Convention on Human Rights," http://www.cidh.oas.org/Basicos/basic4.htm (Accessed: April 9, 2007).

[22] For a detailed analysis, see: Héctor Fáundez Ledesma, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales* (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1996): 55-166.

[23] Art. 5 (1) and (2) respectively of the Inter-American Convention on Human Rights.

[24] Art. 5 (2) of ibid. applies to "[a]ll persons deprived of their liberty. …"

prohibition against torture[25] may involve adapting domestic legislation to international standards whenever necessary.[26] However, since in principle all Latin American states have banned this practice,[27] adaptation is most needed to repeal and annul amnesty laws, because to protect a person from torture includes the duty to prosecute the crime.

Since the Convention also compels states to treat everybody equally,[28] "'person' means every human being," governmental officials cannot use the excuse of a different ideology or of the fight against terrorism to violate the right of every individual to be free from torture. As a consequence, whenever torture has happened, states must compensate the victims[29] regardless of the circumstances under which it took place.

2. THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE[30]

Adopted in Cartagena de Indias, Colombia on 12 September 1985, the Inter-American Convention to Prevent and Punish Torture entered into force on 28 February 1987 only for those countries that ratified or acceded to it.[31] The Convention's preamble

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[25] Art. 1 (1) of the Inter-American Convention on Human Rights affirms the general duty of states.

[26] Art. 2 of ibid.

[27] See: Above, Fn. 6.

[28] Art. 1 (2) of the Inter-American Convention on Human Rights. Similarly, art. 24 of ibid.

[29] Art. 63 of ibid.

[30] For the complete text and state of ratifications/accessions, see: http://www.oas.org/juridico /english/Sigs/a-51.html (Accessed: June 20, 2005). From now on, Convention on Torture or Convention.

[31] These countries are: Argentina (31 March 1989), Brazil (20 July 1989), Chile (30 September 1988), Colombia (19 January 1999), Costa Rica (8 February 2000), Dominican Republic (29 January 1987), Ecuador (9 November 1999), El Salvador (5 December 1994), Guatemala (29 January 1987), Mexico (22 June 1987), Panama (28 August 1991), Paraguay (9 March 1990), Peru (28 March 1991), Suriname (12 November 1987), Uruguay (10 November 1992), and Venezuela (26 August 1991).

Bolivia (9 December 1985), Haiti (13 June 1986), and Honduras (11 March 1986) have signed but not ratified or acceded to the Convention. And Antigua and Barbuda, Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Trinidad & Tobago, and the United States have not signed it.

explains its adoption as a means "for the pertinent rules contained in the aforementioned global and regional instruments [the OAS Charter, the UN Charter, the American Declaration of the Rights and Duties of Man, and the UDHR] to take effect."

a. Torture: Concept and Main Characteristics

Torture is defined, "for the purposes of this Convention," in article 2 as,

> [A]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

For the Convention the prohibition is absolute, which prevents policy-makers and officials in the field from using exceptions such as the "ticking bomb" scenario to subvert the prohibition.[32] Moreover, the definition of torture is wide enough to avoid excluding certain activities from constituting a violation of this ban on torture.

But it never includes "physical and mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."[33] The last section is useful to remind authorities that prisioners can only be deprived of their freedom of movement outside the facility where they are serving time but retain all the other human rights. Thus, regardless of the crime committed, they cannot be tortured.

In Office of Inter-American Law and Programs, "A-51: Inter-American Convention to Prevent and Punish Torture," http://www.oas.org/juridico/english/Sigs/a-51.html (Accessed: June 20, 2005).

[32] Torture is justified in Alan M. Dershowitz, "Should the Ticking Bomb Terrorist be Tortured? A Case Study in how a Democracy Should Make Tragic Choices," in *Civil Liberties vs. National Security in a Post-9/11 World*, Ed., M. Katherine B. Darmer, Robert M. Baird & Stuart E. Rosebaum (Buffalo, NY: Prometheus Books, 2004): 189-214.

[33] Art. 2 (2) of the Inter-American Convention on Torture.

Torture has to be intentional and practiced by public servants—internationally, the *ad hoc* tribunals have eliminated this second characteristic—[34]in their official capacity or by persons working as their accomplices or as intellectual authors,[35] superior orders is no defense,[36] and the prohibition against torture is absolutely *non-derogable* irrespective of a state's internal situation.[37] Non derogability—is of the outmost importance because it means that the prohibition against torture belongs to a category of human rights that no government can legitimately suspend.[38] In addition, the American Convention on Torture bolsters this non-derogability by denying that individual circumstances—such as "the dangerous character of the detainee or prisoner . . . or the lack of security of the prison . . . or penitentiary—"may justify torture.[39]

b. Duties of the State

The general duty of all the parties to the Convention to "prevent and punish torture in accordance with the terms of this Convention"[40] translates into specific duties classified here as preventive—education and rejection of confessions under duress—and of criminalization of torture. Since in Latin America torture in its less heinous varieties

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[34] See: Above, Ch. 1, Sec. A.6.

[35] Art. 3 (a) and (b) of the Inter-American Convention on Torture.

[36] Art. 4 of ibid.

[37] A "state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability or other public emergencies or disasters" cannot justify torture. Art. 5 (1) of ibid. This exhaustiveness reflects Latin American reality.

[38] Non derogable human rights are listed in art. 4.2 of the ICCPR. See: Above, Ch. I, Sec. A.4.

[39] Art. 5 (2) of the Inter-American Convention on Torture.

[40] Art. 1 of ibid.

was endemic[41] and during the military regimes harsher practices such as "scientific torture"[42] became entrenched, promoting education on its illegality is needed. Thus, states are compelled to "take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporally or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest."[43]

Training is not sufficient, so it is imperative to avoid any circumstances that can favor torture. That is why, first, confessions resulting from torture are invalid except to prosecute those who practiced it.[44] As a result, most officials will desist from torturing when they realize that it will only produce their own conviction. Second, states parties to the Convention should deny extradition to countries suspected of practicing torture.[45]

Since no preventive system is perfect, instances of torture could (and do) happen. That is why the Convention requires parties to it to criminalize such abuses, punish them severely,[46] and prosecute them according to the principles of a fair trial.[47] In order to prosecute criminally such violations, states must establish the jurisdiction of their own

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[41] Amnesty International, *Report on Torture* (1975): 191.

[42] Although pharmaceutical drugs and electronic devices are "scientific methods," the term refers more to procedure—based on scientific studies on the effects of different torture practices and the presence of medical doctors in the torture sessions—than methods. See: Peters, *Torture*: 160-1.

[43] Art. 7 (1) of the Inter-American Convention on Torture.

[44] Art. 10 of ibid.

[45] Art. 13 (4) of ibid.

[46] Art. 6 (2) of ibid.

[47] Art. 8 (1) and (2) of ibid.

courts.[48] Although the Convention only mentions expressly territorial and subject—active and passive—jurisdiction, it also "does not exclude criminal jurisdiction exercised in accordance with domestic law."[49] As a result, the Convention provides an opening for universal jurisdiction as long as it is part of the domestic legislation ("in accordance with domestic law"); it does not impose a duty to exercise such type of jurisdiction.[50]

Given that sometimes extradition is necessary, article 13 of the Convention compels states to include torture as an extraditable offense in all their extradition treaties, to use the Convention in the absence of such treaty, and to extradite those accused of torture.[51] Moreover, once torture has been proven, states must repair any damages.[52]

3. ADVANTAGES AND SHORTCOMINGS OF THE INTER-AMERICAN CONVENTIONS ON HUMAN RIGHTS AND ON TORTURE TOWARD THE IMPLEMENTATION OF THE BAN ON TORTURE

The Convention on Human Rights has the advantage of establishing two mechanisms to implement rights, the IACHR and the IACtHR, but it only bans torture and cruel, inhuman, or degrading punishment or treatment without any further specification; the more detailed regulation was a task reserved to the Convention on Torture, which describes the activities that constitute torture—albeit broadly to better protect individuals—underlines preventive measures, and facilitates the prosecution of torture by implicitly supporting the use of universal jurisdiction.

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[48] Art. 12 of the Inter-American Convention on Torture.

[49] Art. 12 of ibid. in fine.

[50] Art. 12, in fine, of in relation with art. 14, which establishes the duty *aut dedere, aut judicare*, i.e., to prosecute the accused of torture in case such country decides not to extradite him or her.

[51] Art. 11 of ibid.

[52] Art. 9 (1) of ibid. but respecting [domestic] "prior rights." [Art. 9 (2) of ibid].

The commitment of the drafters of the Convention on Torture to the prevention of future violations through education is commendable because it shows their knowledge of the situation in Latin America, where superiors who did not instigate torture condoned it as a lesser evil. Although the Convention could have been more precise—for example, via the establishment of compulsory workshops on human rights and non-tolerated activities and lectures by prominent military officials on zero tolerance policies—it is a positive start.

Nevertheless, the absence of a reference to specific implementation mechanisms in the Convention on Torture can be considered a relevant shortcoming because it allows states to ratify the Convention on Torture without agreeing to be subjected to the jurisdiction of the American court.[53] The Court however, has perceived the lack of explicit reference to the IACtHR in the Convention on Torture as an advantage.

> A general clause opened up the possibility that a greater number of states would ratify the Convention on Torture. What [the drafters] considered relevant was to grant jurisdiction to apply the Convention to an international organ, be it a Commission, a Committee, or a pre-existing court or one created in the future. In this case, since the Inter-American Commission sent it [the case], the Court [IACtHR] has the right to exercise its jurisdiction.[54]

Notwithstanding the Court's positive assessment, the generality relative to the mechanisms of implementation of the prohibition against torture, which derives from the

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[53] The following states have ratified the Inter-American Convention on Rights but not the Convention on Torture: Barbados (5 November 1981), Bolivia (20 June 1979), Dominica (3 June 1993), Grenada (14 July 1978), Haiti (14 September 1977), Honduras (5 September 1977), Jamaica (19 July 1978), and Trinidad & Tobago (3 April 1991).

Dominica and Trinidad & Tobago are the only states that have ratified the Inter-American Convention on Human Rights but do not recognize the jurisdiction of the Court.

Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, and the United States have not signed or ratified the Convention on Human Rights and do not recognize the jurisdiction of the Court.

See: Convención Americana sobre Derechos Humanos, http://www.oas.org/juridico/spanish/firmas/b-32.html (Last Accessed: January 18, 2008).

[54] *Villagrán Morales y otros (Caso de los ´Niños de la Calle´) vs. Guatemala*, Sentencia de 19 de noviembre 1999, Serie C, no. 62: Par. 248.

state-centrism of the system, has not produced a universal ratification of the Convention on Torture by the members of the OAS. Moreover, the lack of automatic jurisdiction of the IACtHR in torture-related cases limits the protection against torture because victims faced domestically with impunity will have to depend on the Commission to bring the case before the Court.[55] As a result, I consider such generality a shortcoming of the Convention on Torture.

B. MECHANISMS OF IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

Although the Convention on Torture, as aforementioned,[56] refers nowhere to the Court, it does not exclude the jurisdiction of the IACtHR in torture cases because article 16 of such Convention does "not limit the provisions of the American Convention on Human Rights . . . or the Statutes of the Inter-American Commission on Human Rights." Thus, this section examines briefly the general role of the IACHR and the IACtHR in implementing the prohibition against torture.

1. INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

Although article 106 of the OAS Charter mentions the Commission, the IACHR was not established until a 1960 Statute set it up with the purpose of "promoting the respect for [human rights]."[57] The Commission's relevant period of activity for the dissertation, as the only implementation mechanism available in the system, is the one

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[55] See: Articles 8 (3) and 17 of the Convention on Torture and *Villagrán Morales* (Serie C, no. 62), Ibid: Par. 247.

[56] See: Above, Sec. A.1.

[57] Meeting of Foreign Ministers (Santiago, Chile: August 1959): Res. VIII. See: CIDH, "Informe Anual 1974," http://www.cidh.org/annualrep /74sp/sec.1.htm (Accessed: June 23, 2005): Sec. 1.A.

between 1969—when the Convention on Human Rights was adopted—and 1978—when the Convention entered into force and the American Court started to work.

a. Characteristics: Composition

The IACHR has seven commissioners who serve for four renewable years. Notwithstanding its "autonomous" character (article 1 of its Statute), the Permanent Council of the OAS selects the Commission's members.[58] Therefore, the Commission **is set up**, primarily, **to serve and represent**[59] **the state members of the OAS** and not individuals.

Moreover, not only must the IACHR ask for permission from the states to investigate allegations in their territory—necessary to prove the existence of a practice of torture—but it also depends on states for its budget[60] and its technical and administrative support.[61] Such state-centrism is exacerbated by the part time nature of the institution—the total of ordinary sessions cannot exceed eight weeks per year—[62] which increases the need for state assistance to obtain the pertinent information.

b. Functions: General and Relative to Torture

Originally and according to article 9 of the 1960 Statute of the Commission, its functions were mere aspirations limited to educational and consultative endeavors. However, the IACHR interpreted this regulation broadly as granting it "jurisdiction to . . .

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[58] Art. 4 of the Statute of the IACHR.

[59] Art. 3 of ibid.

[60] E.g. for the period of 1974-75, the IACHR asked for $774,5 million but it only received $622,4 million and thus "certain activities were eliminated . . . such as . . . members' travels to check the situation of human rights in . . . [given] countries." [Translation]. In CIDH, "Informe Anual 1974": Sec. 1. D.

[61] Articles 14 and 14 bis of the Statute of the IACHR.

[62] Héctor Faúndez Ledesma, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales* (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1996): 119.

examine the situation of human rights . . . where flagrant and repetitive violations occurred; [as allowing it to ask [states] . . . to be able to visit their territory; . . . and prepare reports . . . [too]."[63] In addition, it started receiving individual communications, which are specifically relevant for the implementation of the prohibition against torture.

These functions were incorporated into its Statute in April 1966 at the XIII Meeting of the Assembly General of the OAS, and to its Rules of Procedure.

> [The Statute] establishes a special procedure for communications that denounce the violation of any . . . human rights . . . of the American Declaration on the Rights and Duties of Man . . . the right to life, liberty, security and integrity of the person (Article I); the right to equal treatment under the law (Article II); . . . the right to justice (Article XVIII); the right to be protected from arbitrary detention (Article XXV); and the right to judicial procedures respectful of the rule of law (Article XXVI).[64]

After the entry into force of the Convention on Human Rights in 1978, the Commission finally had a stronger mechanism at its disposal—the IACtHR—to implement rights when confronted with lack of compliance. However, during the high-day of torture practices, its actions were limited to general and individual reports[65] and to *in loco* visits.

c. Procedures to Protect Human Rights

Although procedurally flexible, the IACHR must respect important deadlines.[66] Thus, it will only accept individual allegations presented within six months from the day in which the domestic mechanisms were exhausted and it will presume that such allegations are true whenever governments take more than 180 days to respond to them. In addition, the IACHR has three months to opt among starting a judicial process,

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[63] In CIDH, "Informe Anual 1974": Sec. 1.C.1.

[64] Id.

[65] See: Fáundez Ledesma, *El sistema interamericano*: 49.

[66] Articles 34.8, 38, 42 and 54 (1) of the Rules of the Commission.

sending a report[67] to the Inter-American Conference or the Meeting of the Secretaries of Foreign Affairs, or making such report public.

Among these reports, annual ones are significant because they include the Commission's main general and country-specific findings on torture. Although the IACHR has to include positive advances in the protection of human rights, it also documents the most heinous abuses in specific states to try to shame them into improving the situation. For example, even though the Commission's 1976 report compiled advances in Chilean law favorable to reducing torture during detention; the characteristics of the practice of torture; and circumstances that might favor it, especially governmental acquiescence and impunity;[68] the IACHR also found the following:

> [W]idespread practice of sophisticated means of torture . . . . The[ir] spread … is due to the lack of standards . . . or . . . to the fact that these standards are not applied . . . or, what is more serious, due to the intimidation of judges and high officials . . . who do not perform their duty of preventing these acts by investigating and punishing those responsible. . . .
>
> An equally disturbing form of mistreatment of detainees is the lack or shortage of medical attention in jails and other detention centers.[69]

Due to Latin American authorities' common disregard for the international prohibition against torture, the Commission reminded them in the same annual report of the non-derogability of such prohibition by stating that "it goes without saying that these emergency situations in no instance justify the application of torture."[70] Moreover, the IACHR recommended states to approve the following,

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[67] For access to all the published reports (1970 - to our days), see: IACHR, "Annual Reports of the IACHR," http://www.cidh.org/annual.eng.htm

[68] CIHR, "Annual Report 1976": Sec. 2, Part I. This report is available in Spanish too.

[69] Ibid: Sec. 2, Part II.

[70] Id.

> [A]n effective policy . . . to enable judges to investigate . . . regardless of the duties of the administrative authorities to proceed with the appropriate investigations and to impose punishment . . . Only through rigorous investigations, submission to trial, and the imposition of severe penalties . . . will it be possible to put an end, or at least to limit this abominable practice and prevent its recurrence.[71]

Since a specific section on Chile was added in the Commission's 1977 annual report to shame the Chilean government into compliance, the efforts of the Commission lacked tangible results.[72]

d. Relevant Limitations

The excessive state-centrism of the system was overcome through the work of the Commissioners, who used victims' demands for justice to base their investigations. In general, individual communications reduced limitations derived from the difficulty to conduct proper *in loco* visits due to lack of resources and to the need to negotiate with the state the conditions of the authorized visits.

Nevertheless, although the Commission broadened the role the OAS had assigned to it relative to the protection of human rights, its efforts were insufficient—torture and impunity for torture continued in the region—until the IACtHR started to work and provided certain degree of accountability in favor of the victims of human rights violations. Then the reports of the Commission acquired importance as evidence on which to base cases against different states accused of violating, among others, the right to be free from torture.

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[71] CIHR, "Annual Report 1976": Sec. 2, Part II, Recommendations, 2. On *habeas corpus*, see: Ibid, Appendix.

[72] CIHR, "Informe Anual 1977," http://www.cidh.org/annualrep/77sp/sec.2b.htm (Accessed: June 23, 2005). See: Sec. 2, Part II.

2. INTER-AMERICAN COURT OF HUMAN RIGHTS[73]

The IACtHR, located in San José, Costa Rica since September 1979, had its first meeting "on the 29 and 30 June 1979 at the seat of the OAS in Washington D.C."[74] Its Statute and Rules of Procedure regulate in detail the process before the Court. As aforementioned, although not named in the Inter-American Convention on Torture, it can decide torture-related cases because the prohibition of torture appears in the American Convention on Human Rights, which the Court has the duty to implement.

a. Characteristics

After the Commission or the state initiate a process before **the IACtHR**, the Court **works as an independent institution**. However, even though the 2000 Reform of its Rules of Procedure increased individual participation, the information compiled by the Commission still constitutes a significant part of the evidence used by the Court.[75]

The IACtHR[76] **has limited territorial and temporal jurisdiction**, i.e., it can only decide cases that involve facts that have occurred in states that have accepted its jurisdiction and that happened after they accepted it. In addition, the Court has no criminal jurisdiction. However state-centric these jurisdictional provisions are, once a

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[73] Fáundez Ledesma, *El sistema interamericano*: 123-65. See also: Thomas Buergenthal, "The Inter-American Court of Human Rights," *American Journal of International Law* vol. 76, no. 2 (April 1982): 231-45

[74] CIDH, "Sede para la Corte Interamericana de Derechos," http://www.corteidh.or.cr/inf_general/convenio.html (Accessed: February 24, 2005).

[75] The Court can order depositions and extract from them its own conclusions but since it lacks time and money to check out every piece of information, it assumes that the Commission's allegations are truthful; presumption stronger in the ECtHR, see: Below, Sec. D.

[76] For a comprehensive analysis of the Court that incorporates the 2000 reforms, see: Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, England: Cambridge University Press, 2003).

case is submitted to the Court not even a state's denunciation of the treaty prevents the IACtHR from handing down its decision.[77]

Notwithstanding these limitations, content-wise the ICtHR has the broadest abilities because **it is in charge of implementing all human rights-related matters**. And since their regulation is not always specific, the American Court **can exercise great flexibility in its decisions**. Thus, its judges have been creative in designing a variety of non pecuniary reparations—for example, imposing on the state the duty to translate the decision of the court into an indigenous language or to honor the victims by naming public spaces after them—in favor of the victims of human rights violations.[78]

b. Obligations of the Court Relative to the Prohibition of Torture

Article 62 (3) of the American Convention on Human Rights establishes that "the jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention," which includes the right to one's "physical, mental and moral integrity."[79] In general, the IACtHR has the duty "to rule [so] that the injured party be ensured the enjoyment of his right or freedom that was violated. [And/or the duty to assure] . . . that fair compensation be paid to the injured party."[80]

The aforementioned duties applied to the prohibition of torture impact especially the conditions in detention centers and prisons. As a consequence, the Court must sometimes order an improvement in prison conditions—including ending solitary

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[77] See: Below, Sec. C.

[78] The trend started with disappearance-related cases which always include torture. For further details, see: Below, Sec. C and Ch. V, Sec. C.

[79] Art. 5 (1) of the Convention on Human Rights.

[80] Art. 63 (1) of ibid.

confinement, providing medical care and adequate nutrition,[81] segregating the accused and those already convicted, and awarding special treatment for minors—or an overhaul of a whole prison system or of specific prisons.[82]

c. Procedures to Protect Human Rights: General and Preventive Measures

Chapter VIII (articles 52-69) of the Convention on Human Rights establishes the Organization (Section 1), Jurisdiction and Functions (Section 2), and Procedure (Section 3) of the IACtHR. However, the procedure section only regulates the verdict (articles 66 to 69).[83] According to the Convention on Human Rights, the verdict has to be justified, and dissenting opinions must be attached to it (article 66); it is final but subjected to interpretation by the IACtHR "at the request of any of the parties (article 67);" it is compulsory for the parties to the Convention (article 68); and it has to be notified to the parties in the case (article 69). Thus it is necessary to follow the procedures established in the Court's Rules of Procedure.

The procedure before the IACtHR starts with a lawsuit. Once the lawsuit is complete,[84] the victims and/or their representatives can send documents to the Court with "petitions, reasons, and evidence"[85] for a period of two months. The accused state has four months from the day it was notified of the lawsuit to submit all its preliminary

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[81] Based on art. 5 (2) of the Convention on Human Rights.

[82] Art. 5 (3) and 5 (6) of ibid.

[83] Fáundez Ledesma, *El sistema interamericano*: 422-3 and 337.
An example of a contentious case before the Court appears in Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 13-22. For the evolution of the content and structure of its decisions, see: Below, Ch. V, Sec. B.2. The execution of decisions is beyond the scope of the dissertation.

[84] Art. 33 of the Rules of Procedure. Art. 34 allows 20 days to complete any missing data.

[85] Art. 36 of ibid.

objections to prevent the Court from assuming the state's agreement to any provision in the lawsuit.[86] The document with the state's preliminary objections is delivered to the plaintiff, who must reply to them within 30 days from the day of the notification. Otherwise the procedure could end after the Court admits one or more of the preliminary objections of the state.[87]

After the IACtHR rejects the preliminary objections, the oral phase—consisting of public hearings including interrogation of witnesses and experts—starts.[88] The lack of a specific procedure against torture notwithstanding, many of the victims are alive and thus can provide first-hand accounts of the crime; a type of evidence absent in cases of disappearances. These accounts acquire a significant weight when the governments accused of the abuses are incapable of providing contrary evidence. Finally, the verdict can refer to the substantive issue of the trial and/or to reparations;[89] this final decision can be interpreted or revised.[90]

In addition, the adoption of the provisional measures of article 63 (2) of the American Convention[91] is central to torture-related cases because the bulk of the cases

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[86] Articles 38 (1) and (2) and 37 (1) of the Rules of Procedure. It must include all its preliminary exceptions.

[87] Similarly, the Court's acceptance of the plaintiff's decision to forgo the lawsuit (art. 53 of ibid) or of the friendly agreement between the parties in the process [art. 37 (4) of ibid].

[88] Fáundez Ledesma, *El sistema interamericano*: 359-385. See: Title II, Chs. III and IV (Evidence) of the Rules of Procedure. The process can end without a decision, see: Ch. V of ibid.

A sizeable part of the evidence is documentary; public hearings are especially suitable for cases of disagreement. The Court can order the investigation *ex officio*. See: Art. 45 (1) of the Rules of Procedure, ibid.

[89] Art. 56 of the Rules of Procedure refers to the content of the decision and art. 57 of ibid. to reparations.

[90] Tit. II, Ch. VI of ibid. And Fáundez Ledesma, *El sistema interamericano*: 416-21.

[91] Fáundez Ledesma, *El sistema interamericano*: 316. For further details, see: Ibid, 317-423.

decided by the Court refer to torture against detainees—either under illegal detention or quite often, in prisons.[92] For example, in 1999 the Court ordered the state to protect "the physical, psychological, and moral integrity of"[93] an alleged victim of torture and threats.

Although the initiative to adopt such measures rests with the Commission in the pre-trial phase, during the trial individuals can also petition for those measures.[94] To assess the need for those measures the Court has to rely on outside information, including the government's, which has to inform the IACtHR of how those measures are being implemented; information originating in the Commission or well-respected UN agencies and NGOs will be considered reliable by the IACtHR.

d. Relevant Limitations

Leaving aside limitations derived from the IACtHR's lack of standing to initiate the process or from budgetary concerns,[95] the Court cannot take full advantage of the specific regulation against torture because it can only decide on the violation of specific articles of the Convention on Torture against states party to it and for torture activities happening after the Convention entered into force for that specific state.[96]

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[92] See: Below, Sec. C.

[93] *Cesti Hurtado vs. Perú*, Sentencia de 29 de Septiembre de 1999, Serie C, no. 56: Par. 36. Although the Court found no evidence of violation of art. 5 (2) of the Convention because he is receiving adequate medical care, it adopted the preventive measures. See: Ibid, Par. 160; and Verdict, Par. 199 (5).

[94] For further details see: Below, Ch. V, Sec. B.2.

[95] Another limitation to the Court's independence is that, with the exception of the Court's secretary, "the staff of the Secretariat, which includes its staff attorneys are not chosen by the Court." In Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 24-5.

[96] Art. 62 of the American Convention on Human Rights.

The IACtHR rejects cases of alleged torture due to lack of temporal jurisdiction. E.g., *Dodd vs. Estados Unidos Mexicanos*, Excepciones Preliminares, 3 de septiembre de 2004, Serie C, no. 113: Par. 86 (1) (Unanimous Verdict). Not so in disappearances due to their continuous nature. See: Below, Ch. V.

In addition, since the IACtHR has no criminal jurisdiction, its findings refer exclusively to general state responsibility.[97] As a consequence, even if states where torture is an administrative practice pass regulations forbidding it, individuals can perceive that their actions were correct under the circumstances because they are not criminally prosecuted, which will make it more difficult to end torture practices.

C. MAIN TORTURE-RELATED CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The focus of this section is on cases in which freedom from torture is the main substantive right violated. Thus, torture inherent to cases of disappearances—starting with the first decisions of the IACtHR in which disappearances were considered torture for the victim and the victims' relatives—is more specifically the object of Chapter V.[98]

This section is divided into two parts. First, an examination of the main cases involving freedom from torture classified according to the relevant justifications of torture used in these cases—fight against terrorism and delinquency. In each case I will briefly examine the facts, present the violations found by the Court against the state, and summarily refer to the standard and specific reparations imposed on the state found responsible of such violations.

Second, and based on the aforementioned cases, I will analyze the main judicial findings of the IACtHR relative to the concept of torture, evaluation of evidence, reparations with a special focus on non-pecuniary ones, and a brief reference to the jurisprudential impact of the admission by a state of the veracity of the alleged facts and/or of its responsibility. These judicial findings are important for evaluating the work

[97] Some of the documents used as evidence name specific officials who practiced or allowed torture but there is no judgment against them. Thus, the need for criminal prosecution domestically.

[98] For an in-depth analysis of disappearances-related jurisprudence, see: Below, Ch. 5, Sec. C.

of the Court in implementing the prohibition against torture and thus, discerning trends for the future implementation of human rights law.

1. RELEVANT CIRCUMSTANCES USED BY THE STATE TO JUSTIFY TORTURE

The analysis of the decisions of the Court shows that states justified the use of measures that can constitute torture, or at least cruel, inhuman, and/or degrading treatment, based on the existence of internal strife and their need to fight against terrorism and/or delinquency. Although all these cases involved also illegal detentions, threats, and denial of due process; torture and/or cruel, inhuman and degrading treatment were the main substantive allegations.

a. Fight against Suspected Terrorists

Even though some of the prosecuted events happened after the end of the Cold War, they can still be linked to the fight against Communism because the violations of article 5 of the Convention on Human Rights were the result of pre-established plans and the direct offspring of the mentioned doctrine of national security. The cases refer to the actions of Ecuador, Guatemala under a civil war, and Peru.

The government of Ecuador admitted on June 1998 that members of the Navy detained Prof. Consuelo Benavides Cevallos illegally on 4 December 1985 under suspicion of having ties to the guerrilla movement. Nine days later her remains appeared with signs of torture. Although the judicial process to demand responsibility domestically was ineffective, the government finally paid her family a million dollars in compensation.[99]

[99] On impunity, see: *Benavides Cevallos vs. Ecuador*, Sentencia de 19 de junio de 1998, Serie C, no. 38: Par. 35. For compensation paid one day after the government recognized its responsibility, see: Ibid, Par. 56.

During the Guatemalan civil war the government targeted guerrilla groups and country-dwelling indigenous peoples—identified as the guerrilla groups' natural allies.[100] On 18 July 1982 the Army massacred 268 Achí Mayans,[101] including, "[s]ome 20 [females] … between the ages of 12 and 20 … [and] ill-treated, [and] raped them [too]."[102] In addition, there were forced displacements and the burning down of homes and crops. Then, the victims' relatives and the survivors suffered harassment for demanding justice while the perpetrators enjoyed impunity.[103]

Since the Guatemalan government admitted the facts and its responsibility on 23 April 2004, the Court accepted such admission and affirmed that Guatemala had violated article 5 of the Inter-American Convention on Human Rights and reserved the discussion on reparations and fees for a separate decision,[104] in which the victims were awarded not only pecuniary compensation to recover from damages, expenses, and fees but also a variety of non-pecuniary compensation—including the publication of the decision in indigenous language and Spanish, and providing the victims and relatives with access to medical care, education, and decent housing.[105]

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[100] *Masacre Plan de Sánchez vs. Guatemala*, 29 de abril de 2004, Serie C, no. 105: Pars. 42 (1-8) (General practices: 1969-1996) and 42 (15-21) (Specific to the massacre).

[101] Ibid: Par. 42 (21).

[102] Ibid: Par. 42 (18). Rape is torture due to governmental involvement and being part of an anti-Mayan policy. See also: *The Prosecutor versus Jean-Paul Akayesu*, Case No. ICTR-96-4-T: Par. 597.

[103] Ibid: Par. 42 (22).

[104] *Masacre Plan de Sánchez* (Serie C, no. 105): Par. 35.

[105] *Masacre Plan de Sánchez vs. Guatemala*, Reparaciones, 19 de noviembre de 2004, Serie C, no. 116: Par. 125 (Unanimous).

Other Guatemalans were suspected of being members of guerrilla groups. Thus, Maritza Urrutia—a 33 year old with a young son, who lived with her parents—[106]was kidnapped on 23 July 1992[107] and remained illegally detained for 8 days. She was subjected to psychological torture and solitary confinement. Available evidence linked her kidnappers to an army intelligence group.[108] The IACtHR included information from the *Comisión de Esclarecimiento Histórico* and the *Proyecto Interdiocesano de Recuperación de la Memoria Histórica*, and the Guatemalan partial admission of the facts and its responsibility[109] as bases of its decision, in which Guatemala was found, unanimously, responsible for violating, among others, the ban on torture and other cruel, inhuman and degrading treatment (article 5 of the American Convention on Human Rights and articles 1 and 6 of the Inter-American Convention on Torture); and the right to judicial redress (article 8 of the Inter-American Convention on Torture).[110]

As a result of such violations, the Court unanimously imposed on the Guatemalan government the duty to investigate what happened to Urrutia and to bring to justice those individuals responsible for the violations of Urrutia's rights. In addition, the government was ordered to pay pecuniary reparations to the victim, her parents, and her son. Although all the judges agreed on the need for reparations[111] and for an amount to

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[106] *Maritza Urrutia vs. Guatemala*, Sentencia de 27 de noviembre de 2003, Serie C, no. 103: Par. 58 (23).

[107] Ibid: Par. 58 (4).

[108] Ibid: Par. 58 (6) and (4-5).

[109] Ibid: Par. 42-43. August 9, 2000 is the date of the admission, see: Ibid, Par. 6.

[110] Ibid: Par. 194 (2) and (3) (Verdict).

[111] Ibid: Par. 194 (6) and (7).

cover the fees and other expenses related to the process before the Court,[112] *ad hoc* Judge Arturo Martínez Galvéz dissented on the amount, which he considered excessive due to Guatemala's weak economy.[113]

Several cases involved Peru and torture and/or cruel, inhuman and degrading treatment practices during its fight against terrorism between 1980 and 1994. The illegal activities were the work of DINCOTE [the division of the Peruvian National Police in charge of the fight against terrorism]. The *Coordinadora Nacional de Derechos Humanos* [a human rights NGO] alleged that torture was used against '3,868 detainees accused of terrorism or treason.'[114] In chronological order from the moment of the illegal detention, the decisions of the IACtHR include:

(1) On 21 June 1991 two Peruvian minors—of fourteen and seventeen years of age—the Gómez Paquiyauri brothers, were illegally and brutally detained by the Peruvian police under suspicion of terrorism and forced into the trunk of a car; everything captured by TV cameras.[115] They were killed immediately. "[A]pproximately an hour after their detention, their corpses . . . were sent to the morgue of the hospital."[116] Afterwards, the parents and siblings of the two victims and the love interest of the 17 year old—Jacinta Peralta Allccarima, who had a daughter with the deceased but was too

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[112] *Maritza Urrutia* (Serie C, no. 103): Par. 194 (8).

[113] Ibid: Partial dissenting opinion, Point II.

[114] *Cantoral Benavides vs. Perú*, Sentencia de 18 de Agosto de 2000, Serie C, no. 69: Par. 43 (b).

[115] *Los Hermanos Gómez Paquiyauri vs. Perú*, Sentencia de 8 de Julio 2004, Serie C, no. 110: Pars. 3 and 67 (f).

[116] Ibid: Par. 67 (h).

afraid to inscribe him as the father in the official registry—[117]alleged threats and harassment on the part of the authorities.[118]

According to precedent, throwing a person into the trunk of a car—as was done to the Gómez Paquiyauri brothers—is by itself a violation of article 5 of the American Convention on Human Rights.[119] However, in this case the victims suffered other physical abuses—including beatings with the butt of a rifle—before being killed.[120] Thus, the IACtHR—by unanimity—found Peru responsible for the violation, among others, of the right to be free from torture and other cruel, inhuman and degrading treatment (article 5 of the American Convention on Human Rights and articles 1 and 6 of the Inter-American Convention on Torture), not only against the Gómez Paquiyauri brothers but against the victims' parents, siblings, and the seventeen year old's love interest, too.[121] In addition, since the direct victims were minors, Peru was found responsible for the violation of the state's special duty to protect underage individuals (article 19 of the Convention on Human Rights).[122]

As a consequence of the proven abuses, the Court, unanimously imposed on the government of Peru the duty to investigate what happened to the two brothers and to eventually bring to justice the individuals responsible for their torture and ultimate

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[117] *Los Hermanos Gómez Paquiyauri* (Serie C, no. 110): Par. 67 (v).

[118] Ibid: Par. 67 (w). That is why the Court decided to order Peru to protect the security of these persons, see: Ibid, Par. 38.

[119] See: *Castillo Páez*, Sentencia de 3 de Noviembre de 1997, Serie C, no. 34: Par. 66.

[120] *Los Hermanos Gómez Paquiyauri* (Serie C, no. 110): Par. 67 (g) and (i).

[121] Ibid, Par. 253 (3).

[122] Ibid: Par. 253 (6) (Unanimous).

death.[123] Furthermore, the Court decided, unanimously, that the Peruvian government had to pay pecuniary reparations to the victims' parents, siblings, and to the love interest and the daughter of the seventeen year old.[124] Moreover, all the judges agreed on the duty of Peru to pay for the fees and other expenses related to the process before the Court[125] and on significant non-pecuniary reparations, which included—apart from the standard publication of the decision in the official gazette of the country and in one newspaper of national scope—[126]naming an educational center after the two brothers and covering the expenses of the education of the daughter of one of the victims and providing for her official inscription as the daughter of the deceased.[127]

María Elena Loayza Tamayo, a university Professor, was illegally detained on 6 February 1993. Then "she was placed in solitary confinement, subjected to torture, cruel and degrading treatment . . . in order to force her to . . . declare herself a member of the Communist Party of Peru-Shining Path."[128] According to the victim's testimony "she was blindfolded and tied up, she was beaten and undressed, raped vaginally and anally, and submerged into the sea … [S]he was beaten and sexually abused daily."[129] That same day, Luis Alberto Cantoral Benavides—a 20-year old Biology student—was

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[123] *Los Hermanos Gómez Paquiyauri* (Serie C, no. 110): Par. 253 (9).

[124] Ibid: 253 (14) and (15).

[125] Ibid: Par. 253 (16).

[126] Ibid: Par. 253 (11).

[127] Ibid: Par. 253 (3), Par. 253 (12) and (13) respectively.

[128] *Loayza Tamayo vs. Perú*, Excepciones Preliminares, Sentencia de 31 de Enero de 1996, Serie C, no. 25: Par. 14 (b).

[129] In *Loayza Tamayo vs. Perú,* Sentencia de 17 de Septiembre de 1997, Serie C, no. 33: Par. 45 (e).

illegally detained and suffered an ordeal similar to that of Loayza Tamayo. While in detention, the officials took Cantoral Benavides to the beach,

> [T]hey started to torture his brother, and he heard it all and was very afraid . . . they started to beat [Cantoral Benavides]; he was blindfolded and they hit his ears with their hands; they told him that they were going to submerge him. . . . '[T]he psychological torture was too much for me' . . . he was paraded before the press with a detainee uniform, and accused . . . of terrorism as a member of Shining Path . . . [H]e was moved to a penal prison . . . where he was equally mistreated . . . [H]e remained under the sun during hours. . . . [H]e was forced to be in line to await for beatings. . . . He was subjected to electrical shocks . . . thrown to the floor . . . covered with water and kerosene . . . [H]is body was covered in blood and one of his arms became paralyzed; he had to crawl … to his cell; he received no medical care.[130] [Translation].

Moreover, he was placed in solitary confinement as Loayza Tamayo was.[131] In these two cases, the IACtHR—unanimously—found a violation of the right of the victims to be free from torture and to have access to redress.[132] As a result, the American Court—unanimously again—imposed on Peru the aforementioned standard duties to find those responsible for the violations, to pay pecuniary and non-pecuniary reparations to the victims, and to cover the fees and other expenses of the case.[133]

In addition, the Peruvian government was specifically compelled to release Loayza Tamayo. However, Judge Alejandro Montiel Argüello argued against applying the principle of double jeopardy to acquit her because, since the military tribunal that acquitted Loayza Tamayo of the crime of treason did not rebuke the facts that based the

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[130] In *Cantoral Benavides* (Serie C, no. 69): Par. 43 (a).

[131] Ibid: Par. 43 (a). For twenty-three and a half hours every day according to his testimony.

[132] See, respectively: *Loayza Tamayo* (Serie C, no. 33): Par. 86 (2) and (3); and *Cantoral Benavides* (Serie C, no. 69): Par. 198 (1), (3), (4), and (11).

[133] See, respectively: *Loayza Tamayo*, Reparaciones, Sentencia de 27 de Noviembre de 1998 (Serie C, no. 53): Par. 192 (6), (4), and (7); and *Cantoral Benavides vs. Perú*, Reparaciones, Sentencia de 3 de Diciembre de 2001, Serie C, no. 88: Par. 99 (1), (2) (pecuniary reparations), (3) (fees and expenses), (7) (non pecuniary reparations), and (9) (duty to investigate the violations and bring those responsible to justice).

accusation against her, the civilian court had not violated double jeopardy when it found her guilty of the crime of terrorism.[134]

Moreover, Peru was ordered to reinstate Loayza Tamayo as a professor with all the benefits and to reform its antiterrorist legislation.[135] In relation to Cantoral Benavides, the IACtHR ordered Peru to declare void any prior conviction against Cantoral Benavides and to cover all the costs derived from paying for his higher education career, including food and accommodations. In addition, Peru was instructed to provide Cantoral Benavides' mother with medical and psychological treatment.[136]

The following last cases I am examining in this section refer to allegations of violation of article 5 of the American Convention based primarily on the placement of individuals in solitary confinement. In October 1993 the DINCOTE detained illegally four Chilean citizens.[137] Although the detainees were not nationals of Peru, they were accused by the Peruvian government of treason.[138] Likewise, from 17 January 1996 to 7 October 1998 a U.S. citizen, Lori Berenson, was imprisoned in Yanamayo after being found guilty of the crime of treason.[139] During this period she was in solitary confinement and could only "go out [of her cell] for half an hour everyday during the first year and a half and then one hour a day."[140] Although Berenson was in other prisons, the

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[134] Loayza Tamayo (Serie C, no. 33): Par. 86 (5) and dissenting opinion of Judge Montiel Argüello: Pars. 3-7 and 10-11.

[135] Ibid: Par 192 (1) and (5) (Unanimous Verdict).

[136] See, *Cantoral Benavides* (Serie C, no. 88): Par. 99 (4), (5), and (6).

[137] *Castillo Petruzzi y otros vs. Perú*, Sentencia de 30 de mayo de 1990, Serie C, no. 52: Par. 86.

[138] Ibid: Par. 86 (9).

[139] *Lori Berenson vs. Perú,* Sentencia de 25 de noviembre de 2004, Serie C, no. 119: Par. 3.

[140] Ibid: Par. 95.

Court limited its examination to her imprisonment in Yamamayo following strictly the request of the victim's representatives and of the IACHR.[141]

In both cases, the Court declared that Peru had violated article 5 (1) of the Convention on Human Rights—in relation to Berenson, the Court mentioned specifically the violation of art. 5 (6) which establishes that "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social rehabilitation of the prisoners."[142]

As a result of such violations, the American Court, unanimously, imposed on Peru the duty to change any antiterrorism legislation that contravened the American Convention on Human Rights[143] and to pay to the parents of the victims an amount to cover the fees and costs involved in bringing the case to Court and the procedures before it.[144] Moreover, the IACtHR declared the criminal process against the four Chileans accused of terrorism void and thus "order[ed] . . . a new trial with complete adherence to due process of law."[145] In addition, in the Lori Berenson case, the Court also declared the duty of Peru to improve the conditions in the Yanamayo prison, so the state met its

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[141] Lori *Berenson vs. Perú,* Sentencia de 25 de noviembre de 2004, Serie C, no. 119: Par. 99.

[142] Ibid: Par. 248 (1) (Unanimous Verdict: Declarative Section) and Castillo Petruzzi (Serie C, no. 52): Par. 226 (10). In the *Castillo Petruzzi* case, Judge Vidal Ramírez dissented in relation to declaring a violation of art. 5 because he considered that there had been no in-depth examination of the special laws in effect in Peru at the time when the alleged violation happened.

[143] *Castillo Petruzzi* (Serie C, no. 52): Par. 226 (14) and *Lori Berenson* (Serie C, no. 119), ibid: Par. 248 (1) (Dispositive Section).

[144] *Castillo Petruzzi* (Serie C, no. 52), ibid: Par. 226 (15) and *Lori Berenson* (Serie C, no. 119), ibid: Par. 248 (7) (Dispositive Section).

[145] *Castillo Petruzzi* (Serie C, no. 52), ibid: Par. 226 (13).

international obligations in the matter, and to provide the victim with medical attention.[146]

On 27 March 1996 a medical doctor, Teresa de la Cruz Flores, was legally detained for providing medical care to a member of the Communist party Shining Path and failing to provide the authorities with the pertinent information about him.[147] During a month, she was placed in solitary confinement for twenty-three and a half hours daily.[148] She remained in prison until 9 July 2004[149] suffering inhuman and degrading conditions such as no access to proper food, reading materials or medical attention. The IACtHR found Peru guilty of violating the right to be free from torture and other inhuman and degrading treatment (art. 5 of the Convention on Human Rights) against de la Cruz Flores and against her mother, her two brothers, her sister, her son, and her daughter.[150] Thus, Peru was ordered to pay reparations to the victim and her relatives and to cover de la Cruz Flores' procedural fees and expenses.[151] Furthermore, the Court imposed on Peru specific non pecuniary reparations such as "providing medical and psychological attention to the victim . . . including free access to medicines,"[152] reinstating the victim to her job with all the benefits, and training her professionally.[153]

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[146] *Lori Berenson* (Serie C, no. 119): Par. 248 (4) and (4) (Dispositive Section).

[147] *De la Cruz Flores vs. Perú*, Sentencia de 18 de noviembre de 2004, Serie C, no. 115: Par. 102 (3).

[148] Ibid: Par. 73 (12).

[149] Ibid: Par. 75 (53).

[150] *De la Cruz Flores* (Serie C, no. 115): Par. 188 (3) (Declarative Section).

[151] Ibid: Par. 188 (3) and (4) (Dispositive Section).

[152] Ibid: Par. 188 (5) (Dispositive Section).

[153] Ibid: Par. 188 (6-8) (Dispositive Section).

b. Fight against "Delinquents" or Social Cleansing[154]

Although "delinquents" refers usually to individuals that commit crimes, "delinquents" is used here in very broad terms to include individuals belonging to certain sectors of society, which are perceived as such just because they belong to a different culture and/or social class. The rights of these "delinquents" are violated because the society at large and the government consider them inferior and outside the protection of the law. The Court cases focus on Ecuador, Guatemala, and Suriname.

On 23 June 1992 the National Police of Ecuador illegally detained Rafael Iván Suárez Rosero, suspected of drug dealing,[155] and placed him in solitary confinement for more than a month—banned internationally and unconstitutional in Ecuador.[156] The IACtHR—unanimously—found that Ecuador had violated Suárez Rosero's right to be free from torture (art. 5 of the Convention on Human Rights). As a result, Ecuador was instructed to find those responsible for the abuses and to prosecute them, and to compensate Suárez Rosero and his relatives for the violations suffered.[157]

In addition, in a separate decision on reparations in which the specific pecuniary compensation was established, the Court ruled that Ecuador had "to remove [Suárez Rosero's] name from both the Register of Criminal Records, as well as from the Register

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[154] Notes from a "Lecture by Victoria Sanford," NEH Summer Institute "Human Rights in Conflict, Interdisciplinary Perspectives" (New York, 25 July 2006).

[155] *Suárez Rosero vs. Ecuador*, Sentencia de 12 de noviembre de 1997, Serie C, no. 35: Par. 34 (a) and (b).

[156] Ibid: Pars. 89, 34 (d), and 52. Ecuador did not refute the facts, see: Ibid, Pars. 56 and 85.

[157] *Suárez Rosero*, Serie C, no. 35: Par. 110 (6) and (7).

maintained by the National Council on Narcotic Drugs and Psychotropic Substances, as to the facts concerned in the present proceeding" and to pay fees and expenses.[158]

Daniel Tibi, a dealer in precious gems, was illegally detained on 27 September 1995 on similar charges as those of Suárez Rosero.[159] In prison he suffered "punches in the body and face, cigarette burnings on the legs and electroshocks in the testicles . . . [and was] submerged in a tank with water,"[160] to force him to confess.[161] As a result, the IACtHR found that Ecuador had violated Tibi's right to be free from torture (article 5 of the Convention on Human Rights and Arts. 1, 6 and 8 of the Convention on Torture) and the right of his wife, his two stepdaughters, his daughter with his present wife, and his son from a previous marriage to be free from torture;[162] Tibi's family suffered "attacks against their personal integrity as a consequence of the illegal and arbitrary detention, the lack of due process, and the torture to which [Tibi] was subjected.[163]

Therefore, Ecuador—besides finding the individuals responsible for the abuses Tibi suffered and punishing them—had to pay reparations to Tibi and the members of his family, to cover any expenses and fees incurred by Tibi during the Court procedures, to recognize in writing its responsibility for the facts proven in the decision, and to apologize—in writing also—to Tibi and his family.[164] In addition, Ecuador "ha[d] to

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[158] *Suárez Rosero vs. Ecuador*, Reparaciones, Sentencia de 20 de enero de 1999, Serie C, no. 44: Par. 113 (1) and (3) [Translation into English is from the IACtHR's website].

[159] *Tibi vs. Ecuador*, Sentencia de 07 de septiembre de 2004, Serie C, no. 114: Par. 3.

[160] *Tibi* (Serie C, no. 114): Par. 148.

[161] Ibid: Par. 149.

[162] Ibid: Par. 280 (5) and (6) (Unanimous Verdict: Declarative Section).

[163] Ibid: Par. 160. Similarly, see: Below, 2.c.2.

[164] Ibid: Par. 280 (10), (14), (15), (16) and (12) (Unanimous Verdict: Dispositive Section).

establish an Inter-institutional Committee in charge of defining and implementing programs on human rights education and on the treatment of prisoners. . . ."[165]

The Guatemalan National police subjected five young men to physical and psychological torture before killing four of them.[166] The Guatemalan government agreed to the facts of the case, including the torture.[167] These young men were targeted for being "street children," i.e., poor and marginalized members of society which are presumed to be petty criminals. Moreover, the government recognized that the torture and killing of the so-called "'street children' [was] a systematic practice that remain[ed] unpunished."[168] Thus, the Court unanimously decided that Guatemala had violated the right not to be subjected to cruel and/or inhuman or degrading treatment (article 5 of the Convention on Human Rights against the four victims and their family members—which include their mothers and the grandmother of one of the victims.[169] Moreover, since two of the young men were minors, Guatemala had also violated its duty to protect minors (article 19 of the Convention on Human Rights).[170]

Since four of the victims were killed, the compensation derived from the violation of the right to be free from torture consist basically of the pecuniary amounts that Guatemala had to pay to the victims' heirs, who will inherit the amount that would have

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[165] *Tibi* (Serie C, no. 114): Par. 280 (1)3 (Unanimous Verdict: Dispositive Section).

[166] *Villagrán Morales* (Serie C, no. 62): Par. 82. For further details, see: Ibid, Par. 157.
Another case of abuses to minors is *Instituto de reeducación del menor vs. Paraguay*, Sentencia de 2 de septiembre de 2004, Serie C, no. 112: Par. 340 (4) and (6) (Unanimous Verdict) on responsibility and Par. 340 (9-17) on reparations.

[167] *Villagrán Morales*, ibid: Par. 150. Section X is devoted to this violation.

[168] Ibid: Par. 183.

[169] Ibid: Par. 253 (3) and (4). In addition, it found that Guatemala had also violated arts. 1, 6 and 8 of the Convention on Torture with respect to the four young men, see: Ibid, Par. 253 (7).

[170] Ibid: Par. 253 (5).

being awarded to the direct victims for their suffering in addition to the amount received for their own suffering. Thus, the judges decided that Guatemala had to pay such reparations not only to the mothers of the victims and one grandmother but also to the known siblings of the victims; and Guatemala had to cover any of their expenses derived from the court proceedings.[171] Moreover, Guatemala was instructed to adapt its regulation to the standards set in the Convention on Human Rights in relation to the special protection states have to provide to minors (article 19 of the Convention) and to find those individuals responsible for the abuses and to bring them to justice.[172]

On 31 December 1987 the Surinamese military attacked a group of more than 20 *Cimarrones*—a different ethnic and cultural group than that of the majority in Suriname.[173] Then, the members of the military apprehended seven unarmed men from the tribe of the Saramacas and "gave each of them a shovel and an order to start digging."[174] One of the unarmed men was able to escape the massacre but died less than a week later from injuries which worsened while hiding from the military and trying to find help.[175] On December 2, 1991, the representative of Suriname recognized the state's responsibility for the facts. Therefore, the Court closed the fact finding phase and opened the reparations phase.[176]

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[171] *Villagrán Morales vs. Guatemala*, Reparaciones, Sentencia de 26 de mayo de 2001, Serie C, no. 77: Par. 123 (1-4) and (9).

[172] Ibid: Par. 123 (5) and (8).

[173] *Aloeboetoe y otros vs. Suriname*, Reparaciones, Sentencia de 10 de septiembre de 1993, Serie C, no. 15: Par. 2.

[174] Ibid: Pars. 4-5.

[175] Ibid: Par. 6.

[176] *Aloeboetoe y otros vs. Suriname*, Sentencia de 4 de diciembre de 1991, Serie C, no. 11: Par. 22 and Unanimous Verdict, 1-2.

In the reparations phase, the Court ruled on Suriname's duty to pay an amount of money to the extended family of the victims and/or their heirs. In addition, the IACtHR adopted non pecuniary reparations when it "ordered . . . Suriname . . . to reopen a school . . . and to equip it with the necessary academic and administrative personnel to guarantee that it will work permanently starting in 1994 and to make the medical facilities that exist in [the locality from which the victims originated] operational [in 1993]."[177]

2. MAIN JUDICIAL FINDINGS

The Court reminds the accused states, in each torture-related decision, of the *ius cogens* nature of the violation of the prohibition against torture and of its non-derogability.[178] Thus, it rejected that the fight against terrorism could justify the violations of article 5 of the Convention on Human Rights.[179]

Moreover, through its jurisprudence, the IACtHR decides which activities constitute torture or cruel, inhuman, and degrading treatment—both forbidden in article 5 of the Convention on Human Rights; how to evaluate the evidence; what reparations correspond to the victims and their families; and how to solve cases in which the state has accepted the facts and/or its responsibility for the abuses.

a. Activities that Constitute Torture and Activities that Constitute Cruel, Inhuman, and Degrading Treatment

When evaluating what the alleged abuses are from a legal perspective, the Court refers to the relevant European jurisprudence such as *Ireland v. the United Kingdom*—[180]

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[177] [Translation]. *Aloeboetoe y otros vs. Suriname*, Reparaciones (Serie C, no. 15): Par. 116 (5) (Unanimous Verdict).

[178] *Tibi* (Serie C, no 114): Par. 143.

[179] *Aloeboetoe y otros* (Serie C, no. 15): Pars. 53-4.

[180] For a more in-depth analysis, see: Below, Sec. D.

first decision of the European Court on torture in which it defined this activity and administrative practice; and *Ribitsch v. Austria*,[181] which affirmed the special vulnerability of detainees and prisoners to suffer this violation of human rights.[182]

Even though distinguishing between torture and cruel, inhuman, and degrading treatment is irrelevant from the perspective of the article violated—article 5 of the Convention on Human Rights—a higher degree of stigma is attached to torture and thus, reparations are larger. That is why the IACtHR has established whether certain activities constitute torture.[183] The decisions include the following seven main categories:

i. Solitary Confinement

Keeping a person in solitary confinement—meaning usually that the individual can only get out of the cell for half an hour or an hour a day—for nine days is "cruel, inhuman and degrading treatment,"[184] and thus, a violation of article 5 (2) in relation to 1 (1) of the American Convention.[185] Furthermore, confinement can be accompanied by horrid conditions such as being in a "humid . . . underground [cell] of approximately 15 square meters . . . with another sixteen detainees, under bad hygienic conditions and [being] forced to sleep on top of newspapers while subjected to beatings and threats[186] or "in a room handcuffed with lights and music blasting all the time."[187]

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[181] *Ribitsch v. Austria,* Judgment of 4 December 1995, Series A, no. 25: Par. 36.

[182] For the reference to both precedents, see: *Loayza Tamayo* (Serie C, no. 33): Par. 57.

[183] Torture usually requires several serious ill-treatments. See: *Tibi* (Serie C, no 114): Par. 149.

[184] *Loayza Tamayo* (Serie C, no. 33): Par. 58. And *Suárez Rosero* (Serie C, no. 35): Par. 91.

[185] *Suárez Rosero* (Serie C, no. 35), ibid: Pars. 92 and 110 (3).

[186] [Translation]. Ibid: Par. 91.

[187] *Maritza Urrutia* (Serie C, no. 103): Par. 58 (6).

ii. Physical Abuse

Physical abuse of a certain degree of severity is torture. Thus, the Court affirmed that Cantoral Benavides suffered[188] torture because "acts . . . [were] inflicted intentionally . . . to suppress [his] physical and psychological resistance to force him . . . to confess . . . [and], after he was sentenced, to subject him to punishment beyond deprivation of freedom."[189] Thus, Ecuador "violated articles 5.1 and 5.2 of the Convention on Human Rights … and 2, 6, and 8 of the […] Convention on Torture."[190]

In *Morales Paniagua,* the IACtHR decided that Guatemala had violated the right to be free from torture (article 5 of the Convention on Human Rights) of ten people. Since some of the victims died, the bulk of the evidence is based on autopsy reports which show, among others, multiple injuries produced by a sharp object. [191] Moreover, survivors' testimonies underline that the police subjected them to mistreatment, including beatings and humiliations. Augusto Angárita Ramírez's testimony is illustrative of these types of abuses.

> [He] declared being handcuffed, ordered to lie on the floor belly down . . . [Then] he felt how a man was kneeling on his back. . . .[T]they covered his nose and mouth with a piece of wide plastic, . . . while at the same time they were pulling his head backwards and bending both of his legs. . . . [He] stated that they hit his fingers and toes and his genitalia and they threatened him with electroshocks.[192] [Translation].

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[188] See: Above, p. 131.

[189] *Cantoral Benavides* (Serie C, no. 69): Par. 104.

[190] Ibid: Pars. 106 and 198, 1 and 11 (Unanimous Verdict).

[191] *De la 'Panel Blanca' (Paniagua Morales y otros) vs. Perú*, Sentencia de 8 de marzo de 1998, Serie C, no. 37): Par. 66 (3), (4), and (5) c-d.

[192] Ibid: Par. 66 (2) b. See also: Ibid: Par. 66 (6), (7) a, and (9) a.

iii. Corporal Punishment

Since whipping[193] constitutes a violation of article 5 of the American Convention on Human Rights and the laws of Trinidad and Tobago established whipping as a form of punishment, this country was violating such article.[194] In addition, the Court mentioned as further basis of its position two cases from the ECtHR relative to corporal punishment administered to minors, i.e., *Tyrer v. United Kingdom* and *A. v. United Kingdom*.[195] In *Caesa*r, the victim described the psychological and physical torture suffered.

> On 5 February 1998 I received fifteen whippings with the cat-o'-nine-tails. . . . I was the last one. . . . I was afraid of not surviving due to my condition [a recent operation]. . . .
>
> I was forced to spread naked on a metallic contrivance. . . . My hands and feet were tightly tied to it. Then my head was covered with a cloth. . . . I fainted. . . .
>
> I remained in the infirmary during two months after the whipping. … Presently, I still feel the whipping.[196] [Translation].

The IACtHR stated that the punishment was administered in a manner degrading to the victim who was naked.[197] Moreover, since a doctor was present during the whipping, medical ethics were violated too.[198] Furthermore, Caesar was tortured psychologically prior to the whipping because "in three or four . . . occasions [he] was exposed to other prisoners' suffering while . . . [they were] subjected to a similar punishment."[199]

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[193] Details in *Caesar vs. Trinidad y Tobago,* Sentencia de 11 de marzo de 2005, Serie C, no. 123: Pars. 71 and 73.

[194] Ibid: Pars. 74 and 89.

[195] *Caesar vs. Trinidad y Tobago* (Serie C, no. 123): Par. 64, and Fn. 21. The decisions are, respectively, of 5 April 1978 and of 23 September 1998.

[196] *Caesar vs. Trinidad y Tobago* (Serie C, no. 123), ibid: Par. 76.

[197] Ibid: Par. 79.

[198] Ibid: Par. 80.

[199] Ibid: Par. 77.

iv. Psychological Torture Including Broadcast Forced Confessions

The finding of psychological torture[200] is based on the victims' "isolation from the outside world and . . . their realization that their lives were in jeopardy."[201] The IACtHR justified this decision by naming ECtHR's jurisprudence, which affirms that "creating a menacing situation or threatening an individual with torture can amount, under certain circumstances, at least to inhuman treatment."[202] Since these events happened while the young men were in police custody, the agents of the government are responsible.[203]

In addition, when the peace talks started in Guatemala, the government "to demoralize and weaken . . . 'the enemy (URNG) [Unidad Revolucionaria Nacional Guatemalteca] . . . used the so-called psychologically operations in which alleged members of the URNG were brought before the mass media, and forced to declare their desire to abandon such groups. . . ."[204] The Report of the CEH (*Comisión de Esclarecimiento Histórico*) corroborated the existence of such practices.

v. Suffering of the Victim's Relatives

The Court has affirmed the existence of cruel, inhuman and degrading treatment against the victims' family not only in relation to acts directed against them, as when Cantoral Benavides' mother testified that to see her son she suffered "in some occasions,

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[200] *Cantoral Benavides* (Serie C, no. 69): Par. 63 (f).

[201] *Villagrán Morales* (Serie C, no. 62): Par. 163.

[202] Ibid: Par. 165.

[203] Ibid: Par. 169. Similarly in *Maritza Urrutia* (Serie C, no. 103): Par. 58 (6): "Threats of physical torture and of killing her or members of her family is she did not cooperate." [Translation].

[204] [Translation]. *Maritza Urrutia* (Serie C, no. 103): Par. 58 (2).

vaginal searches,"[205] but also as a result of the victims' suffering. For example, the IACtHR affirmed that article 5 (2) was violated in relation to a Peruvian MD's children and mother, [206] and to Cantoral Benavides' mother and brother.[207]

Another significant finding of the IACtHR is that the victims' mothers suffered from inhuman and cruel treatment because they were unable to bury their children properly and justice was denied.[208] In one case the Court used the report of Ann Deutsch, a psychologist who specializes in treating and studying torture victims, as evidence of these psychological effects of torture.[209] According to the Court, "[t]he conditions of poverty intensify the affective links to their children."[210] In taking into account the suffering of the victims' relatives, the IACtHR follows a European precedent.[211]

vi. Actions which Do Not Constitute a Violation of Article 5

In the case of two brothers who disappeared after a prison revolt was controlled using excessive force, the Court not only rejected the allegation of torture but, after applying *ex officio* article 5 (2),[212] it rejected the existence of cruel, inhuman or degrading

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[205] *Cantoral Benavides* (Serie C, no. 69): Par. 43 (j).

[206] *De la Cruz Flores* (Serie C, no. 115): Par. 188 (Verdict, Declarative Point 3).

[207] *Cantoral Benavides* (Serie C, no. 69): Par. 105.

[208] *Villagrán Morales* (Serie C, no. 62): Par. 173. In ibid: Par. 174.
Similarly when the victims are "dismembered and thrown to the river." [Translation]. In *19 Comerciantes vs. Colombia,* Sentencia de 5 de julio de 2004, Serie C, no. 109: Par. 212.

[209] *Villagrán Morales* (Serie C, no. 77): Par. 56 (a).

[210] Ibid: Par. 56 (a). It deals with the effects on their mothers, and a grandmother and the sister that was a mother figure.

[211] Ibid: Par. 176.

[212] "[The Court's] right and duty to apply to a case the adequate legal provisions even if the parties to it did not mention them expressly." [Translation]. In *Durand y Ugarte*, Sentencia de fondo del 16 de Agosto de 2000 (Serie C, no. 68): Par. 76.

treatment too[213] because both—torture and cruel, inhuman, or degrading treatment—are "concepts that posses a specific juridical content and cannot be assumed necessarily and automatically whenever there is an arbitrary attack on life, even under aggravated circumstances."[214] However, Judge Carlos Vicente de Roux Rengifo, in a partially dissenting vote, considered there was a high probability that the victims suffered psychologically and physically before dying,[215] and thus, the Court could have used presumptions to establish such violation as it had done in other circumstances.

b. Admissible Evidence: Evaluation

The IACtHR, as any court, has at its disposal a variety of means of proof such as testimonies from victims, witnesses, and experts; and reports from NGOs and governments relative to common country practices including torture. The evidentiary value of each of them rests on the discretionary power of the IACtHR.

Victims' testimonies are admitted—sometimes this type of evidence is the only available proof—but they are evaluated "as part of all the evidence of the process considered as a whole."[216] The Court imposes this requirement to avoid partiality which can be presumed to accompany the testimony of one of the parties to the process. Their value increases when the testimonies can be corroborated by physical evidence.

The testimonies of experts are relevant to document the consequences of physical abuse and the traces of psychological mistreatment and torture. For example, forensic doctor Roberto von Bennewitz found "a correlation between present ills and the specific

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[213] Decision of 6 votes against 1. *Durand y Ugarte* (Serie C, no. 68): Par. 146 (2) (Verdict).

[214] *Durand y Ugarte* (Serie C, no. 68): Par. 79.

[215] Ibid: Voto parcialmente disidente del Juez de Roux Rengifo.

[216] *Cantoral Benavides* (Serie C, no. 69): Par. 59 [Translation].

tortures to which the victim was subjected."[217] They are also valuable to assess the suffering of the victims' relatives.

In the case of Guatemala's treatment of "street children"—whose official autopsy-reports attributed the signs of violence in the corpses to wild animals—[218]the evidence of physical torture—including mutilations—was provided by a Report from Amnesty International.

> [In] it is pointed out that the corpses had signs of torture: their ears and tongues had been cut off and their eyes had been burnt or extracted. In addition, it seems that a boiling liquid was poured over the chin and chest of [Cael Sandoval]. According to the office of the Public Defender, the mutilations . . . correspond to the treatment reserved by police to whistleblowers. The mutilation of ears, eyes and tongue means that person had heard, seen or said something inconvenient.[219] [Translation].

Sometimes the evidence of a generalized practice of torture in a given country is considered valid proof of the existence of a violation of article 5 of the Convention on Human Rights in specific cases. For example, since torture was a common practice in Peru[220] "against persons being investigated for treason and terrorism,"[221] the IACtHR admitted such practice as evidence of Loayza Tamayo's sufferings.

c. Reparations: Especially Non-Pecuniary Ones

The purpose of reparations is to try to approximate the conditions of the victim's life as closely as possible to those existing prior to the abuses. Whenever this is impossible, the Court compensates the victims with pecuniary and non-pecuniary

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[217] *Loayza Tamayo* (Serie C, no. 42): Par. 75. [Translation]. Another report, with similar findings in ibid: Par. 76. These reports are admitted despite Peru's objections, see: Ibid: Pars. 81-2.

[218] *Villagrán Morales* (Serie C, no. 62): Par. 158.

[219] Ibid: Par. 159.

[220] *Loayza Tamayo* (Serie C, no. 25): Par. 58.

[221] *Cantoral Benavides* (Serie C, no. 69): Par. 63 (t). [Translation].

measures. Since the applicable law does not specify the reparations attached to the different violations, the IACtHR must evaluate the material and moral damages suffered on a case by case basis. As a result of such discretionality, it has adopted a variety of non pecuniary reparations.

i. Reparations Established in the Convention on Human Rights

The first conventional obligation of a state is to investigate any violation of article 5 of the Convention on Human Rights,[222] find those responsible for torture and/or cruel, inhuman and degrading treatment, and punish them after they are found guilty.[223] And the second duty is to award to the victims and their families pecuniary compensation for the violations suffered. Both measures are standard forms of reparation.

The duty imposed in article 2 of the Convention to adapt state legislation to the protection of human rights can also provide some satisfaction to the victims because it prevents future abuses and/or fights impunity. For example, where torture is legally established, the Court orders the annulment of such laws;[224] where it is a widespread practice, the Court can impose the overhaul of prison conditions.[225]

ii. Reparations for Material and Moral Damages and their Beneficiaries

Aloeboetoe exemplifies how the Court takes into account material and moral damages before evaluating what reparations to award to the victims.

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[222] *Cantoral Benavides* (Serie C, no. 69): Par. 171. And *Masacre Plan de Sánchez vs. Guatemala*, 19 de Noviembre de 2004, Serie C, no. 116: Par. 125 (1) (Dispositive Section).

[223] Ibid: Par. 198 (12) (Unanimous Verdict) and *Masacre Plan de Sánchez*, ibid: Par. 125 (1). On the obligation to investigate and punish, see: *Suárez Rosero* (Serie C, no. 35): Par. 110 (6) and (7).

[224] See: *Caesar* (Serie C, no. 123): Par. 14 and *Loayza Tamayo* (Serie C, no. 42): Par. 192 (6).

[225] *Lori Berenson* (Serie C, no. 119): Par. 248 (6). Its heinous conditions are corroborated by the UN Committee on Torture, ibid: Par. 107.

> The dead victims . . . suffered a moral damage when they were humiliated by an armed band which took their freedom and then killed them. The injuries received, the pain of seeing themselves condemned without any reason, the ordeal of having to dig their own graves are part of the moral damage suffered . . . the one that did not die in the beginning had to bear that his injuries were invaded by the worms and had to see how the corpses of his friends served as food for the vultures.[226] [Translation].

Since in this case all the victims are dead, their successors—spouses, children, and parents in the absence of the other two—inherit the victims' right to compensation.[227] Nevertheless, finding these heirs is complicated due to the way of living of the Saramacas tribe—polygamists and in many cases absent from the official census.[228] The IACtHR is sensitive to the Saramacas' culture, so it awarded compensation rights to 25 dependents of the victims that were not their legal heirs.[229] As a rule, when beneficiaries are not close family, they must prove a relationship of dependency with the victim.[230]

iii. Non-Pecuniary Reparations

In all its decisions the Court establishes that each decision is *per se* a form of reparation[231] but as a consequence of the seriousness of the violations, it is insufficient. Thus, the American Court adopts a variety of measures which can be classified broadly as educative/professional, medical, and tailored to indigenous peoples' interests.

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[226] *Aloeboetoe* (Serie C, no. 15): Sec. VI, par. 51.

[227] "[T]he Court imposes compensation . . . for moral damages, according to equity." [Translation]. In *Caracazo v. Venezuela*, Reparaciones, Sentencia de 29 de Agosto de 2002 (Serie C, no. 95): Par. 99.

The Court decided the amount based on the "duration and complexity of the case." [Translation]. In *Suárez Rosero* (Serie C, no. 44): Par. 99.

[228] *Aloeboetoe* (Serie C, no. 15): Sec. IX, 64. For each one's multiple wives, see: Par. 66.

[229] Ibid: Par. 69.

[230] Ibid: Par. 68.

[231] *De la Cruz Flores* (Serie C, no. 115): Par. 188 (2) (Dispositive Section); and *Masacre Plan de Sánchez* (Serie C, no. 116): Par. 125 (1) (Declarative Section).

Since according to the IACtHR, torture constitutes an attack against a person's "life project,"[232] the Court imposes on the state the duty of awarding scholarships to the victims; training them in their former professions;[233] and reinstating them to their jobs in public institutions[234] and into the retirement system.[235] The decision to strike a person off a list of criminals facilitates rehabilitation and resuming prior professional activities.[236] The Court's educative measures not only favor the victims. For example, in *Tibi* it included human rights training programs for all prison-related personnel.[237]

In addition, and considering the amount of physical and psychological pain and suffering torture victims endure—sometimes for the rest of their lives—the Court requires states to pay for any medical or psychological treatment the victims and/or their families may require[238] including free medicines in some cases.[239]

When deciding cases involving attacks against indigenous peoples, the IACtHR establishes important non pecuniary reparations that will benefit the whole community, including "reopen[ing] the school and equip[ing] it with facultative and administrative personnel . . . and start[ing] running the clinic."[240] Such decision was based on the

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[232] *Villagrán Morales* (Serie C, no. 62): Par. 176.

[233] *De la Cruz Flores* (Serie C, no. 115): Par. 188 (Unanimous Verdict: Dispositive Section).

[234] As a professor, *Loayza Tamayo* (Serie C, no. 42): Par 192 (1) (Unanimous Verdict); as a MD in *De la Cruz Flores* (Serie C, no. 115), ibid: Par. 188 (7) (Unanimous Verdict: Dispositive Section).

[235] *De la Cruz Flores* (Serie C, no. 115), ibid: Par. 188 (8).

[236] Ibid: Pars. 76 and 113 (1), Puntos Resolutivos.

[237] *Tibi* (Serie C, no. 114): Par. 280 (13) (Unanimous Verdict: Dispositive Section).

[238] In relation to the victim only, ibid: Par. 188 (5).

[239] *De la Cruz Flores* (Serie C, no. 115): Par. 188 (5).

[240] *Aloeboetoe y otros* (Serie C, no. 15): Par. 116. 7 (Verdict).

number of victims of the massacre and their role as the community's main providers. Since in the countries where these massacres occurred indigenous peoples are considered second class citizens and lack proper access to the courts, the decisions of the IACtHR show deference to them. For example, the Court decided that Guatemala must honor the victims of the massacre of Plan Sánchez and publish its decision not only in Spanish but in the Achí language too.[241]

d. Cases in Which States Agree to the Facts

These cases are less cumbersome because instead of examining preliminary exceptions[242] and factual evidence,[243] the Court can proceed immediately to establish reparations and costs and expenses. This subsection focuses on the court's requirements to approve an admission of responsibility and on an assessment of this type of decisions.

First, the governmental admission of the facts and of responsibility must be unequivocal. For example, for the Court is not enough that the Guatemalan government declared that "it agreed . . . to the facts and to its responsibility," and that torture was an institutionalized practice; [244] it had to admit also that a general practice is evidence of Maritza Urrutia's torture.[245] Second, after the Commission and the victim's relatives agreed to the governmental admission of the abuses and its responsibility[246] the Court

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[241] *Masacre Plan de Sánchez* (Serie C, no. 105): Par. 125 (2-3) and (5).

[242] Ibid: Verdict, 2.

[243] Ibid: Sec. VI, Par. 52.

[244] *Maritza Urrutia* (Serie C, no. 103): Par. 30.

[245] Ibid: Pars. 33 and 42 [Ref. to *Cantoral Benavides* (Serie C, no. 40)]: Par. 30.

[246] *Benavides Cevallos* (Serie C, no. 38): Pars. 42 and 57 (1) (Unanimous).

accepts the establishment of reparations through friendly compromise.[247] However, the IACtHR will continue monitoring the implementation of such decision.[248] Thus, since the government violated the Convention on Human Rights in the cases studied,[249] "it has the duty to prosecute criminally those individuals responsible of the crime."[250] Furthermore, victims and their families retain the right to demand reparations directly from those individuals accused of the violations.[251]

Sometimes the IACtHR showed its approval of the state's admission and thus relaxed some of the demands against it. That is why, although the Court awarded money as restitution for what the victims and their families spent in investigating the facts and seeking justice domestically,[252] absent in cases prior to *Aloeboetoe*, it did not award money for other expenses such as bringing the case before the Court.[253]

From the perspective of the states involved, these decisions are advantageous because they are spared from a long civil proceeding in which the victims will give detailed testimony of the abuses suffered and from publishing a detailed decision in the official gazette and in the main newspapers. Nevertheless, the IACtHR reserves its right to evaluate the execution of its decisions and rejects governmental attempts to minimize

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[247] *Benavides Cevallos* (Serie C, no. 38): Par. 35. Regulated in art. 45 of the Rules of Procedure of the IACHR.

[248] Ibid: Par. 57 (5) (Unanimous).

[249] Ibid: Par. 57 (2). Specifically arts. 3, 4, 5, 7, 8 and 25 in relation to 1 (1).

[250] Ibid: Par. 47 (4) (Unanimous).

[251] Ibid: Par. 48 (3). Ecuador's payment of a million dollars notwithstanding, ibid: Par. 56.

[252] *Aloeboetoe* (Serie C, no. 15): Par. 79.

[253] Ibid: Par. 115.

their involvement in such abuses. As a result, victims are still protected in this special type of procedures.

D. RELATIONSHIP BETWEEN THE IACtHR AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

During the Cold War Western Europe suffered from the administrative practice of torture, which article 3 of the European Convention on Human Rights bans.[254] Even though nowadays such administrative practices seem to have ended in Western Europe, they continue in other countries of the Council of Europe such as Turkey and former members of the Communist bloc. As a result, the ECtHR still produces a substantial jurisprudence. However, here the Western European precedents are the most relevant.

This section examines first, the relevant differences between the European and the Inter-American Court. Second, the main jurisprudential findings of the ECtHR based on three case studies related to abuses against political prisoners as happened in Latin America, i.e., the Greek case, *Ireland v. United Kingdom*, and Turkish violations. And finally, an evaluation of the relationship between the European and the Inter-American Courts based on those jurisprudential findings.

1. RELEVANT DIFFERENCES BETWEEN THE ECtHR[255] AND THE IACTHR

These Courts work in two distinctive environments, i.e., respect with occasional violations of the rule of law in Europe, and widespread abuses without accountability in

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[254] P.J. Duffy, "Article 3 of the European Convention on Human Rights," *International and Comparative Law Quarterly* vol. 32, no. 2 (April 1983): 316-46.

[255] Focus on the reform after 1999, via approval of Protocol 11.

In some ways it seems more state-centric than the IACtHR due to "[t]he confidentiality of part of the proceedings, the role accorded to the Committee of Ministers, and the provision for there to be a judge from every state party." In Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals* (Oxford, England: Oxford University Press, 2000): 797.

Latin America. Moreover, the European Court had almost a decade head start on torture with respect to its American counterpart. Besides, there are also salient differences of a procedural nature.

Procedurally, we find the following main differences: first, with the elimination of the Commission in November 1998[256] and the entry into force of Protocol 11 making the Court's jurisdiction compulsory to all parties to the European Convention on Human Rights, the role of the ECtHR has been enhanced, i.e., the Court started working full-time and deciding directly which cases were under its jurisdiction. Second, individuals have standing before the ECtHR,[257] a significant novelty in supranational courts that facilitates access to justice because states are reticent to start processes against each other. [258]

Third, decisions of the Court can be appealed before the Grand Chamber,[259] whose members are different from those that heard the case in first instance with the exception of the justice representing the accused country. The existence of a review process increases the accountability of the ECtHR. And finally, the European Court uses mainly English and French in its hearings but has to translate documents written in more than twenty languages, a testament to the cultural variety of this region.[260]

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[256] Registrar of the European Court of Human Rights, "Historical Background, Organisation and Procedure," http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm (Accessed: June 7, 2005): I, B, Par. 6. It is too soon to evaluate this new development; it could overburden the Court with new responsibilities, including more administrative ones, and thus increase the recourse to settlement.

[257] Art. 6 (1) (right to a fair trial) and art. 35 (exhaustion of domestic remedies) of the ECHR. The ECtHR is more formalist. See: Claire Kilpatrick, Tonia Novitz and Paul Skidmore, Eds., *The Future of Remedies in Europe* (Oxford, England: Hart, 2000): 23; and on exhaustion of remedies, see: Neville March Hunnings, *The European Courts* (Brussels, Belgium: Cartermill International, 1996): 28.

[258] But it happened on behalf of disappeared citizens. See: *Cyprus v. Turkey* (May 10, 2001).

[259] Art. 43 of the European Convention (ECHR).

[260] The American region affected by the IACtHR is quite uniform because Canada and U.S. reject the Court's jurisdiction; Suriname is one of the most significant outliers.

2. RELEVANT JURISPRUDENTIAL FINDINGS OF THE ECtHR

Before analyzing its findings, it is important to underline that the ECtHR, like the IACtHR, is a civil court and does not impose punitive damages. In addition, it is subsidiary to domestic jurisdictions. Thus, after the Court declares that a state has violated the ECHR, it fixes the compensation the state has to pay to the victim but only in the absence of adequate domestic remedies.[261]

This subsection briefly examines three case studies: the Greek dictatorship, *Ireland v. United Kingdom*, and Turkey. The first one only involves the Commission but it is central for influencing the jurisprudence of the ECtHR on torture; the second is historically relevant as the first decision of the Court on torture; and finally, the Turkish case study is significant to evaluate the effectiveness of the Court through time. Moreover, it follows closely the principles established in the two previous cases.

a. Torture during the Greek Dictatorship: 1967-1974

The Greek case is one of true emergency, those of Northern Ireland and of Turkey are "entrenched emergenc[ies] . . . of systematic human rights violations."[262] Although the conclusions of the Commission are central enough to later jurisprudence to require examination, torture in this case was prosecuted domestically and in general the international level lacked efficacy.

On 21 April 1967 a military coup d'état installed a military Junta; the dictatorship ended in July 1974. The evidence of widespread torture during the rule of the military

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[261] Art. 41 of the ECHR, states "[I]f the internal law of the High Contracting Party concerned allows only partial reparations to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[262] Oren Gross, "`Once More unto the Breach:' The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *Yale Journal of International Law* vol. 23, no. 2 (Summer 1998): 437.

was compiled in a report based on investigations sponsored by Amnesty International between "December 1967 and January 1968." The attempts of the military to discredit such report[263] show the *ius cogens* status, at least theoretically, of torture.

Torture continued throughout the dictatorship. And although these activities started before torture was widespread in Latin America, they were the product of a similar administrative activity, i.e., people assumed to be enemies of the regime were illegally detained and tortured. Then they were subjected to trial as happened in Uruguay. As a rule, victims did not disappear as in Argentina and Chile.[264]

Internationally,[265] the European Commission found that first, torture—defined as inhuman treatment with a purpose—was being committed under the Junta. Second, torture was an administrative practice—characterized by 'a repetition of acts' and 'official tolerance' which "could clearly exist in the absence of any legislation directing or approving [it] as well as in the face of contrary legislation. . . ."[266]

In this case domestic instruments were more effective. Thus, once democracy was restored, those accused of torture were criminally prosecuted and some of those in charge of the institutions where torture happened received a steep punishment in Western European terms, i.e., more than 20 years of prison.[267]

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[263] Letter to the Editor from Paul J. Lyons, Executive Director of Amnesty International of the U.S.A., "Greek Junta's Record," *The New York Times* (8 May 1968): 46.

[264] Letter to the Editor from Maurice J. Goldbloom, [Ed. of *News of Greece*] *The New York Times* (22 July 1971): 32.

[265] The members of the Council of Europe asked for its expulsion; the Junta's severed ties to it.

[266] Hurst Hannum and Kevin Boyle, "The Donnelly Case, Administrative Practice and Domestic Remedies Under the European Convention: One Step Forward and Two Steps Back," *American Journal of International Law* vol. 71, no. 2 (April 1977): 317.

[267] And "acquitted . . . mainly enlisted men." Dispatch of *The Times*, London, "Greek Junta's Prison Officials Sentenced on Torture Charges," *The New York Times* (13 September 1975): 7.

b. *Ireland v. United Kingdom*[268]

Although the allegations of torture in Ulster were investigated domestically, those efforts were insufficient to protect the rights of the Northern Irish accused of terrorism during the Cold War.[269] "On August 9, 1971, 342 men were [extra-judicially] arrested … a small group . . . had been selected for interrogation in depth."[270] Thus, in 1971 Ireland lodged a complaint against the U.K. before the European Commission of Human Rights[271] which unanimously considered "the combined use of the five techniques [wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink] . . . a practice of inhuman treatment and of torture in breach of Article 3." [Emphasis added].[272]

Since the U.K. is a democracy, first attempts to whitewash the issue—even *The Times* took some time before it published the incident—were substituted by a domestic inquiry, i.e., the "Compton Report," which concluded that "posture on the wall, hooding, noise, deprivation of sleep, diet of bread and water" were "physical ill-treatment."[273]

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[268] "Ireland v. United Kingdom," *International and Comparative Law Quarterly* vol. 27, no. 4 (October 1978): 897; and Michael O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. the United Kingdom," *American Journal of International Law* vol. 71, no. 4 (October 1977): 674-706. More specifically, the case refers to excessive use of violence targeting the Catholic population.

[269] The conflict in Ulster can be linked to the 1801 Act of Union; the Good Friday Agreement of 10 April 1998 has assuaged the conflict.

[270] *Ireland v. The United Kingdom*, Judgment of 18 January 1978. For the factual background, see: Ibid, Pars. 11 and 50-77, and Secs. B, C and D.

[271] Based on art. 24 of the European Convention: Ireland was denouncing cases that occurred between 1971 and 1975. In *Ireland v. United Kingdom*, ibid: Pars. 16 and 103.

[272] *Ireland v. United Kingdom*, ibid: Par. 147 (iv) and (v).
For a brief description of each of these five techniques used in combination for 'interrogation in depth,' see: Ibid, Par. 96.

[273] CAIN Web Service, "Report of the Enquiry into Allegations against the Security Forces of Physical Brutality in Northern Ireland Arising out of the Events on the 9th August, 1971," Chairman Sir

However, the report's findings can be perceived as partial because, as mentioned in the report, it was based mainly on testimonies of officials involved in the case and not on direct evidence provided by the victims.[274] The Irish considered the findings insufficient.[275] Moreover, according to a 1979 government-sponsored report the ill-treatment continued.[276] Thus, even though the British prosecuted criminally those accused of the abuses and compensated the victims,[277] the Irish government equated such response to impunity and logged a complaint before the European Commission.

The Commission restated its definition of administrative practice as a repetition of acts and official tolerance and unanimously held that there was an administrative practice "at Palace Barracks, Holywood . . . in breach of Article 3."[278] The European Commission added that even in the absence of a state level policy condoning the practice, "[t]he responsibility of a State under the Convention may arise for acts of all its organs, agents and servants … [and] does not necessarily require any 'guilt' on behalf of the State."[279]

Edmund Compton (Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, November, 1971), http://cain.ulst.ac.uk/hmso/compton.htm (Accessed: June 23, 2005). "Our investigations have not led us to conclude that nay of the grouped or individual complainants suffered physical brutality as we understand the term." [Emphasis added].

[274] Only heard one victim out of 40 cases presented (out of 237 detained) and only one written communication: "[I]n other cases we have acted on complainants' statements published by the press or otherwise transmitted to us." In CAIN Web Service, "Report of the Enquiry into Allegations."

[275] Bernard Weinraub, "Dublin Calls for Ulster Brutality Inquiry," *The New York Times* (2 December 1971): 6.

[276] William Borders, "Torture of Ulster Prisoners Indicated in British Report," *The New York Times* (17 March 1979): A 3. It included "bruising, contusions, hyper-extension and hyper-flexion of joints, hair-pulling, jabbing, rupture of the ear drums and increased mental agitation."

[277] For further details on the prosecutions, see: *Ireland v. United Kingdom*: Pars. 140-43.

[278] Ibid: Par. 147 (vi).

[279] *Ireland v. United Kingdom*: Par. 383. See also: Michael O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights": 690.

Finally, the Court heard of the case the U.K. considered moot after banning those five techniques in 1972 and adopting measures to prevent violations of article 3 of the European Convention on Human Rights.[280] Contrary to the Commission's report and the U.K.'s admission, the ECtHR affirmed that the combination of the five techniques was inhuman or degrading treatment.[281] To reach this conclusion, the Court used 'a severity of suffering' test' which provides for a gradation of conducts: "[I]t appears . . . that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[282] This decision is deferential to the state and detrimental to victims' protection.[283]

The ECtHR agreed with the Commission that there was an administrative practice, albeit of inhuman treatment, in Palace Barracks;[284] not in the other centers.[285] Three judges in the minority affirmed that in Palace Barracks the practice constituted

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[280] *Ireland v. United Kingdom*: Pars. 154-55.

Some authors—Michael O'Boyle, "Torture and Emergency Powers under the European Convention on Human Rights," ibid: 704-5—defend the U.K.'s position but I disagree because the victims of those practices have the right to redress.

On preventive measures, see: *Ireland v. United Kingdom*, ibid: Par. 153.

[281] *Ireland v. United Kingdom*, ibid: Par. 156 and Par. 167, in fine (By thirteen to four). See: Ibid, Verdict, 4. The perpetrators "did not occasion suffering of the particular intensity and cruelty implied by … torture."

[282] Ibid: Par, 167, Based on Art. 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the UN on 9 December 1975.

[283] "[U]sed . . . to fly below the radar of the absolute prohibition . . . I find such definitional wizardry . . . uninteresting and unsatisfactory." In Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," *Minnesota Law Review* vol. 88 (June 2004): 1489.

[284] *Ireland v. United Kingdom*: Verdict, 6 (unanimously).

[285] Ibid: Verdict, 8 (Fifteen to two).

torture.[286] According to the Court, both institutions defended different definitions and applied different rules to evaluate the evidence. The Court "examines all the material before it . . . and, if necessary, obtains material *proprio motu*,"[287] the Commission decided the case based on the principle of "beyond reasonable doubt."[288]

Since the Irish government, which brought forth the case, asserted that their purpose was not that "of the obtaining of compensation for any individual person,"[289] the Court decided, by majority, not to discuss the issue of compensation for those fourteen individuals subjected to the combined five techniques aforementioned. However, in a separate opinion, Judge Mehmet Zekia refers to the hefty sums the British government paid such individuals as compensation for their suffering.[290]

c. Turkey

Although the 2004 Human Rights Watch Report considered that Turkey's "human rights record continued to improve,"[291] it is alleged that actions that amount to torture are

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[286] *Ireland v. United Kingdom*: Pars. 96 and 168. Judge Mehmet Zekia advocated for an objective and subjective evaluation of when a degrading or inhuman treatment is severe enough to constitute torture.

[287] Ibid: Par. 160.

[288] Ibid: Par. 161. For a critique, see: Anthony Cullen, "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights," *California Western International Law Journal* vol. 34, no. 1 (Fall 2003): 29.

[289] *Ireland v. United Kingdom*, ibid: Par. 245.

[290] Ibid: Separate Opinion of Judge Zekia, C.

[291] Human Rights Watch, "Overview of Human Rights Issues in Turkey" (31 December 2004), http://hrw.org/english/docs/2005/01/13/turkey9882.htm (Accessed: June 23, 2005). The report warned that "[a]chievements in combating torture remain fragile, with a risk of backsliding into old habits."

The following assessment corroborates Turkey's improvement in this area because "[t]he government has . . . introduced an official policy of zero tolerance towards torture . . . [P]unishment for torture has been increased, and sentences may no longer be deferred or converted into fines, as often happened in the past." "The Wrongs and Rights of Minorities," *The Economist* vol. 374, issue 8418 (March 19, 2005): 8-11.

systematically practiced—[292] and justified to fight terrorist movements that have been threatening the country, i.e., left-wing Marxist-Leninist groups in the 1970s, continuous Kurdish separatist efforts, and religious sponsored terror beginning in the 1990s.[293]

Most of these torture or torture like practices target members of the Kurdish minority. However, the right not to be subjected to torture or inhuman or degrading treatment is violated also in relation to non-Kurdish "dissidents" who hold views opposed to those of the government.[294] In the past, Turkey has been described as "a European country where . . . trade unionists are tortured . . . and . . . no genuine effort is made to combat or punish torture. . . ."[295]

Impunity at home[296] has forced individuals to bring their allegations to the Commission and then directly to the Court. Although from the perspective of individual victims this mechanism has the advantage of awarding compensation for being subjected to torture or similar practices, in general it seems that the Court has been incapable of curtailing this widespread abuse due to three main limitations.

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[292] "[T]he Turkish Human Rights Foundation (TIHV) says that of 918 people treated at its centres in 2004, 337 claimed they had been tortured . . . even in 2004, 'torture was applied systematically by police, gendarmerie and special units in interrogation centres." In "The Wrongs and Rights of Minorities," ibid. These violations continued in 2007, see: Kerim Yildiz and Frederick Piggot, "Report: An Ongoing Practice: Torture in Turkey" (London: Kurdish Human Rights Project, August 2007).

Notwithstanding medical reports, the Court found violation of art. 3 but no torture in *Kiliç v. Turkey* (Application no. 35044/97) and *Karakaş and Yeşilımak v. Turkey* (Application no. 43925/98) of 28 June 2005; and *Aslangiray and Others v. Turkey* (Application no. 48262/99), of 31 May 2005.

[293] Feridun Yenisey, "Some Legal Aspects of Terrorism in Western Europe and in Turkey," *Kansas Journal of Law and Public Policy* vol. 14, no. 3 (Spring 2005): 648.

[294] Gross, "Once More unto the Breach": 485.

[295] David Barchard, "Western Silence on Turkey," *MERIP Reports* no. 121, State Terror in Turkey (February 1984): 3-6.

[296] E.g. *Tekin v. Turkey*, Judgment of 9 June 1998: Pars. 11-12 and 14.

First, since the Court accepts agreements between the government and applicants and strikes out the cases,[297] Turkey has realized that it is cost effective to pay off those who allege acts of torture in exchange for the absence of a verdict. Even though the decisions to strike out the cases compile the facts—clearly showing torture—and could prove the existence of an administrative practice,[298] they are less powerful than a verdict.

Second, verdicts in favor of the victim are written using politically correct language, i.e., instead of torture the code word is ill-treatment, which "must attain a minimum level of severity if it is to fall within the scope of Article 3. . . ."[299] For example, placing a detainee in a cold cell and subjecting him to blows that left bruises was not torture.[300]

Third, the decisions of the court rarely focus on the need for law reform in Turkey. Turkish domestic laws provide for "a separate system of national security prosecutors and courts," whenever somebody is accused of terrorism and whenever there are "offences alleged against members of the security forces in the state-of-emergency region,"[301] which clearly fosters torture and impunity in the country.

d. Main Jurisprudential Findings

This subsection focuses briefly on the Court's concept of torture, evaluation of evidence, and deference to the state. First, although torture is banned in absolute terms,

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[297] E.g. *Sur v. Turkey*, Judgment of 3 October 1997: Pars. 29-31. *Tomasi v. France* (1992); *Ribitsch v. Austria* (1995); and *Aksoy v. Turkey* (1996) are precedents named in ibid: Par. 31.

[298] *Sur v. Turkey*, ibid: Par. 13.

[299] *Tekin v. Turkey*: Par. 52.

[300] Ibid: Par. 53. However, two of the three dissenters—Gölcüklü and de Meyer—denied it constituted a violation of art. 3 based on reasonable doubt, see: Ibid, Par. 54 (3) (Verdict: Six votes to three).

[301] Ibid: Pars. 29-30.

for an activity to be considered torture, it has to be intentional, purposeful, severe,[302] and officially sponsored.[303] And the concept used in *Ireland v. the United Kingdom* is too narrow because "techniques devised by scientists that do not involve physical ill-treatment but are nonetheless used to extract information no longer qualify as torture. …"[304] Thus, the concept could foster activities that lack the stigma of torture.[305]

> In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3 … As noted in previous cases, it was the intention that the Convention should attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom* . . .). In addition to the severity … there is a purposive element, as recognised in the United Nations Convention against Torture . . . which came into force on 26 June 1986.[306]

However, the Court considers that inhuman or degrading treatment affects parents who suffer the disappearance of a son and no official redress.[307] Moreover, in cases of *refoulement*—significant after 9/11—involving extradition to a country where article 3 could be violated, the Court sustains that such *refoulement* is a violation of art. 3.[308]

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[302] "The experience of the victim is of primary consideration in determining acts that constitute torture. . . . [P]ain and suffering are . . . subjective." In Cullen, "Defining Torture in International Law": 33.

Labita v. Italy: Par. 121 and P.J. Duffy: 345.

[303] See: Cullen, 'Defining Torture in International Law": 33-4.

[304] Ibid: 44. He proposes to follow the example of the UNHR Committee which applies art. 7 as a whole without distinguishing between torture and inhuman or degrading treatment.

[305] E.g. Allegations of psychological torture and the use of medical doctors and behavioralists in Guantánamo. In Jane Mayer, "The Experiment: The Military Trains People to Withstand Interrogation. Are Those Methods Being Misused at Guantánamo?" *The New Yorker* (11 and 18 July 2005): 60.

[306] *Kışmır v. Turkey*, Judgment of 31 May 2005, Par. 129. It founded "at least inhuman treatment" in ibid: Par. 131 and a violation of art. 3 in ibid: Par. 132. He died in custody, see: Ibid, Par. 125.

[307] *Kışmır v. Turkey*: Verdict, 6 (Unanimous). Also positive because it compensates the mother, albeit meagerly. See: Ibid, Par.160. Similarly in *Imurtas*: Par. 98 and *Ipek*: Par. 183. But it did not find a violation of art. 3 in *Orhan v.Turkey*, Judgment of 18 June 2002: Pars. 360 and 168 and in *Koku v. Turkey,* Judgment of 31 May 2005: Par. 171.

[308] *Cruz Varas and Others v. Sweden,* Judgment of 20 March 1991.

Second, in the evaluation of the evidence, the Court follows the principle of proof 'beyond a reasonable doubt' and places the burden of proof on the authorities for any pain or suffering the victim receives while in their custody.[309]

> Such proof may . . . follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (Ireland v. the U.K. [remains the decisive precedent]. . . .). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. . . . the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey*, no. 21986/93, par. 100).[310]

The Court in principle admits the evidence approved by the Commission or by domestic courts.[311] Nevertheless, "it is not bound by the Commission's findings of fact. . . . [However], it is only in exceptional circumstances that it will exercise its power in this area. [For example] . . . if the Court, following a careful examination of the evidence … finds that the facts have not been proved beyond a reasonable doubt."[312]

Third, the ECtHR applies the doctrine of the "margin of appreciation," which defers the assessment of a given situation to the government alleging the need for emergency measures. For example, "in *Lawless v. Ireland* . . . Ireland . . . claim[ed] that

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[309] *Dalan v. Turkey* (no. 38585/97), 7 June 2005, http://www.echr.coe.int/Eng/Press /2005/June/ChamberJudgments070605.htm (Accessed: June 29, 2005).

[310] *Celik* and *Imret v. Turkey* (44093/98), Judgment of 26 October 2004: Par. 40. Since the victims were healthy before, ill-treatment at the hands of the government is presumed (Par. 39). Precedents are named in Pars. 41-42 of ibid. *Aksoy v. Turkey*, Judgment of 18 December 1996 and *Ribitsch v. Austria,* judgment of 4 December 1995 are particularly important.
See also: *Villagrán Morales* (Serie C, no. 62): Par. 170.

[311] *Erdagöz v. Turkey*, Judgment of 22 October 1997: Par. 40. The Court, unanimously, did not find a violation of Art. 3. See: Ibid, Verdict, 2.

[312] *Tekin v. Turkey*: Par 38. Par. 38 of ibid, names as precedent *Selçuk and Asker v. Turkey*, Judgment of 24 April 1998.

preventive detention was a necessary response to . . . terrorist acts by the [IRA]."[313] This doctrine is legitimate except when the Court uses it in cases involving non-derogable rights, which cannot be subjected to any margin of appreciation. The Court excessive deference to the state is reserved mostly to democratic ones.[314] Non-democratic regimes do not qualify for this deference, as demonstrated by the strong language the Commission used against the Greek Junta, a dictatorship "easily distinguishable from any future case involving a democratic regime, thus alleviating member states' fears that a strong decision might be used against them in the future."[315] As a result, the ECtHR receives low marks regarding emergency situations.[316]

The Court's deference to the state is especially problematic when it avoids discussing allegations of Turkish discrimination (violation of article 14 of the European Convention) against the Kurd minority.[317] Judge Antonella Mularoni rejected such common practice of the Court by stating in a partly dissenting opinion that "[a]fter examining tens and tens of similar applications [involving abuses against the Kurds] . . . and very often concluding that there was a violation of articles 2 and 3 of the Convention, the Court should . . . at least consider that there could be a serious problem."[318]

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[313] Jeffrey A. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law," *Columbia Journal of European Law* vol. 11, no. 1 (Winter 2004-2005): 117.

[314] Gross, "'Once More unto the Breach": 43.

[315] Ibid: 46-8.

[316] Fionnuala Ni Aoláin, "The Emergence of Diversity: Differences in Human Rights Jurisprudence," *Fordham International Law Journal* vol. 19, no. 1 (1995): 101, 103-4.

[317] For further discussion on the negative implications of friendly settlements, see: Yildiz and Piggot, "Report: An Ongoing Practice: Torture in Turkey": 115-7.

[318] *Kışmır v. Turkey*, Judgment of 31 May 2005. However, the Court recognizes a violation of art. 3 regarding the mother of the victim.

Notwithstanding these limitations, the Court also uses discretion in favor of individuals' rights. So in the case of a nine-year-old British boy beaten with a cane by his stepfather, the ECtHR found that the state does not protect children adequately and "failure to provide adequate protection constitutes a violation of Article 3 of the Convention."[319] Moreover, since the Committee on Torture (CPT)[320] is now heard in the decisions of the Court, individual rights will receive further protection.

3. EVALUATION OF THE RELATIONSHIP BETWEEN THE JURISPRUDENCE OF THE ECtHR AND THAT OF THE IACtHR

The ECtHR has had relevant contributions to the concept of torture,[321] to principles relative to the evaluation of evidence, and to the recognition of the suffering of family members. Thus, the IACtHR makes references to the European jurisprudence in its decisions.[322] However, the ECtHR presents two important limitations in relation to the IACtHR: first, it adheres excessively to procedural rules, i.e., the European court faithfully respects deadlines and rejects granting any kind of grace period.[323] And, second, the European court does not participate actively in agreement cases.

The second limitation deserves further elaboration because several cases that ended with an agreement instead of a judgment included allegations of severe violations of article 3 of the Convention. In this respect, the role played by the Inter-American

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[319] *A. v. The United Kingdom*, Judgment of 23 September 1998: Par. 21. The duty to provide protection derives from an obligation of art. 1 of the Convention, see: Ibid, Par. 22. See: Sharon Detrick, "Practice and Implementation: European Court of Human Rights: Judgment in the Case of *A.* v. *The United Kingdom*," *International Journal of Children's Rights* vol. 6 (1998): 335-6.

[320] For the official webpage of the Committee, go to: http://www.ohchr.org/english/bodies/cat.

[321] *Maritza Urrutia* (Serie C, no. 103): Voto concurrente de Cancado Trindade, Par. 7.

[322] For example, see: Fn. 211.

[323] *Teixeira de Castro v. Portugal*, 44/1997/828/1034), Judgment of 9 June 1998: Par. 41.

Court in cases in which the state recognizes the facts and/or responsibility for the violation of human rights is more advantageous for the victims and for the implementation of human rights in general. The IACtHR continues monitoring the process and thus, hands down the decision to establish compensation and in doing so it goes over the facts and the violations.

In addition, the IACtHR imposes on the states that have recognized their responsibility the duty to prosecute domestically those guilty of the abuses. This is not so in the decisions of the ECtHR because cases decided by agreement between the state and the victims are struck out of the docket—preventing further Court involvement. As a consequence, the accused states and the victims and/ their relatives are the only ones authorized to reach a solution to the case, which usually involves pecuniary compensation and no accountability domestically.

E. EVALUATION OF THE DECISIONS OF THE IACtHR IN TORTURE CASES

The implementation of the ban on torture is more difficult than that to implement the ban on disappearances because, while the crime of disappearances—as chapter V will show—is usually related to certain states of exception; torture is part of everyday life and continues to be practiced—with different levels of intensity—even during the transitions to democracy in Latin America. As a result, the evaluation of the role of the IACtHR in implementing the prohibition against torture involves violations perpetrated by past and new political regimes.

This added workload notwithstanding, the IACtHR has to be evaluated—as courts in general—with basis on two relevant criteria, i.e., its degree of legitimacy and of effectiveness. Thus, this concluding section is divided into two parts. First, the

advantages and disadvantages of torture-related decisions of the IACtHR presented from the perspective of four main issues, i.e., (1) jurisdiction of the Court, (2) state-centrism of the Inter-American system of human rights, (3) victims' participation in the system, and, (4) the Court's level of effectiveness with a focus on the duration of the processes and on the granting of adequate compensation in favor of the victims. And, second, a summary of the IACtHR's significant contributions toward implementing the ban on torture and a list of relevant recommendations to further the role of the Court in the implementation of this ban.

1. ADVANTAGES AND DISADVANTAGES OF THE USE OF THE IACtHR TO IMPLEMENT THE BAN ON TORTURE

a. Jurisdiction of the IACtHR

Latin Americans are used to corrupt and/or ineffective courts but trust international courts, especially the IACtHR due to the way it has behaved,[324] i.e., whenever cases have reached the Court, it has acted using up its limited jurisdiction and it has regularly addressed—as seen in the case studies of Section C of this Chapter—the duty of the state to end impunity domestically, to establish training programs with the goal of educating officers in the need to uphold human rights and to avoid torture, and to repair the material and moral damages suffered by the victims of torture. All these measures are included routinely in the decisions of the Court.[325]

However relevant, the adoption of the aforementioned measures may be insufficient to end impunity regarding torture—a widespread and persistent practice in

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[324] A review of newspapers in the region shows decisions of the IACtHR are first page news.

[325] Robert A. Dahl, *On Democracy* (New Haven, CT: Yale Nota Bene, 2000): 148-9.
"The . . . Court has been particularly effective in advancing the development of reparations in international human rights law. . . . Ecuador's Constitutional Court declared a provision in its criminal code to be unconstitutional after the . . . Court found it to be in violation of the American Convention." In Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 338.

Latin America—because although the Court decides on the veracity of the allegations of torture, including those committed by government officials, the IACtHR can only recognize state responsibility. It cannot decide on individual responsibility. As a consequence of this diluted responsibility, individuals accused of torture could consider their actions justified—or misrepresent the seriousness of the violations—and resume such practices.

The Court's time constraints limit it to decide cases that involve torture that happened after states have accepted its jurisdiction with the exception of instances of torture committed in connection with the permanent crime of disappearances. Thus, widespread violations of the ban on torture remain unpunished and can contribute to underline the sense of being above the law of those accused of torture and undermine transitions and/or consolidations of democracy. For example, the Court rejected unanimously granting a hearing regarding the allegations of torture and denial of justice brought forth in the case of Alfonso Martín del Campo Dodd against Mexico because these violations had occurred before Mexico accepted the Court's jurisdiction.[326]

b. State-centrism of the Inter-American System of Protection of Human Rights

The Court expects governments to abide by the rules set up for the process before the Court. That is why it rejected Brazil's preliminary exception of non-exhaustion of domestic remedies[327] in the case of the violation of Mr. Damião Ximenes Lopes' right to

[326] *Alfonso Martín del Campo Dodd vs. Estados Unidos Mexicanos*, Excepciones Preliminares, Sentencia de 3 de Septiembre de 2004, Serie C, no. 113: Par. 86.

[327] *Ximenes Lopes vs. República Federativa del Brasil*, Excepción Preliminar, Sentencia de 30 de Noviembre de 2005, Serie C, no. 139: Resolution Section, Par. 1.

be free from cruel, inhuman, and degrading treatment[328] because the exception was made once the process had started before the Court instead of during the procedure before the Commission.[329]

Nevertheless the state-centrism of the system has a negative impact. Beyond budget constraints, the Court's most serious shortcoming is that it can only accept deciding a case after a state or the Commission subjects it to the Court's jurisdiction and the cases examined show that states have never brought a case against themselves or one another—with the exception of Costa Rica, all the states that have recognized the jurisdiction of the Court have poor human rights records. Furthermore, states exerted excessive control over the IACHR for a long time, thus preventing judicial implementation as shown by the delay in bringing cases before the Court. For example, the first case decided by the Court was submitted to it on April 24, 1986, almost five years after it was received by the Commission. Moreover, this first case decided by the Court targeted Honduras—one of the weakest states in Latin America.[330]

In addition, although the Court's decisions are self-executing regarding compensation-related issues,[331] it depends on governmental compliance with its provisions. While the ECtHR can somewhat rely on the Council of Europe to enforce

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[328] *Ximenes Lopes* (Serie C, no. 139): Par. 2. Mr. Ximenes Lopes, "an individual with mental incapacity [committed] . . . to *Casa de Repouso Guararapes*; [where] he was allegedly beaten . . . by civil servants . . . [and where] he died. [Translation].

[329] Ibid: Par. 5.

[330] *Velásquez-Rodríguez vs. Honduras*, Sentencia de 29 de Julio de 1988 (Serie C, no. 1): Par. 1. A former member (1976-1983) and president (1980-1982) of the Commission, Tom Farer, explained such paucity as a result of the IACtHR's "emphasis on reports and … limited time and resources." In Tom Farer, "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, not Yet an Ox," *Human Rights Quarterly* vol. 19, no. 3 (1998): 544.

[331] Víctor Manuel Rodríguez Rescia, "La ejecución de sentencias de la corte," in *El futuro del sistema interamericano de protección de los derechos humanos*, Eds., Juan E. Méndez and Francisco Cox (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1998): 459.

compliance, the IACtHR can only expect the General Assembly of the OAS to comment on the Court's annual report. [332]

> The GA [General Assembly of the OAS], meeting in Guatemala [in 1999], said and did nothing when the government of Trinidad and Tobago executed a prisoner who was under the protection of provisional measures of the Inter-American Court. Neither the GA nor the PC [Permanent Council of the OAS] made a move to oppose the Peruvian Government's decision to remove itself from the contentious jurisdiction of the Court.[333]

In general, state compliance varies depending on the content of the decisions of the Court. According to the Principal Specialist at the General Secretariat of American States' Secretariat for the Inter-American Commission on Human Rights, as a rule, states comply with reparations more easily than with issues of accountability.[334] For example, pecuniary reparations have been paid in numerous cases including Benavides Cevallos, Velásquez Rodríguez, Godínez Cruz, and Loayza Tamayo. However, there are low levels of compliance regarding the duty to end impunity domestically and to change the laws to accommodate them to international human rights principles.[335] These low levels of compliance could endanger the implementation power of the IACtHR and render it ineffective, and eventually illegitimate in the eyes of the citizens.

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[332] Juan E. Méndez and Javier Mariezcurrena, "Human Rights in Latin America and the Caribbean: A Regional Perspective," (Submitted to the Human Development Report 2000 'Human Rights and Human Development'), http://hdr.undp.org/en/reports/global/hdr2000/papers/mendez2000.pdf (Accessed: January 18, 2008): 12.

[333] Ariel Dulizky and Ismene Zarifis, "Improving the Inter-American Human Rights System: A Continental Challenge, a Collective Undertaking," *Human Rights Databank* vol. 7, no. 1 (March 2000), http://www.hri.ca/Tribune/viewArticle.asp?ID=2536 (Accessed: April 18, 2007).

[334] Christina M. Cerna, "The Inter-American System for the Protection of Human Rights," *Florida Journal of International Law* vol. 16, no. 1(March 2004): 203-4. Corroborated in Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 339.

[335] Conclusion reached by examining the IACtHR's decisions relative to supervisions of state compliance.

c. Victims' Role in the Procedures before the Court

Even before the adoption by the OAS of the new measures to increase individual participation,[336] the Court had always erred on the side of granting adequate participation to the victims while respecting its statute and rules. For example, in a case involving street children, the Court heard the testimony of a former street child who had witnessed the abduction of one of the victims and who had been kidnapped herself twice by the police.[337]

In addition, the Court has allowed the testimony of expert witnesses on the psychological effects of torture regarding the evaluation of evidence when no traces of physical damage remain and the evaluation of the impact of torture practices on the family of the victims.[338] In a 2005 judgment, the Court followed the suggestion of a professor of legal medicine and established the duty of Colombia to educate medical doctors and other personnel on the implementation of the 1999 Istanbul Protocol on how to document the aggressions suffered by those detained. [339] Moreover, the IACtHR calls experts to testify on the rights of certain groups and the violations suffered in the region.[340]

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[336] The 2000 reform of the Rules of Procedure of the Court increased such participation. See: Art. 32 of ibid.

[337] *Villagrán Morales* (Serie C, no. 62): Par. 65 (d) (Testimonio de Rosa Angélica Vega, 'niña de la calle' en la época en que se produjeron los hechos).

[338] *Villagrán Morales y otros* (Serie C, no. 77): Par. 56 (a). See: Above, Fn. 216.

[339] *Gutiérrez Soler vs. Colombia*, Sentencia de 12 de Septiembre de 2005, Serie C, no. 132: Pars. 42.a (Expert Witnesses: "Peritaje de la señora María Cristina Nunes de Mendonça, profesora de Medicina Legal en la Universidad de Coimbra, Portugal), 110 and 127 (5) (Unanimous Verdict: Dispositive Section, Unanimous).

[340] Ibid: Par. 56 (b) and (c).

Although individuals are able to send their complaints to the Commission, which has the duty to investigate the validity of the accusations, when the state members of the OAS gave up part of their jurisdictional powers to the Commission and the Court they eliminated direct access of individuals to the Court. Thus, individuals are subjected to the discretion and diligence of the Commission. Taking into account the limited number of complaints the Commission had brought to the attention of the Court—one per year from 1986 to the mid 1990s—a tentative conclusion is that granting to individuals direct access will increase the number of cases before the Court. Although beginning in the mid 1990s the workload sent to the Court each year has increased, the IACtHR has decided less than two hundred cases in twenty years;[341] a small workload compared with the European Court, which has granted individuals direct access and currently decides hundreds of cases each year.

Individual access to the Court is further compromised because the Inter-American Convention on Torture does not refer to supranational mechanisms of implementation. Therefore, whenever the Commission is notified by victims or their representatives of allegations of a violation of the right to be free from torture, it will use its discretion to determine whether to subject the case to the Court based on the violation of article 5 of the Inter-American Convention on Human Rights. This Convention recognizes the Court as part of its mechanisms of implementation.

d. Level of Effectiveness of the IACtHR: Victim's Rights to Reparations/Compensation and Duration of the Process

In general terms, since torture affected and continues affecting in a higher degree

[341] See: Corte Interamericana de Derechos Humanos, "Casos Contenciosos," http://www.corteidh.or.cr/seriec/index_c.html (Accessed: June 26, 2006). Up to that date, it only had decided 147 cases.

the poorest and weakest sectors of society in Latin America, victims need a strong advocate to disseminate the truth about the torture practices and to change official attitudes toward torture. That is why it is so relevant that the decisions of the IACtHR find states responsible of human rights violations, including torture. As a result of this responsibility, states have to publish the decisions of the Court in the official gazette and in newspapers, and to organize public ceremonies in which the responsibility of the government is recognized.

The IACtHR with all its shortcomings is still able to use its flexibility to make limitations work to the advantage of the victims because the judges realize that they are the last resort for victims who confronted impunity at home. Not only is there discretion in applying the deadlines in favor of the victims of human rights violations but the Court adopts a variety of non-pecuniary measures that reflect the centrality of the victims for the Court.

For example, in a case in which the government of Guatemala recognized its responsibility for different crimes including torture against a tribe of the Mayan people, the Court used genocide—over which it has no contentious jurisdiction—as a determining factor to award a higher amount of compensation.[342] Even in the absence of an Inter-American Convention banning genocide, the IACtHR justifies its use of genocide based on the *ius cogens* status of this crime and the Court's duty to uphold human rights and to calculate compensations—for which the American system does not provide any specific rules.

It is a fact that due to scarce resources, monetary and of time, the IACtHR only deals with the most heinous cases and basically with systematic use of torture.

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[342] *Masacre Plan de Sánchez* (Serie C, no. 105): Par. 51.

Nevertheless, each of its decisions condemns categorically such torture activities. Thus, no official in the region can argue that he/she was following orders or that he/she ignored that such activities were torture.

Notwithstanding these advantages, the handing down of decisions takes too long. The lapse of time from the moment complaints are logged before the Commission to the final decision by the Court spans several years. For example, the *Velásquez-Rodríguez* case was subjected to the jurisdiction of the Court four and a half years after the allegations were officially in the hands of the Commission.[343] Since the IACtHR also hands down decisions relative to the execution of its decisions, including the provisions on reparations, it is necessary to include in the final computation the additional years it takes for the decision of the IACtHR to be executed domestically.

Although as a rule states have a year to comply with the reparations, other measures necessarily take longer. Many of the delays to execute the Court's decisions are due to the need to reform national laws by criminalizing activities that constitute torture and to void amnesty laws; and to the duty to domestically prosecute civil and criminally alleged perpetrators of these crimes. Educational efforts to instill in officials the illegality of torture and what activities constitute torture are also being slowly undertaken by the authorities.

2. MAIN CONTRIBUTIONS OF THE IACTHR TO THE IMPLEMENTATION OF THE INTERNATIONAL BAN ON TORTURE

Since torture is outlawed internationally and nobody can legitimately say that they thought it was acceptable, torture is practiced in secrecy. Thus when there are accusations of torture, governments tend to deny the facts. If this does not work, the

[343] See: Velásquez-Rodríguez (Serie C, no. 1): Par. 1.

tactic is to deny that the practices were systematic and widespread and instead claim that torture was the work of a "few bad apples." Finally, if the evidence of systematic and widespread torture is overwhelming, governments will categorically deny that those activities constituted torture.[344] The IACtHR, by bringing forth the evidence of the facts and establishing state responsibility, makes it more difficult for the different states to continue denying the existence of a generalized practice of torture in Latin America, and, due to its legitimacy, those who criticize its findings lack credibility.

The decisions of the IACtHR have shown not only the widespread use of torture in the region but also that even though it affected different social classes, the poor and ethnic minorities were the targets of this practice in higher percentages. Since the members of the IACtHR strongly believe in the benefits of a democratic society and the rule of law, they underline the need to treat all members of society equally. As a result, the IACtHR rejects in its decisions any justification relative to the practice of torture.[345]

The Inter-American system of protection of human rights, which historically had a limited impact on the implementation of these rights, is slowly being transformed from a state-centric system to a system in which individuals and their rights are becoming the focus of interest. These qualitative changes have been fostered by the work of the Inter-American Court of Human Rights, whose judges incorporate jurisprudential findings of

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[344] Based on Stanley Cohen's *States of Denial*, Lisa Hajjar elaborates briefly on how governments confront allegations of torture without admitting their responsibility. See: Lisa Hajjar, "Torture and the Future," as reproduced in *Human Rights in the World Community: Issues and Action*, 3rd Ed., Eds., Richard Pierre Claude and Burns H. Weston (Philadelphia: University of Pennsylvania Press, 2006): 82-3.

[345] In a decision relative to the mistreatment of street children, the Court lectures on the social implications of this crime: "First of all, governments do not prevent [the children] from being thrown into a life of squalor. . . . [And] second, the governments attack them physically, mentally, and morally, and even try to take away their lives." My translation of "[e]n primer lugar, los Estados no evitan que sean lanzados a la miseria. . . . En segundo lugar, atentan contra su integridad física, psíquica y moral, y hasta contra su propia vida." In *Villagrán Morales*, (Serie C, no. 62): Pars. 191 and 197.

the most advanced system of protection of human rights, i.e., the European system and its court.

Moreover, the decisions of the IACtHR have become a model in the development of non pecuniary reparations tailored to the specific needs of the groups and individuals subjected to abuses and in the development of doctrinal novelties such as taking into account a person's "life project" when assessing the harm suffered by the victims as a result of the abuses. Therefore, a system that in principle was set up to pay lip service to human rights is now shifting—slowly but constantly—to a system in which human rights are at the center, which supports the solidarist position.

Lack of execution of certain decisions of the Court notwithstanding, countries in the region are accepting the Court's compulsory jurisdiction, recognizing their responsibility for torture abuses before decisions are handed down by the IACtHR,[346] and are increasing complying with its decisions,[347] an indication of a trend toward the incorporation of human rights into the national interests of governments that want to enforce their commitment to democracy and enhance their legitimacy. This trend is further supported in the next chapter, which focuses on the implementation—using universal jurisdiction—of the ban on torture in the jurisprudence of the Spanish court system. Spanish courts have investigated—and in the Scilingo case handed down a guilty verdict—torture cases in which the interest of the Spanish state is not self-evident

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[346] See: Above, Sec. C.2.d.

On the importance of this voluntary acknowledgment of responsibility, see: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 8.

[347] When Peru complied with the Court's order to release from prison María Elena Loayza Tamayo . . . a new level of State compliance was reached. Peru also later released Cesti Hurtado from prison." In Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 8-9.

because accountability is sought for crimes committed abroad by foreigners and against foreigners.

3. RELEVANT RECOMMENDATIONS

According to transitional justice scholars, accountability for past violations of human rights strengthens democracy,[348] which is the political system in which human rights can flourish. In addition, it is necessary to promote respect for the rule of law in the present. Thus, stopping the pervasive practices of torture and other cruel or inhuman treatment—that characterized the previous authoritarian regimes—should be a priority. As seen in the case studies, the IACtHR—from the beginning—has understood the relevance of fighting against this type of violation of human rights. Therefore, it is necessary to support the IACtHR when it focuses on the rights of the detainees, on the non derogable nature of the ban on torture and on non pecuniary compensation for the victims.

First, the Court should continue focusing on the protection of the rights of the detainees because, contrary to the Preamble and article 5 (1) and (2) of the American Convention of Human Rights, [349]detainees are treated in Latin America as if the ban on torture were not applicable to them. I find especially relevant that the Court has decided that the Istanbul Protocol should be adopted by states as a means to document properly

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[348] The United Nations has sponsored accountability mechanisms for conflict and post-conflict societies. See: Report of the UN Secretary General, "On the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," S/2004/616 (3 August 2004).

On the positive effects for democracy, see: Juan E. Méndez, "Accountability for Past Abuses," *Human Rights Quarterly* vol. 19, no. 2 (1997): 275-8 and OEA (Departmento de Información Pública), "Protección de los derechos humanos," http://www.oas.org/key_issues/spa/OEAderechos humanos.htm (Accessed: March 1, 2005).

However, other scholars reject accountability for the atrocities of past regimes and consider that it can undermine efforts to develop the rule of law. See: Jack Snyder and Lesli Vinjamuri, "Trials and Errors, Principle and Pragmatism in Strategies of International Justice," *International Security* vol. 28, no. 3 (Winter 2003/04): 5-44.

[349] See: Above, Fn. 22.

any signs of torture and thus, to prevent widespread abuses. Proper-documented torture practices provided by medical doctors and other medical professionals that work at detention facilities can be used as evidence in Court. Consequently, if such documentation becomes compulsory, prison officials will think twice before engaging in torture or torture-like practices.[350]

Second, the Court should continue emphazing the *ius cogens* nature of the ban on torture. Since the decisions of the IACtHR have to be published in the official gazette and/or main newspapers of the state found responsible for the violations of the ban on torture, repeated references to the non derogability of the ban on torture will serve to educate everybody—authorities and the rest of the population—regarding the absolute nature of the right to be free from torture. In addition, the Court should continue underlining the duty of the state to provide for the training of public servants on the illegality of torture;[351] a duty established in article 7 (1) of the Inter-American Convention on Torture.[352]

Finally, the Court's emphasis on non pecuniary reparations is appropriate for Latin America where governmental officials believe that they are entitled to violate human rights with impunity.[353] Awarding the victims pecuniary compensation barely impacts the alleged perpetrators—who do not suffer any loss of freedom or money—and

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[350] See: Above, Fn. 339.

[351] See: Above, Fn. 237.

[352] See: Above, Fn. 43.

[353] For example, sometimes support for the alleged violators keeps being strong during the transition to democracy: "**As late as 2003**, . . . [a]ccording to a poll conducted that year by a firm with rightist sympathies, **30 percent of those surveyed still admired Pinochet and his rule**. But most of that support evaporated in 2004." [Emphasis added]. In Larry Rother, "In Death, Pinochet's Legacy is Rewritten by His Supporters" *International Herald Tribune* (27 December 2006), http://www.iht.com/articles/2006/12/27/news/chile.php (Accessed: May 7, 2007).

may provoke a negative reaction from the general population which may confuse the victims' demands for justice with "freeloading" at society's expense. Non pecuniary measures are commendable because they confront impunity and foster a culture that will reject any justification for torture.[354]

[354] For specific cases and more detailed examination of non pecuniary reparations, see: Above, Sec. C.2.b.ii.

CHAPTER IV

THE JUDICIAL IMPLEMENTATION OF THE INTERNATIONAL BAN ON TORTURE: THE USE OF UNIVERSAL JURISDICTION BEFORE THE SPANISH COURT SYSTEM TO PROSECUTE ABUSES COMMITTED IN LATIN AMERICA DURING THE COLD WAR

Nowadays torture is undoubtedly considered a crime against humanity,[1] a category of international crimes that represents the starkest violation of international human rights law and thus, constitutes *ius cogens*. That is why studying the steps states take to prosecute the crime of torture is relevant to understand the implementation of human rights norms in general. This section focuses on the violation of the prohibition of torture on its international dimension,[2] the difficulties to implement such a prohibition before national jurisdictions, and how those obstacles are overcome judicially.

Although internationally the banning of torture has long been part of customary law[3] and it has been more recently the object of a comprehensive convention,[4] the

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[1] "[T]he most widely outlawed human rights violation," in Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," *International Organization* vol. 54, no. 3 (Summer 2000): 250.

Nevertheless, the current "War on Terrorism" could erode significantly the consensus against torture. See: European Parliament Hearing on Human Rights in the European Union, "Counter-Terrorism Measures and the Prohibition against Torture and Ill-treatment," [Submission by Human Rights Watch] (April 24, 2003); and Paul Reynolds, "Papers Show US Torture Debate," *BBC News* [UK edition] (28 June 2004), http://news.bbc.co.uk/1/hi/world/americas/3833073 (Accessed: March 28, 2004), regarding the Aug. 2002 US justice memo changing the definition of torture to 'physical pain . . . equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death.'

[2] Excluding those promptly punished domestically such as occasional police brutality.

[3] Since at least the turn of the XXth century.

[4] Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

concept of torture presents two main challenges, i.e., the lack of agreement regarding the actions and/or omissions that constitute torture and the added complexity of being able to subsume the activities identified with torture into different categories of crimes such as disappearances—see below, Chapters V and VI—genocide, terrorism, or torture proper.

Conceptually, I exclude disappearances from the crime of torture.[5] Even though ignoring the victim's whereabouts could constitute psychological torture for the family and friends of the disappeared, there are two key reasons why disappearances constitute a crime on their own.[6] First, its permanent nature, i.e., the crime keeps on happening until the victim appears dead or alive; and second, it is a complex crime, i.e., the direct victim of the crime suffers a combination of kidnapping and probable killing.

I do consider sexual aggressions, including rape,[7] as torture independently of the sex of the victim and the degree of completion of the crime, i.e., a threat of the aforementioned activities is torture. The inclusion is relevant because traditionally rape and other sexual aggressions were not categorized as international law violations—an oversight corrected with the decisions handed down by the *ad hoc* tribunals for Rwanda and the former Yugoslavia,[8] which will facilitate accountability.

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[5] Justified due to specific international regulation and to scholarly examination in separate chapters. See: Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton, NJ: Princeton University Press, 2001): Chs. III-IV. So Clark's statement that "this is a false division to some extent," lacks sufficient force to override an analytically useful distinction. See: Ibid, 72.

[6] See: Below, Ch. V, Sec. A.2.a.

[7] Rape is especially relevant for the cases studied. For example, "La venda sexy" was a Chilean detention center notorious for systematic rapes, which sometimes included the use of a dog. See: León Gómez Araneda, *Tras la huella de los desaparecidos* (Santiago, Chile: Ediciones Caleuche, 1990): 244.

[8] "[R]ape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," in: *The Prosecutor v. Jean-Paul Akayesu*, case no. ICTR-96-4-T (2 September 1998): Par. 597.

This chapter focuses on a series of cases of torture that occurred as a consequence of state terrorism practiced in Latin America with special intensity since the 1970s—and lasting until democratic restoration—[9]that have been prosecuted before the Spanish court system. Since the crimes occurred in countries under the jurisdiction of the Inter-American Court of Human Rights (IACtHR),[10] it is possible to compare the implementation of the right not to be subjected to torture at the international and national levels.

The chapter is divided into five sections. First, in order to know the duties and rights of the Spanish courts to prosecute torture as an international crime, this section examines the international regulation of two substantive issues, i.e., the concept of torture and the categories of crimes that correspond to these activities; and a procedural issue, i.e., jurisdiction granted to Spanish courts to decide cases involving torture-related acts. The focus is on UN-sponsored documents because although the regional regulation is pertinent to Spain as member of the Council of Europe and of the European Union,[11] such regional regulation usually reaffirms the universal regulation.

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[9] P. Timothy Bushnell et al., "State Organized Terror: Tragedy of the Modern State," in *State Organized Terror: The Case of Violent Internal Repression,* Ed., P. Timothy Bushnell, et al. (Boulder, CO: Westview Press, 1991): Ch. 13-21; Alex Schmid and A. J. Jongman et al., *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (Amsterdam, Holland: Noth-Holland, 1988); and Pedro N. Miranda, *Terrorismo de Estado: Testimonio del horror en Chile y Argentina* [Colección Expediente Negro] (Chile: Editorial Sextante, 1989): 13-30, 31-188 (Argentina), and 189-350 (Chile).

[10] As seen: Above, Ch. III.

[11] The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and the issue-specific 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 1 February 1989). See: D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London, England: Butterworths, 1995).

There is even a non-binding charter of Fundamental Rights whose article 4 is a verbatim transcription of the UDHR's prohibition of torture. See: http://www.europarl.eu.int/charter.

Second, I will study the domestic duties and rights of the Spanish courts. Although Spain follows a monist theory concerning international law, which means international treaties that have been ratified are automatically part of the Spanish legal system,[12] the specific rules applicable to the prosecution of torture are the result of a combination of laws that the courts need to interpret in a systematic way. For the purpose of the dissertation the main laws are the Spanish Constitution, the Spanish Penal Code and its procedural legislation.

Third, an analysis of the actual cases brought before the Spanish judicial system. After an examination of general issues that affect all the cases, the focus turns to four specific prosecutions, i.e., against Adolfo Scilingo, Ricardo Miguel Cavallo, Augusto Pinochet (now deceased), and other officials. The Scilingo case is significant because the accused confessed—while residing in Spain—to his participation in torture activities in Argentina during the military regime and was found guilty in 2005. In the other two cases—Cavallo and Pinochet—one of the crucial problems was the need for cooperation from other countries via extradition to get hold of the accused; Cavallo was extradited to Spain in 2003 but returned this March to Argentina to stand trial for his crimes.

Fourth, since the Spanish courts do not work in a vacuum, their activity is linked to that of other domestic and foreign authorities/agents that can hinder or help them in furthering the implementation of human rights. Notwithstanding the active role that victims' groups have played in starting criminal procedures in Spain against those accused of practicing torture in Latin America during the Cold War, I am focusing on the interactions of the Spanish court system with the different branches of the government at home and abroad because of the centrality of these branches for the implementation of

[12] Art. 96 (1) of the Spanish Constitution recognizes such monist system.

human rights. The analysis is limited to the interaction with the Spanish executive and with the Argentinean, Mexican, British, and Chilean executive and judicial branches whose cooperation was central to the cases analyzed in the previous section.

The final section is an evaluation of the prosecution of the international crime of torture in Spain and is subdivided into, first, an analysis of the relevant advantages and shortcomings of the use of universal jurisdiction by Spanish courts toward the implementation of the ban on torture. And second, an overall positive evaluation of the efforts of the Spanish judiciary to foster the implementation of this ban and a list of the relevant recommendations to further the role of the Spanish courts regarding the ban on torture.

A. INTERNATIONAL REGULATION

Article 5 of the 1948 Universal Declaration of Human Rights (UDHR), by stating that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"[13] codified internationally a prohibition that had the status of customary *ius cogens* by the time of the Nuremberg and Tokyo trials.[14] Although the UDHR is a mere declaration for some,[15] its relevance is underlined in the *verbatim* transcription of that

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[13] http://www.hrweb.org/legal.udhr.html (Accessed: January 16, 2003).

[14] Disagreement exists especially among non international law scholars. See: Joe Verhoeven, "*Jus Cogens* and reservations or 'Counter-reservations' to the Jurisdiction of the International Court of Justice," in *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Ed., Karen Wellens (The Hague, Holland: M. Nijhoff Publishers, 1998): 195-208. The 1993 Vienna Conference on Human Rights named torture among the crimes against humanity and thus confirmed its *ius cogens* status. In: The Vienna Declaration and Programme of Action, http://www.unhchr.ch/html/menu5/ wchr.htm (Accessed: November 1, 2002): Par. I-30.

However, the Abu Ghraib torture case is one of the recent wake-up calls to the existence of widespread torture. See: Seymour M. Hersch, "Torture at Abu Ghraib," *New Yorker* vol. 80, no. 11 (10 May 2004): 42.

[15] United Nations Agreements on Human Rights, "A Summary of United Nations Agreements on Human Rights," http: //www.hrweb.org/legal.undocs.html (Accessed: January 16, 2003). See: Richard A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York, NY: Routledge,

disposition in article 7 of the legally binding 1966 International Covenant for the Protection of Civil and Political Rights (ICCPR).[16]

According to the ICCPR, the prohibition against torture has no exceptions. As a result, states have to abstain from practicing torture against any person under their jurisdiction independently of the war or peace situation existing in the country.[17] Nevertheless, only the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provided a detailed regulation of torture.[18]

These conventions affect the Spanish legal system because article 10 (2) of the 1978 Spanish Constitution asserts that "[t]he regulations relating to fundamental rights and liberties the Constitution recognizes should be interpreted according to the UDHR and to the international treaties . . . ratified by Spain on those subjects."[19] Thus, this section examines the Convention Against Torture (CAT) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

2000): 6; and Henry J. Steiner and Philip Alston, *International Human Rights in Context* (Oxford, England: Clarendon Press, 1996): 123.

Others consider the UDHR, the ICESC, and the ICCPR and its two Optional Protocols as the International Bill of Rights, see: Office of the High Commissioner of Human Rights, "Fact Sheet No. 2 (Rev. 1): The International Bill of Human Rights," http://www.unhchr.ch/html/menu6/2/fs2.htm (Accessed: September 30, 2003); and Steiner and Alston, ibid: 124.

[16] Widely ratified (160 countries as of 20 July 2007), see: Office of the United Nations High Commissioner for Human Rights (UNHCHR), http://www2.ohchr.org/english/bodies/ratification/4.htm (Last Accessed: January 18, 2008): Chile ratified it in 23 March 1976; Spain in 27 July 1977; and Argentina in 8 November 1986.

[17] Art. 4 (1) and (2) of the ICCPR, http://www.hrweb.org/legal/cpr.html

[18] For a summary of the road toward codification in 1984, see: Clark, *Diplomacy of Conscience*: Ch. III, 35-69. This Convention is referred to from now on as Convention against Torture or CAT.

[19] See: BOE no. 311.1 (29 December 1978).

1. THE 1984 INTERNATIONAL CONVENTION AGAINST TORTURE (CAT)[20]

Spain ratified the CAT on 21 October 1987. The CAT entered into force on 26 June 1987 and is divided into three sections. This subsection focuses on the first one because it describes what characteristics make an act an international crime of torture and the main obligations of the states party to it, including the use of universal jurisdiction to prosecute the crime of torture.[21]

a. Characteristics of the Crime of Torture

Torture is, according to article 1 (1) of the CAT,

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating him or a third person, or for any reason based on discrimination of any kind. . . . It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

Therefore, not all torture-like activities are the object of the international prohibition against torture but only those with the following four main characteristics.

First, from the perspective of their effects on the victim, they must provoke "severe pain or suffering," which introduces an element of subjectivity due to varying pain thresholds. Second, they have to be intentional, which excludes accidental side effects. Third, they ought to be purposeful or aimed at certain goals including extracting "information or a confession, punishing . . . or intimidating [the victim] or a third person, or for any reason based on discrimination." And fourth, even though they may share the

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[20] 145 ratifications as of 2 October 2007, in Office of the UNHCHR, "Declarations and Reservations," http://www2.ohchr.org/english/bodies/ratification/9.htm (Last Accessed: January 18, 2008).

[21] Section II refers to the Committee against Torture and section III to the entering into force of the Convention and related procedural rules; both beyond the scope of the dissertation.

aforementioned characteristics, legally established penalties are not torture *per se*. Recently, the jurisprudence of the two *ad hoc* criminal tribunals for the former Yugoslavia and for Rwanda removed the public official element from the definition.[22]

In addition, the CAT establishes that its definition will be applicable except when the domestic law of a given state party to the Convention is more inclusive[23] and that the torture regulated in this Convention is an international crime prosecuted even during war times[24] and never amenable to justification.[25]

b. Obligations of All the States Party to the CAT: Jurisdictional Issues and Duties of the Courts

To eradicate torture, "[e]ach State Party shall take effective legislative, administrative, judicial, or other measures … in any territory under its jurisdiction."[26] In order for a state to adopt judicial measures, of interest for the dissertation, it needs to have jurisdiction (territorial or subjective). However, although a party to the Convention must prosecute "(a) offences . . . committed in any territory under its jurisdiction . . . [territorial jurisdiction] [and] (b) when the alleged offender is a national [active subject jurisdiction];"[27] it has more leeway relative to the passive subject one because—contrary to customary law—it can decide whether prosecution is "appropriate."[28] Moreover, the

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[22] For example, *Simic, Tadic, and Zaric* (Trial Chamber, ICTY) (October 17, 2003): Par. 82 and *Kvocka et al.* (Trial Chamber, ICTY) (November 2, 2001): Par. 139.

[23] Art. 1 (2) of the CAT.

[24] Art. 2 (2) ibid.

[25] Art. 2 (3) of ibid. An order from a superior officer or any public authority is no justification.

[26] Art. 2 (1) of ibid.

[27] Art. 5 (1) of ibid.

[28] Ibid. 'Appropriate' equals political discretion and interferes with the *ius cogens* status of torture.

CAT allows, but does not impose, the use of universal jurisdiction when a country rejects exercising its territorial jurisdiction.[29]

Moreover, states party to the CAT have the duty to guarantee justice to torture victims by "ensur[ing] in [their own] legal systems that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation"[30] and by criminalizing torture practices.[31] Moreover, states must adopt all measures necessary to secure the presence of the accused in that country to guarantee that he/she will not flee prosecution. "[A]fter an examination of information . . . it shall take him into custody . . . only for such time as is necessary to enable any criminal or extradition proceedings."[32]

The duty to place the accused under the custody of the authorities protects the rights of the victims because it secures the presence of the alleged culprit for a future trial.[33] However, since the CAT establishes that the custody is limited "for such time as is necessary,"[34] the rights of the accused are also present in the regulation.[35] Since this protection in favor of the accused is too general, the CAT has two added protections, i.e.,

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[29] This optional character reflects the opinion of the majority of human rights scholars and is based on the principle of a*ut dedere aut judicare*, which means he state that has the alleged criminal under its custody can either prosecute or extradite him/her to any country that requests it. See: Art. 5 (2) of the CAT in relation to art. 7 (1) of the CAT and art. 5 (3) of ibid. However, domestic legislation could impose it as a duty.

[30] Art. 14 of ibid.

[31] Art. 4 (2) of ibid.

[32] Art. 6 (1) of ibid.

[33] Art. 13 of ibid. It regulates other rights of the victim of torture.

[34] Art. 6 (2) of ibid.

[35] For other rights guaranteed to the accused, see: Art. 6 (3) of ibid.

the duty of the state to "immediately make a preliminary inquiry into the facts"[36] and to guarantee a fair process.[37]

2. THE 1968 CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY[38]

Notwithstanding torture's international double status as a war crime and a crime against humanity, the last category is significant to the dissertation's case studies, which refer to situations of peace with the exception of the Guatemalan civil war. As a crime against humanity, torture cannot be subjected to any statute of limitations, cannot be the object of amnesty and it produces individual responsibility. All of these are relevant characteristics for the victims of torture practiced in Latin America during the Cold War because they had to wait to the (re)/establishment of democracy in their respective countries to demand justice.

a. Special Status of Crimes against Humanity: Not Subjected to Any Statute of Limitations and Illegality of Amnesty Laws

The Convention on the Non-Applicability of Statutory Limitations asserts:

> **No statutory limitation shall apply to the following crimes**, irrespective of the date of their commission: (b) Crimes against humanity whether **committed in** time of war or **in time of peace** as they are defined in the Charter of the International Military Tribunal, Nürenberg . . . and the crime of genocide . . . , even if such acts do not constitute a violation of the domestic law of the country in which they were committed.[39] [Emphasis added]

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[36] Art. 6 (1) of the CAT.

[37] Art. 7 (2) and (3) of ibid. underlining the need for "fair treatment" of the accused.

[38] "Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968; entry into force on 11 November 1970, in accordance with article VIII." See: Antonio A. Cançado Trindade, Lorena González and Daniel Zovatto, Eds., "La Dimensión Jurídica de los Derechos Humanos: textos completos," CD-ROM (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1995).

[39] Art. I of the Convention on the Non -Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

The "non statutory limitation" is relevant to the Spanish court cases because it precludes the defendant from using three main defenses, which are the existence of *ex-post facto* laws, the amount of time elapsed between the commission of the crime—mostly 1970s and early 1980s—and its prosecution starting on the second half of the 1990s, and the existence of amnesty laws.

The first defense is of no use in these cases because torture was forbidden internationally—at least since Nuremberg—and domestically.[40] The second one, *prima facie*, seems weightier but torture is as a crime against humanity and cannot be subjected to any statute of limitations. Finally, the Convention declares amnesty laws illegal.[41] Thus, opening the doors to prosecutions at home and/or abroad.

b. Individual Responsibility

Article II of the Convention reaffirms the principle of individual responsibility established in Nuremberg.

> If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Prosecution affects not only those who directly torture but also those who incite others to torture or who remain inactive while commanding enough power to put an end to widespread torture in a given country, i.e., a person with command responsibility.[42]

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[40] Pinochet recommended the signature of CAT in 1988 while in power in Chile.

[41] And imposes the duty of eliminating them. See: Art. IV of the Convention on the Non - Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[42] See: Below, Sec. C.

Thus, this Convention encompasses the prosecution of every type of alleged perpetrator, from the lowest in the chain to the authorities in charge of the country.

B. DOMESTIC REGULATION

The 1978 Spanish Constitution,[43] which set up the basic legal framework for the new democratic regime after forty years of dictatorship, is the "supreme law of the land" and has direct effects.[44] Thus, "citizens and the government are subjected to [it and must comply with] the rest of the legislation of the country,"[45] including international law.[46]

However, the process of determining the applicable regulation to decide a case is complicated in practice due to conflict first, between domestic and international laws; and second, among domestic laws that have to fill in for the gaps of the international regulation.[47] As a result, the highest courts in Spain, i.e., the *Tribunal Supremo* or Supreme Court and the *Tribunal Constitucional* or Constitutional Court have to decide definitively which, among contending solutions, is applicable to a given case.

The analysis of the relevant torture-related domestic regulation is summarized as follows: first, the description of the activities considered torture, the type of crime the aforementioned activities constitute, and the different degrees of responsibility for such actions; second, an examination of the duties of the courts relative to the prosecution of

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[43] It entered into force on December 29 of that year.

For an informative analysis of the transition to democracy in Spain, see: Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: John Hopkins University Press, 1996): 87-115.

[44] See: Decision of the Spanish Constitutional Tribunal of 15 June 1981.

[45] Art. 9 (1) of the Spanish Constitution.

[46] See: Above, Fn. 12.

[47] See: Below, Sec. C. For an example of problems involved in adapting to international law, see: Amnistía Internacional, "Ante la Reforma del Código Penal, Amnistía Internacional pide que la violación se considere siempre tortura," (Comunicado de Prensa, 13 June 2003), http//:www.es.amnesty.org/com/2003/com_13jun03.shtm (Accessed: March 29, 2004).

the prohibition of torture; and third, legal obstacles to the use of Spanish courts for the prosecution of torture committed abroad by foreigners and against foreigners.

1. TORTURE UNDER SPANISH LAW: ACTIVITIES, TYPE OF CRIME AND RESPONSIBILITY

The Spanish Penal Code—reformed in depth in 1985 to "adapt [it] . . . to the [new] constitutional values," establishes what activities constitute crimes, and their respective punishment. The reform not only included torture among crimes against "the moral integrity" of the person but it also sought to "provide . . . the citizen with a stronger protection against torture."[48]

a. Activities that Constitute Torture

The Spanish Penal Code underlines torture's psychological effects by describing torture in article 173 as "[any person] inflict[ing] upon another person a degrading treatment that damages his/her moral integrity." Nevertheless, its physical effects are present in relation to torture committed by members of the government—the crime at the crux of the case studies studied in the dissertation. In these cases, torture consists of,

> [S]ubjecting [a] person to conditions or procedures that due to their nature, length or other circumstances, provoke physical or mental sufferings, the suppression or diminishing of mental, judgment, and decision-making powers, or that attack in any way against his or her moral integrity, with the goal of obtaining a confession or information. . . . or punishing him/her for any activity that he or she has done or is suspected of having done.[49]

The limitations that this article establishes have to do with the purposes for which torture is inflicted, i.e., information or punishment; other cases are covered in article 175.[50]

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[48] See: Spanish Penal Code of 1995: Justification Section.

[49] Art 174 (1) of the Spanish Penal Code.

[50] "[W]hich is applicable to cases outside those named . . . [in article 174] that attempt against the moral integrity of a person."

Since "nature, length, or other circumstances" are central to declaring an activity performed by the authorities as torture and these characteristics are not specified in the Spanish Penal Code, the courts will face difficulties in distinguishing torture from legal tactics used in extracting information. Section C of this chapter deals with the main difficulties; an issue that has acquired increased relevance since September 11 and the global "War on Terror."[51]

b. Type of Crime

Although the aforementioned activities are constitutive of the crime of torture "proper;" whenever "in all those crimes . . . apart from harming the moral integrity, there [is] an attack against life, physical integrity, health, sexual liberty or property of the victim or of a third person, the punishment for those specific acts will be added to that of the torture."[52] After the courts decide that the accused are guilty of these several criminal types, the different punishments will be served subsequently "except when a special punishment is prescribed legally for the crimes . . . committed."[53]

In addition, sometimes the activities of torture can be subsumed into the crimes of genocide, crimes against humanity or terrorism and as a consequence those found guilty will be punished according to these other criminal types. Moreover, for the purposes of the dissertation the activities of relevance are usually all those that are short of death and for the most part do not include as their main objective extorting property from the

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[51] Despite the expanding definitions of the maligned "Torture Memos"—Department of Justice, Office of Legal Counsel, "Memorandum for Alberto R. Gonzales: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340 A," (1 August 2002)—certain activities, i.e., causing 'physical pain . . . equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death, go beyond torture and constitute amputation and homicide. See: Above, Fn. 1, 2nd Par.

[52] Art. 177 of the Spanish Penal Code.

[53] Ibid, in fine.

victims. However, in Argentina, Chile, and Guatemala torture ended with death in a considerable number of cases and sometimes it was used to force individuals to sign over their property to the alleged torturers.

c. Responsibility and Punishment

In general, any person found responsible for the crime of torture can be deprived of his/her freedom for no less than six months and no more than six years.[54] In addition, special penalties are attached to torture committed directly by public servants—i.e., removal from their official position and ineligibility for any public office for a given period of time;[55] these same penalties apply to authorities with command responsibility.[56]

Furthermore, public servants who work in prisons and similar institutions are mentioned specifically in article 174 (2) of the Penal Code to underline that if found guilty of torture against any individual under their custody, they will be met with the same punishment as reserved for those who torture people not legally deprived of their freedom.[57] This is significant to confront those who consider prisoners lack any rights and particularly to the case studies analyzed in the dissertation.

2. OBLIGATIONS OF THE COURTS REGARDING THE BAN ON TORTURE

Although Spanish courts in general must provide a venue where torture victims can seek justice without sidestepping the rights of the alleged perpetrators, their specific

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[54] Book II, Title VII of the Spanish Penal Code.

[55] Articles 174 and 175 of ibid.

[56] Those "allow[ing] other people to do the activities mentioned [previously]." (Art. 176 of ibid).

[57] Art. 174 (2) of ibid.

duties vary with the types of jurisdiction exercised,[58] which are established in the LOPJ (*Ley Orgánica del Poder Judicial,* or law that regulates the workings of the judicial branch of the government).[59] Its article 23 (4)—allowing the prosecution of certain crimes regardless of place of commission, author or victim—is of special relevance for the dissertation.

a. Granting Justice to the Victims and to the Accused

The Spanish Constitution affirms that: "**All persons** have the right to obtain the effective protection of judges and courts in the exercise of their legitimate rights and interests"[60] and it recognizes that "everyone, [citizens and non-citizens alike in the territory of Spain] have the right to physical and moral integrity, without being subjected under any circumstances to torture nor to inhuman or degrading punishment or treatment."[61]

Thus, in principle, any victim of torture can demand justice from the Spanish courts. The Constitution does not limit the activities to be prosecuted to those committed in the territory of Spain, so the disposition can apply to torture committed anywhere[62] and as result it is an opening to lawsuits initiated by foreigners. Spanish courts have to start to investigate the alleged crimes because they have a duty to provide "effective" protection.

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[58] See: Above, Subsec. B.1.b.

[59] Laws called "orgánicas" are significant because qualified legislative majorities approve them.

[60] Art. 24 (1) of the Spanish Constitution.

[61] Art. 15 of ibid.

[62] Right regulated in articles 24 and 25 of ibid.

Once a victim starts a process demanding justice, the accused has a series of rights too. I focus on the guarantees to his/her freedom and the right to a fair trial—clear indictment, representation by a lawyer, and reasonably speedy trial. Therefore, the alleged perpetrator of torture will be indicted and "deprived of his/her freedom but only according to the protections established in the Constitution and . . . in relevant laws."[63]

b. Jurisdiction of Spanish Courts: Territorial, Subject, and Universal

As is common to all courts, Spanish courts have territorial and subject jurisdiction and, under certain circumstances, they also have universal jurisdiction: Spanish courts can decide cases involving "actions committed outside the territory of Spain by Spaniards or foreigners that according to the Spanish penal law could be categorized as . . . a) Genocide. b) Terrorism . . . g) And any other that, according to international treaties or Conventions, should be prosecuted in Spain."[64] Nevertheless, the jurisdiction to prosecute torture committed abroad by foreigners continues to be a controversial issue.

This regulation is the basis of a 2002 decision of the Spanish Supreme Court that confirmed Spanish jurisdiction—universal—and therefore, denied the appeal of the district attorney's office that contended that Spanish courts could not decide the case because they lacked territorial and subject jurisdiction.[65] The Supreme Court just reproduced the November 5, 1998 decision of the Spanish *Audiencia Nacional* that had already resolved the question in favor of the jurisdiction of Spanish courts.

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[63] Art. 17 (1) of the Spanish Constitution.

[64] Art. 23 (4) of the LOPJ.

[65] "Escrito de la Fiscalía solicitando el archivo de las actuaciones en los casos argentino y chileno Audiencia Nacional, Rollo de la Sala número 139-97, Sumario número 19-97, Juzgado Central de Instrucción número 5, Sección Tercera," (November 26, 2002). However, there were Spanish victims too.

> The tortures denounced would be part of the more severe crime of genocide or terrorism. That is why it is unproductive to examine if the crime of torture is in our legal system one that grants universal prosecution . . . If Spain has jurisdiction to prosecute genocide committed abroad, the investigation and the procedure will have to reach the crimes of torture integrated in that of genocide. And not only in the case of victims of Spanish nationality, according to article 5, 1, c of the convention [against torture]. . . .
>
> According to article 5.2 of the aforementioned Convention, Spain would have jurisdiction based on an international treaty.[66]

Even though Spain became part of the CAT on 9 November 1987, the customary *ius cogens* status of these crimes object of the lawsuits initiated in Spain allows the use of universal jurisdiction to prosecute torture activities committed after, at least, the beginning of WWII. Consequently, the Supreme Court, in the aforementioned decision, concurred with Judge Baltasar Garzón's rejection of a public prosecutor's appeal based on lack of jurisdiction.[67]

3. LEGAL OBSTACLES TO THE PROSECUTION OF THOSE ACCUSED BEFORE THE SPANISH COURT SYSTEM

The main legal obstacles[68] for the prosecution of those accused of torture are the immunity of the head of state and other high officials; the non-retroactivity of the penal law; and those directly linked to other processes against the same accused—the existence of a final fair trial against them (double jeopardy).

a. Immunity of the Head of the State

Internationally, article 21 (1) of the 1969 New York Convention on Special

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[66] "Auto de la sala de lo Penal de la Audiencia Nacional desestimando el Recurso De Queja Nº 77/99 interpuesto por el ministerio fiscal," (Madrid, 19 November 1999): Fundamentos de Derecho, Fourth and Seventh.

[67] "Auto por el que se desestima el recurso de reforma interpuesto por el Ministerio Fiscal, contra el auto de ampliación de procesamiento dictado el 30 de abril de 1999," (Madrid, 17 de Mayo de 1999): Parte Dispositiva. In addition, it could be said that the prosecutor neglected his duty to promote legality (article 124 of the Spanish Constitution) by re-opening a case already decided by the court.

[68] Cooperation issues will be examined in: Below, Sec. D.

Missions regulates the immunity of public figures—[69]especially of the head of state and of government when they travel abroad in a special mission. Domestically, article 56 (3) of the Spanish Constitution grants immunity to the Spanish chief of the state, i.e., the king. As a result, attempts to prosecute current chief executives have been dismissed.[70]

The solution in cases involving former chiefs of state[71] is unclear and, although there is a widespread agreement on prosecuting former chiefs of state for personal activities, the difficulty lies in defining personal activities. The British decisions relative to the petition of extradition of Pinochet are ambiguous[72] because while the High Court stated the official nature of the crimes; the House of Lords[73] denied immunity to Pinochet "for the indictments for torture and conspiracy to commit it starting on December 8, 1988." [74] As a result, "grave crimes of international law prevent the granting of immunity." [75]

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[69] http://www.unog.ch/archives/missions.htm (Accessed: November 16, 2004).

[70] For example: Against the king of Morocco and the president of Equatorial Guinea, see: "Auto del Juzgado Central de Instrucción número 5" (December 23, 1998); against the president of Cuba, see: "Auto del Pleno de la Audiencia Nacional" (March 4, 1999); and against the Chief of Italy, see: "Auto de la sección cuarta de la Sala de lo Penal de la Audiencia Nacional en el procedimiento abreviado no. 262/97 del Juzgado Central de Instrucción no. 5," (May 27, 2002).

[71] "Escrito de la Fiscalía solicitando el archivo de las actuaciones en los casos argentino y chileno," (2002). It is briefly treated because it basically affects Pinochet.

The prosecution of Milosevic, see: Scott Grosscup, "The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice," *Denver Journal of International Law and Policy* vol. 32, no. 2 (Spring 2004): 355.

[72] Nevertheless, the office of the prosecutor mentions them profusely in favor of immunity.

[73] March 24, 1999.

[74] Escrito de la Fiscalía solicitando el archivo de las actuaciones en los casos argentino y chileno.

[75] Ibid.

The 14 February 2002 decision of the International Court of Justice (ICJ)—*Republic of Congo vs. Belgium*—[76]has resolved the issue by denying any distinction between official and personal activities while a chief of state or any other high official is in office. Thus, it seems that these high officials are protected by immunity even when accused of crimes against humanity, which is contrary to the Nuremberg principles. Due to Spanish monism relative to international law, the decision from the ICJ is part of Spanish law and it has to be applied by its courts.[77]

b. Non-Retroactivity of the Penal Law

A well-established principle of domestic and of international law is the prohibition of retroactive punitive laws, also known as *nullum crimen sine lege*. According to this principle the state cannot prosecute individuals for actions that were not crimes at the time of commission and cannot impose starker penalties for existing crimes. Due to the central role of this principle in modern criminal law, it has constitutional status in Spain.[78]

It is common for those accused of committing the international crime of torture to allege the existence of ex-post facto laws to prevent the action of the courts. However, since the acts of torture committed in Latin America during the Cold War and prosecuted before the Spanish courts were crimes at the time of their commission—either

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[76] Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium)* – Judgment – [2002] ICJ 1 (14 February 2002), http://www.worldlii.org/int/cases/ICJ/2002/1.html (Accessed: November 16, 2004): Referred to the head of foreign affairs but applicable to chiefs of state and of the executive. See: Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgment in *The Congo v. Belgium* Case," *European Journal of International Law* vol. 13, no. 4 (2002).

[77] The office of the prosecutor goes even further when it considers that the immunity also covers those who took part in the commission of the acts planned by the chief of state and other high officials.

[78] Art. 9 (3) of the Spanish Constitution. The Supreme Court set its doctrine relative to the principle of non-retroactivity in its decision of 20 July 1981.

domestically and/or internationally—these prosecutions have respected the principle of non retroactivity of the penal law.

c. Obstacles Linked to Processes Followed Abroad

A significant obstacle to the action of the Spanish courts is the prohibition of double jeopardy.[79] Spanish courts can prosecute any foreigner accused of torture as long as "the criminal was not acquitted, pardoned, punished abroad, or that in this last case the criminal did not serve the whole sentence. If only part of the sentence was served, that will be taken into account to lower proportionally the penalty" handed down.[80]

Despite the absolute terms of this article, it is necessary to interpret it in relation to international law principles. Thus, the processes against the accused should have respected the rights of the alleged perpetrators and of the victims. That is why processes cut short due to political agreement or whose sentencing dispositions were suspended by amnesty laws,[81] do not prevent the activity of the Spanish courts.

C. CASES BEFORE THE SPANISH COURT SYSTEM[82]

Among the variety of cases available,[83] I am focusing on those abuses committed during the Cold War in Latin America by officials waging war against communism and other "exotic" ideologies. In the repressors' minds, advocates of these ideologies could

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[79] See: Art. 23 (5) of the LOPJ in relation to 23 (2) c. Art. 23 (5) states that "in the cases referred to in sections 3 and 4 what is included in letter c) of section 2 of this article should be applied."

[80] Art. 23 (2) c of ibid.

[81] See: Above, Sec. A.2.

[82] As mentioned, I am using the Spanish originals. For a summary in English, see: "The Criminal Procedures against Chilean and Argentinean Repressors in Spain: A Short Summary," Revision One (11 November 1998), http://www.derechos.net/marga/papers/spain.html (Accessed: February 23, 2004).

[83] E.g. the TVPA (Torture Victims Protection Act) and the ATCA (Alien Tort Claim Act) allow plaintiffs to initiate civil lawsuits in the US against crimes of torture committed by foreigners against other foreigners abroad; both Acts have been used against abuses in Latin America and in the former Yugoslavia.

destroy their societies.[84] Although that region has transitioned into democracy, the victims of human rights violations, including torture, still find difficulties in seeking redress domestically.[85] Thus, Spanish courts have been used until recently as the most favorable forum because they grant individual standing to initiate judicial processes.

Nevertheless, the processes against alleged cases of torture did not start immediately in Spain; the first ones started only in the second half of the decade of the 1990s. The main explanations for the delay are: first, the victims' belief that during the transitional phase reconciliation should have the upper-hand.[86] Second, the victims' hope for domestic accountability. And third, the lack of access to the documentation necessary as evidence to prosecute.

This section is divided into three parts. First, common issues that affect all the processes; and second, a study of specific cases: Scilingo, an officer who confessed his criminal activity to a Spanish judge; Cavallo and Pinochet who resided outside Spain and had to be extradited; and processes for abuses committed in Guatemala and Honduras, which help underline the potential scope of judicial implementation.

1. COMMON ISSUES AFFECTING TORTURE CASES PROSECUTED IN SPAIN

The analysis of the cases shows four main common issues. One derives directly from Spanish domestic law; the others are a consequence of the existence of an

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[84] See: Mark J. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt* (New Haven, CT: Yale University Press, 2001): Especially Ch. I, "'Dirty War' and Democratic Response," 11-24; and Donald C. Hodges, *Argentina's 'Dirty War'* (Austin, TX: University of Texas Press, 1991): Ch. 6.

[85] Amnesty International, "Argentina and Chile: Initiative by the Spanish National Court Shows Justice has no Borders," News Service 188/97 (AMR 13/011/1997), http://web.amnesty.org/ai.nsf/Index/AMR130111997?OpenDocument&of=COUNTRIES\SPAIN (Accessed: January 2, 2003).

[86] Naomi Roht-Arriaza and Lauren Gibson, "The Developing Jurisprudence on Amnesty," *Human Rights Quarterly* vol. 20, no. 4 (November 1998): 843.

agreement among South American military governments to cooperate with each other in carrying out their own type of state terrorism and in covering up their activities at a transnational level through the "Operación Cóndor" or *Cóndor* plan.[87]

Therefore, this subsection covers the following: first, citizens and non-citizens alike can initiate criminal suits in Spain without prior intervention by a prosecutor. Second, torture in Latin America constituted a crime against humanity; it was systematic and widespread. Third, a reference to the most common types of torture practiced in Latin America. And fourth, torture-related criminal types in the Spanish Penal Code.

a. Victims' Easier Access to Initiate a Criminal Process

In Spain, as aforementioned, citizens and non-citizens alike can initiate a criminal lawsuit through the use of what is called a *querella* or popular action, which means they have standing to start a judicial process.[88] As a consequence of that action, the investigative judge will begin to work in the case—as long as the judge has jurisdiction and the lawsuit is not frivolous.

Nevertheless, individuals must follow certain formalities. The main ones are that the popular action has to be written and presented through two intermediaries—"procurador" or solicitor-like figure in charge of mere representation and a lawyer—[89]which increases expenses; and second, in certain cases, the law demands a monetary

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[87] Samuel Blixen, *El vientre del Cóndor: del Archivo del Terror* (Montevideo, Uruguay: Brecha, 1994): Ch. 1; John Dinges, *The Condor Years* (New York, NY: The New Press, 2004); and J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America* (Lanham, MD: Rowman & Littlefield, 2005): Ch. 1 (What Was Operation Condor?).

[88] Articles 101 (for citizens) and 270 (for citizens and foreigners) of the 1882 Ley de Enjuiciamiento Criminal (Law Regulating Criminal Process), from now on referred to as LECrim. The edition checked has incorporated modifications to the law as of September 2003; and art. 19 of the LOPJ.

[89] Art. 277 of the LECrim.

deposit to serve as security;[90] the victim and the victim's heirs and legal guardian are exempt.[91] The amount cannot prevent the exercise of the popular action.[92]

Foreigners are not treated equally to nationals because foreigners can only use the popular action for crimes committed against their persons or their property, or that of those under their guardianship[93] and they are only exempt from the security according to international treaties and the principle of reciprocity.[94] Thus, they may confront starker obstacles to demand justice.

b. Torture in Latin America: A Crime against Humanity

The judicial decisions show that the alleged torture—especially in Argentina and Chile— was a crime against humanity. It was practiced by agents of the government; it targeted Leftists, Jews, and indigenous peoples; it affected sufficient people to be considered widespread;[95] and, based on retrieved documents relative to the *Cóndor* plan,[96] which prove torture was an essential part of the military's plot to crush any who opposed the regime, it was also systematic.

In addition, medical doctors were usually present during torture sessions, not for humanitarian reasons but to prolong the usefulness of the torture by preventing the victim's death, which conveys the existence of a pre-approved plan to torture these

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[90] This is an adequate measure to prevent unnecessary lawsuits. See: Art. 280 of the LECrim.

[91] Art. 281 of ibid.

[92] Art. 20 (3) of the LOPJ.

[93] Art. 270, 2nd Par. of the LECrim.

[94] Art. 281, Last Par. of ibid.

[95] See: Below, Appendix C.

[96] See: Above, Fn. 87.

victims and prevents any defense of the accused based on the accidental—the heat of the moment or renegade members' activity—nature of the torture.[97]

Although the decisions refer to discrimination based on Leftist ideology, broadly understood; discrimination based on race and religion—traditional bases for the crime of genocide—was also found. The decisions underline the special cruelty against Jewish individuals.[98] Similarly, indigenous groups were the target of the bulk of the violations in Guatemala. And in Chile the Mapuche Indians—only ten per cent of the Chilean population or around one million people—were an easy target for the most heinous torture and have not received redress for the violations of their rights.[99]

c. The Most Common Types of Torture Practiced in Latin America

The descriptive data provided by the Spanish judicial decisions, which include extensive documentary evidence from court records, show a mix of physical and psychological torture.[100] Physical torture included as common practices not only blunt

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[97] For Argentina, see: "Auto de ampliación del Auto de Procesamiento de Sep. 1, 2000 contra Ricardo Miguel Cavallo," (October 5, 2000): Hechos, Seventh; and for Chile, see: "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte y se ratifica la prisión provisional," ibid: Facts, Sixth.

[98] "Auto de ampliación del Auto de Procesamiento de 1 de septiembre del 2000 contra Ricardo Miguel Cavallo," ibid: Hechos, Seventh. Similarly, Auto de 25 March of 1998: Razonamiento Jurídico 11° refers to an especially heinous practice called "retoscopio," which consists of "inserting a metallic tube in the anal or vaginal cavity and then introducing a rat inside the aforementioned tube." Also forced to listen to Nazi anti-Semitic speeches and to look at and wear Nazi paraphernalia.

[99] According to "Who are the Mapuche?" http://ww.mapuche.nl/english/mapuche.htm (Accessed: November 16, 2004).

For abuses under Pinochet, see: HRW, "Indebido Proceso: los juicios antiterroristas, los tribunales militares y los Mapuche en el sur de Chile," http://www.hrw.org/spanish/informers/2004/chile1004 (Accessed: November 16, 2004) and "Nómina parcial de ejecutados políticos de la nación mapuche durante el régimen de Pinochet," http://members.aol.com/mapulink3/chile-e/doc-02.html (Accessed: November 16, 2004).

[100] E.g.: Juzgado Central de Instrucción número cinco, Audiencia Nacional Madrid, Procedimiento: Sumario 19/97-J, Pieza Separada III: Fundamentos Jurídicos, First.

For a list of the most common tortures, see: Nilson Mariano, *Operación Cóndor: terrorismo de estado en el Cono Sur* (Buenos Aires, Argentina: Lohlé Lumen, 1998): 20-1. The author underlines how this Plan meant similar practices in different countries.

use of force—hard blows and cutting—but also more sophisticated techniques such as "la parrilla" or grill where the "detainees"[101] suffered restraint of their limbs and electrical discharges; and the submarine and the "dry submarine," in which the "detainees" are deprived of air by immersion in liquids of different nature or with a plastic bag around their head. Rape was also common.[102]

Psychological torture comprised activities such as forcing the victim to see how a family member or a relative was being physically tortured or to hear his/her cries while under the torture; threats of rape against the victims or their relatives—either male or female; and subjecting the "detainees" to servitude, thus attacking the victim's dignity. As seen in section A of this chapter, the Convention Against Torture (CAT) forbids both types of activities—physical and psychological—and so does the Spanish legislation.

d. Types of Crimes Constituted by the Torture Activities

According to the decisions of the Spanish courts, torture activities can be punished as the following crimes: torture proper, assault and battery, sexual aggressions, terrorism, and genocide. I am going to focus on genocide and terrorism because they grant the use of universal jurisdiction in Spain. Genocide, regulated internationally by the Convention against Genocide of 9 December 1948, is committed by the following,

> [T]hose that with the purpose of destroying totally or partially a national, ethnic, racial or religious group, … commit any of the following acts: sexual attacks,[103] … injuries of article 149 and 150 of the Penal Code or any other type of

[101] Detainees is between quote marks, because detention implies a legal base; absent here as a rule.

[102] The *ad hoc* Tribunals have equated rape to genocide. See: Above, Fn. 8; and Kelly D. Askin, "A Decade in Human Rights Law: A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003," *Human Rights Brief* vol. 11, no. 3 (Spring 2004): 16.

[103] Article 607 (1) 2° of the Penal Code.

> injuries,[104] or force the group or any of its members to conditions that endanger their lives or alter seriously their health (Article 607.1 of the Spanish Penal Code).

Although the specific attacks against the indigenous peoples and the Jews constitute acts of genocide "against an ethnic, racial or religious group,"[105] Spanish courts affirmed that the widespread torture affected groups that were distinctive due to their political ideas and thus, torture in Argentina and Chile constituted genocide against national groups. For example, a decision underlines that the Argentinean military had the "intention to destroy citizens opposed to the regime and those indifferent to it, too."[106]

According to articles 515, 516 (2) and 571 of the Spanish Penal Code the crime of terrorism is constituted by activities done with the purpose of "subvert[ing] the constitutional order or to alter seriously the public order … [And the means used are explosives and/or fires] provoking injuries, torture … [and] the existence of a terrorist

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[104] Article 607 (1) 2°, 3° and 5° of ibid.

[105] See: Above, Sec. C.1.b. The harsher incidence of torture against the Jewish population could also reflect another characteristic of this group that goes beyond their race, ethnicity, or religion, i.e., their high degree of professionalism, in: Margarita Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* (New York, NY: Oxford University Press, 1998): 106.

[106] "Auto de ampliación del Auto de Procesamiento de Sep. 1, 2000 contra Ricardo Miguel Cavallo": Fundamento de derecho, quinto. And the very relevant "Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura argentina," (Madrid, 4 november 1998): Fundamento de Derecho, Quinto. Similarly, "Auto de Procesamiento a Pinochet" (10 December 1990): Antecedentes, Segundo.

This broad concept of subversion is best expressed by General Ibérico Saint-Jean: 'First, we must kill all subversives; then their sympathizers; then those who are indifferent; and finally, we must kill all those who are timid.' Quoted in: Tina Rosenberg, *Children of Cain: Violence and the Violent in Latin America* (New York, NY: Penguin Books, 1992), [Reprint, Originally Published: New York, NY: W. Morrow, 1991]: 176. [Reprint, Originally Published: New York, NY: W. Morrow, 1991]: 176.

organization or an armed band."[107] Since Latin American state-sponsored terrorism altered "the constitutional order," it can be prosecuted in Spain.[108]

The military in Argentina and in Chile violated the constitutional order of their respective states not only by suspending elections but by attacking all the rights that derive from the rule of law, including respect for universal human rights. It is relevant to underline that habeas corpus[109] was among the rights eliminated because it is fundamental to protect the other rights.

2. SPECIFIC CASES BEFORE THE SPANISH JUDICIARY

In each of these case studies, after a brief reference to the period of time in which the alleged facts occurred, I will examine with the relevant charges against each of the accused and their direct culpability based on the available evidence; the preventive judicial measures adopted—excluding the seizing of assets which is a common practice against the indicted;[110] and the degree of respect of the court to the rights of the accused.

a. The Adolfo Scilingo Case

i. Facts, Charges, and Direct Culpability

From December 1976 to1977—the most repressive period in the Argentinean military regime—Scilingo was in charge of the department of electricity and motor

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[107] Art. 571 of the Spanish Penal Code.

[108] "practicado desde el Estado . . . utilizando las estructuras de la Administración y empleando para su ejecución a militares, personal civil, . . . terroristas y grupos armados . . . dirigidos y coordinados dentro . . . ´del . . . Proceso de reorganización nacional.'" In: "Auto de 25 de marzo de 1998."

[109] It is being attacked as a consequence of the War on Terror. The Military Commissions Act of 2006 is an example of "attempts to suspend habeas corpus to all non-citizens who have been determined to be 'enemy combatants' or are 'awaiting such determination' and to strip the federal courts of the right to hear detainees' claims." In: Center for Constitutional Rights, "The Facts About the Military Commissions Act: Guantánamo Global Justice Project," http://www.ccr-ny.org

[110] "Auto fijando la lista de imputados, embargando las cuentas financieras y estableciendo en 330 las víctimas españolas con legitimidad en el procedimiento judicial" (Madrid, 16 octubre 1998): Parte Dispositiva, 1° a, b,c; and Razonamientos Jurídicos, Primero.

vehicles at the ESMA (Mechanized School of the Navy), where thousands suffered from torture—among other crimes against humanity.[111]

This was the easiest case to prosecute because Scilingo lived under the territorial jurisdiction of the Spanish judiciary and "he accused himself . . . in a precise, specific and conclusive way, and … made reference to his alleged participation in the extremely heinous criminal facts which constitute … torture."[112] Based on overwhelming evidence, the Court started the oral proceedings against him on 27 June 2003.[113]

ii. Judicial Measures Adopted against Scilingo and Judicial Protection Granted to Him

In order to guarantee Scilingo's presence during the trial, the judge ordered him to remain in Spain. That is why he had to give up his Argentinean passport.[114] Then he was ordered to inform the authorities about any change of address and to visit weekly the court to minimize the probability of escape. Since Scilingo thought these measures were unfair, he appealed them before the Spanish Constitutional Court,[115] which annulled them.

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[111] See: Gregorio Dionis, "El capitán Scilingo aporta un nuevo carácter a la investigación por la desaparición de españoles en Argentina," http://www.derechos.org/nizkor/arg/espana/sci.html (Accessed: March 1, 2004) and "Auto de 24 de noviembre del 2000 por el que se reforma el Auto de Procesamiento contra militares argentinos de fecha 2 de noviembre de 1999," (Madrid, 24 noviembre del 2000): Facts, Décimosexto.

[112] "Escrito de Alegaciones de la Acusación Popular en respuesta al Recurso de Amparo interpuesto por Adolfo Scilingo ante el Tribunal Constitucional," (Madrid, October 23, 2000).

[113] Audiencia Nacional, Sala de lo Penal, sección tercera, "Auto de conclusión del sumario y de apertura de juicio oral en el Caso Scilingo," (Madrid, 27 de junio de 2003). However, the office of the prosecutor disagreed based on immunity of the chief of state and lack of jurisdiction.

[114] Juzgado Central de Instrucción no. 5 (9 January 1998).

[115] See: "Auto por el que se decreta la Prisión Provisional Incondicional de Adolfo Scilingo" (Madrid, July 31, 2001): Razonamiento Jurídico Primero.

Scilingo's appeal was based on the violation of his constitutional rights—to an ordinary judge, an effective judicial protection, and to the respect to the principle of non-retroactive criminal laws.[116] Moreover, Scilingo claimed that he was not a flight risk because his voluntary confession showed good will;[117] that his confession was invalid as evidence;[118] and that he had just followed orders.[119] On 16 July 2001 the Spanish Constitutional Court stated that the provisional measures "lack[ed] . . . proportionality . . . derive[d] from the lack of time limits . . . [affecting particularly] an Argentinean . . . whose residence, family, and work are outside Spain."[120] Thus, the only provisional measures left against Scilingo were "weekly visits to the court . . . informing [the court] of his current address . . . [and] police surveillance."[121] As a result, the only measure available to prevent Scilingo from fleeing to Argentina and escaping prosecution was ordering his unconditional preventive detention, which the investigative judge in charge of the criminal process against Scilingo did.[122]

Afterwards, when the date was set for the beginning of the trial, Scilingo started a hunger strike. Thus, medical doctors appointed by the Court examined him to check whether he could stand trial and then they decided Scilingo was healthy enough to endure

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[116] "Recurso de amparo 3,824/1999 de Adolfo Scilingo ante el Tribunal Constitucional" (Madrid, 16 September 1999). Rights established in articles 24 (1) and (2) and 25 of the Spanish Constitution.

[117] Ibid: Fundamentos de Derecho, Sustantivos, Second Motive, Second Point.

[118] Ibid: Fundamentos de Derecho, Sustantivos, Second Motive, Third Point. "[U]nintelligible . . . and no presence of the prosecutor in the declaration."

[119] Ibid: Fundamentos de Derecho, Sustantivos, Second Motive, Sixth Point, B-G.

[120] "Sentencia del Tribunal Constitucional de España ante el recurso de amparo interpuresto por Adolfo Scilingo" (16 June 2001): Reason 10.

[121] "Auto por el que se decreta la prisión provisional incondicional de Adolfo Scilingo" (31 July 2001): Razonamientos jurídicos, Primero.

[122] Ibid: Dispositive Part.

it.[123] Since the accused could appeal measures adopted against him, it can be concluded that Scilingo's rights were respected.

iii. Oral Phase and Appeals: Guilty Verdict and Punishment

Finally, on 14 January 2005, the trial against Scilingo started in the *Audiencia Nacional* or National Court in Madrid.[124] Although the accused refused to answer the prosecution's questions, there was enough evidence—his earlier confession before a judge—for Section III of the *Audiencia Nacional* to hand down, on 19 April 2005, a guilty verdict of "640 years in prison" for committing "a crime against humanity [which included]: 1st, "killing 30 people under aggravated circumstances [victims drugged and thrown to the sea from airplanes], which are punished with 21 years of prison per death [630 years]; 2nd, . . . practicing illegal detentions, which is punished with five years of prison; 3rd, causing severe tortures which is also punished with five years of prison.[125] In addition, Scilingo was deprived of any public position and he cannot apply to any of them during the years he is in prison.

The defense and some of the accusers—who demanded "his responsibility for other disappearances that occurred while Scililngo was at the ESMA and wanted the Court to declare that he was guilty of genocide"—[126]appealed the verdict. Finally, in a decision of 1 October 2007, the Spanish Supreme Court decided to void Scilingo's

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[123] Marcelo Risi, "Juicio a Scilingo: inicio accidentado," *BBC.Mundo.com* (14 January 2005), http://news.bbc.co.uk/hi/spanish/latin_america/newsid/4173000/4173807.stm (Accessed: January 19, 2005).

[124] Associated Press (Madrid, Spain: January 14, 2005), http://abcnews.go.com (Accessed: January 19, 2005).

[125] Audiencia Nacional, "Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo," (19 April 2005): Verdict, 1.

[126] Ibid.

conviction based on allegations of torture because such activity was not criminalized in Spain at the time when it occurred and to uphold his conviction for crimes against humanity based on the proven counts of illegal detentions and homicide.[127] Moreover, in the verdict, the penalties are reduced to[128]

> 19 years of prison per each count of homicide, 4 years of prison for each count of illegal detention he committed directly and 2 years of prison for each count of illegal detention in which he participated as an accomplice. . . . [Furthermore] he cannot hold any official position during each of the 19 years he has to serve for each count of illegal detention and suspension of his right to vote during the time he is in jail for the other counts.[129]

Overall, he cannot serve more than 25 years in prison.[130]

b. The Ricardo Miguel Cavallo Case

i. Facts, Charges and Direct Culpability

Between 1976 and 1979 Cavallo worked at the Grupo de Tareas 3.3.2—which was part of the activities of the ESMA—[131]where torture was common as mentioned before. The time-frame coincides with the period in which the abuses peaked in Argentina. After 1980 the number of abuses decreased.[132]

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[127] Sentencia no. 798/2007 (1 de octubre de 2007): Fundamento de Derecho, sexto, 6.
For a brief assessment of this decision, see: Richard Wilson, "Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity," *ASIL Insight* vol. 12, no. 1 (January 30, 2008), http://www.asil.org/insights/2008/01/insights080130.html

[128] Segunda sentencia no. 798/2007 (1 de octubre de 2007): Verdict.

[129] "las penas de 19 años de prisión por cada delito de asesinato; cuatro años de prisión por el delito de detención ilegal del que se le condena como autor, y dos años de prisión por cada uno de los delitos de detención ilegal de los que es considerado cómplice . . . inhabilitación absoluta respecto de cada una de las penas de 19 años de prisión y de inhabilitación especial para el derecho de sufragio pasivo respecto de las demás penas." In ibid.

[130] Based on article 76 (1) a of the Spanish Penal Code.

[131] "Auto de ampliación del auto de procesamiento de 1 de septiembre del 2000 contra Ricardo Miguel Cavallo": Hechos, Décimosexto.

[132] Ibid: Hechos, Octavo.

As one of the officials in charge of the ESMA, Cavallo had command responsibility for the torture of at least 110 persons. Moreove, witnesses confirmed his direct responsibility for 27 cases of torture. "He boasted before detainees [of his participation in torture activities in "la Huevera"]."[133] In addition, four witnesses testified before Judge Garzón about his brutality.[134] On 3 October 2003, the judge ordered the end of the investigative phase of the process and the start of the oral one.[135]

ii. Judicial Measures Adopted against Cavallo and Judicial Protection Granted to Him

There was enough evidence for the court to order Cavallo's provisional detention[136] and to establish his civil responsibility for several violations of human rights.[137] Since he had taken refuge in Mexico and was not in Spain, the court had to approve a petition of extradition which the Spanish executive sent to the Mexican authorities. Finally, the Mexican Supreme Court declared the legality of such extradition but only for the crimes of genocide and terrorism, not for torture because according to the unanimous decision of the Mexican Supreme Court, the alleged tortures were subjected to the statute of limitations.[138]

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[133] "Auto de ampliación del auto de procesamiento de 1 de septiembre del 2000 contra Ricardo Miguel Cavallo": Hechos, Décimosexto. The number could be higher, around 227 victims.

[134] Julio M. Lázaro, "Cuatro testigos acusan al ex militar Cavallo de torturas y desapariciones en Argentina," *El País* (August 27, 2003).

[135] "Auto de conclusión del sumario" (October 3, 2003).

[136] "Auto de procesamiento de Miguel Angel Cavallo" (Madrid, 1 Septiembre 2000): Parte Dispositiva.

[137] See: "Auto de 25 Agosto 2000," ratified on Sep. 1.

[138] "Sentencia de la Corte Suprema ante el caso de la extradición del oficial de contrainteligencia de la Armada Argentina, Ricardo Miguel Cavallo," (11 June 2003): Verdict, Second, http://www.derechos.org/nizkor/arg/espana/cortemex.html (Accessed: February 20, 2004).

Once Cavallo arrived in Spain—29 June 2003—Judge Baltasar Garzón ordered his preventive imprisonment because "[t]he criminal activity for which he is indicted . . . is of such seriousness that there is no acceptable alternative."[139] Moreover, the judge took into consideration that Cavallo was a flight risk to Argentina where in that moment amnesty laws were still effective.[140] However, the district attorney's office appealed that measure alleging lack of jurisdiction of the Spanish courts.[141]

iii. Latest Developments: Extradition to Argentina

Although Cavallo's defense was able to convince the *Audiencia Nacional* in favor of postponing the beginning of the trial alleging the doctrine of the subsidiary jurisdiction of the Spanish Courts, i.e., that the Spanish courts should defer to the Argentinean courts; this doctrine was overturned by the Constitutional Court in September of 2005 and thus, the oral phase was set to start after the prosecutor appealed such postponement because it constituted an excuse to lengthen the process unnecessarily.[142] In addition, on 24 January 2006 the *Audiencia Nacional* denied the accused the right to choose the venue where he wanted to be prosecuted—thus confirming the legality of prosecuting Cavallo in Spain.[143]

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[139] "Auto de ratificación de la prisión incondicionada y comunicada de Miguel Angel Cavallo" (Madrid, 29 de Junio de 2003): Razonamiento Jurídico, 3.

[140] He disguised his true identity and had several aliases. "Auto de ratificación de la prisión incondicionada y comunicada de Miguel Angel Cavallo" (Madrid, 29 de Junio de 2003): Antecedentes, 1°.

[141] "Recurso de la Fiscalía contra el Auto de 29 de junio del 2003 que decreta la prisión provisional incondicionada de Cavallo" (1 July 2003).

[142] On 14 November 2005 the Prosecutor sent an appeal against the decision of the criminal section of the Audiencia Nacional of November 3, 2005 declaring "the process will stop pending petition from Argentina." In: Equipo Nizkor, "La Sección Tercera suspende el juicio oral en el Caso Cavallo (November 23, 2005), http://www.radionizkor.org/espana/index.html (Accessed: January 25, 2006).

[143] Plataforma Argentina contra la Impunidad, "Deniegan la extradición a Cavallo" (Tuesday, 24 January 2006), http://www.plataforma-argentina.org/article. php3?id_article=271 (Accessed: January 25, 2006).

Nevertheless, the oral phase has not started. On 20 December 2006 the three magistrates of the *Audiencia Nacional* "stated that [Spain] was not the legal venue for the trial and suggested to the Argentinean authorities, once more, to ask for [Cavallo's] extradition" and on 29 January 2007, Cavallo was freed. [144] In March of this year, he was extradited to Argentina where he may face trial for alleged crimes committed during the Argentinean dirty war.[145]

c. The Augusto Pinochet Case

i. Facts, Charges and Direct Culpability

The prosecution of the former dictator is limited to activities that took place while in power, i.e., between 11 September 1973 and 12 March 1990. At the beginning of Pinochet's dictatorship the number of violations of human rights was high but it decreased with the passing of the years—especially in the late 1980s. Torture was so widespread because it was used to extract information about other "subversives."[146]

In order to ask the English authorities for Pinochet's extradition, the Spanish court had to divide the activities of torture object of prosecution into three main periods. (1) Prior to 29 September 1988.[147] (2) Between 29 September 1988 and 8 December

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[144] Reuters, "El repressor argentine Ricardo Cavallo será juzgado en España," *20minutos.es* (13 July 2007), http;//www.20minutos.es/imprimir/noticia/261555/ (Accessed: January 15, 2008).

[145] EFE, "Cavallo rehúsa declarar en Buenos Aires tras ser extraditado por España," *El País.com* (4 April 2008).

[146] "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte y se ratifica la prisión provisional del procesado así como las órdenes internacionales de detención, de fecha 16 y 18 de octubre de 1998 (Madrid, 30 April 1999)," and "Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España": Tenth, 1.

[147] "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte," ibid: Hechos, Octavo. Seventeen cases with evidence (testimony).

1988.[148] And (3) after 8 December 1988.[149] The reason is that the English could only accept extraditions for torture committed after they had ratified the Convention Against Torture (CAT), i.e., after 8 December 1988.

Pinochet was accused of committing crimes against 99 persons.[150] In addition, he was held responsible for the creation of the so-called *Cóndor* Plan, an "international repressive organ . . . a systematic plan of illegal actions (kidnappings, tortures, forced transportation of persons, killings and or disappearances of numerous persons), affecting citizens from Argentina, Spain, United Kingdom, and Chile among others."[151]

Pinochet was the self-proclaimed President of Chile, the commander in chief of the Armed Forces, and the direct chief of the secret services or DINA.[152] Thus, he controlled power in a highly hierarchical regime. Not only did he order the torture activities—to impose and afterwards maintain his regime—but he also received reports of the atrocities, did nothing to stop them, and granted immunity to the torturers.

> [Preparation prior to the coup]. [T]hose who prepare the military insurrection have **instruments of torture installed in military centers** and have given orders for their use . . . from the . . . morning of [the coup]. . . .
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> [Afterwards] . . . the killing or forced disappearance of the detainees is preceded by **torture, practiced by military personnel who follow the orders of their superiors and Pinochet has direct knowledge** of the execution [of these activities].[153] [Emphasis added].

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[148] "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte": Hechos, Noveno and Décimo. There are eight cases.

[149] Ibid: Hechos, Undécimo. There are fifty cases.

[150] "Auto de fecha 16 de Octubre de 1.998."

[151] Ibid.

[152] Ibid: Hechos, Séptimo.

[153] Ibid: Hechos, Quinto.

He was responsible, not only as leader of Chile but also as the leader, organizer and instigator of a common plan—*Cóndor* plan—[154]which included torture. Thus, he had command responsibility.[155]

ii. Judicial Measures Adopted against Pinochet and Judicial Protection Granted to Him

Judge Manuel García Castellón, after reaffirming Spanish jurisdiction, ordered an international *comisión rogatoria* or "to certify . . . the existence of opened criminal causes against … Pinochet, and if so, their number and the crimes for which he is indicted"[156] on 15 September 1998. Such order was annulled once the indictments against the Argentinean and Chilean military were consolidated before another court.

Thus, on 16 October 1998 Judge Garzón—now the investigative judge in charge of the case—ordered Pinochet's provisional imprisonment and also the urgent communication of the international detention orders so the British judicial authorities could secure Pinochet's presence in England while the Spanish authorities formalized the petition of extradition.[157] Although the Spanish office of the prosecutor appealed such decisions, the evidence compiled prevented the success of the appeals.[158]

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[154] Dinges, *The Condor Years*.

[155] Article 6 of the Nuremberg Charter recognizes the responsibility of "[l]eaders, organizers, instigators and . . . participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed."

[156] "Auto del juez del juzgado central de instrucción número seis de la audiencia nacional española (15 September 1998)": Parte Dispositiva, Segunda.

[157] "Auto por el que se decreta la prisión provisional incondicional de Augusto Pinochet y se cursa orden de captura internacional contra el mismo": Sección Dispositiva.

[158] The type of evidence the court uses is varied: the Rettig report—official document on the human right abuses under the Pinochet dictatorship; testimonies of victims and their families; confession of Manuel Contreras—the former Director of the DINA; and all the testimonies in the "Sumario" 19/97. In "Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España": Sección Dispositiva.

As a consequence, Pinochet was detained in England while the legality of his extradition to Spain was resolved by two decisions of the House of Lords.[159] The first decision was appealed in part because one of the judges was a member of an NGO known for its work against Pinochet, and as result he was perceived as biased against the accused. Finally, although the English judicial authorities gave a green light to Pinochet's extradition to Spain, the British Home Secretary Jack Straw denied the extradition based on a humanitarian reason, i.e., the frail health of the accused.[160] As a result, Pinochet was granted all the protection allowed by the law and did not have to stand one day in court in Spain.

Further developments in this case are outside the scope of the dissertation because they do not involve the use of universal jurisdiction before the Spanish court system but the Chilean judiciary, which has territorial and subject jurisdiction over Pinochet's alleged crimes. Moreover, due to Pinochet's death on 11 December 2006, the processes against him have ended.[161]

d. Other Cases: Guatemala and Honduras

i. Guatemala: Facts, Alleged Crimes, and Difficulties toward Judicial Implementation

Although heinous violations of human rights during the Guatemalan civil war extend from 1962 until 1996 when the peace accords were signed between the government and the guerrilla groups, Rigoberta Menchú Tum—in cooperation with

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[159] House of Lords, *Regina v. Bartle* (25 November 1998) and *Re Pinochet* (24 March 1999). The first one was based on Bow Street Magistrate's Court*, The Kingdom of Spain v. Augusto Pinochet Ugarte*.

[160] For more details, see: Below, Sec. D.

[161] BBC News, "Clashes Follow Death of Pinochet: Thousands of Chileans have Taken to the Streets Following the Death of the Country's Former Military Ruler, Augusto Pinochet, at the Age of 91," (11 December 2006), http://news.bbc.co.uk/2/hi/americas/6167747.stm (Accessed: May 11, 2007).

several NGOs—denounced eight Guatemalan officials accused of several crimes including torture that were perpetrated in Guatemala between 1978 and 1990.[162]

The judge who knew first of the case affirmed the jurisdiction of the court and thus adopted measures to guarantee that justice was served, i.e., he sent a petition to the Guatemalan authorities asking whether any case was pending against the accused[163] because in the absence of prosecution in Guatemala, the Spanish courts had the right to prosecute what constituted genocide against the Mayan people.[164]

However, the office of the prosecutor appealed the judge's decision before the *Audiencia Nacional,* which denied on 13 December 2000 Spanish jurisdiction based on the subsidiary nature of Spanish prosecution, which means that the Spanish courts have to defer to the Guatemalan courts.[165]

Then, the particular accusation ("Asociación Argentina Pro-Derechos Humanos-Madrid, Rigoberta Menchú Tum y otros, Confederación Sindical de Comisiones Obreras, Asociación Libre de Abogados, Asociación contra la Tortura, D'Amistiada Amb el Poble de Guatemala, Asociación Centro de Documentación y Solidaridad con América Latina y África, Comité Solidaridad Internacional de Zaragoza y Asociación Pro-Derechos Huma-

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[162] She did so on December 2, 1999 before the Spanish judiciary.

For a general study of the use of European courts to demand justice in the Guatemalan case, see: Jan-Michael Simon, "Justicia Universal y el Genocidio en Guatemala: Perspectivas Europeas," (Freiburg, Germany: Marx Planck Institute for Foreign and International Criminal Law, March 2001), http://iuscrim.mpg.de

[163] "Auto del Juzgado Central de Instrucción no. 5 (Madrid, 27 de Marzo del 2000)." The Prosecution had asked the court not to continue with the case.

[164] Ibid.

[165] Sala de lo Penal del Tribunal Supremo (December 13, 2000): Fundamentos de Derecho, Tercero and Cuarto.

nos de España")[166] appealed this decision to no avail because on 25 February 2003 the Spanish Supreme Court confirmed Spanish courts' lack of jurisdiction to decide a case involving alleged human rights abuses committed in Guatemala against Guatemalans.

Finally, on 26 September 2005, the Spanish Constitutional Court annulled the decisions of the *Audiencia Nacional* and the Supreme Court and cleared the path for Menchú Tum and the rest of the groups with standing before the Court to continue the criminal process before the Spanish court system.[167]

The next steps required securing evidence in Guatemala[168] and obtaining the extradition of the alleged violators of human rights, including torture. Thus, on 7 July 2006, Judge Santiago Pedraz handed down an order of international capture against former Guatemalan President Efraín Ríos Montt and seven other accused, and decided to freeze their bank accounts to cover, if needed, their civil responsibility for the alleged violations of human rights.[169] This case is still open and is faced with serious obstacles to secure the evidence and the alleged accused.

ii. Honduras: Facts, Alleged Crimes, and Process against Billy Joya

Captain Billy Joya—a member of the 3-16 paramilitary squadron "trained by CIA officials and Argentine and Chilean military officers—"[170]was accused of attacking "six

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[166] Sala de lo Penal del Tribunal Supremo, "Sentencia no. 327/2003" (25 February 2003): Verdict, First Par.

[167] Tribunal Constitucional, "Sentencia 237/2005, de 26 de Septiembre, Fallo," *BOE* no. 258 Suplemento (Viernes, 28 octubre 2005): 45-57.

[168] For further details, see: Fundación Rigoberta Menchú Tum (FRMT), "El genocidio en Guatemala no quedará impune," (Guatemala, 11 November 2005).

[169] Juzgado Central de Instrucción n° 1 de la Audiencia Nacional, "Auto de 7 Julio de 2006."

[170] Thelma Mejía, "Rights-Honduras: Madrid-based Fugitive Officer Turns Himself In," *Inter-Press Service* (Tegucigalpa, Honduras: December 16, 1998), http://www.oneworld.org/ips2/Dec98/19_45_076.html (Accessed: October 9, 2002).

students . . . [and] subject[ing them] to interrogations, blows and mock-up executions"[171] on 27 April 1982. Fifteen years later, the Honduran authorities asked their Spanish counterparts to place Joya under preventive detention[172] because they had evidence that he was living in Spain. Nevertheless, in December 1998 Joya returned voluntarily to Honduras to benefit from the extended scope of a 1990 amnesty law.[173]

Since there was already a pending process in Honduras, the Spanish judge decided to reject the criminal lawsuit against Joya in Spain.[174] However, the judge could have cooperated with Honduras by placing Joya in custody, thus fostering implementation. Confronted with this negative outcome, the parties to the lawsuit against Joya appealed the decision.[175] But the possibility of cooperation ended when the accused decided to go back to Honduras.

Joya's return to Honduras to take advantage of the decision of "the Court of Appeals . . . to extend the 1990 amnesty for leftist militants of the eighties to military human rights violations"[176] provides an opening for re-starting the process in Spain and for demanding civil responsibility before the IACtHR because, according to international law, amnesty laws in these cases are inadmissible. Since the Honduran court system is helping impunity, victims of the abuses have the right to seek redress elsewhere.

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[171] "Auto por el que el Magistrado del Juzgado de Instrucción núm. 2 rechaza la denuncia inter-puesta por delitos de torturas contra Billy Joya" (Madrid, 8 de septiembre de 1988).

[172] "Honduras notifica a España la situación procesal del oficial Billy Joya, prófugo de la justicia por torturas," (7 August 1997).

[173] Thelma Mejia, "Rights-Honduras: Madrid-based Fugitive Officer Turns Himself In."

[174] Judge Ismael Moreno Chamarro, in charge of this case, considers the crime of torture can only be prosecuted after the CAT entered into force in Spain, i.e., 1987 which is inapplicable to the Joya case.

[175] "Recurso de Apelación Caso Billy Joya al Juzgado de instrucción no. 2 de la Audiencia Nacional" (11 September 1998).

[176] Thelma Mejia, "Rights-Honduras: Madrid-based Fugitive Officer Turns Himself In."

D. COOPERATION FROM OTHER DOMESTIC AND FOREIGN AUTHORITIES[177]

Spanish courts are independent from the executive.[178] Nevertheless, to guarantee a proper administration of justice, these courts—as any other court—[179]need the cooperation of other authorities at home and abroad. The Spanish executive must carry out the decisions of the courts.[180] Circulating petitions of extradition to other executives[181] is a common way to cooperate with the courts. The *ministerio fiscal or* the office of the prosecutor—part of the executive functionally—has the duty to "promote the action of the judicial system to defend the rule of law, the rights of the citizens and the public interest … ex officio or at the petition of the interested parties, and also to secure the independence of the Courts."[182]

Furthermore, Spanish courts may need the cooperation of authorities abroad, especially to prosecute international crimes such as torture. Since all the cases examined are "criminal proceedings" and Argentina, Chile, and the U.K. are parties to the Convention Against Torture; such states "shall afford one another the greatest measure of assistance in connection with criminal proceedings … including supplying all the

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[177] I do not delve into the role played by NGOs because they helped start the different processes and therefore they are always going to support any measure that favors prosecution.

[178] Article 117 of the Spanish Constitution.

[179] The reason is that the judiciary has legitimacy but lacks the powers of the sword and the purse.

[180] Article 118 of the Spanish Constitution.

[181] I deal with extradition in a tangential fashion because once the courts ask the executive to formulate the petition, the decision to proceed is on the hands of the Executive—a pure political decision in which legitimate legal reasons are trumped by the existence of other interests.

[182] Article 124.1 of the Spanish Constitution.

evidence at their disposal necessary for the proceedings."[183] Thus, they should assist Spain which used *comisiones rogatorias* to request the freezing of the accounts and the seizing of the assets of the accused.[184]

This section is divided into three main parts. First, an examination of the role played by the Spanish authorities—the executive and the office of the prosecutor. Second, a study of the role played by the foreign institutions organized by states—Argentina, Mexico, United Kingdom, and Chile. And third, an evaluation of the effects of the need for external cooperation on the judicial implementation of the prohibition against torture.

1. DOMESTIC AUTHORITIES

The proper administration of justice means the judiciary needs the daily support of a variety of administrative staff—for example, law clerks, police forces, and translators. Nevertheless, these professionals lack the use of political discretion to decide when and how to comply with the demands of the courts. That is why the focus is on the cooperation of those authorities that can exercise political discretion, i.e., the government *strictu sensu*,[185] especially the ministry of the Interior and the office of the prosecutor.

a. The Executive: The Council of Ministers (*Consejo de Ministros*) and the Ministry of the Interior

Since torture is a crime against humanity that authorizes the use of universal jurisdiction, many consider that the Spanish government has the duty to petition for the

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[183] Article 9 (1) of the Spanish Constitution. The second paragraph adds that the cooperation has to follow the dispositions of "any treaties on mutual judicial assistance that may exist between them."

[184] "Auto fijando la lista de imputados, embargando las cuentas financieras y estableciendo en 330 las víctimas españolas con legitimidad en el procedimiento judicial (Madrid 16 octubre 1998)": Parte Dispositiva 2°.

[185] Prime minister and competent secretaries.

extradition. Although the petitions of extradition of Cavallo—[186]residing in Mexico—and of Pinochet—visiting in England—were formulated by the executive, public declarations of the members of the executive showed that the decision of the Spanish courts clashed with the interests of the executive, including economic ones.

In the case of forty alleged violators of human rights detained in Argentina in 2003 to stand possible extradition to Spain, the denial of cooperation on the part of the Spanish executive hampered the administration of justice "because if the petitions of extradition d[id] not reach Argentina before September 2 [of 2003], the judge who ordered the detention of those whose extraditions are asked for will have to agree to their release."[187] And as a result, impunity will continue.

The Spanish Cabinet decided on 30 August 2003 not to proceed with this extradition. The reason for not asking for the extradition, according to the then Spanish First Vicepresident was: 'We believe in the serious resolve—because the [Argentinean] president (Néstor Kirchner) has confirmed it—of the members of the Argentinean government to proceed with the criminal prosecution of those people and … [also based on] the principle of territoriality, we have not agreed to ask for their extradition.[188] As a consequence, the accused arrested in Argentina had to be liberated.[189]

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[186] See: Asociación Argentina Pro Derechos Humanos, "El Gobierno español pone en marcha el proceso de extradición," http://www.exdesaparecidos.org.ar/judiciales/todoespana/cavallo.htm (Accessed: November 16, 2004).

[187] J.M.Lázaro, "Los acusadores de Cavallo piden al Gobierno que tramite las extradiciones" *El País* (23 August 2003): 19.

[188] Resumen de Agencias, "España no solicitará la extradición de represores" (30 August 2003), http:// elpais-cali.terra.com.co/historico/ago302003/INT/A930N1.html (Accessed: January 27, 2006).

[189] See: "Auto ordenando la remisión al juez argentino de la decisión del Consejo de Ministros de no tramitar las extradiciones y solicitando comunique si enjuiciará los hechos" (30 Agosto 2003).

However, more recently, a decision of the Spanish Supreme Court (Sala de lo Contencioso-Administrativo) of 31 May 2005 voided Prime Minister Aznar's decision, and the current government has the duty to ask for the extradition of the accused without having to defer to the activity in Argentina to end impunity.[190] Nevertheless, since the Argentinean courts have started to prosecute criminally those accused of human rights abuses during the military regime, it may be more cost effective for the trials to take place in Argentina instead of waiting for the extraditions to Spain.

b. Office of the Prosecutor

The Spanish processes show that the office of the prosecutor has not been as supportive of the activities of the judiciary as should be expected from its role to defend the rule of law and justice.[191] In the Pinochet case[192] the Chief Prosecutor of the *Audiencia Nacional* supported advising the Spanish government not to ask for the extradition due to jurisdictional and procedural obstacles,[193] and, thus, adopt a position contrary to the jurisprudence of the courts which had already voided these obstacles.

After the British authorities petitioned the Spanish court for additional information, which the Spanish court used to "confirm the preventive detention [of Pinochet and] . . . the international petitions of October 16 and 18, 1998;"[194] the office of the prosecutor appealed this decision mainly on procedural grounds. First, the office of

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[190] Europa Press, "Una orden del Surpemo permite pedir la extradición de 39 militares argentinos," *La Voz de Galicia* (23 July 2005): 15. The extradition petitions will affect forty accused.

[191] Such contradiction is a result of its functional subordination to the executive.

[192] November 3, 1998.

[193] "Auto de extradición de Augusto Pinochet" (3 November 1998): Antecedent, Second.

[194] Auto por el que se amplía el procesamiento de A. Pinochet Ugarte y se ratifica la prisión provisional del procesado, así como las órdenes internacionales de detención: Razonamientos, Séptimo plus, Parte Dispositiva and "Auto decretando el embargo de los bienes de los procesados en el auto de 2 de noviembre de 1999" (Madrid, 7 July of 2003).

the prosecutor considered that the additional information should be sent to the British authorities via a new petition of extradition;[195] and second, the office of the prosecutor considered that the Spanish courts had no jurisdiction to start a process against Pinochet for crimes committed outside Spain.[196]

Similarly, in the process against Scilingo the office of the prosecutor supported the arguments of the defense instead of supporting the activity of the judiciary. In addition, in the Guatemalan case the prosecutor initiated three appeal processes, claiming lack of jurisdiction, but finally the Spanish Constitutional Court declared the unconstitutionality of the decisions which denied Spanish jurisdiction.[197] Although it can be argued that the office of the prosecutor was just defending the principle of legality by rejecting a novelty, i.e., the use of universal jurisdiction by domestic courts to prosecute human rights, the constant use—from the beginning—[198]of the appeals procedure to deny this jurisdiction after the courts had established its legality, is a hint that his/her interpretation was more in tune with the position of the violators of human rights than that of the victims.'

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[195] According to the prosecution's interpretation of article 12.1 CEEx. In: "Recurso de reforma de la Fiscalía contra el Auto de 30 de abril de 1999 por el que se ordenó ampliar el procesamiento de A. Pinochet Ugarte" (Madrid, 5 May 1999): Points 2 and 3. Particularly this last point.

[196] Substantive issues—such as Pinochet's lack of responsibility for torture committed in Chile during his dictatorship—are accessory in the appeal. See: "Recurso de reforma de la Fiscalía," ibid: Point 1.

[197] See: Tribunal Constitucional, Sentencia 237/2005.

[198] "Recurso de la fiscalía contra el Auto de 27 de Junio 2003 por el que se decretaba la apertura de juicio oral respecto de Adolfo Scilingo" (1 July 2003) and "Escrito de la Fiscalía solicitando el archivo de las actuaciones en los casos argentino y chileno" (26 November 2002).

2. FOREIGN AUTHORITIES[199]

Since the majority of the accused—with the exception of Scilingo—were outside the territory of Spain, cooperation from foreign authorities was needed to a higher extent than in cases involving Spaniards or relative to crimes committed in Spain. Among the petitions for cooperation, extradition is probably the most controversial because it can be perceived as curtailing a country's sovereignty; other petitions—freezing of assets, disclosing information (especially non classified one), and securing witness' testimony—can be considered less intrusive[200] Thus, the degree of foreign cooperation will be higher in the latter.

a. Argentina

Even though in 1983 the military regime was ousted in Argentina after the defeat suffered in the Falklands war, the military retained sufficient power to prevent the effects of widespread demands for justice.[201] Furthermore, the successive elected administrations—until President Néstor Kirchner—have helped impunity by granting pardons to the high ranking officials who were prosecuted and by blocking the petitions of cooperation from Spanish authorities. Overall the judiciary has been more cooperative.

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[199] The focus is on Argentina, Mexico, the United Kingdom (England), and Chile in that order because the Argentinean authorities have been recipients of more numerous petitions of cooperation and the decisions of these authorities have impacted the extradition of an Argentinean residing in Mexico. Then I examine the cooperation provided by the British authorities because Spain asked them for the extradition of Pinochet, who was visiting England and this petition had an impact in Chile. Since the investigative phase of the process in the Guatemalan case has started recently this country is not included in this assessment of cooperation.

[200] E.g. Petition to interrogate Kissinger, "Comisión rogatoria para interrogar a Kissinger," *La Insignia* (20 April 2002), http://www.lainsignia.org/2002/abril/der_023.htm (Accessed: November 16, 2004).

[201] J. Patrice McSherry, *Incomplete Transition: Military Power and Democracy in Argentina* (New York, NY: St. Martin's Press, 1997).

i. The Executive[202]

The Argentinean executive passed amnesty laws that prevented the criminal prosecution of officials accused of torture and disappearances—except for child abduction and attacks against private property. Thus, the only way to grant justice to the victims was a process started abroad. An opportunity curtailed after Argentinean President Fernando de la Rúa (1999-2001) approved Decree 1581 banning extraditions for the purpose of prosecuting abroad crimes committed under the military regime. Since most of the accused resided in Argentina, such law obstructed the prosecutions in Spain.

More recently the attitude of the Argentinean executive has changed, which could be a consequence of the reinforcement of the democratic regime. Thus, President Néstor Kirchner (2003-2007) revoked Decree 1581 in July of 2003.[203] Nevertheless, as aforementioned, some sustain that Kirchner's administration reached a secret agreement with the Spanish executive to stop the petition of extradition of the accused.

This secret agreement deprived Spanish courts of the needed cooperation to prosecute those accused of torture because it guaranteed that most of the accused[204] would be prosecuted in Argentina where amnesty laws (*Leyes de Punto Final* of 1986 and *de Obediencia Debida* of 1987) were still effective. Moreover, even though the Argentinean Congress revoked the amnesty laws in August 2003, they are applicable to prosecutions with basis on the principle of non-retroactivity of the penal law.

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[202] Rebecca Lichtenfeld, "Accountability in Argentina: 20 Years Later, Transitional Justice Maintains Momentum," Report from the ICJ (August 2005): 3-5.

[203] "Kirchner deroga el decreto que impedía la extraditar a los militares," *El País* (Julio 26, 2003): Front Page.

[204] Exceptions include the commanders, who ordered the abuses.

ii. The Courts

After the accusation against Argentinean officials was presented before the Spanish court system in 1996, the victims had to wait for July 2003 when finally, an Argentinean judge, emboldened by the actions of judge Garzón who had formulated via Interpol an order of detention against those forty alleged violators of human rights, decided to use legal mechanisms to seek justice: "the [Argentinean] Federal Judge Rodolfo Canicoba Corral imposed preventive detention against the military men and the one civilian that were demanded by Judge Garzón."[205] Thus, the accused were ready for prosecution, either in Argentina or in Spain after their extradition to this last country.

Domestically, another obstacle remained, i.e., the contention on the part of the accused that amnesty laws protected them from any prosecution. Two judges in the lower courts, whose decisions were confirmed by the Federal Court, attacked the constitutionality of such laws. Such decisions were sent to the Supreme Court in 2001. Nevertheless, the Supreme Court remained inactive[206] until June 2005 when it declared the amnesty laws void[207] and thus confirmed Federal Judge Gabriel Cavallo's 2001 decision on the unconstitutionality of amnesty laws.[208]

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[205] Carlos Ares, "Los argentinos respaldan en los sondeos las decisiones de la justicia," *El País*, (Buenos Aires, 28 de julio de 2003).

[206] In this case, the office of the prosecutor was in favor of declaring the amnesty laws unconstitutional. However, a member of the Court went as far as "assur[ing] … that the Supreme Court will soon declare the constitutionality of [such] laws, guaranteeing the impunity for the crimes against human rights." In: HRW, "La Corte Suprema debe resistir las presiones del ejército," http://www.hrw.org/spanish/press/2003/argentina_corte.html (Accessed: January 25, 2005).

[207] See: HRW, "Argentina, Corte Suprema anula leyes de amnistía, http://www.hrw.org/spanish/press/2005 /argentina.html (Accesed: January 25, 2005). The Supreme Court decision is based on *Barrios Altos,* Sentencia de Fondo de 14 Marzo 2001, Ser. C, no. 75.

[208] http://www.hrw.org/spanish/press/2003/argentina_corte.html (Accessed: January 25, 2005).

b. Mexico

Mexico transitioned into democracy more recently than Argentina and Chile and it is only now that it has started to confront governmental abuses against its citizens, especially during the 1960s and 1970s, including torture and disappearances. Even though Mexico has to surmount numerous problems to consolidate democracy – widespread corruption, impunity and poverty—its executive and its courts have shown, through their cooperation with Spanish authorities, a commitment to the rule of law which has been absent in Argentina and Chile.

i. The Executive

Although it could be alleged that the Mexican executive behaved differently than the Argentinean and Chilean executives because Cavallo was not a Mexican citizen, it is important to underline that they could have opposed extradition as the British government did or declared that such extradition was not convenient as the Spanish Prime Minister and Minister of the Interior did publicly. On the contrary, President Ernesto Zedillo (1994-2000) and then President Vicente Fox (2000-2006) placed no obstacles to the extradition.[209]

As happens with petitions of extradition, Mexican courts decided on the legality of the request for extradition —extraditable crime, *non bis in idem* or double jeopardy, and specialty principle or that the crime/s for which extradition is asked for are criminalized in Spain and in Mexico—and then the final decision was taken by the executive. When the Supreme Court of Mexico stated in appeals that the petition of extradition of Cavallo fulfilled all legal requirements, the government granted the

[209] There are no declarations against the petition of extradition. Thus the Mexican Minister of Foreign Affairs proceeded immediately to sign the document agreeing to the extradition of Cavallo to Spain, see: Anuario de noticias nacionales, "Extradición de Ricardo Miguel Cavallo," (2003).

extradition. The result of such cooperation was that the Spanish courts could start the trial against him but not for the crime of torture, one of the charges which based the petition of extradition against him, because this crime was subjected to a Mexican statute of limitations.[210]

ii. The Courts

Spanish Judge Baltasar Garzón issued a warrant for Cavallo's arrest on 25 August 2000. The groups with standing before the Spanish court asked the court to request Mexico to extradite Cavallo and thus to prevent his extradition to Argentina, which would equal impunity because in Argentina, in those days, amnesty laws were still in place and decree 1581 forbade the extradition of Argentinean nationals to stand trial in other countries. [211] On 10 June 2003 a lengthy process[212] ended when the Supreme Court of Mexico decided that Cavallo could be extradited to Spain to stand trial[213] with the exception of the charges of torture because "according to Mexican law they were subjected to a statute of limitations."[214]

Respect for the right of the accused to due process of law, lengthened the procedures. In Spain the accusers' petitions were appealed and in Mexico, Cavallo's defense lawyer appealed his preventive arrest–imposed due to the severity of the crimes

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[210] Carlos Avilés, "Quitan a Cavallo delito de tortura," *El Universal* (11 June 2003), http://www.laneta.apc.org:3080/cavalloentrerejas/Index.htm (Accessed: November 16, 2004).

[211] See: "Escrito de la Acusación Popular pidiendo la prisión incondicional del marino Miguel Angel Cavallo con fines de extradición": Fundamento de Derecho, Cuarto.

[212] He was in jail for the last three years while the legality of the petition of extradition was examined in Mexico, see: Elva Narcia, "Elogian extradición de Cavallo," *BBC News* (29 June 2003).

[213] See: Miguel Ángel Lugo Galicia; "Cavallo, extraditado a España: Farol en la calle y oscuridad en la casa," *La Insignia* (17 June 2003) and "Mexico Ruling a Victory for International Justice," http//www.hrw.org/press/2003/06/mexico061003.htm

[214] Avilés, "Quitan a Cavallo delito de tortura."

alleged in the arrest warrant against him–and the decision of "the [Mexican] Sixth District Judge in Criminal Matters of the First Circuit . . . that the extradition should proceed for the crime of genocide and terrorism, but not for torture because the statute of limitations crated by the Mexican legislature had expired with regard to the alleged torture."[215]

The appeal was based on three main reasons, i.e., the alleged facts were subjected to amnesty laws in Argentina, the accused should be prosecuted before a military tribunal, and the Spanish courts were biased against the Argentinean military that worked at the ESMA during the military regime; the three reasons were rejected by the Mexican Supreme Court.[216] First, the Mexican Court replied that amnesty laws "for serious violations of human rights" are contrary to international law as the IACtHR affirmed in *Barrios Altos*, thus Argentinean amnesties were null. Second, since Cavallo was accused of genocide, terrorism and torture, the appropriate jurisdiction was not a military tribunal, as the defense alleged, but rather a civilian venue. And, third, the Spanish judiciary could not be accused of bias against the military serving at the ESMA because it just prosecuted him following a pre-established process.

c. United Kingdom

Pinochet was visiting England for medical treatment in 1998 as he had done previously—with impunity—when the English authorities received through the Interpol a petition from a Spanish judge to detain him while a formal extradition request was

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[215] Juan E. Méndez and Salvador Tinajero-Esquivel, "The Cavallo Case: A New Test for Universal Jurisdiction," *Human Rights Brief* vol. 8, no. 3, http://www.wcl.american.eduhrbrief/08/3cavallo.cfm (Accessed: March 15, 2006).

[216] "Sentencia de la Corte Suprema ante el caso de la extradición del oficial de contrainteligencia de la Armada Argentina, Ricardo Miguel Cavallo, Amparo en revisión 140-2002" (Mexico, 11 Junio 2003): Agravios de la Parte Quejosa, 14.

formulated. As close as the relationship between the U.K. and Pinochet was because of his support during the Falkland's war against Argentina, the U.K. had to comply with this request based on adherence to the rule of law and Spain and U.K.'s common European Union membership.

i. The Executive

The 1957 European Convention on Extradition was incorporated into British law through the 1989 Extradition Act and the 1990 European Convention on Extradition Order which the government has to comply with. As a democratic government, the British government respected all the procedures established by law and let the courts decide the legality of the petition of extradition formulated by Spain.[217]

Notwithstanding the aforementioned respect to due process, extradition is foremost a political decision in the hands of the executive. And although the decision not to extradite Pinochet based on his fragile health respects the extradition regulation of the U.K.,[218] the government—through Home Secretary Jack Straw—[219]went against the duty imposed by the CAT on states to prosecute or extradite individuals accused of torture.

ii. The Courts[220]

On 16 October 1998 Investigative Judge Baltasar Garzón ordered Pinochet's provisional imprisonment and also the urgent communication of the international orders

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[217] "British Interior Minister to Review Pinochet Extradition: It is a Judicial Matter," *Law News* (19 October, 1998), http://nichenews.com/AP2.html (Accessed: November 16, 2004): 'I will treat his extradition request by Spain in the same way as I treat any other extradition request.'

[218] "Pinochet Set Free," *BBC News*, http://news.bbc.co.uk/1/hi/uk/663170.stm (Accessed: November 16, 2004).

[219] "Straw Considers Pinochet case," *BBC News* (25 March 1999), http://news.bbc.co.uk/1/hi/world/302487.stm (Accessed: November 16, 2004).

[220] "A Separation of Powers Perspective on Pinochet, A Special Edition: A Tribute to Justice Frank Sullivan, Jr.," *Indiana International and Comparative Law Review* vol. 14, no. 2 (2004): 409.

of detention to the British judicial authorities.[221] Two British Metropolitan Magistrates complied with Garzón's request that same month through the issue of arrest warrants against Pinochet.

The two British decisions relative to the extradition of Pinochet[222] have been widely analyzed but for this discussion what is relevant is that both of them affirmed that the English government could grant the extradition of Pinochet—even if it was for a lesser number of crimes than those that the Spanish authorities asked for because the CAT entered into force in England on a later date than in Spain. Thus, the judicial authorities supported the use of universal jurisdiction, rejected granting immunity to a former head of state for the crime of torture, and provided cooperation to their Spanish counterparts.

d. Chile

The Chilean transition to democracy was different from that of Argentina because the Chilean former dictator, who left office in 1990, controlled the whole process. Not only did Pinochet appoint himself as senator for life but he packed the different branches of the government with his supporters, thus making reform difficult for incoming Chilean democratic leaders.[223] As a consequence, accountability for abuses committed during the dictatorship and cooperation with foreign courts for this purpose was rare. This lack of cooperation characterized the Chilean executive and the judiciary.

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[221] "Auto por el que se decreta la prisión provisional incondicional de Augusto Pinochet y se cursa orden de captura internacional contra el mismo": Dispositive section.

[222] I.e., *Regina v. Bartle* (House of Lords, Appellate Committee) of 24 March 1999 and *The Kingdom of Spain v. Augusto Pinochet Ugarte* of 8 October 1999.

[223] Brian Loveman, "¿*Misión Cumplida*? Civil-Military Relations and the Chilean Political Transition," *Journal of Interamerican Studies and World Affairs* vol. 33, no. 3 (Fall, 1991): 35-74.

i. The Executive

Meanwhile the process of extradition of Pinochet was taking place in England, there were two successive democratically elected presidents in Chile, Eduardo Frei (1994-2000)— more conservative—and Ricardo Lagos (2000-2006)—a Socialist—who did everything in their power to assure Pinochet's supporters that justice would not be sought against the former dictator[224] for two main reasons. (1) Extradition questioned the sovereignty and as a consequence, the independence of Chile to take the decisions that suited its interests and, (2) the extradition of a popular and powerful figure could destabilize the country.

The attitude of the Chilean executive relative to impunity for the abuses committed under Pinochet's dictatorship seemed to change once his extradition to Spain was denied because Lagos reassured the victims of such violations and the international community that justice will be sought against Pinochet but on Chilean soil:

> [The PS and Party for Democracy (PPD)] presidential candidate Ricardo Lagos has over the past month [November 1998] zigzagged between backing the government's stance of opposing Pinochet's extradition on nationalist grounds and suggesting that he was indifferent to Pinochet's fate.
> Now Lagos said that he was ready to travel to London to have Pinochet returned to Chile, claiming that Pinochet could be brought before the Courts. He said: 'I understand and respect the sentiments of the victims who see in this decision a possibility of obtaining truth and justice after 25 years of waiting. At the same time I have the conviction that it is better for our country that Pinochet return to face our courts.'[225]

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[224] See: Roger Burbach, "Pinochet Mocks Justice in Chile: 'No Truce' Declares Human Rights Movement," (13 July 2002), http://www.redress.btinternet.co.uk/rburbach10.htm (Accessed: November 16, 2004 and Mauricio Saavedra, "Chilean Socialist Party Seeks to Rescue Pinochet," (1 December 1998), *World Socialist Web Site*, http://www.wsws.org/news/1998/dec1998/chil-d01.shtml (Accessed: November 16, 2004).

[225] Maricio Saavedra, "Chilean Socialist Party Seeks to Rescue Pinochet," *World Socialist Web Site* (1 December 1998), http://www.wsws.org/news/1998/dec1998/chil-d01.shtml (Accessed: November 16, 2004).

Although several attempts to prosecute him failed, he had been stripped of his immunity and it was very possible that he would face trial in his country. Finally, and even though some trials—criminal and civil— had begun against the former dictator, Pinochet died in 11 December 2006 without standing trial for human rights abuses. However, the trials are going to continue against the other individuals accused in different lawsuits.[226]

ii. The Courts

Chile's courts have been less active than the Argentinean ones in prosecuting crimes against humanity and other abuses of human rights as a result of being packed with members supportive of Pinochet's regime. Therefore, their cooperation with foreign authorities has been meager compared to their Argentinean counterparts. For example, on 15 September 1998 Spanish Judge Manuel García Castellón ordered an international *comisión rogatoria* to know the status of prosecution in Chile.[227] There was no reply.

The next significant step in the prosecution against Pinochet was the Spanish petition of extradition against Pinochet. Despite the final result of the process of extradition against Pinochet in England—Pinochet's extradition to Spain and to other countries which petitioned it subsequently was denied by the British authorities—

[226] Pamela Aravena B. "Hablan querellantes y defensores: El destino de los juicios contra Pinochet," *El Mercurio* (Santiago de Chile, Domingo 17 de diciembre de 2006), http://www.mercurio.cl/2006/12/17/reportajes/_portada/noticias/A65B780D-D1E6-4282-9B44-01F6476F643F.htm?id={A65B780D-D1E6-4282-9B44-01F6476F643F} (Accessed: May 11, 2007).

[227] "[T]o certify … the existence of opened criminal causes against … Pinochet, and if so, their number and the crimes for which he is indicted." "Auto del juez del juzgado central de instrucción número seis de la audiencia nacional española" (15 September 1998): Dispositive Section, Second.

scholars in the field of transitional justice agree that the case opened against Pinochet in Spain contributed to a flood of lawsuits against Pinochet in Chile.[228]

3. CONCLUSIONS

Domestically, the Spanish courts examined in this chapter had to overcome the opposition of the office of the prosecutor to Spanish jurisdiction—basically arguing that seeking justice was the privilege of the countries where the abuses were committed.[229] But apart from lengthening the processes, superior courts were unconvinced for the most part.[230] The Spanish government was against such prosecution, too. Nevertheless, it complied with its duty of sending the requests from the courts to other governments, which proves that courts have sufficient legitimacy so their orders are complied with by the government, but also that their petitions follow the principle of legality.[231]

Internationally, the level of cooperation is uneven depending mainly on the degree of democratization, the type of petition formulated, and who is in charge of the government in the case of the Latin American countries. Consolidated democracies—Spain and England—gave course to requests automatically, following pre-established procedures. In Latin America requests were subjected until recently to political arbitrariness. In principle, cooperation was independent from the political ideology of the government. Although the Right was in power in Spain, the Left—broadly constructed—

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[228] See: Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2005).

[229] Anachronistic perspective nowadays when the principle of absolute sovereignty of the state has crumbled: The Nuremberg precedent already pierced through the principle and the end of the Cold war underscored how human rights violations are an international concern and that sovereignty cannot provide impunity for them.

[230] In the Guatemalan case, the *Audiencia Nacional* rejected the precedent value of previous court decisions and handed down a decision against the use of universal jurisdiction.

[231] The courts are complying with domestic and international law; if they weren't the government would have an excuse not to send the petitions to the foreign governments.

controlled the executives of England, Chile under Lagos, and Mexico under Zedillo. And except for Zedillo, none of them was enthusiastic about cooperating with the Spanish courts.

Petitions of information were more easily complied with than those of extradition and preventive prison because governments perceive these two last ones as more intrusive. Sometimes, as in Argentina, courts favored cooperation more than the executive. Finally, the issue of the type of government in power is related to the level of democracy, at least it seems to be in the case of Argentina because it is only under Kirchner that the government has annulled the amnesty granted in past administrations to the perpetrators of crimes against humanity.

E. EVALUATION OF THE PROSECUTION OF THE CRIME OF TORTURE BEFORE THE SPANISH COURT SYSTEM

The evaluation of the judicial implementation of the prohibition against torture is based mainly on the legitimacy—real and perceived—of the courts and on their effectiveness. In order for the courts to avoid being considered as "kangaroo courts," the process must respect the rights of the victims and of the accused, follow pre-established procedures, and minimize any appearance of bias on the part of the court.

But legitimacy is not enough for a positive evaluation; prosecution must have some tangible effects such as providing justice for the victims by at least indicting the alleged violators of the prohibition of torture—a verdict punishing the accused is the ideal rarely obtained; fostering further processes—especially where the crimes were committed; and affecting a substantive number of victims and/or accused.

With basis on these criteria, the evaluation is divided into, first, advantages and shortcomings of the use of Spanish courts to prosecute torture committed abroad by foreigners with a focus on issues of legitimacy of the courts, effects on democratic transition and/or consolidation in the countries where the abuses were committed, respect for fair trial principles, and effectiveness of the court with a special reference to the fostering of prosecutions abroad. And, second, an overall positive balance of the implementation of the prohibition against torture in Spanish courts with an emphasis on how human rights are being incorporated to the list of state interests and on the importance of intergovernmental networks in advancing such implementation.

1. ADVANTAGES AND SHORTCOMINGS OF THE USE OF SPANISH COURTS TO PROSECUTE TORTURE COMMITTED ABROAD BY FOREIGNERS

a. Perceived Legitimacy of the Courts

From the perspective of the victims' of torture and their relatives, Spanish courts were a legitimate forum to seek justice. The victims wanted the accused to be prosecuted in a human rights-friendly and independent forum that applied international law principles. And although not everybody agrees that international law imposes a duty to prosecute crimes against humanity, there is widespread support for the proposition that at least it does not ban it.

The prosecutions in Spain were not instigated by the Spanish executive but were the result of the petitions of Chilean and Argentinean citizens who took advantage of the easier access to justice in Spain. In general, the Spanish authorities have no direct political gain in relation to these prosecutions. Moreover, in practical terms and as stated

by the Aznar administration, not prosecuting is better because it would reduce the amount of time and money spent in prosecutions that involve to a great extent non-Spaniards.[232]

However, supporters of the accused and critics of the use of universal jurisdiction to implement human rights have accused Spanish courts of imperialism.[233] Those who view Spanish courts as imperialistic, contend that Spain should focus on accountability for the crimes of torture committed under Franco instead of trying to solve those of foreign nations—which have their own sovereignty and can make their own decisions. This accusation is similar to that of superiority against the Allied powers—especially the Western ones—vis-à-vis the Japanese prosecuted in the International Military Tribunal for the Far East (Tokyo Tribunal).[234] Why are Spanish courts accused of imperialism? Because of the colonial past that links Spain to Latin America. However, the accusation of imperialism lacks credibility because the countries from which the accused come had been independent from Spain for more than a century. [235] Thus, apart from sharing a common cultural heritage, the accusation of colonialism is not as relevant as it might

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[232] From a human rights perspective everybody—national and non-nationals alike—deserve the same kind of protection. Any human right violation affects the whole international community.

[233] For an overview of different cases in which former imperial powers have exercised universal jurisdiction to prosecute gross violations of human rights in their former colonies, see: Thomas W. Donovan, "Jurisdictional Relationships between Nations and Their Former Colonies" *Gonzaga Journal of International Law* vol. 6, no. 3 (2002-2003), http://www.gonzagajil.org (Accessed: May 14, 2007). The author concludes that such efforts can weaken the rule of law in the former colonies.

"That Chile's former colonial master would be the nation to try to wring justice from Pinochet's cold heart only makes a mockery of the entire episode . . . Once again, Europe has decided that its former colonies just can't govern themselves and will have to do so for them." In: Jim Traegeser, "Pinochet and the White Man's Burden," http://www.trageser.com/archive/essays/essay-pinochet.html (Accessed: November 16, 2004). [Originally published in *American Reporter*, 3 November 1999].

[234] See: Above, Ch. II.

[235] And many, including Pinochet, used to be proud of his Spanish heritage. Furthermore, nearly 90% of the Chileans are descendents of Spaniards. See: Bill Vann, "An Answer to Pinochet's Defenders," *World Socialist Web Site* (17 November 2004), http://www.wsws.org/news/1998/nov1998/pino-n17.shtml (Accessed: November 16, 2004).

appear beforehand, especially, when after the Spanish civil war, Chile and Argentina have been economically powerful relative to Spain.[236]

b. Effects on Democratic Transition/Consolidation of the Countries Where the Abuses were Committed

Although the on-going debate between those who consider that justice is incompatible with order and those who believe that order cannot be obtained without justice is still a theoretical one, the case study analyze in this chapter provides no factual evidence that prosecution in Spain has undermined these countries' democracy.

Nevertheless, some are afraid that the demands for accountability against the Argentinean and Chilean military in the Spanish court system would provoke not only instability in those countries but even increase the chances of a coup. In the case of Guatemala, the actions of the Spanish judiciary seem to endanger the life of human rights activists[237] and it diverts scarce resources—governmental officials have to respond to Spanish requests and that takes time and money—that should be used to strengthen Guatemala's democratic regime.

This criticism is relevant to the discussion on implementation of human rights because a democratic regime—with all its shortcomings—is the best milieu for fostering human rights. Although torture does happen under democratic regimes, the mechanisms to prosecute those guilty prevent torture from becoming widespread and systematic. In

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[236] Nowadays Spain can be accused of economic imperialism. E.g., REPSOL and other Spanish companies which considerable investments in the region.

[237] "Amnistía Internacional (AI) ha remitido una carta al juez de la Audiencia Nacional Santiago Pedraz, que investiga a ex altos cargos de Guatemala por su presunta relación con la represión cometida contra el pueblo maya entre 1978 y 1986, para advertirle de que algunos testigos, demandantes y organizaciones de derechos humanos que participan en el proceso están siendo recientemente amenazados." In: Europa Press, "Guatemala - Amnistía Internacional alerta al juez Pedraz de que algunos testigos están recibiendo amenazas" (10 Julio 2006), http://www.lukor.com/not-mun/america/0607/10183720.htm (Accessed: May 14, 2007).

addition, this criticism is reasonable in relation to Spain because when Spain transitioned to democracy in the late 1970s there was "a compromise on justice . . . [consisting of] forgoing the punishment of actors who have violated human rights."[238]

Thus, since Spain gave up the prosecution of members of the prior regime during its transition to democracy in favor of reconciliation and its democracy was quickly consolidated (by 1983 at the latest), why should it meddle in how other countries have solved their transitional issues? Nevertheless, there is no available evidence that the prosecutions in Spain have caused any instability in Argentina or Chile. In addition, the impact on Guatemala is difficult to assess because, even in the absence of pending processes against the alleged perpetrators of human rights violations, human rights abuses have continued after the peace accords and human rights activists have been the favored targets

c. Respect for Fair Trial Principles

The international standard for a fair trial in criminal cases of articles 10 and 11 of the UDHR is specified in article 14 of the ICCPR, which includes these main principles: equality, public hearings, presumption of innocence, prohibition of double jeopardy, timely resolution, and the right to legal representation.

From the perspective of fair trial principles, Spain provides a most favorable jurisdiction to both the accusation and the defense in these cases because of the common language, democratic setting, upholding of the rule of law after the restoration of democracy,[239] and especially due to the easier access of the victims to the court. Of all of

[238] Ruth Wedgwood, "Augusto Pinochet and International Law," *McGill Law Journal* vol. 46, no. 1 (2000): 246-7.

[239] It had a representative government from 1931-36, which lasted until 1939 in certain parts.

these advantages I focus on the ones relative to language—a significant issue as seen in the historical cases—[240]and to respect to the rule of law.

Due to the common language, allegations of defenselessness are unreasonable. The accused can follow the process and the misinterpretation of evidence is minimal. Moreover, Spanish courts respect the rule of law and cannot be accused of applying a double standard against regimes of the right. The only lawsuits brought before them are mostly against right-wing regimes and the case against Fidel Castro was dismissed because he still was a chief of state. Even though this partiality were to be proven, "it will always be far better for a murderer to be tried and sentenced than not, even though other murderers may escape punishment."[241]

Although Spanish courts respect all of these principles, the criticism refers mostly to a bias against certain ideologies. Since those indicted belonged, until recently, to regimes from the right —"Why are dictators of the left not scorned in the same way as those of the right?—"[242]Spanish courts could be accused of imposing their own brand of justice instead of the rule of law. The strength of this criticism has diminished with the indictment of the Chinese government—a leftist regime—for human rights abuses connected to the invasion of Tibet[243] and to the persecution against the Falun Gong.[244]

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[240] See: Above, Ch. II and Art. 14.3 of the ICCPR.

[241] Mario Vargas Llosa, "One Dictator At a Time," *El País* (Op-Ed) (1 November 1999).

[242] Ibid.

[243] The Tibet Society, "Spanish High Court to Investigate Allegations of Genocide in Tibet," http://www.tibetsociety.com/news.asp#111

[244] "La represión china, ante la Audiencia Nacional" *El País* (12 June 2006), http://www.elpais.es/articulo/espana/represion/china/Audiencia/Nacional/elpporeso/20060612elpepinac (Accessed: December 6, 2006).

d. Effectiveness: Fostering Prosecutions Abroad

The number of the indicted is low. Nevertheless, the Spanish cases have fostered the activity of foreign courts, which are seeking justice for the victims of torture and other crimes against humanity. The petitions of extradition against Pinochet and Cavallo are international precedents and the basis for future prosecutions because even though, as aforementioned, extradition is basically a political decision, the courts have to start the process of extradition and decide on the legality or not extradition request.

The prosecutions against the accused of torture and other crimes against humanity in Latin America have even had a positive impact relative to Spanish past. The movement to restore the memory of the defeated during the civil war has gained renewed strength and thus, their relatives are demanding the annulment of the verdicts handed down against the defeated, the investigation of the whereabouts of the disappeared, and reparations for family members tortured and killed.[245]

Taking into account how widespread the abuses were in Latin America, the number of people preliminarily indicted—almost 200 individuals—seems small; a figure that decreased to 121 later on. Finally, only 99 persons were actually indicted.[246] However, some of those indicted included leading figures with command responsibility.

The numbers become more dismal when referring to those accused actually subjected to trial in Spain. Only two of the indicted were physically in Spain, i.e., Cavallo and Scilingo. In April 2005 Scilingo was finally found guilty, and the decision

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[245] Carlos E. Cué, "El Ejecutivo se concentra en los republicanos, pero incluirá a todos para 'cicatrizar heridas,'" *El País* (9 December 2005). In: Asociación para la recuperación de la memoria histórica, http://www.memoriahistorica.org/modules.php?name=News&file=article&sid=211 (Accessed: May 14, 2007).

[246] Juzgado central de Instrucción no. 5, Audiencia Nacional, "Auto de Procesamiento a 98 Militares Argentinos, Sumario 19/97-L," (Madrid, 2 November 1999): Antecedentes, Seventeenth and Fundamentos de Derecho, Eleventh.

of the court was confirmed in appeals. In addition, although the trial against Cavallo started, it was suspended pending appeals but in 2007 the Spanish Supreme Court rejected this suspension. Finally, in March 2008 Cavallo was extradited to Argentina.

2. MAIN CONTRIBUTIONS OF THE SPANISH COURT SYSTEM TO THE IMPLEMENTATION OF THE INTERNATIONAL BAN ON TORTURE

Although, as aforementioned, there are negative aspects derived from prosecuting criminally the international crime of torture in a domestic court, such prosecutions have helped to advance the implementation of human rights law—as stated in two resolutions of the European Parliament supporting the activities of the Spanish courts against alleged Argentinean and Chilean criminals and their petition of extradition against Pinochet.[247]

The main advantages of the Spanish courts are first, easier access to the courts. Individuals have standing, which guarantees at least the investigation of cases against the prosecutor's contrary opinion. Second, the courts are bound to interpret the law according to international law, which supports the position of the Spanish courts of prosecuting foreigners that committed torture abroad against other foreigners. Third, Spain has a special relationship with Latin America—which facilitates the prosecution of torture and of human rights violations in general—i.e., a common language and similar legal tradition. And fourth, Spanish prosecutions continue fostering implementation in other countries. For example, thanks to the international orders of indictment written by the Spanish courts, the Argentineans detained forty members of the military

[247] "Resolución del Parlamento Europeo sobre las Investigaciones Españolas por los Desaparecidos en Chile"and "Resolución del Parlamento Europeo de 21 de Octubre de 1998 sobre la Detención de Augusto Pinochet."

preventively.[248] Although the extradition process in this cause is paralyzed, the Spanish courts retain jurisdiction to reactivate the case if the Argentinean courts do not prosecute. If the Argentinean aurthorities begin a trial against the accused, the Spanish courts are prepared to send all the evidence to the Argentineans. So the victims are protected. Some of these exchanges of relevant documentation have already started.[249]

As seen in the proceedings before the Spanish court system, states are not monolithic but there are intergovernmental networks that can foster or oppose these developments. Since it is too early to determine whether prosecuting the international crime of torture, especially after 9/11, is firmly entrenched, it will be necessary in the next decade to examine the role of those who oppose human rights or that at least have a more limited view of the role of human rights norms. For a future project, it will be interesting to look also at the interactions between intergovernmental networks and transnational networks, especially NGOS and how they overcome obstacles when trying to end impunity.

The next two chapters will reinforce these findings because the jurisprudence regarding the ban on disappearances at the international and the national levels has provided new developments relative to the continuity of the crime until the whereabouts of the victim are known. Moreover, it can tentatively be affirmed that some degree of cross-fertilization has occurred between the international and domestic levels due to the impact of the decisions of the IACtHR in the cases of the Honduran disappeared—also tortured as aforementioned. On the domestic level, the Spanish courts continue to

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[248] "Providencia recordando a las autoridades argentinas que la orden de detención de 30 diciembre 1999 sigue vigente, y ordenando se les remita nuevamente vía Interpol" (Madrid, 7 July 2003).

[249] "Auto ordenando la remisión al juez argentino de la decisión del Consejo de Ministros de no tramitar las extradiciones" (Madrid, 30 de Agosto de 2003).

combine the traditional interest of states to protect their nationals (Spanish citizens and individuals of Spanish ancestry were disappeared in Latin America) and the newer interest of protecting human rights, which apply to every person regardless of nationality.

3. RELEVANT RECOMMENDATIONS

Since until recently the Spanish courts basically provided the victims with the only opportunity to find the justice denied at home,[250] I disagree with the preference for international tribunals by jingoists who claim that "[t]o try in the national courts of Spain or Britain a Chilean citizen for breaches of criminal international law in his own country may offend Chile's national pride and stir emotional resentment of Chileans."[251] This is a lopsided view of the facts because it forgets to add the victims' perspective; victims of the abuses and their representatives demanded justice form the Spanish courts.

Regarding the implementation of the international ban on torture, it is necessary for the Spanish court system to continue exercising universal jurisdiction and fostering cooperation at home and abroad. First, the Spanish court system should continue using universal jurisdiction to prosecute torture practices that constitute crimes against humanity. Although extradition was not granted in the case of the indictment based on torture allegations against former dictator Augusto Pinochet, at least the alleged criminal was placed in preventive custody.

It is too early to tell whether universal jurisdiction will continue being used to bring to justice any violator of human rights of certain degree of severity. However, it

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[250] "The safest place for an Argentinean genocidaire is the place where he committed those crimes. The most humiliating place for the victims is where they were victimized." In: Héctor Timerman, "Las ventajas del genocida argentino," *Revista Debate* (Argentina, July 2003) as it appears in *La Insignia*, http://www.lainsignia.org/2003/julio/ibe_010.htm (Accessed: April 15, 2004).

[251] Ben Chigara, "Pinochet and the Administration of International Criminal Justice," in *The Pinochet Case: A Legal and Constitutional Analysis*, Ed., Diana Woodhouse (Oxford, England: Hart Publishing, 2000): 127.

can be claimed, based on the cases studies examined, that its use has become more legitimate. The legitimacy of universal jurisdiction is important for providing justice to the current and future allegations of systematic and/or widespread torture resulting from the War on Terror.

Second, it is crucial to increase cooperation among different branches of the government at home and abroad. International cooperation can help avoid one of the main pitfalls of the process of extradition, i.e., the fact that is time consuming. When a process against an alleged criminal is delayed because he or she is not under the court's jurisdiction, the victims of the violations alleged in the indictment, and also the accused, can perceive the whole extradition process as an obstruction of justice. In order to increase cooperation judges and prosecutors that have exercised universal jurisdiction against torture should exchange information regarding their experiences with the extradition process—difficulties, ways of harnessing evidence and/or precedents used in the decisions and in calculating the punishment for multiple counts of torture—with their counterparts abroad.

WHEN ORDER IS NOT ENOUGH:
THE BAN ON TORTURE AND DISAPPEARANCES IN THE JURISPRUDENCE OF THE IACtHR AND THE SPANISH COURT SYSTEM

by

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CHAPTER V

THE JUDICIAL IMPLEMENTATION OF THE BAN ON DISAPPEARANCES: THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The crime of disappearances—which at its crux includes the violation of the rights to life and to due process of law—affected most of the Americas,[1] to a lesser or higher degree, from the late 1950s to the 1990s. However, it remained a low priority for the Organization of American States (OAS) until the 1980s due, to a great extent, to the foundational objectives of this regional organization.

The OAS founding Charter of 30 April 1948—which came into effect on 13 December 1951—establishes as the main goals of the organization those of the preservation of the peace and of the independence of its member states.[2] The protection of individual rights—including those rights violated in the complex crime of disappearances—was secondary to securing the rights of the member states.[3] Indeed, the members of the OAS supported the idea that human rights violations belonged exclusively to the domestic jurisdiction of each member state.[4] On prioritizing its

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[1] Canada, Costa Rica, the US and the Caribbean countries are the only clear exceptions.

[2] Art. 1 and 2 (a-e) and (h) of the OAS Charter on the nature and purposes of the organization.

[3] Protection deduced from the duty "to promote and consolidate representative democracy," [art. 2 (b)] and "[t]o eradicate extreme poverty," [art. 2 (g)]; and the link between rights and peace [Art. 3 (l)].

Although the Inter-American Commission on Human Rights is mentioned among the organs of the OAS [art. 53 (e) of the Charter], its establishment is deferred to the approval of a future Convention on Human Rights [art. 106 of the Charter].

[4] A position under attack more recently and which has lost its thrust nowadays. In the 1960s this position was already losing strength, see: "Governments may continue to claim that how they treat their

objectives, the OAS followed the example of its model,[5] the United Nations (UN).[6] The primary purpose of the UN is "[t]o maintain international peace and security;"[7] human rights are of lesser importance and thus, the UN has the purpose of "promoting and encouraging respect for human rights" but not of protecting them.[8]

Therefore, the Charters of both international organizations, UN and OAS, show that they were the product of an international context that confronted human rights cautiously, i.e., even though as a consequence of the atrocities of World War II governments and international organizations had to incorporate into their regulations provisions respectful of people's demands for human rights and to include at least the promotion of these rights as one of their goals, such commitment did not imply an overriding of other interests such as peace and security.[9]

As a result of the aforementioned preeminence awarded to peace and security, the member states of the OAS were reluctant to establish legally-binding standards and implementation mechanisms to protect such rights, and to use them effectively once

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own inhabitants is of concern to them alone; increasingly it is a losing claim." In Louis Henkin, "The United Nations and Human Rights," *International Organization* vol. 19, no. 3 [The UN: Accomplishments and Prospects] (Summer, 1965): 506.

[5] According to articles 1, 2, and 131 of the OAS Charter, the OAS is subordinated to the United Nations.

[6] See: Henkin, "The United Nations and Human Rights": 516; and Asbjørn Eide, "Peace-Keeping and Enforcement by Regional Organizations: Its Place in the United Nations System," *Journal of Peace Research* vol. 3, no. 2 (1966): 125.

The main objective of the UN was to avoid World War III: "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." See: Preamble to the UN Charter.

[7] Art. 1 (1) of the UN Charter.

[8] Art. 1 (3) of ibid.

[9] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, PA: University of Pennsylvania Press, 1998): 172-204.

approved.[10] That is why the 1948 American Declaration of Rights and Duties of Man was only incorporated into a legally-binding document via the 1969 American Convention on Human Rights that became effective in 1978 and why access to implementation mechanisms—the Commission and the Court of Human Rights—[11] remained ineffective until the 1980s when the Inter-American Court of Human Rights handed down its first decision, i.e., *Velásquez-Rodríguez vs. Honduras.*

In its 1988 *Velásquez-Rodríguez* decision, the IACtHR held the state of Honduras responsible for the disappearance of one of its citizens and thus ordered the Honduran government to pay reparations to the family of the disappeared.[12] In the following years and up to 31 January 2006 (the cut-off for the analysis), the Court continued deciding cases involving the crime of disappearances and developing a jurisprudence that has had an impact inside and outside its jurisdiction, as will be examined in sections C and D of this chapter. The Court's efforts to grant justice to the victims of the crime of disappearances were bolstered with the entry into force in 1996 of the 1994 Inter-American Convention on Forced Disappearances—the first legally-binding instrument to ban specifically the crime of disappearances at the international level.[13]

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[10] See: Cecilia Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Dordrecht, Holland: Martinus Nijhoff, 1988): 38.

[11] Article 106 of the OAS Charter mentions the Commission and provides for its future creation. For the main documents relative to the Court, see: Sede para la Corte Interamericana de Derechos Humanos, AG/Res. 372 (VII-0/78) (1 July 1978), http://www.corteidh.or.cr/inf_general/convenio.html; Statute, AG/Res. 448 (October 1979), modified by AG/Res. 625 (XII-0/82) and by AG/Res. 1098 (XXI-91), http://www.corteidh.or.cr/inf_general/estatuto.html; and Reglamento, (24 November 2000), modified partially by the Court in 25 November 2003, http://www.corteidh.or.cr/inf_general/reglamento.html.

[12] *Velásquez-Rodríguez* case [1988] IACHR 1 (29 July 1988).

[13] Inter-American Convention on Forced Disappearances of 9 June 1994, OEA/Ser. L. V/II.92, doc. 31 rev. 3; original: Spanish, reproduced in http://www.memoriaviva.com/Desaparecidos/oea.htm (Accessed: May 13, 2004).

Although the crime of disappearances during the Cold War was linked to the authoritarian regimes of certain Latin American countries, it has characterized—and continues to characterize—other regions of the world including Europe, where disappearances are circumscribed mainly to Turkey and Russia. However, Europe lacks a Convention on disappearances and its regional mechanism of implementation of human rights, i.e., the European Court of Human Rights (ECtHR), has played a less important role on the development of disappearance-related jurisprudence when compared with the Inter-American Court of Human Rights.[14]

The leadership of the Inter-American system toward the implementation of the prohibition of disappearances notwithstanding,[15] the IACtHR names relevant European Court precedents in support of some of its statements related to the crime of disappearances.[16] Thus, it is crucial for the dissertation to analyze the relationship between the decisions of the European and the Inter-American courts on this matter.

This chapter is organized into five sections. First, a study of the main OAS-sponsored conventions, with a focus on the American Convention on Human Rights and the Convention on Disappearances. Second, a brief examination of the system's

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[14] Irum Taqi, "Note: Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights Approach," *Fordham International Law Journal* vol. 24, no. 3 (March 2001): 940.

[15] "Until 1988 [Velasquez-Rodriguez case] . . . no court . . . had held a country liable for the forced disappearance of one of its citizens." In William P. George, "The Future of Human Rights: An Interview with Douglass W. Cassel, Jr.," *Christian Century* vol. 112, no. 12 (13 April 1994).

[16] The IACtHR names directly ECtHR's jurisprudence. E.g. on the need to control illegal detentions, instrumental in preventing this crime, see: *Villagrán Morales vs. Guatemala*, Sentencia de 19 de Noviembre 1999, Ser. C, no. 62: Par. 135; or on presumptions of violation of the right to life, see: Below, Sec. C.2.b.i.

See also: "Human Rights: Citing Jurisprudence of European Human Rights Court and International Agreements, Inter-American Court Finds that Guatemala has Violated Several Articles of the Inter-American Convention by Failing to Prosecute Local Police for Murders of 'Street Children,'" *International Law Update* vol. 6 (January 2000): 7-9.

mechanisms with quasi-judicial—IACHR—or judicial functions—IACtHR—specifying those characteristics that can hinder the implementation of the prohibition against disappearances. Third, a chronological study of the main IACtHR's decisions regarding disappearances up to 31 January 2006 with a brief reference to the facts of the case and the Commission's role, and a focus on the court's contributions toward implementation. Fourth, an assessment of the relationship between the jurisprudence of the IACtHR and the ECtHR on the subject. And finally, an evaluation of the main contributions of the IACtHR to advance the implementation of the prohibition against disappearances and a list of recommendations to further the role of the Court in the implementation of the ban on disappearances.

A. INTERNATIONAL REGULATION: RELEVANT OAS-SPONSORED CONVENTIONS

The adoption of the American Declaration of the Rights and Duties of Man of 2 May 1948[17] signals the start of the American system of protection of human rights after World War II. However, the two legally-binding documents relevant to the implementation of the ban on disappearances in this region are the 1969 American Convention on Human Rights and the 1994 Inter-American Convention on Forced Disappearances.

This section examines first, the rights violated in the crime of disappearances and the duties of the states to implement such rights according to the American Convention on Human Rights and the Inter-American Convention on Forced Disappearances. And, second, it evaluates the main advantages and shortcomings of both of them toward such implementation.

[17] It was adopted prior to the UDHR.

1. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The Convention was signed in San José, Costa Rica on 21 November 1969 but it only came into effect on 18 July 1978.[18] Its preamble establishes the significance of "essential rights" that everybody has because they are human beings, which "justif[ies] international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."[19]

Even though the Convention lacks a specific reference to the crime of disappearances, it regulates a series of rights, which the crime of disappearances violates and the duties of the states party to the Convention (currently 25 countries)[20] to protect them. Both, rights and duties are the object of this subsection. The means of protection the Convention establishes, i.e., the Commission and the Court of Human Rights, will be analyzed in the second section of this chapter.

a. Relevant Conventional Rights Violated by Disappearances

This crime involves the violation of a series of substantive rights recognized by the Convention to everyone: the right to life;[21] to physical, mental, and moral integrity;[22]

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[18] See: Above, Ch. III, Sec. A.1.

[19] http://www.oas.org/juridico/spanish/tratados/b-32.html (Accessed: March 1, 2005).

[20] Currently, the following twenty-five OAS countries have ratified the Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

IACHR, "Basic Documents: Signatures and Current Status of Ratifications: American Convention on Human Rights," http://www.cidh.oas.org/Basicos/basic4.htm (Accessed: April 9, 2007). OAS members that are not parties to it: Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and the US. In Convención Americana sobre Derechos Humanos (22 November 1969): B-32, http://www.cidh.oas.org/Basicos/basic3.htm (Accessed: March 20, 2005).

For the dates of the ratification by each state, see: Above, Ch. III.A.1.

[21] Art. 4 of the American Convention on Human Rights.

[22] Art. 5 of ibid.

to freedom;[23] the prohibition of slavery and servitude,[24] and the protection of the family.[25] Relative to disappeared children—usually placed illegally in adopted families—[26]the crime violates the right to one's name too.[27]

From a procedural perspective, this crime denies the rights to a "fair trial,"[28] "equal protection,"[29] and "judicial protection" because the victims of this crime and their families have no access to the judicial system. In general, the judiciary rejects habeas corpus petitions to find the disappeared alive and hampers any attempt to investigate the disappearance, to find the remains, and to prosecute the alleged criminals.[30]

b. Duties of the States

The Convention establishes three main duties for those states that have ratified it. First, they must protect everyone's human rights, including adapting their own legislation when necessary.[31] Second, states cannot limit the exercise of certain rights even under conflictive circumstances. And finally, any violation of the rights recognized in the Convention imposes the obligation to end impunity. According to article 1 of the Convention, governments must:

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[23] Art. 7 of the American Convention on Human Rights.

[24] Art. 6 of ibid.

[25] Art. 17 of ibid.

[26] Rarely do the children suffer servitude or loss of life; but the other violations affect them too.

[27] Art. 18 of the American Convention on Human Rights.

[28] Art. 8 of ibid.

[29] Art. 24 of ibid.

[30] Art. 25 of ibid.

[31] Art. 2 of ibid.

> [R]espect the rights and freedoms recognized herein and to ensure to all persons subject to its jurisdiction the free and full exercise of those rights and freedoms, **without any discrimination for reasons of** race, color, sex, language, **religion, political or other opinion, national or social origin, economic status, birth**, or any other social condition. [Emphasis added].

The Convention provides a broad scope of protection because not only does article 1 (2) affirm that any reference to "'person' means every human being," but the Convention also lists a series of non-derogable rights the states have to comply with at all times; the following non-derogable rights are usually at stake in the case of disappearances,

> [A]rticle 3 (Right to Juridical Personality), art. 4 (Right to Life), art. 5 (Right to Humane Treatment), art. 6 (Freedom from Slavery) . . . art. 17 (Rights of the Family), art. 18 (Right to a Name), art. 19 (Rights of the Child), art. 20 (Right to a Nationality) . . . or the judicial guarantees essential for the protection of such rights.[32]

Since governments have the duty "to ensure . . . the free and full exercise of those rights and freedoms,"[33] democratic governments now in power in Latin America must investigate past crimes and bring to justice the alleged violators; amnesties are banned.[34] Furthermore, the state has the duty to compensate the victims for any damage suffered.[35]

2. THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCES

The Convention, signed in Belém do Pará, Brazil on 10 June 1994, entered into force on 29 March 1996, when the IACtHR had been deciding disappearances-related cases for almost a decade and the crime's heyday in the region had passed. However, it is still relevant as the first comprehensive legally-binding international document on the

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[32] Art. 27 (2) of the American Convention on Human Rights.

[33] Art. 1 (1) of ibid.

[34] The IACtHR has only declared void self-amnesties, see: Below, Sec. C.2.b.iii; and Héctor Fáundez Ledesma, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales* (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1996): 67.

[35] Article 63 (1) of the American Convention on Human Rights.

issue. Currently, thirteen OAS countries have ratified the Inter-American Convention on Forced Disappearances.[36]

It is significant to note that with the exception of Brazil and Chile, all the countries party to the Cóndor plan—Argentina, Paraguay, and Uruguay—in which the military-controlled governments agreed to cooperate in the fight against subversives using any means necessary including torture and enforced disappearances,[37] have ratified the Convention. Guatemala and Peru, where disappearances lasted into the 1990s have also ratified the Convention. This subsection focuses on the concept and main characteristics of the crime of disappearances, and the relevant duties assumed by the states party to the Convention.

a. Disappearances: Concept and Main Characteristics

Article II of the Convention establishes a broad definition of what it refers to as "forced disappearances:"

> [T]he act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

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[36] Argentina (October 31, 1995), Bolivia (September 19, 1996), Colombia (April 1, 2005), Costa Rica (March 20, 1996), Ecuador (July 7, 2006), Guatemala (July 27,1999), Honduras (April 28, 2005), Mexico (February 28, 2002), Panama (July 31, 1995), Paraguay (August 26, 1996), Peru (February 8, 2002), Uruguay (February 6, 1996), and Venezuela (July 6, 1998). In Office of International Law (OAS), "Multilateral Treaties: A-60: Inter-American Convention on the Forced Disappearance of Persons, http://www.oas.org/juridico/english/sigs/a-60.html (Accessed: April 27, 2007).

[37] "Informe Rettig or Informe de la Comisión Nacional de Verdad y Reconciliación," tomo 2 (Chile, February 1991): 457. "Relaciones con instituciones foráneas afines" (3rd Section, Ch. II. 1.c.3.1).

In addition to the five members of the Cóndor plan, this report hints to the possibility of the participation (or cooperation) of the secret services of other Latin American countries in Cóndor-sponsored operations. For example, Bolivia and Peru are mentioned in "The Criminal Procedures against Chilean and Argentinean Repressors in Spain: A Short Summary," Revision One (11 November 1998): Section I, http://www.derechos.net/marga/papers/spain.html (Accessed: March 23, 2003).

The crime is committed by the state against its citizens directly or with its knowledge. Disappearances consist of attacks against individual freedom that the authorities deny. As a result of the denial, the victims and their relatives are left in a judicial limbo.

Although the Preamble to the Convention characterizes disappearances as a crime against humanity—[38]non-derogable[39] and following orders is no defense—[40]the Convention—contrary to international standards—allows the "[c]riminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator" to be subjected to statutes of limitations "if there should be a norm of a fundamental character . . . [allowing it] after a period . . . equal to that which applies to the gravest crime . . . domestic[ally]."[41] Since disappearances are permanent crimes,[42] the period of time established in the statutes of limitations only starts to run after the victims' fate is known.

b. Duties of the States

The general duties of ratifying states—established in article I of the Convention and specified in articles III to XII—can be classified into preventing the crime, ending impunity, and cooperating with other states. To fulfill these duties, states "must adopt all the [needed] legislative, administrative, judicial, and other type of measures."[43]

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[38] Ana Lucrecia Molina Theissen, "La desaparición forzada de personas en América Latina": Sec. 4.5.1.2, http://www.laneta.apc.org/afadem-fedefam/desapa1.htm (Accessed: December 29, 2004).

[39] Art. I (a) of the Convention on Disappearances. Expanded in art. X (1) of ibid.

[40] Art. VIII (1) of ibid.

[41] Art. VII (2) of ibid.

[42] Art. III of ibid.

[43] Art. I (d) of ibid.

Since limiting habeas corpus increases the likelihood of disappearances by not holding authorities accountable for the detainees' whereabouts,[44] the Convention orders that "the competent judicial authorities shall have free and immediate access to all detention centers . . . and to all places where there is reason to believe the disappeared person might be found, including places . . . subject to military jurisdiction."[45] However, judicial intervention may be too late, which underlines the importance of the conventional duty to educate public servants on the criminality of disappearances[46] and of establishing certain procedures to follow whenever a person is detained.[47]

All these preventive measures notwithstanding, disappearances have occurred and may continue. Thus, article 3 of the Convention establishes the duty of the state to criminalize such activity and to impose "an adequate sanction taking into account its extreme gravity;" sanction that can be reduced whenever the accused "help to cause the victim to reappear alive or provide information that sheds light on the [crime]."[48] In addition, the Convention combats impunity by establishing that responsibility extends beyond the perpetrators of the crime and encompasses the "accomplices and accomplices after the fact . . . and [those accused of] attempted disappearance"[49] can be held

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[44] For actual cases of denial, see *Trujillo Oroza*: Below, Sec. C, footnotes 302-4.

[45] Art. X (2) of the Convention on Disappearances.

[46] Art. VIII (2) of ibid.

[47] Including "establish[ing] and maintain[ing] official up-to-date registries of their detainees and … mak[ing] them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities." See: Art. XI (1) and (2) of ibid.

[48] Art. III (2) of ibid. They are called mitigating circumstances.

[49] Art. I (b) of ibid.

responsible; and by imposing the jurisdiction of ordinary courts instead of military tribunals favorable to the accused.[50]

The Convention follows mostly territorial and subject jurisdictions.[51] Nevertheless, it opens up the possibility of universal jurisdiction "when the alleged criminal is within [a state's] territory and it does not proceed to extradite him."[52] In this case the state must proceed "as if the offense had been committed within its jurisdiction."[53]

Finally, although "the duty to cooperate with every effort to prevent, punish and eradicate . . . disappearances"[54] only affects those states party to the Convention, all OAS states must "give each other mutual assistance in the search for, identification, location, and return of minors."[55] Even though this provision heightens the protection of those most vulnerable, the mention of "minors" could be interpreted to mean that the duty ends when the disappeared reach 18, and thus their relatives are left to fend for themselves.

3. ADVANTAGES AND SHORTCOMINGS OF THE CONVENTIONS ON HUMAN RIGHTS AND ON ENFORCED DISAPPEARANCES TOWARD THE IMPLEMENTATION OF THE PROHIBITION AGAINST DISAPPEARANCES

These two conventions have an added value, i.e., solutions developed in the Inter-American system can provide useful suggestions for the implementation of human rights

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[50] Art. IX (3) of the Convention on Disappearances.

[51] Art. IV (1) a, b, and c of ibid.

[52] Art. IV (2) of ibid.
As a general rule states party to the Convention must extradite the accused. See: Art. V of ibid.

[53] Art. VI of ibid.

[54] Art. I (c) of ibid.

[55] Art. XII of ibid.

outside the region because these regulations must conform to international law.[56] For example, the European Court of Human Rights in the case of *Kurt v. Turkey* of May 25, 1998 includes among the relevant international materials for its decision the preamble, the definition of the crime of disappearances, and its status as a crime against humanity of the Inter-American Convention on Enforced Disappearances; and the case law from the IACtHR.[57] Such materials were submitted by the plaintiffs and incorporated to the European Commission of Human Rights' report.[58]

In addition, the Spanish *Auto de Procesamiento* or indictment against 98 Argentinean members of the Armed Forces of November 2, 1999[59] explains the decisive role of the IACtHR in establishing that disappearances necessarily always constitute torture and how it has influenced the interpretation of such violations by the now defunct United Nations Commission on Human Rights.[60]

Even though both conventions are legally binding, the timing of their entry into force—after widespread violations of human rights in the region—shows the ability of states to hold back the system by preventing the ratification of documents that will compel them to end impunity domestically. Notwithstanding this general shortcoming, a relevant advantage of the Convention on Human Rights is that it applies to every

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[56] Due to its supremacy. See: Art. 27 of the 1969 Vienna Convention on the Law of Treaties.

[57] *Kurt v. Turkey,* Judgment 25, 1998: Pars. 66 and 67.

[58] Ibid: Par. 63.

[59] "Auto de Procesamiento a 98 militares argentinos" (Madrid, 2 de noviembre de 1999): Razonamientos Jurídicos, Séptimo.

[60] The Human Rights Council substituted the Commission in 2006, see: General Assembly of the United Nations, Res. A/RES/60/251 (3 April 2006).

individual, "without any discrimination for reasons of . . . political or other opinion."[61]

However, it lacks a specific regulation of disappearances, a gap the Convention on Disappearances filled based on the past Latin American experience of disregard for detainees' rights and on the efforts of the IACHR and the IACtHR, implementation mechanisms established in the Convention on Disappearances, to address these violations. That is why the Convention on Disappearances provides a broad definition of the crime and emphasizes the importance of preventive measures.

Nevertheless, since the object of the Convention on Disappearances is to regulate a crime against humanity—part of *ius cogens* international law, which imposes on every state the duty to respect it regardless of their individual agreement to abide by it—the Convention can be criticized for not adopting a firmer stand regarding amnesty laws and statutes of limitations. Moreover, the provisions of this Convention only affect those states that have ratified or acceded to the Convention.[62] Thus, the main shortcomings affecting both Conventions are that they are only applicable to state parties and that they lack provisions for the immediate implementation of the rights they protect.

B. MECHANISMS OF IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS: THE IACHR AND THE IACtHR[63]

The second part of the American Convention on Human Rights—entitled "the Means of Protection—"which is of general application to the protection of rights, sets up

[61] Art. 1 (1) of the American Convention on Human Rights.

[62] Art. XX of the Convention on Disappearances.

[63] No reference here to the General Assembly or the Permanent Council of the OAS.

a division of labor between the IACHR[64] and the IACtHR,[65] which is reflected in their practice. While the Commission works on the preliminary implementation phases and controls access to the Court, the Court decides applicable law, what violations are proven, and the type and amount of the reparation owed to the victims and to their families.[66]

This section examines the legal underpinnings of both mechanisms, the next one the actual court cases. Since the IACHR and the IACtHR were not conceived specifically for the protection against the crime of disappearances, it is necessary to adapt the study of their functions, characteristics, process of implementation before them, and limitations in general to this crime.

1. THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS[67]

Although the IACHR—located in Washington DC—started to work on 3 October 1960, it only became an OAS organ on 27 February 1970 via the Buenos Aires Protocol, which amended the OAS Charter and "strengthened [the IACHR's] juridical bases."[68]

a. Characteristics

Prior to the Convention on Human Rights the IACHR was barely regulated because the members of the OAS envisioned a limited role for it. However, in practice

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[64] From now on Commission or IACHR. For its role re torture, see: Above, Ch. III, Sec. C.1.

[65] From now on Court or IACtHR. For its role re torture, see: Above, Ch. III, Sec. C.2.

[66] See: Richard J. Wilson and Jan Perlin, "The Inter-American Human Rights System: Activities from Late 2000 Through October 2002," *American University International Law Review* vol. 18, no. 3 (2003): 651.

[67] For an in depth analysis of its composition and functions, see: Fáundez Ledesma, *El sistema interamericano*: 107-23. It is regulated in articles 34 to 51 of the American Convention on Human Rights.

[68] Fáundez Ledesma, *El sistema interamericano*, ibid: 51. For its workings before becoming an OAS organ, see: Medina Quiroga, *The Battle of Human Rights*: 67-85; for its role afterwards, see: Fáundez Ledesma, ibid: 115-6. For a more updated examination, see: Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, England: Cambridge University Press, 2003).

"the lack of formal, explicit powers worked . . . to the advantage of human rights"[69] as did the Commission's acceptance of the region's main languages, which favors individual access to justice.[70] Since there is widespread agreement that **some of IACHR's activities**—admission of petitions and sending cases to the Court—**are quasi-judicial and thus "binding**,"[71] its importance relative to human rights is accentuated.

Nevertheless, **member states still affect its degree of independence** by naming its Commissioners; influence reflected in the IACHR's overall deferential attitude toward member states, which can stall the proceedings and compel individuals to compromise—especially when the family of the disappeared is afraid or suffering from economic hardship. In addition, only after the Court started to work in 1979, did the Commission acquire a strong weapon to force states to comply with its decisions. Before 1979 the ICtHR's starkest measure was the publication of country reports to shame states.[72]

b. Functions: General and Relative to Disappearances

The Commission's main function is "to promote the observance and protection of human rights."[73] In order to comply with it, the Convention on Human Rights provides the IACHR with a series of "functions or powers."[74] The relevant ones here are

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[69] Medina Quiroga, *The Battle of Human Rights*, ibid: 75. See also: Tom Farer, "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, not Yet an Ox," *Human Rights Quarterly* vol. 19, no. 3 (1998): 510-46.

[70] Fáundez Ledesma, *El sistema interamericano*: 123. Spanish and English as working ones.

[71] Ibid: 116. Exceptions are reported in ibid: 114.

[72] See: Above, Ch. III, Sec. B.1.

[73] Art. 106 of the OAS Charter. Its advisory function is beyond the scope of the dissertation.

[74] Art. 41 (a-g) of the American Convention on Human Rights.

recommending improvements and/or changes in domestic law;[75] elaborating country and issue reports,[76] and deciding whether to publish them or not;[77] "request[ing] the governments . . . to supply . . . information;"[78] and answering to individual petitions.[79]

Even though article XIII of the Convention on Disappearances mandates that the IACHR must follow its pre-established procedures, due to the special nature of the crime "the Commission's Executive Secretariat shall **urgently** and confidentially address the respective government . . . to provide as soon as possible information as to the whereabouts of the allegedly disappeared." [Emphasis added].[80]

c. A Process before the Commission: Requirements for Admission and Procedure

The IACHR only admits complaints by non-state actors[81] that fulfill the following requirements: (1) **procedurally** all domestic venues are "exhausted,"[82] it "is lodged within . . . six months from . . . the notifi[cation] . . . of the final judgment" in the case except when justice is denied or excessively delayed,[83] the case is "not pending . . . international[ly] . . . for settlement,"[84] and it includes the pertinent petitioner's personal

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[75] Art. 41 (b) of the American Convention on Human Rights.

[76] Art. 41 (c) of ibid.

[77] Art. 50 (2) and 51 (3) of ibid.

[78] Art. 41 (d) of ibid.

[79] Art. 41 (f) of ibid.

[80] Art XIV of the Convention on Disappearances.

[81] Individuals and NGOs. See: Art. 44 of the American Convention on Human Rights.

[82] Art. 46 (1) a of ibid.

[83] Art. 46 (1) b and 46 (2) a, b, and c of ibid.

[84] Art. 46.1.c of ibid.

data.[85] And (2) **substantively** petitions must be based on facts, on one or more violations of the Convention on Human Rights, and on new questions that do not duplicate—even partially—prior ones.[86] These requirements are lifted in "serious and urgent cases,"[87] such as disappearances.

After the petition[88] is admitted and the government receives "a transcript of the pertinent portions of the petition," the IACHR sets a date for the government to produce the required information.[89] Then the Court decides "whether the grounds for the petition . . . still exist;"[90] if they exist, the process continues and the Court must investigate the facts directly or based on "oral . . . or written statements from the parties concerned."[91] The procedure can end with "[a] friendly settlement"[92] reflected on a report.[93]

d. Relevant Limitations

The main limitations spring from its excessive state-centric characteristics. Not only do states name its Commissioners but in order for the Commissioners to investigate on location the alleged violations of human rights they need states' permission too. This last limitation applies to "urgent and serious cases" such as disappearances too.

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[85] I.e., name, nationality, profession, domicile, and signature. See: Art. 46 (1) d of the American Convention on Human Rights.

[86] Art. 47 (b), (c), and (d) of ibid. These requirements seek to curtail frivolous petitions.

[87] Art. 48 (2) of ibid.

[88] Articles 48-51 of ibid.

[89] Art. 48 (1) a of ibid.

[90] Art. 48 (1) b. of ibid.

[91] Art. 48 (1) d and e of ibid.

[92] Art. 48 (1) f of ibid.

[93] Art. 49 of ibid. For other cases in which a report is produced, see: Arts. 50 (2) and 51 (1).

From the victims' perspective the process seems a series of obstacles favoring the state which can force—via necessity or fear—a settlement instead of justice. Moreover, petitions can only involve countries party to the Convention, so victims from other countries are defenseless.[94] And even cases under the "jurisdiction" of the IACHR could be examined cursorily due to the Commission's multiplicity of duties.

2. INTER-AMERICAN COURT OF HUMAN RIGHTS[95]

The IACtHR,[96] located in San José, Costa Rica since September 1979, met for the first time "on the 29 and 30 June 1979 at the seat of the OAS in Washington D.C."[97] The process before the Court is detailed in the IACtHR's Statute and Rules of Procedure. The Convention on Human Rights has granted the Court wide powers regarding the structure of its decisions because it only regulates the verdict.[98]

a. Characteristics

Even though the states party to the OAS name each of the Court's seven judges, the IACtHR is an **autonomous institution**[99] with adjudicatory, advisory and competency

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[94] Art. 45 of the American Convention on Human Rights.

[95] For a detailed description of the advisory and contentious jurisdiction of the Court and its activities to protect human rights, see: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*.

[96] Regulated in arts. 52-73 of ibid. See also: Fáundez Ledesma, *El sistema interamericano*: 123-65.

[97] See: Corte Interamericana de Derechos Humanos, "Historia" and "Sede para la Corte Inter-americana de Derechos," http://www.corteidh.or (Accessed: April 2, 2005).

[98] See: Arts. 66-69 of the Convention. Its decisions have evolved structurally: On the first decade, the admissibility of preliminary objections, the merits of the case, and reparations were decided separately; then in the same decision. See: Wilson and Perlin, "The Inter-American Human Rights System": 666-7.

[99] See: Articles 1, 15 (2) and 18 of the Court's Statute.

jurisdiction.[100] However, the Convention on Human Rights reserves to the Commission a privileged position relative to the Court. First, only the Commission or a state that has accepted the Court's jurisdiction can activate the Court; second, the IACtHR supplements the Commission because it can only act after the end of the Commission-sponsored procedures;[101] and third, the Commission is always part of the Court cases.[102]

The Commission's relevance notwithstanding, **the Court's decisions are** its own, i.e., **independent from the Commission's**[103] and binding "on all matters relating to the interpretation or application of this Convention."[104] Moreover, judgments must be reasoned which is important because the "judgment of the Court shall be final and not subject to appeal."[105] In addition, since most of the countries that accept the Court's jurisdiction are Spanish-speaking ones,[106] it is relevant that although according to Art. 20 of the Statute of the Court "[t]he official languages of the Court are those of the OAS."[107] In practical terms the most used languages are Spanish—the authoritative language for sentencing—[108]and English.

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[100] See: Fáundez Ledesma, *El sistema interamericano*: 424-54 (Adjudicatory); and Thomas Buergenthal, "The Inter-American Court of Human Rights," *American Journal of International Law* vol. 76, no. 2 (April 1982): 235-45.

[101] See, respectively: Art. 61 (1) and (2) of the Convention on Human Rights.

[102] Art. 57 of ibid.

[103] Fáundez Ledesma, *El sistema interamericano*: 164-5.

[104] Art. 62 (1) of the Convention on Human Rights. And art. 68 (1) of ibid.

[105] Art. 66 (1) and (2) of ibid.

[106] Bahamas, Belize, Canada, and USA are not under the Court's jurisdiction. See: Above, Fn.14.

[107] In "Statute of the Court," Res. No. 448 (La Paz, Bolivia: October 1979).
The official languages of the OAS are: Spanish, English, Portuguese, and French.

[108] Fáundez Ledesma, *El sistema interamericano*: 159.

b. Functions: General and Relative to Disappearances

Article 63 (1) of the Convention on Human Rights establishes as the Court's general function that of deciding whether a state has violated the Convention or not. [109] Nowadays, it has to apply the regulation set in the Convention on Disappearances too. Once a violation is proven, the Court will specify how the state will reinstate that right to the victim and/or compensate him or her for its violation.

Even though for the direct victims of the disappearances it is usually too late, from the perspective of their relatives it is important that the IACtHR can adopt at their request—once the process has started—[110]provisional measures in cases of emergency, i.e., "when necessary to avoid irreparable damage to persons,"[111] which is always the case in disappearances. Prior to the trial only the Commission can request them.[112]

c. Procedures to Protect Human Rights through the Court: General Procedure, Interpretation of Decisions and Preventive Measures

The general procedure before the Court can be summarized as follows.[113] First, the Commission (or a state) brings in a lawsuit before the Court,[114] which after accepting the case, notifies formally the plaintiffs and interested parties of the existence of such lawsuit. Then, the victims, their relatives, and/or representatives are allowed two months from the notification of the lawsuit to send to the Court any documents with "petitions,

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[109] Not including its advisory function (Arts. 60-65 of the Rules of Procedure), beyond the scope of the dissertation. On its advisory function, see: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 27-80.

[110] See: Art. 25 (3) of the Rules of Procedure.

[111] Art. 63 (2) of the Convention on Human Rights.

[112] Art. 1, 2, and 25 (2) of the Rules of Procedure of the Court and art. XIV of the Convention on Disappearances; and for further details, see: Fáundez Ledesma, *El sistema interamericano*: 317-423.

[113] For a more detailed description, see: Above, Ch. III, Sec. B.2.3.

[114] Art. 33 of the Rules of Procedure. Art. 34 allows twenty days to complete any missing data.

reasons, and evidence"[115] pertinent to the case and the accused state is allotted four months from the notification of the lawsuit to reply to it in an exhaustive manner so as to prevent the Court from assuming the state's agreement to any of the facts and/or responsibility alleged in the lawsuit. [116]

The admission of a preliminary objection ends the procedure[117] but the plaintiffs have thirty days from the notification of the admission to rebut any of the alleged objections.[118] The rejection of the preliminary objections marks the beginning of the oral phase, which consists of public hearings including interrogation of witnesses and experts.[119] Finally, the verdict settles the substantive issue of the trial and/or the reparations.[120]

This final decision can be interpreted or revised.[121] Although the procedure in cases of interpretation is simpler and shorter,[122] the Rules of Procedure guarantee an interpretation as close as possible to the original intent of the Court by requiring that the

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[115] Art. 36 of the Rules of Procedure.

[116] For the deadline, see: Art. 38 (1) of ibid; for exhaustiveness, see: Arts. 37 (1) and 38 (2) of ibid.

[117] As does the Court's acceptance of the plaintiff's decision to forgo the lawsuit (Art. 53 of ibid.). or of the friendly agreement between the parties in the process.

[118] Art. 37 (4) of ibid.

[119] See: Fáundez Ledesma, *El sistema interamericano*: 359-385 and arts. 40-52 of the Rules of Procedure, ibid. The Court can order the investigation *ex officio*, see: Art. 45 (1) of the Rules of Procedure, ibid.

[120] Art. 56 of the Rules of Procedure, ibid, refers to the content of the decision and art. 57 to reparations.

[121] See: Fáundez Ledesma, *El sistema interamericano*: 385-421 and arts 56-8 of the Rules of Procedure.

[122] Fáundez Ledesma, ibid: 416-21. The parties have only "ninety days from the . . . notification of the judgment," to request such interpretation (Art. 67 of the Convention on Human Rights). See also: Art. 59 (5) of the Rules of Procedure, ibid.

exact same judges participate in the interpretation of such decision.[123] In addition, the decision is "render[ed] . . . in the form of a judgment."[124]

Adopting preventive measures is similarly simpler and swifter than the general procedure.[125] The President of the Court—[126]in charge of "demand[ing] . . . urgent measures from the government—"[127]must be "inform[ed] immediately" of any petition of such nature. Once adopted, accountability is guaranteed because those favored with these measures can "present . . . their observations to the State report,"[128] the Commission has to comment the observations,[129] and the Court must "include in its annual report to the General Assembly a list of measures . . . and . . . formulate recommendations."[130]

d. Relevant Limitations

Lack of individual standing—set in Art. 63 (2) of the Convention on Human Rights— is being overcome slightly with the 2000 reform of the Rules of Procedure stating that individuals may have a "full[er] participation . . . in all stages of the proceedings." [131] However, state-centrism imbues the Court's activities. States determine the Court's members, the scope of its jurisdiction, and its budget.[132]

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[123] Art. 59 (3) of the Rules of Procedure. See also art. 16 of ibid.

[124] Art. 59 (5). of ibid. It is a substantive decision, see: Art. 59.4 of ibid.

[125] Art. 63 (2) of the Convention on Human Rights.

[126] Art. 25 (4) of the Rules of Procedure. Any of the judges or the Secretariat.

[127] Art. 25 (5) of ibid.

[128] Art. 25 (6) of ibid. More participation of individuals and the IACHR due to a 2003 reform.

[129] Art. 25 (6) of ibid.

[130] Art. 25 (8) of ibid.

[131] Art. 32 of ibid.

[132] Buergenthal, "The Inter-American Court of Human Rights": 232.

In addition, since the consequences of the crime of disappearances may include the death of the victims, other relevant limitations of the Court relate to: first, the judges' workload—apart from adjudicating cases involving the violation of human rights they must perform advisory and interpretative functions—[133]which may result in their response being late to save a life. And, second, the civil nature of the Court's jurisdiction,[134] which may be insufficient to foster compliance at the individual level.

C. MAIN DISAPPEARANCES-RELATED CASES BEFORE THE IACtHR[135]

Since the first decisions of the IACtHR—as well as the bulk of its jurisprudence up to now—focus on disappearances, this section deals in-depth with cases that constitute breakthroughs in the implementation of the prohibition against disappearances, with a special reference to the paradigmatic *Velásquez-Rodríguez* case. The cases are analyzed in a loosely chronological manner to grasp better the advances in such implementation.

The cases are examined in three subsections. First, initial cases that originated the main jurisprudential principles of the IACtHR on the issue of disappearances. Second, consolidation and advancement of the jurisprudence of the Court. And third, cases in which governments accepted the facts and/or their responsibility. Although I briefly study the main facts of the cases and the Commission's role, the findings of the IACtHR are essential to the dissertation.

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[133] Dinah Shelton, "The Jurisprudence of the Inter American Court of Human Rights," *The American University Journal of International Law and Policy* 10, no. 1 (Fall 1994): 333.

[134] *Velásquez-Rodríguez vs. Honduras*, Decision of 29 July 1988, Series C, no. 4: Par. 134.

[135] For a summary, see: Molina Theissen, "La desaparición forzada de personas en América Latina": Sec. 4.6.

1. FIRST CASES: SETTING JURISPRUDENTIAL BASES FOR THE IMPLEMENTATION OF THE PROHIBITION AGAINST DISAPPEARANCES

Although not identical, all these cases refer to smaller countries in which the practice of disappearances was supported by the government but the number of victims did not reach the scope of the crime in Argentina, Chile, or Guatemala. In addition, the range of the reparations—especially non-pecuniary ones—was more limited.

a. Facts

From 1981 to 1984 the Honduran government practiced disappearances according to the following pattern:[136] individuals thought to belong to subversive groups—wide concept including anyone who dared to speak against the government—were detained without court orders, then they were tortured and their families' attempts to find their whereabouts proved fruitless. *Velásquez-Rodríguez* reflects a typical disappearance.

On 12 September 1981 the authorities illegally detained and tortured Ángel Manfredo Velásquez-Rodríguez—a 35-year old Economics student, married with three children—[137]for being a subversive.[138] Seven years later his whereabouts were still unknown, so the judges "assume[d] he [was] dead."[139] Since the authorities were uncooperative in finding him or punishing the accused, the Court rejected Honduras' preliminary objection related to pending internal processes.[140]

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[136] *Velásquez-Rodríguez* (Serie C, no. 4): Par. 147 and Sec. IV.

[137] *Velásquez-Rodríguez vs. Honduras,* Indemnización Compensatoria, 21 de julio de 1989, Serie C, no. 7: Par. 51 (Their suffering is admitted by the Court as basis for compensation).

[138] Of which there is no real evidence, see: *Velásquez-Rodríguez* (Serie C, no. 4): Par. 147 (h).

[139] *Velásquez-Rodríguez vs. Honduras,* Excepciones Preliminares, 26 de junio de 1987, Serie C, no. 1: Par. 15. *Velásquez-Rodríguez* (Serie C, no. 4): Pars. 3 and 147 (e).

[140] *Velásquez-Rodríguez* (Serie C, no. 4): Pars. 147 (d) V and 74.

Less than a month after Velásquez-Rodríguez's disappearance, Francisco Fairén Garbi and Yolanda Solís Corrales—28-year old Costa Ricans—disappeared in Honduras.[141] Official denial of their presence in Honduras was recanted in March 1982 because Nicaraguan authorities "certified they entered into Honduras."[142] The case's complexity increased after witnesses were killed.[143] And, on 22 July 1982, Saúl Godínez Cruz—a 32-year old professor and union activist—disappeared on his way to work.[144]

b. Role of the Commission

As a consequence of its state-centrism, the Commission showed deference to Honduras, which used stalling tactics—by providing tidbits of information—after receiving more than one request from the IACHR and after demanding deadline extensions.[145] Finally, after more than four years had passed, the Commission decided to force Honduras to end impunity by bringing the case of *Velásquez-Rodríguez* before the Court.[146]

Apart from such deference to the state, the victims suffered other serious disadvantages derived from their lack of active participation in these first procedures,

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[141] *Fairén Garbi y Solís Corrales vs. Honduras*, Excepciones Preliminares, 26 de junio de 1987, Serie C, no. 2: Par. 16; and *Fairén Garbi y Solís Corrales*, Sentencia de 15 marzo de 1989, Serie. C, no. 6: Par 3.

[142] *Fairén Garbi* (Serie C, no. 2), ibid: Par. 16.

[143] *Fairén Garbi* (Serie C, no. 6): Pars. 63-66.

[144] *Godínez Cruz vs. Honduras*, Indemnización Compensatoria, Sentencia de 21 de julio de 1989, Serie C, no. 8: Par. 43; *Godínez Cruz*, Excepciones Preliminares, Sentencia de 26 de junio de 1987, Serie C, no. 3: Par. 15; and *Godínez Cruz* (Serie C, no. 5): Pars. 3 and 114 (his wife states he was preparing another strike). For specifics, see: *Godínez Cruz* (Serie C, no. 5), ibid: Par. 154. For how he disappeared, see: Ibid, Sec. IX. And for ineffective habeas corpus and criminal lawsuits, see: Ibid, Par 77.

[145] *Velásquez-Rodríguez* (Serie C, no. 1): Pars. 16-24.

[146] Ibid: Par. 24. Similarly: *Fairén Garbi* (Serie C, no. 2): Pars. 25-29; and *Godínez Cruz* (Serie C, no. 3): Pars. 1, 20-27; and *Godínez Cruz* (Serie C, no. 5): Par. 12.

which left the accusation in the hands of the Commission. For example, the IACHR did not include in its lawsuit any specific amounts regarding damage compensation for the victims and did not ask for repayment of any type of expenses. Thus, the Court had to fix the quantity of the compensation awarded to the victims and rejected re-payment for any expenses based on the absence of any reference to the expenses in the lawsuit and lack of evidence.[147] In another case, the Commission's delay in presenting the lawsuit before the Court[148] curtailed the victims and their families' rights on a case of disappearances, torture and proven deaths.[149]

c. Relevant Court Findings

These findings are limited for the purposes of the dissertation to: first, characteristics of the Court, i.e., unlimited jurisdiction, international nature and thus discretion in admitting cases. And second, the Court's status as a forum amenable to the development of the protection against disappearances which sets the characteristics of the crime and hands down verdicts establishing the responsibility for such crime and reparations for the victims.

i. The Court's Unlimited Jurisdiction, International Nature and Discretion

The IACtHR interprets article 62 (1) of the American Convention on Human Rights as granting it "unlimited jurisdiction."[150] As a result, "[it] is not forced to follow

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[147] *Godínez Cruz* (Serie C, no. 8): Secs. III-V and Pars. 39 and 40.

[148] More than seven months compared to the three month deadline of art. 51 (1) of the Convention. See: *Cayara vs. Perú*, Excepciones Preliminares, Sentencia de 3 de febrero 1993, Serie C, no. 14: Par. 60.

[149] Ibid: Par. 15.

[150] *Velásquez-Rodríguez* (Serie C, no. 4): Par. 11. Honduras had accepted its jurisdiction.

prior decisions of the Commission, but can decide freely"[151] all the substantive and procedural questions brought before it. Moreover, the Court asserted in its first decision its international character. Thus, although the IACtHR is complementary to the domestic level,[152] it is not subjected to it.

Therefore, the Court follows international law doctrine including that which establishes that "whenever there is doubt, dispositions . . . must be interpreted . . . so their efficacy is unfolded."[153] As a result, the IACtHR focuses on the victims' right to access justice instead than on strict formalities.[154] So the Court rejects preliminary exceptions based on procedural defects[155] and intervenes against impunity in the absence of exhaustion of internal mechanisms.[156] However, such discretion has limits. For example, the Court ended the process in *Cayara* because it considered that "continuing . . . when the procedural rules are . . . clearly broken, would mean losing the authority and credibility necessary for organs in charge . . . of the protection of human rights."[157]

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[151] *Velásquez-Rodríguez* (Serie C, no. 1): Par. 29.

[152] *Velásquez-Rodríguez* (Serie C, no. 4): Par. 61.

[153] *Velásquez-Rodríguez* (Serie C, no. 1): Par. 30. It reproduced what was said in *Free Zones of Upper Savoy and the District of Gex*, Order of August 1929, P.C.I.J., Series A, no. 22: 13.

[154] Ibid: Pars. 33-4. And *Velásquez-Rodríguez* (Serie C, no. 7): Pars. 30-31 (Following international principles).

[155] *Velásquez-Rodríguez* (Serie C, no. 1), ibid: Secs. VII-X. Based on lack of: (1) explicit admission of the complaint; (2) the offer of a friendly resolution—unreasonable due to the government's denial of the crime; (3) investigation *in loco* by the IACHR— illogical due to the government's ban; and (4) compliance with arts. 50 and 51. Similarly*, Godínez Cruz* (Serie C, no. 5): Pars. 88 and 95-6.

[156] *Velásquez-Rodríguez,* ibid: Sec. XII.
On not exhausting domestic mechanisms, see: Art. 46 (1) a of the American Convention on Human Rights in relation to article 44; habeas corpus was ineffective so the victim had no recourse internally, in *Fairén Garbi* (Serie C, no. 6): Par. 111.

[157] *Cayara* (Serie C, no. 14): Par 63. The Commission violated 51 (1) of the Convention, see: Verdict, Point 1 (Unanimous).

The IACtHR uses its discretion widely in all evidence-related issues, such as types of evidence admitted and evaluation of available evidence. Thus, the Court evaluates "freely"[158] the evidence available.[159] Such leeway is especially necessary in disappearances[160] because secrecy surrounds them.[161] Consequently, the IACtHR admits "[c]ircumstantial evidence and presumptions . . . as long as it can infer conclusions consistent with the facts,"[162] which allows victims to link specific violations to systematic practices, "lower[ing] the burden of proof . . . and increase[ing] the likelihood of success on the merits."[163] In addition, although the burden of proof lies on the Commission,[164] the government has to present contrary evidence to refute the accusations but "[d]ifferently from domestic criminal law, in processes dealing with violations of human rights, the defense of the State cannot rest on the accusation's impossibility to present evidence that . . . cannot be obtained without the cooperation of the States." [165]

Finally, the Court admits as proof evidence usually considered suspect. That is why it rejected Honduras' petition to strike down a mother's testimony because, first,

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[158] *Velásquez-Rodríguez* (Serie C, no. 4): Sec. VII, esp. Par. 127. Based on "international jurisprudence . . . *Corfu Channel*, Merits, . . . *Military . . . in and against Nicaragua*, . . . Merits, Judgment, I.C.J. Reports 1986, Pars. 29-30 and 59-60;" and *Godínez Cruz* (Serie C, no. 5): Sec. VII.

[159] *Velásquez-Rodríguez* (Serie C, no. 4), ibid: Sec. VI; *Fairén Garbi* (Serie C, no. 6): Sec. VII; and *Godínez Cruz* (Serie C, no. 5): Sec. VI.

[160] *Velásquez-Rodríguez* (Serie C, no. 4), ibid: Pars. 133 and 129.

[161] Ibid: Par. 131. For the ECtHR, see: Gobind Singh Sethi, "The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances," *Human Rights Brief* vol. 8, no. 3 (Spring 2001): 30.

[162] *Velásquez-Rodríguez*, ibid: Par. 130; *Godínez Cruz* (Serie C, no. 5): Par. 155; and *Paniagua Morales y otros* (Serie C, no. 37): Par. 72.

[163] Singh Sethi, "The European Court of Human Rights' Jurisprudence": 29.

[164] *Fairén Garbi* (Serie C, no. 6): Par. 126.

[165] *Velásquez-Rodríguez* (Serie C, no. 4): Par. 135.

"[i]t is inadmissible to insinuate that people . . . who use the Inter-American system . . . are being unpatriotic;"[166] and second, Honduras "did not prove with facts that the witnesses were not telling the truth."[167] And third, the Court admits that newspaper articles prove:

> [W]ell-known facts that as such do not require proof, others have value, as recognized by international jurisprudence . . . as reproducing verbatim declarations from [high-ranking authorities] . . . others are important taken together as long as they agree with the testimony . . . relative to disappearances and the pinning of these facts to military or police authorities of that country.[168]

ii. The Court as a Forum Amenable to the Development of the Protection against Disappearances: Defining the Crime, Establishing Responsibility and Setting Reparations

In broad terms the Court concluded that the crime of disappearances constitutes a complex[169] and continuous[170] crime, which involves always an illegal detention and constitutes torture on its own.[171] Furthermore, "it means a total breakdown of the treaty … and a disregard for the duty of organizing the state in a way in which the rights recognized in the Convention are guaranteed."[172] Thus, without the Commission's prior request and based on the principle of *iura novit curia*—meaning literally that the Court knows the law and as a consequence it will apply the pertinent law to the case at hand

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[166] *Fairén Garbi* (Serie C, no. 6): Par. 142.

[167] Ibid: Par. 141.

[168] *Velásquez-Rodríguez* (Serie C, no. 4): Par. 146. Similarly, in *Paniagua Morales y otros vs. Guatemala* , Sentencia de 8 de marzo de 1998, Serie C, no. 37: Par. 75.

[169] For a brief history of the crime, its characteristics and regulation at the international level, see: *Velásquez-Rodríguez* (Serie C, no. 4): Sec. X; and *Godínez Cruz* (Serie C, no. 5): Pars. 157-67.

[170] *Velásquez-Rodríguez* (Serie C, no. 4), ibid: Pars. 150 and 155 respectively.

[171] Ibid: Par. 156.

[172] Ibid: Par. 158.

even in the absence of any mention of it in the lawsuit—[173]the Court established that disappearances in the *Velásquez-Rodríguez* case violated article 1 of the Convention on Human Rights.

The Court found Honduras responsible for Velásquez Rodríguez's disappearance and consequently for "the violation of articles 7, 5 and 4 of the American Convention on Human Rights."[174] Even though the verdict was handed down after the practice of disappearances had ended in Honduras, the Court followed the doctrine of continuity of the state and held Honduras responsible for the denial of justice.[175] However, the judges unanimously decided they lacked sufficient evidence to declare Honduras responsible for the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales,[176] who may have traveled to Guatemala and then to El Salvador—their original destination.[177]

Since the disappeared are presumed to be dead, the Court demanded reparations "for the consequences [of the crime],"[178] based on article 63 (1) of the Convention which refers to "the payment of a just compensation to the party who suffered the damage;" and article 45 of the Rules of Procedure of the Court. The IACtHR's decision to defer compensation setting to a friendly agreement is overturned in *Godínez Cruz*,[179] due probably to a poignant dissent in *Velásquez-Rodríguez* and to the lack of agreement in the

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[173] *Velásquez-Rodríguez* (Serie C, no. 4): Par. 163.

[174] Ibid: Pars. 185-88. In relation to the violation of article 1 (1), see: Ibid, Verdict, 1-4.

[175] Ibid: Par. 184. More details in ibid: Pars 178-79 and 182.

[176] *Fairén Garbi* (Serie C, no. 6): Pars. 157-8 and Verdict, 2.

[177] Ibid: Par. 155.

[178] Ibid: Par. 189. See also: Verdict, 1-5.

[179] Ibid: Par. 194 (Verdict), Points 6 (Dissenting Vote of Piza Escalante) and 7 (Unanimous on Court's homologation of the agreement). And *Godínez Cruz* (Serie C, no. 5): Par. 203 (Verdict) point 6.

prior case.[180] In principle, unless the government recognizes the facts and its responsibility, a friendly solution to heinous crimes such as disappearances is unreasonable. Thus, the Court will usually fix the modality—underscoring the importance of family—[181]and amount of reparations; and will supervise its future implementation,[182] including ordering interest payment when delay in the payment occurs.[183]

Following international law, the Court asserted in these cases that reparations "comprise . . . *restitutio in integrum,* which includes restoring the situation prior [to the violation] and repairing the consequences of such violation and . . . compensate[ing] for material and non-material damages including moral ones."[184] Such right to reparations is recognized to victims and their relatives.[185] Moral damages are presumed in relation to the victims and their close relatives—parents, children, and siblings with close ties.[186] For example, after hearing expert's evidence in *Godínez Cruz* affirming that "his wife . . . and [children] suffered from several symptoms of sudden shock, anguish, depression, and withdrawal,"[187] the Court recognized moral damages in their favor.

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[180] *Velásquez-Rodríguez* (Serie C, no. 4): Dissenting vote, 3 and 5; and *Velásquez-Rodríguez* (Serie C, no. 7): Par. 22.

[181] *Godínez Cruz* (Serie C, no. 8): Pars. 52 and 53. For the unanimous verdict: Ibid. Par. 55 (4)

[182] Ibid: Par. 55. 5 (Verdict).

[183] *Godínez Cruz vs. Honduras*, Interpretación de la Sentencia de Indemnización Compensatoria, 17 Agosto 1990, Ser. C, no. 10: Par. 38.

[184] *Velásquez-Rodríguez* (Serie C, no. 7): Par. 27. Its international law based justification is in Ibid: Par. 25.

[185] *Godínez Cruz* (Serie C, no. 8): Par. 39 and *Velásquez-Rodríguez* (Serie C, no. 7): Par. 39.

[186]*Velásquez-Rodríguez* (Serie C, no. 7), ibid: Par. 54.

[187] Ibid: Par. 51.

The amount of the compensation for moral damages is fixed according to the principles of equity.[188] Equity is a form of judicial discretion available when a given law does not provide any regulation for a specific case. It was already formulated by Aristotle, who stated that 'it is correct to rectify . . . the omission and mistake of the lawgiver due to the generality of his statement.'[189] In addition, equity is a form of distributive justice, which according to Aristotle is 'the just share [which] must be given on the basis of what one deserves, though not everybody would name the same criterion of deserving.'[190] Equity is necessary because of the absence of a specific regulation of reparations in the Inter-American system of protection of human rights.

In its decisions—already a type of reparation—the Court adopts pecuniary and non-pecuniary forms of reparations. The non-pecuniary ones are linked to ending impunity, finding the victims' whereabouts,[191] respecting the victims' memory, and preventing new violations of the prohibition against disappearances.[192] Such Discretion notwithstanding, the IACtHR, similarly to its European counterpart, cannot award punitive damages.[193]

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[188] The IACtHR relies on resolutions of the Committee on Human Rights set up by the Additional Protocol to the ICCPR to justify compensation for international human rights violations, see: *Velásquez-Rodríguez* (Serie C, no. 7), Pars. 27-8.

[189] Mark W. Janis, *An Introduction to International Law*, 2nd Edition (Boston, MA: Little, Brown and Company, 1993): 67.

[190] Ibid: 74.

[191] More relevant in *Aloeboetoe y otros*, Reparaciones, Sentencia 10 Septiembre 1993, Ser. C, no. 15: Par. 109; *Velásquez-Rodríguez* (Serie C, no. 4): Par. 181; and *Godínez Cruz* (Serie C, no. 5): Par. 191.

[192] *Godínez Cruz* (Serie C, no. 8): Par. 30: "investigation of the facts, . . . punishment of those guilty, . . . public reprobation of this practice, [and] vindication of the victim's memory." [Translation].

[193] *Velásquez-Rodríguez* (Serie C, no. 7): Par. 38. Precedent used in *Castillo Páez vs. Perú*, Reparaciones, Sentencia de 27 de Noviembre de 1998, Ser. C, no. 43: Par. 95.

2. JURISPRUDENTIAL CONSOLIDATION AND EXPANSION

Even though its first decisions went beyond barebones jurisprudence, they left some unsolved questions. Thus, starting in the 1990s the Court not only widened the geographic scope of cases but it consolidated its jurisprudence and made relevant contributions by expanding the concept of victim, individual procedural involvement and non-pecuniary reparations. Since the Commission's role remains similar except for the increase in cases brought before the Court, it is not analyzed here separately.

a. Facts

Although several cases examined by the Court still involved the disappearance of civilians accused of being "subversives," the spectrum of victims and contexts increased to include guerrilla fighters and so-called street children. Moreover, the Court handed down verdicts against more powerful states such as Argentina or Colombia. In this phase, the IACtHR decided cases involving civil war, such as the on-going one in Colombia and that of Guatemala that ended in 1996; and states of emergency.

Civil war affected: (1) civilians. On June 1982, the Salvadoran army abducted 7 and 3-year old sisters Ernestina and Erlinda Serrano Cruz, according to their eldest sister.[194] On 28 March 1985, Nicholas Chapman Blake—a US journalist—and his photographer Griffith Davis,[195] disappeared after an encounter with the Guatemalan Civil Defense Patrols.[196] And in Colombia, seventeen disappeared on 6 October 1987; two

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[194] *Hermanas Serrano Cruz vs. El Salvador*, Excepciones Preliminares, 23 de noviembre de 2004, Serie C, no. 118: Par. 2.

[195] *Blake vs. Guatemala*, Excepciones Preliminares, Sentencia de 2 de julio de 1996, Serie C, no. 27: Par. 12.

[196] *Blake vs. Guatemala*, Judgment of 24 January 1998, Series C, no. 36: Par. 52 (p). In ibid: Par. 76: "had an institutional relationship with the Army …"

were killed.[197] Similarly, Isidro Caballero Delgado and María del Carmen Santana disappeared at the hands of the Colombian military,[198] in "a place of intense activity of the army, the paramilitary and the guerrillas"[199] on 7 February 1989.

(2) Combatants. Members of guerrilla groups were afforded an especially grisly treatment. They were held prisoners for months, and even years to extract as much information as possible from them by using torture and preventing redress. The IACtHR heard the case of Efraín Bámaca Velásquez—a Mayan commander of a group linked to the URNG [Unidad Revolucionaria Nacional Guatemalteca]—who was detained after fighting with army units on 12 March 1992;[200] since that day he is considered disappeared.[201]

In addition, the adoption of states of emergency meant that the police forces assumed exceptional powers to end terrorism and/or delinquency, resulting in widespread abuses and total impunity. Peruvian authorities illegally detained Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera in February 1986 under suspicion of terrorism;[202] they were sent to a prison called *el Frontón*, where on 18 June 1986 a rebellion was crushed violently by the armed forces. Although their mother used habeas

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[197] *Los 19 Comerciantes vs. Colombia*, Excepción Preliminar, Sentencia 12 de junio 2002, Serie C. No. 93: Par. 2.

[198] *Caballero Delgado y Santana vs. Colombia*, Excepciones Preliminares, Sentencia de 21 de enero de 1994, Serie C, no. 17: Par. 10; and Sentencia de 8 diciembre de 1995, Serie C, no. 22: Par. 53 (b).

[199] *Caballero Delgado y Santana* (Serie C, no. 22): Par. 53 (a).

[200] *Bámaca Velasquez vs. Guatemala*, Sentencia de Fondo, 25 de noviembre de 2000, Ser. C, no. 70: Pars. 4 (18) a to d, and 121 (d), which declares proven that he was a *guerrillero*. See also: Ibid, pars. 121 (e). and 121 (h).

[201] *Bámaca Velásquez vs. Guatemala*, Reparaciones, Sentencia de 22 de febrero de 2002, Serie C, no. 91: Par. 29 (A) d and i; and Sentencia de Fondo: Par. 121 (m).

[202] For the facts of the case, see: *Durand y Ugarte vs. Perú*, Sentencia de Fondo del 16 de agosto de 2000, Serie C, no. 68: Par. 59 (a), (b), (f). (j), and (m).

corpus, neither one was found. Similarly and, according to eyewitnesses, [203] on 21 October 1990,[204] twenty-two year old Ernesto Rafael Castillo Páez[205] was thrown into the trunk of a patrol car by two agents of the Peruvian National Police, who presumed he was a terrorist;[206] and was disappeared.

In cases in which delinquency is alleged, the targets are usually the most vulnerable sectors of society—poor children and teenagers seen as the source of street insecurity. Thus, on 15 June 1990 a group of "street kids" disappeared from a dangerous place called *Las Casetas*—[207]where they usually met—after the Guatemalan National Police detained them illegally. There was evidence that the use of 'threats, detentions, cruel, inhuman and degrading treatment, and homicides as means to counterattack juvenile violence, delinquency and vagrancy,' and the lack of access to any judicial protection,"[208] was common.

b. Relevant Court Findings

Starting in the 1990s the Court increased its discretion in the admission of cases, the evaluation of evidence, and the use of presumptions. In addition, the IACtHR developed the protection against disappearances through a refinement of the definitions

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[203] Corroborated by police reports, see: *Castillo Páez vs. Perú*, Sentencia de 3 de noviembre de 1997, Serie C, no. 34: Par. 61.

[204] *Castillo Páez vs. Perú*, Excepciones Preliminares, Sentencia de 30 de enero de 1996, Serie C, no. 24: Par 14.

[205] *Castillo Páez* (Serie C, no. 43): Facts, Par. 68 (A).

[206] *Castillo Páez* (Serie C, no. 24): Par. 53.

[207] *Villagrán Morales vs. Guatemala*, sentencia de 19 de noviembre 1999, (Serie C, no. 62): Pars. 78 and 80.

[208] Ibid: Par. 79 and Par. 136.

of impunity, disappearances and victim; a more detailed verdict relative to articles violated by the crime; and an expansion of reparations—especially non-pecuniary ones.

i. The Court's Unlimited Jurisdiction and International Nature: Increased Discretion in the Admission of Cases and Presumptions, and Evaluation of Evidence Relative to the Crime of Disappearances

In order to interpret and apply the American Convention on Human Rights, the Court can use as support any international convention it considers applicable. Thus, contrary to some states' wishes, the Court affirmed its competence to decide cases involving war.[209] However, discretion is clearer on the Court's disregard for exact deadlines; its admission of presumptions; and its evaluation of evidence. Thus, the IACtHR has accepted cases that violate the three month deadline established in the Convention on Human Rights.[210] But dissenting Judge Edgar E. Larraondo Salguero considered such discretion illegal[211] because "erroneous practices cannot constitute valid precedents."[212]

Discretion relative to presumptions increased during this phase. As a result, the disappeared are presumed dead after certain period of time has passed.[213] In addition, the presumption of death is reinforced whenever the Court has evidence that a given country

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[209] *Hermanas Serrano Cruz* (Serie C, no. 118): Par. 111. In Par. 113 it refers to precedents on this issue, i.e., *Molina Theissen vs. Guatemala*, Reparaciones, Sentencia de 3 de julio de 2004, Serie C, no. 108: Par. 35; and *Bámaca Velásquez* (Serie C, no. 91): Par. 85.

[210] See: *Paniagua Morales y Otros (Caso de la 'Panel Blanca') vs. Guatemala,* Excepciones Preliminares, Sentencia de 25 de enero de 1996, Serie C, no. 23: Pars. 28 and 36.

[211] *Paniagua Morales*, ibid: Dissenting Vote of Judge Edgar E. Larraondo Salguero. He names *Caballero Delgado* (Serie C, no. 17): Par. 52, in which, even though the deadline was violated, the process continued. Not so in *Di Vigilanza* (decision of the ECtHR of 22 September 1993), in which the process ended due to a petition filed one day after the deadline; and in *Cayara* (Serie C, no. 14): Pars. 38 and 63.

[212] *Paniagua Morales* (Serie C, no. 23), ibid: Dissenting Vote of Judge Edgar E. Larraondo Salguero, in fine. See also: *Los 19 Comerciantes* (Serie C, no. 93): Par. 2.

[213] *Castillo-Páez* (Serie C, no. 24): Par. 71.

practiced the crime of disappearances systematically[214] and/or trials to prosecute the crime had been initiated at the domestic level.[215] Nevertheless, when children are abducted from home, the presumption is that they are alive[216] because children were targeted for "re-adaptation" at the hands of handpicked adopted families and thus it is illogical to presume that they are dead.

Another relevant presumption is that disappearances constitute at least cruel treatment—except in *Caballero Delgado*—[217]for the disappeared and his/her family. Since "it is self evident that it is intrinsic to human nature that any person subjected to cruel treatment and torment experiences moral damages"[218] as does the disappearance of a family member,[219] spouses, parents, children, and siblings do not have to prove such damages. For example, the Court recognized a sibling's moral damages in the absence of contact due to close family ties among the Mam—a Mayan tribe.[220]

On its evaluation of evidence, although the Court is flexible enough to admit the testimony—on facts or their own suffering—[221]of family members and any other person

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[214] For a good example, see: *Bámaca Velásquez* (Serie C, no. 70): Par. 173.

[215] *Caballero Delgado* (Serie C, no. 22): Par. 53 (c), (d), and (e).

[216] See: *Hermanas Serrano Cruz vs. El Salvador*, Sentencia de 1 de marzo de 2005, Serie C, no. 120: Pars. 130-32 and 218 (4) (Verdict).

[217] *Caballero Delgado* (Serie C, no. 22): Pars. 53. f and 72. 2. See also: Judge Máximo Pacheco Gómez's Dissenting Opinion, ibid: Razón 2 and 3.

[218] *Garrido y Baigorria vs. Argentina*, Reparaciones, Sentencia de 27 de agosto de 1998, Serie C, no. 39: Par. 49: It names as precedents: *Aloeboetoe y otros vs. Suriname*, Reparaciones, Sentencia 10 septiembre 1993, Serie C, no. 15: Par. 52; and *Neira Alegría y otros vs. Perú*, Reparaciones, Sentencia de 19 de septiembre de 1996, Serie C, no. 29: Par. 57.

[219] *Trujillo Oroza vs. Bolivia*, Reparaciones, Sentencia de 27 de febrero de 2002, Serie C, no. 92: Par. 57.

[220] *Bámaca Velásquez* (Serie C, no. 91): Par. 65. See: 65 (c). Including his half sister.

[221] Ibid: Par. 27.

with a direct interest; it demands corroborative evidence in such cases. For example, Trujillo Oroza's mother testimony, which acquired more relevance because "the State did not formulate any questions [to her, could not] be assessed in isolation."[222] Also, the existence of generalized practices of disappearances in a given country—based on documentary evidence such as police testimonies and reports—[223]is valuable corroborative evidence and it is crucial to base reparations because of the absence of a corpse and direct witnesses too.[224]

In addition, the Court accepts expert testimony from psychologists and psychiatrists to scientifically support allegations of moral damages. For example, Ana Deutsch declared that Bámaca's wife and his sisters suffered from post-traumatic syndrome, including depression and remorse.[225] Moreover, the testimony of persons with similar backgrounds to the victim's is used to project their future earnings, as a basis for reparations.[226]

ii. The Court as a Forum Amenable to the Development of the Protection against Disappearances: Refining Definitions; More Detailed Verdict; and Expanding Reparations, especially Non-Pecuniary Ones

The most significant definitional contributions of the Court refer to impunity, the continuity of the crime, and the concept of victim. The IACtHR defines impunity broadly as follows,

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[222] *Trujillo Oroza* (Ser. C, no. 92): Par. 52.

[223] *Bámaca Velásquez* (Serie C, no. 70).

[224] For an exception, see: *Bámaca Velásquez*, ibid: Par. 121 (1).

[225] In *Bámaca Velásquez* (Serie C, no. 91): Par. 28.

[226] Such as a Mayan Quiche congresswoman. In *Bámaca Velásquez* (Serie C, no. 91): Par. 20 (d).

> Lack of investigation, persecution, capture, indictment, and punishment of those responsible of violations of the rights protected in the American Convention is the rule. The state has the duty to fight such situations with all legal means at its disposal, because impunity fosters chronic repetition of human rights violations and total defenselessness of victims and their families.[227]

To end impunity, "**all amnesty provisions, provisions on statutes of limitations** and … measures designed to eliminate responsibility **are inadmissible** . . . [in] disappearances." [Emphasis added].[228] Thus, according to the Court, self-amnesties violate articles 1, 2, 8 and 25 of the American Convention on Human Rights[229] and the victims relatives' right to the truth.[230] For example, although in Peru disappearances constitute a crime against humanity since 1992, amnesty laws make this legislation useless.[231] Nevertheless, the Court's position is insufficient because it "implicitly leaves the door open to amnesties designed to further purposes . . . such as reconciliation or political transition from a repressive regime."[232]

As a rule, the IACtHR considers disappearances as a continuous crime, but, it has broken its precedent several times including more recently in 2005—in the case of a crime committed before the state's acceptance of the Court's jurisdiction—[233]by

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[227] *Castillo Páez* (Serie C, no. 43): Par. 107, refers to the definition established in *Paniagua Morales* (Serie C, no. 37): Par. 173. And for the damages derived from impunity, see: *Bámaca Velásquez* (Serie C, no. 91): Par. 29 (B) e.

[228] *Barrios Altos vs. Perú,* Sentencia de Fondo de 14 marzo de 2001, Ser. C, no. 75: Par. 41.

[229] For the Court's arguments in detail, see: Ibid, 41-44.

[230] First mentioned directly in *Bámaca Velásquez* (Serie C, no. 70): Voto Razonado Concurrente del Juez Sergio García Ramírez, Pars. 2-9.

[231] See: *Barrios Altos* (Serie C, no. 75): Pars. 108 and 100 respectively. Peruvian agents involved in the fight against terrorism are granted amnesty. On the ill effects of amnesties, see: Ibid, Voto Razonado Conjunto de Cançado Trindade y Abreu Burelli. And on its positive effects, its inadmissibility in disappearances notwithstanding, see: Ibid, Voto Razonado del Juez Sergio García Ramírez, Pars. 6-8.

[232] Wilson and Perlin, "The Inter-American Human Rights System": 656-7.

[233] *Hermanas Serrano Cruz* (Serie C, no. 118): Par. 95.

considering that it is possible to distinguish in the crime of disappearances two different relevant moments. First, the moment when the victim was kidnapped and killed, which is beyond the Court's jurisdiction because the accused state had not yet accepted its jurisdiction. And second, the moment when the victim's whereabouts started to be unknown, which last until the present time and over which the IACtHR can exercise its jurisdiction.[234] However, the Court asserted its jurisdiction in a case in which "some of the facts [occurred] prior to the ratification of the American Convention," because a decision of the Bolivian Supreme Court showed that there was "no objection from the sued State."[235]

In *Hermanas Serrano Cruz*, the Court overcame state's objections to its jurisdiction based on the time in which the abductions happened by basing its prosecution on the violation of the 1969 Convention on Human Rights instead of the Convention on Disappearances.[236] Here the Court seemed to forget that the victims' death is indifferent to the crime because the violation still exists due to not knowing what happened to the two disappeared sisters. However, breaking such continuity was insufficient for dissenting *ad hoc* Judge Alejandro Montiel Argüello who maintained that the court lacked jurisdiction because the crime happened before El Salvador accepted its jurisdiction and because the domestic remedies were not exhausted.[237]

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[234] *Blake* (Serie C, no. 27): Sec. XI (1) (Unanimity).

[235] *Trujillo Oroza* (Serie C, no. 92): Par. 72. It shows the Court's excessive state-centrism.

[236] *Hermanas Serrano Cruz* (Serie C, no. 118): Par. 105. It is a regressive decision, see: Ibid, Dissenting Vote of Cançado Trindade, Pars. 54-56.

[237] Ibid: 143 (3) and (7); and Dissenting Vote of Judge Alejandro Montiel Argüello, ibid: Pars. 7 and 18.

Nevertheless, in other cases the IACtHR underscored the continuity of the crime supported by several judges including Judge Sergio García Ramírez, for whom it is irrelevant that the facts started before Bolivia ratified the Convention;[238] and Judge Charles Brower, who preferred the use of *forum prorogatum,* i.e., Bolivia's acceptance of the Court's jurisdiction,[239] which makes it liable for the violation of this continuous crime. For Judge Antônio Augusto Cançado Trindade, once a country ratifies the Convention on Human Rights it has to protect such rights and it is responsible for their violation whether it accepted the Court's jurisdiction or not.[240]

The concept of victim was widened to include the relatives of the disappeared. In this sense *Bámaca Velásquez* constitutes a welcomed innovation because the Court establishes a connection between the persons presumed dead and their families,[241] especially among indigenous people for whom family includes the dead.[242] Thus, it is essential to force governments to investigate the whereabouts of the victim.

Verdicts in this phase are more detailed and emphasize that security concerns cannot curtail due process and respect for human rights.[243] More specifically, the Court found almost invariably a violation of the following articles of the Convention on Human

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[238] *Blake* (Serie C, no. 36): Par. 67. And *Trujillo Oroza* (Serie C, no. 92): Voto razonado de A.A. Cançado Trindade, Par. 10. In Pars. 11 and following he refers to examples of the evolution of the law.

[239] *Trujillo Oroza* (Serie C, no. 92), ibid: Voto Razonado del juez Charles N. Brower, Par. 5.

[240] *Blake* (Serie C, no. 36): Par. 67. Judge Cançado Trindade, Concurring Vote, Par. 32.

[241] *Bámaca Velásquez* (Serie C, no. 70): Voto Razonado de Cançado Trindade, Pars. 13 and 40. The opinion of the ICJ on the Western Sahara of 1975 is named as a precedent.

[242] *Bámaca Velásquez* (Serie C, no. 91): Par. 21. Based on Ana Deutsch's expert testimony.

[243] *Bámaca Velásquez* (Serie C, no. 70): Par. 174.

Rights with respect to the disappeared individuals: article 4 (right to life),[244] art. 5 (prohibition against inhuman treatment and torture), art. 7 (right to individual freedom),[245] arts. 8 and 25 (right to judicial guarantees, including the right to know the truth),[246] all of them in relation to article 1 (1) of the American Convention on Human Rights, which establishes a general duty of the state party to it "to respect the rights and freedoms [in the Convention] . . . and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination. . . ."[247] In addition, the IACtHR concluded that the rights of "articles 8 and 25 (right to judicial guarantees) . . . in relation to art. 1.1," are violated with respect to the family of the disappeared[248] and that disappearances constitute cruel and inhuman treatment for the victims and their families.[249]

In decisions adopted after the entry into force of the Conventions on Torture and on Disappearances, the Court has stated that disappearances violate article I of the Convention on Disappearances—underlining its non derogable status and the duty of

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[244] *Bámaca Velásquez* (Serie C, no. 70): Par. 175 and 230. 3 (Unanimous Verdict). For rejection of precedent, see: Below, Fn. 258.

[245] Ibid: Pars. 144 and 230 (1) (Unanimous Verdict).

[246] Ibid: Par. 210.

[247] Ibid: Par. 230. 6; *Caballero Delgado y Santana* (Serie C, no. 22): Par. 72.1 (Verdict); *Castillo Páez* (Serie C, no. 24): Verdict, 5; *Paniagua Morales* (Serie C, no. 37): Par. 181. 7 (Verdict); *Blake* (Serie C, no. 36): Par. 124 (Verdict); and *Molina Theissen* (Serie C, no. 108): Par. 74. It is also a violation of 2, 17 and 19.

[248] *Bámaca Velásquez* (Serie C, no. 70), ibid: Pars. 195 and 230. 5 (Unanimous).

[249] "The test … based on recent jurisprudence of the [ECtHR] . . . requires an analysis of the intimacy of the . . . relationship, . . . the degree to which the family . . . witnessed the facts . . . , involvement . . . to obtain information . . . , and the State response." In Wilson and Perlin, "The Inter-American Human Rights System": 669-70. For the reproduction of this European jurisprudence, see: *Bámaca* (Serie C, no. 70), ibid: Pars. 162-3 and 165-6.

governments to fight impunity and to cooperate with each other.[250] In addition, whenever the domestic level has failed to enact legislation penalizing the crime of disappearances, the IACtHR declares a violation of art. 2 of the Convention on Human Rights, art. III of the Convention on Disappearances,[251] and arts. 1, 2, 6 of the Inter-American Convention on Torture.[252] Due to their "accessory character," the IACtHR rejected the victim representatives' petitions to decide on the violation of articles 17 (protection of the family)[253] and 3 (right to judicial personality)[254] of the Convention on Human Rights.

Nevertheless, the IACtHR treats cases involving disappeared children differently by finding that the state has violated additional articles of the Convention on Human Rights, i.e., arts. 17 (protection of the family), 18 (right to one's own name) and 19 (children's rights) in relation to 1 (1) plus and arts. 1 and 6 of the American Convention on Torture;[255] *Hermanas Serrano Cruz* is an exception.[256]

The Court's jurisprudence relative to the violation of article 4 of the American Convention on Human Rights (right to life) changes according to the minors' age and the existence of corpses, thus undermining a uniform approach to the concept of the crime of

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[250] *Trujillo Oroza* (Serie C, no. 92): Pars. 102 and 141 (1) and (5) (Verdict).

[251] *Trujillo Oroza* (Serie C, no. 92): Pars. 96-7.

[252] *Bámaca Velásquez* (Serie C, no. 70): Par. 230 (7) (Verdict); and *Bámaca Velásquez* (Serie C, no. 91): Par. 87.

[253] *Castillo Páez* (Serie C, no. 24): Par. 86.

[254] *Bámaca Velásquez* (Serie C, no. 70): Pars. 181 and 230 (4) (Unanimous Verdict). Moreover, the violation of such right is inherent to death and is not mentioned in the Convention on Disappearances. See: Ibid, Par. 180.

[255] *Villagrán Morales vs. Guatemala*, Excepciones Preliminares, Sentencia de 11 de septiembre de 1997, Serie C, no. 32: Par. 2.

[256] *Hermanas Serrano vs. El Salvador*, Sentencia de 1 de marzo de 2005, Serie C, no. 120: Par. 125. For a contrary position, see: *Hermanas Serrano Cruz,* ibid: Voto Disidente de Manuel E. Ventura Robles, Par. 7.

disappearances. In *Villagrán Morales* the teenagers' disappearances violate their right to life;[257] in *Hermanas Serrano Cruz* the Court denied such violation because "all the youngsters . . . that disappeared in . . . May 1982 as children [the case of these two sisters], were found alive."[258] However, this distinction underlines the special characteristics of the concept of disappeared children, as summarized in chapter I of the dissertation.

On the issue of compensation, it is a general rule of international law that states must pay reparations for lack of compliance with their duty to protect citizens from disappearances and to end impunity. Rarely, based on the theory of risk, the IACtHR has found a state responsible even when it has done everything in its hands to provide justice to the victims and their families. For example, in *Caballero Delgado* two persons kidnapped by members of the Colombian armed forces and other authorities are presumed dead after more than six years without any news from them and, even though a process opened in Colombia to prosecute those accused of the crime, the IACtHR (four votes to one) imposed on Colombia the duty to compensate the victims' relatives for their suffering. A judge dissented because "to impose the [duty] to compensate, it is necessary to prove that the Convention [on Human Rights] has been violated."[259]

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[257] *Villagrán Morales* (Ser. C. No. 32): Par. 2.

[258] *Hermanas Serrano* (Serie C, no. 120): Pars. 131-2.
In favor of the precedent affirming the violation of the right to life, see: Ibid, Voto Disidente de Cançado Trindade: Pars. 32 and 42. Moreover, in par. 35, Cançado Trindade names a precedent of the EctHR, i.e., "*Chipre versus Turquía* (Sentencia del 10.05.2001) . . . Par. 132-36."

[259] *Caballero Delgado* (Serie C, no. 22): Dissenting Judge Rafael Nieto Navia, P. 6.

As aforementioned all disappeared suffer moral damages, which are passed on to their legal heirs.[260] Moreover, family members are awarded compensation for their own moral damages, but who constitutes "family"? "[A]ccording to art. 2.15 of the Rules of Procedure . . . 1 July 2001 . . . [family] is a wide concept that includes . . . children, parents and siblings;"[261] a presumption admitting contrary evidence. For example, the IACtHR considered suffering limited when brothers are not close;[262] and inexistent when children do not know their father.[263] Communities that alleged suffering in these cases must prove damages always.[264]

In certain instances, the crime affects the victims' family directly, i.e., reprisals can follow demands for information and/or justice. For example, Trujillo Oroza's mother was unjustly fired from her job, and government officials abused her husband and her.[265] Similarly, in *Bámaca*, the Court compensated his wife because she had to leave her work to try to find her husband and demand justice.[266] Moreover, the Court assumed that since the war ended in Guatemala, Bámaca Velásquez would have been a provider for his

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[260] *Paniagua Morales,* Reparaciones, Sentencia 25 de mayo del 2001, Serie C, no. 76: Par. 84; and *Trujillo Oroza* (Serie C, no. 92): Par 56 and *Garrido y Baigorria* (Serie C, no. 39): Pars. 43 and 45.

[261] The Rules reflect jurisprudential progress: At the beginning, siblings had to prove the affective link (*Castillo Páez*, Serie C, no. 43: Par. 89). Starting in *Paniagua Morales* (Serie C, no. 76): Voto Razonado de Roux Rengifo) compensation is granted without proof but only for an amount of $1,000; and Trujillo Oroza (Serie C, no. 92): Par. 57. For a brief list of presumptions on reparations, see: Wilson and Perlin, "The Inter-American Human Rights System": 698-701.

[262] *Garrido Baigorria* (Serie C, no. 39): Par. 63.

[263] Ibid: Par. 65.

[264] *Castillo Páez* (Serie C, no. 43): Par. 93. It cites *Aloeboetoe, Reparaciones*: Par. 83.

[265] *Trujillo Oroza* (Serie C, no. 92): Par. 46.

[266] *Bámaca Velásquez* (Serie C, no. 91): Par. 29 (B) b, d, and g.

parents and sisters, as is traditional among the Mam.[267] As a result, the IACtHR took into account his projected earnings when deciding the amounts that Guatemala had to pay to his heirs.

The amount of pecuniary reparations has increased and, as a rule, governments have six months to pay them.[268] Although the Court follows precedent in fixing them, "each case must be analyzed in its specific details"[269] because moral damages for disappearances "can only be repaired, via substitution, through a pecuniary compensation . . . fixed according to equity and based on a prudent appreciation of . . . damages, which cannot be fixed precisely . . . The European Court follows the same criteria."[270] This is an adequate solution because moral suffering varies according to the characteristics of the victims.

For example, in *Serrano Cruz* the Court establishes that "if the sisters cannot claim the award . . . within ten years . . . it should be given . . . to their siblings . . . who will have two years to claim them, afterwards it will go back to the State."[271] Since the sisters' mother died, her children inherit the award. Moreover, the government has to pay interest until the beneficiaries claim the money.[272]

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[267] *Bámaca Velásquez* (Serie C, no. 91): Par. 52.

[268] *Trujillo Oroza* (Serie C, no. 92): Par. 84. For the amounts, see: Ibid, Par. 89. And *Castillo Páez* (Serie C, no. 24): Par. 91 (5) (Verdict).

[269] *Castillo Páez* (Serie C, no. 24), ibid: Par. 83; *Garrido y Baigorria* (Serie C, no. 39): Par. 91 (3) (Verdict): Finding children born out of wedlock; *Caballero Delgado* y *Santana* (Serie C, no. 22): Par. 72 (5) (Verdict); and *Caballero Delgado y Santana vs. Colombia*, Reparaciones, 29 de Enero de 1997, Ser. C, no. 31: Par. 66 (4)1 and 2.

[270] *Castillo Páez* (Serie C, no. 43): Par. 84.

[271] *Hermanas Serrano Cruz* (Serie C, no. 120): Par. 218 (19) (Verdict).

[272] Ibid: 218 (29).

The IACtHR has expanded the scope of non-pecuniary reparations[273] and the guarantees toward compliance by imposing on governments the duty to file an implementation report within six months of the verdict, which facilitates court supervision.[274] Since the Court's decision is insufficient as a form of reparation,[275] it adopts other non-pecuniary reparations—classified here as honoring the victims' memory, ending impunity, preventing future disappearances, and providing for the victims' families.

Honoring the victims entails proper burial and remembrance ceremonies.[276] For the IACtHR, proper burial usually refers to ordering the government to move the victims' remains to where their families want[277] but in one case it meant establishing a country wide program to exhume bodies.[278] Remembrance ceremonies include naming public buildings—educational centers preferred—[279]after the victims "in the presence of their

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[273] "It is more expansive than the ECtHR since *Aloeboetoe*." In *Villagrán Morales y otros*, Sentencia de 26 de mayo de 2001, Serie C, no. 77: Voto Razonado of Judge Antônio Cançado Trindade, Par. 30:

[274] *Barrios Altos vs. Perú*, Sentencia de 30 de noviembre de 2001, Serie C, no. 87: Par. 50 (7) and (8) (Unanimous Verdict).

[275] *Bámaca Velásquez* (Serie C, no. 91): Par. 60; and *Molina Theissen* (Serie C, no. 108): Par. 106.

[276] Right to know the victims' whereabouts, in *El Caracazo vs. Venezuela,* Reparaciones, Sentencia de 29 de agosto de 2002, Serie C, no. 95: Par. 122; *Velásquez-Rodríguez* (Serie C, no. 4): Par. 181; *Trujillo Oroza* (Serie C, no. 92): Par. 113; and *Bámaca Velásquez*, ibid: Pars. 76 and 143 (3) (Pay for the burial). The government must notify the family of the steps taken to find the remains, see: *Trujillo Oroza*, ibid: Pars. 117 and 141 (1) (Verdict); and *Molina Theissen*: Pars. 85 and 106 (2) (Verdict).

[277] *Durand y Ugarte*, Sentencia de 3 de diciembre de 2001, Serie C, no. 89: Par. 45. 4. d); *Villagrán Morales* (Serie C, no. 77): Pars. 102 and 123.6 (Verdict). In this last Par. the Court places this duty in bold and capital letters. On the mother's perspective, see: *Villagrán Morales* (Serie C, no. 62): Voto Razonado of Cançado Trindade, Par. 10.

[278] *Bámaca Velásquez* (Serie C, no. 91): Par. 83. In Par. 106 (1) (Verdict).

[279] *Molina Theissen* (Serie C, no. 108): Par. 106 (6) (Verdict).

relatives;"[280] erecting public monuments;[281] and "establishing a day for disappeared boys and girls.[282]

The Court also seeks to end impunity. Thus, states must investigate the crime[283] and prosecute the accused.[284] For that purpose, national legislation must be adapted to international standards by repealing amnesty laws; ratifying relevant treaties;[285] complying with article 19 of the American Convention on Human Rights and art. VIII of the American Convention on Disappearances;[286] typifying the crime of disappearances in their legislation;[287] and protecting witnesses.[288] In the case of disappeared children, governments must try to find them alive.[289] Thus, the creation of "the Inter-institutional Commission for Finding Boys and Girls Disappeared as a Consequence of the Armed Conflict," in October 2004 in El Salvador[290] is an important advancement.

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[280] *Molina Theissen* (Serie C, no. 108): Par. 122. And Section XI, Puntos Resolutivos, Par 141 (5).

[281] *Barrios Altos* (Serie C, no. 87): Par. 50 (5) (Unanimous).

[282] *Hermanas Serrano Cruz* (Serie C, no. 120): Par. 218 (10).

[283] *El Caracazo* (Serie C, no. 95): Pars. 117 and 143 (1) (Verdict); and *Molina Theissen* (Serie C, no. 108): Pars. 74 (a), 77 (a), and 106 (3) (Verdict).

[284] *Garrido y Baigorria* (Serie C, no. 39): Pars. 74 and 9 (4) (Verdict); *Trujillo Oroza* (Serie C, no. 92): Par. 141 (3) (Verdict); and *Las Hermanas Serrano* (Serie C, no. 120): Par. 218 (7) (Verdict).

[285] *Garrido y Baigorria*, ibid: Par. 85; *Castillo Páez* (Serie C, no. 4): Par. 118 (2) (Unanimous Verdict); *Molina Theissen* (Serie C, no. 108): Pars. 89-91 and Par. 106 (7) and (8); and *Barrios Altos* (Serie no. 87): Par. 50 (5) a and c (Unanimous).

[286] *Barrios Altos* (Serie C, no. 87): Par. 86.

[287] *Trujillo Oroza* (Serie C, no. 92): Pars. 98 and 141. 2 (Verdict); and ibid: Par. 141 (10).

[288] *Caballero Delgado* (Serie C, no. 17): Par. 15; and ibid. (Serie C, no. 22): Par. 19.

[289] *Hermanas Serrano Cruz* (Serie C, no. 120): Par. 218 (6).

[290] Ibid: Par. 48 (13).

Moreover, the Court affirms that states should prevent future disappearances,[291] which includes establishing a "registry of detainees;"[292] educating authorities on the illegality of this practice;[293] publishing the decisions of the Court entirely or partially via the official gazette of the state or newspapers;[294] and recognizing their responsibility in public ceremonies.[295] Evolving with the times, the Court recently prescribed "a link to the complete text of the decision . . . on a web page. . . ."[296]

Finally, the Court protects the families of the victims. Not only does the IACtHR emphasize the importance of education—demanding scholarships to cover the cost of the tuition, books, and uniforms for the victims and their relatives—[297]but also of physical and mental health. For example, the IACtHR compels governments to tell the victims' relatives which facilities will provide them with the awarded "medical and psychological treatment" within six months of the verdict.[298]

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[291] *Hermanas Serrano Cruz* (Serie C, no. 120): Par. 110.

[292] *Paniagua Morales* (Serie C, no. 76): Par. 203 and Verdict, Par. 229 (4).

[293] Ibid: Par. 143 (4) and (5). See: Art. VIII of the Convention on Disappearances.

[294] *Trujillo Oroza* (Serie C, no. 92): Pars. 119 and 141.4 (Verdict). Also publish the agreement, the apology and the promise of no new violations, in *Barrios Altos* (Serie C, no. 87): Par. 50 (5) e (Unanimous); *Durand y Ugarte* (Serie C, no. 89): Par. 45.4 (Verdict); *Castillo Páez* (Serie C, no. 43): Par. 96; partially in *Molina Theissen* (Serie C, no. 108): Pars. 86 and 106 (3) (Verdict). The ECtHR admits it too.

[295] *Molina Theissen*, ibid: Pars. 87 and 106.5 (Verdict); and *Hermanas Serrano Cruz* (Serie C, no. 120): Par. 8.

[296] *Hermanas Serrano Cruz*, ibid: Par. 218 (9).

[297] *Barrios Altos* (Serie C, no. 87): Par. 50 (4) (Unanimous).

[298] *Hermanas Serrano Cruz* (Serie C, no. 120): Par. 218 (11). It goes beyond pecuniary compensation for medical expenses, which happened in *Trujillo Oroza* (Serie C, no. 92): Par. 74.

3. CASES IN WHICH COUNTRIES AGREE TO THE FACTS OF THE CASE

Cases in which countries agree to the facts of the case are less cumbersome that those examined in the previous two subsections because instead of examining preliminary exceptions and factual evidence, [299] the Court can proceed immediately to establish reparations and costs and expenses. This subsection focuses on: first, main cases to show how the crime of disappearances has affected different types of people in a variety of Latin American countries. And second, an evaluation of this type of decisions.

a. Main Facts

José Carlos Trujillo Oroza—a 21 year-old philosophy major from Bolivia—was illegally detained on 23 de December 1971 and sent to a prison called El Pari." [300] After 23 days missing, his mother located him, and during a visit she discovered that he was being tortured.[301] Then she lost contact again and it is stated that he disappeared definitively on Feb. 2, 1972.[302] It took the authorities almost 27 years to start any procedure in this case[303] and even longer to recognize their responsibility.[304]

Molina Theissen—a 14-year old from a politically active family in Guatemala—disappeared on 6 October 1981 after being abducted forcefully from his home to punish

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[299] See: Above, Ch. III, Sec. C.2.d.

[300] *Trujillo Oroza*, Sentencia de 26 de enero de 2000 (Serie C, no. 64): Pars. 1 and 2 (a).

[301] Ibid: Par. 2 (b) and (c); and *Trujillo Oroza* (Serie C, no. 92): Par. 46.

[302] *Trujillo Oroza* (Serie C, no. 64), ibid: Pars. 2 (e) and (g), and 18 (e).

[303] Ibid: Par. 2 (g).

[304] Ibid: Pars. 33-4, 36 and 43 (3).

his sister for her trade union activities; [305] disappearances were then a generalized practice in that country.[306] Justice was hindered because the victim's family had to flee.[307] Finally, after more than twenty years since the abduction the government accepted its responsibility.[308]

The Venezuelan government recognized that members of its military confused a group of fishermen with guerrilla fighters and killed fourteen of them; two escaped.[309] Although reparations were left for a future compromise between the victims and the government, the Court reserved for itself the power to intervene as needed.[310] Since the deadline fixed for the agreement was violated, the IACtHR awarded $722,332.20 to the victims and their families but rejected non-pecuniary reparations[311] and expenses.

In addition, the Court rejected "the Commission's petition to examine and decide . . . on the incompatibility . . . of . . . the Venezuelan Code of Military Justice with . . . the American Convention on Human Rights"[312] because it would have lengthened the process and such code had not been applied to the case examined before the Court. However, Judge Cançado Trindade objected to this refusal because he believed that "the

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[305] *Molina Theissen vs. Guatemala*, Sentencia de 4 de Mayo del 2004, Serie C, no. 106: Par. 40 (9) and 12.

[306] Ibid: Par. 40 (1-6).

[307] Ibid: Par. 40 (13).

[308] Ibid: Par. 7. Admitted by the Court, in ibid: Par. 47 (1) (Verdict).

[309] *El Amparo vs. Venezuela*, Sentencia de 18 de enero de 1995, Serie C, no. 19: Pars. 17 and 18 and 10-12.

[310] Ibid: Par. 21. And Unanimous Verdict, 3 and 4.

[311] Basically a public recognition of the facts and responsibility by the government. In *El Amparo vs. Venezuela,* Reparaciones, Sentencia de 14 de septiembre de 1996, Serie C, no. 28: Par. 50.

[312] Ibid: Par. 64.5.

American Convention [on Human Rights] . . . authorizes the Court, in the exercise of its adjudicatory jurisdiction, to decide whether a law questioned by a plaintiff [even if it did not apply to that concrete plaintiff] . . . is contrary to the Convention."[313] Otherwise, the Court will be contravening the general duty to guarantee human rights of art. 1 of the Convention.[314]

Ana Elizabeth Paniagua Morales disappeared—the government confirmed the crime and the location of her corpse later on—[315]as part of a generalized practice of illegal detentions by members of the Guatemalan Finance Police, who forced victims into white pickup trucks.[316] This case involved another ten victims. All of them tortured; six killed.[317] The Court admitted police reports as circumstantial evidence.[318] In addition, and according to the Inter-American Commission of Human Rights, 'the [Guatemalan] government never challenged the fact that the aforementioned crimes had happened ….'[319] But, although the IACtHR found Guatemala responsible for such crimes because it was proven that the government was "supporting or allowing the violation … [or inactive] to identify, and . . . to punish the authors of the violations,"[320]

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[313] *El Amparo* (Serie C, no. 28): Voto Disidente del Juez A.A. Cançado Trindade, Par. 11, in fine.

[314] Ibid: Par. 4.

[315] *Paniagua Morales* (Serie C, no. 23): Par. 15.

[316] *Paniagua Morales* (Serie C, no. 37): Sec. IX, "Proven Facts," Par. 89 (a), (b), and (c).

[317] Ibid: Sec. VII.

[318] Ibid: Par. 81.

[319] Ibid: Par. 14.

[320] Ibid: Sec. X, Par. 91. For further details, see: Pars. 92-95.

Guatemala alleged that "the domestic mechanisms [to provide justice to the victims] had worked" and thus refused to acknowledge any responsibility in this case.[321]

On 28 April 1990 Argentinean policemen detained Adolfo Argentino Garrido Calderón—"a detention order was pending against him"—[322]and Raúl Baigorria Balmaceda."[323] Since Argentina agreed to the facts and its responsibility there was no need to prove the victims' moral damages, they are presumed.

To stop riots in el Caracazo, Venezuelan President Carlos Andrés Pérez approved a military operation (28 February to 22 March 1989) with a death-toll of more than 276 civilians due to the disproportionate use of force by an inexperienced army full of 17 and 18-year old conscripts.[324] The victims were thrown into common graves.[325]

In Colombia between the 15 and 20 of July 1997 forty-nine people disappeared; some were tortured.[326] Colombia recognized its responsibility on 7 March 2005 but the Commission and the representatives of the victims found it insufficient. [327] The Court stated that "since the State ha[d] recognized its responsibility, . . . it ha[d] accepted implicitly the full jurisdiction of the Court to hear the present case."[328]

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[321] *Paniagua Morales* (Serie C, no. 37): Par. 14.

[322] *Garrido y Baigorria* (Serie C, no. 39): Par. 5.

[323] Ibid: Par. 3.

[324] *El Caracazo vs. Venezuela*, Sentencia de 11 de noviembre de 1999, Serie C, no. 58: Par. 2 (e).

[325] Ibid: Par. 2 (m) and (n).

[326] See: *Masacre de Mapiripán vs. Colombia*, Sentencia de 7 de marzo de 2005, Serie C, no. 122: Par. 32 (3) (Verdict).

[327] *Masacre de Mapiripán* (Serie C, no. 122): Pars. 17-8 and 21-2.

[328] Ibid: Par. 30.

b. Special Characteristics

The Court considers the governments' recognition of the facts and/or responsibility is "a positive contribution . . . to the validity of the principles that inspired the American Convention on Human Rights."[329] Thus, governments benefit from more time to comply with the reparations.[330] Moreover, victims are protected too because the Court awards reparations and supervises their execution.[331]

Although recognition of responsibility is rarer,[332] the mere recognition of the facts validates the victims' claims. That is why in these cases the court decision is by itself a powerful means to repair moral damages.[333] In addition, there are other practical advantages. First, victims suffer less at the hands of the state because they are not victimized again; and second, a shorter process means older family members will find some degree of justice—including recuperating their previous standard of living—before dying.

D. RELATIONSHIP BETWEEN THE IACtHR AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

The European system of protection of human rights is considered the most advanced in the world due in part to the widespread respect for human rights in the region since the signing of the 1950 European Convention on Human Rights and Fundamental

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[329] In *Trujillo Oroza* (Serie C, no. 64): Par. 42. Ibid: Verdict, Point 2.

[330] *El Caracazo* (Serie C, no. 95): Par. 143. 12. In twelve months.

[331] Ibid: Par. 143 (14).

[332] When it happens, it may not be complete. See: *Gómez Palomino vs. Perú*, Sentencia de 22 de noviembre de 2005 (Serie C, no. 136): Pars. 62-63 and 93 (limited to the direct victim, his mother, his "common law wife," and his daughter). Thus, the IACtHR extends the responsibility of the state to the violation of the right to personal integrity (art. 5 of the American Convention of Human Rights) of several of Mr. Santiago Gómez Palomino's relatives, ibid: Par. 113.

[333] *Trujillo Ooroza* (serie c, no. 92): Par. 118.

Freedoms (ECHR), which the ECtHR is in charge of implementing.[334] Nevertheless, the crime of disappearances—however limited mainly to Turkey and the Russia Federation—still affects unprotected groups as it did in Latin American and only recently has it been tackled by the Court.[335]

Although, similarly to its American counterpart, the European Convention lacks a specific reference to disappearances; the ECtHR has developed jurisprudence on the matter that can be compared to the IACHR's. The comparison is significant because both courts use each others' decisions as precedents.[336] Thus, this section, after a brief reference to the main differences between the two courts—studied with more detailed in Chapter III—focuses on the main jurisprudential findings of the ECtHR and the evaluation of the relationship between the courts.

1. RELEVANT DIFFERENCES BETWEEN THE ECtHR AND THE IACTHR

Notwithstanding the European Court's longer history and better record regarding the protection of human rights, its American counterpart has been and continues to be—in many respects—a pioneer on disappearances. From a procedural perspective, the more

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[334] It entered into force in 1953. See: Henry J. Steiner and Philip Alston, "International Human Rights in Context: Law, Politics, Morals," 2nd Ed. (Oxford: Oxford University Press, 2000): 786-8; Janusz Symonides, "Access of Individuals to International Tribunals and International Human Rights Complaints Procedures." In Corte Interamericana de Derechos Humanos, "Memoria del Seminario: El Sistema Inter-americano de protección de los Derechos Humanos en el Umbral del Siglo XXI, San José, Costa Rica: 23 y 24 de Noviembre de 1999," Tomo I (2001): 484; and http://www.echr.coe.int.
From now on ECtHR or European Court.

[335] Based on a review of the cases solved or initiated.

[336] A consequence of increased transnationalism. The European Court has been working for a longer time and its decisions are complied with; the American one could be considered "the new kid on the block" of regional courts but its relevant work on disappearances has made it a model followed by the ECtHR. For the influence of the European Court in the jurisprudence of the Inter-American one, see: Above, Fn. 16.

salient differences are:[337] first, the elimination in November 1998 of the European Commission.[338] Second, the granting of individual standing before the European Court.[339] Third, the right to appeal the decisions of the European Court before the Grand Chamber.[340] And finally, even though English and French are the working languages used in the European Court's hearings,[341]documents have to be translated into more than 20 languages.

2. RELEVANT JURISPRUDENTIAL FINDINGS

Before analyzing its findings, it is important to underline that the ECtHR—like the IACtHR—is a civil court that does not impose punitive damages and it is subsidiary to domestic jurisdictions.[342] Thus, after the Court declares that a state has violated the ECHR, it fixes the compensation the state has to pay to the victim but only in the absence of adequate domestic remedies.[343] Although the Commission "first dealt with disappearances in respect of Greek Cypriots missing in the wake of the military occupation by Turkey in July 1974,"[344] the focus of the dissertation is on the decisions of

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[337] See: Above, Ch. V. Sec. D.1.

[338] Registrar of the European Court of Human Rights, "Historical Background, Organisation and Procedure," http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm (Accessed: June 7, 2005): I.B, Par. 6.

[339] Article 6 (1) of the European Convention of Human Rights (ECHR). And article 35 of ibid. For the more intense formalism of the ECtHR, see: Claire Kilpatrick, Tonia Novitz and Paul Skidmore, Eds., *The Future of Remedies in Europe* (Oxford, England: Hart, 2000): 23.

[340] Art. 43 of the ECHR.

[341] The American region is quite uniform because Canada and US reject the Court's jurisdiction.

[342] For the decisions of the Court, see: European Court of Human Rights, http://www.echr.coe.int.

[343] Art. 41 of the ECHR.

[344] See: International Committee for Human Rights, "Enforced Disappearances," http://www.ichr-law.org/english/expertise/areas/disappearances.htm (Accessed: December 3, 2004). For a summary of its main points, see: Frank Hoffmeister, "Cyprus v. Turkey. App. No. 25781/94," *American Journal of International Law* vol. 96, no. 2 (April 2002): 445-52.

the Court; more specifically on decisions handed down after the entry into force, on 1 November 1998, of the aforementioned Protocol 11,[345] which eliminated the Commission and made the Court's jurisdiction and individual standing before the Court compulsory

a. Facts

Most processes are initiated by individuals trying to overcome impunity at the domestic level via a decision of the ECtHR but an exception is *Cyprus v. Turkey*—initiated by a state against another state. Geographically, the bulk of the cases decided by the ECtHR involve Turkey authorities and the disappearance of Kurdish people presumed to have ties to the K.L.M. (Kurdish Liberation Movement).[346] However, on July 2006 the ECtHR handed down its "first ruling on a Chechen disappearance.'"[347]

b. Rights Violated by Disappearances

As happens in the American system, the plaintiffs in disappearance-related cases expect the ECtHR to declare a violation of the right to life (article 2 of the ECHR); to liberty (art. 5);[348] to proper judicial redress (art. 13); and of the prohibition of torture and cruel treatment (art. 3 of the ECHR). In practical terms, the ECtHR has consistently found a violation of the right to life and of liberty of the disappeared; to access justice (art. 13); and interference with the right to individual petition (art. 25 of the ECtHR). In

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[345] Registrar of the European Court of Human Rights, "Historical Background, Organisation and Procedure": I.B, Par. 6," http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm (Accessed: June 7, 2005). See: Above, Ch. III, Sec. D.1.

[346] Kurds make up "one-fifth of Turkey's population" in Irum Taqi, "Note: Adjudicating Disappearance Cases in Turkey": 965 and 967.

[347] Human Rights Watch, "Chechnya: 'Disappearances' a Crime Against Humanity: EU Fails to Take Action," (Geneva, 21 March 2005), http://hrw.org/english/docs/2005/05/21/russia10342.htm (Accessed: June 7, 2005). The Russian government recognizes 2,090; human rights groups between 3,000 and 5,000; and Human Rights Watch, "Russia Condemned for 'Disappearance' of Chechen: Europe's Top Human Rights Court Issues First Ruling in Chechen Disappearance Case" (Moscow, 27 July 2006), http://hrw.org/english/docs/2006/07/27/russia13864.htm (Accessed: September 19, 2006).

[348] *Akdeniz and Others v. Turkey* [2001] ECHR 349 (31 May 2001): Pars.106-8.

Cyprus v. Turkey (2001), the Court established that the crime of disappearances constitutes a violation of several rights, including the following:

> [A] continuing violation of the right to life because an effective investigation has never been undertaken into the whereabouts and fate of the Greek Cypriot missing persons. . . . [C]ontinuing violation of the right to liberty under article 5 of the Convention. . . . **[T]he silence of the Turkish authorities in the face of the legitimate concerns of the missing persons' relatives was inhuman treatment within the meaning of Article 3 of the Convention**.[349] [Emphasis added].

Whenever a person has last been seen in governmental custody, the state must investigate his/her whereabouts and "establish the factual groundwork for prosecuting the perpetrators."[350] Moreover, for the ECtHR, lack of investigation and information about the disappeared violates the right to life.[351]

c. Evaluation of Evidence

In some relevant aspects the ECtHR's position differs from that of the IACtHR. As a rule, the ECtHR has been hesitant to find a pattern of disappearances and has not explained why. An example is *Kurt v. Turkey* (1998). The non recognition of a pattern of disappearances fosters impunity by making it more difficult to prove the crime because, the state, that has in its hands the evidence of the violation, is rarely going to provide evidence implicating its agents in the disappearances.[352] In *Akdeniz*, the Court rejected even discussing the issue of whether there existed a pattern of disappearances.[353]

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[349] Hoffmeister, "Cyprus v. Turkey": 447.

[350] Ibid: 449. And *Cyprus v. Turkey*: Par. 132.
Similarly, the IACtHR, which found in all cases of disappearances a violation of art. 1 (1) of the American Convention on Human Rights, see: Hoffmeister, ibid: 449-50.

[351] *Akdeniz and Others* (31 May 2001): Par. 93.

[352] Singh Sethi, "The European Court of Human Rights' Jurisprudence": 29.

[353] *Akdeniz* (31 May 2001): Par. 123.

In *TiImurtas v. Turkey* (2000)—due to higher probability of governmental involvement and of the victims' death due to the passing of time—[354] the Court discarded precedent "[and] permitted . . . circumstantial evidence to establish a violation of the right to life."[355] Similarly, in *Akdeniz and Others v. Turkey* (2001), in which the ECtHR "dr[ew] very strong inferences from the length of time which has passed since the disappearance—over seven years—the lack of any documentary evidence relating to their detention, and from the inability of the government to provide a satisfactory and plausible explanation as to what happened to them."[356] Nevertheless, *ad hoc* Judge F. Gölcüklü rejected this position in his dissent because it was contrary to the precedent set in *Kurt*, which required proof "beyond a reasonable doubt."[357] In addition, in this case the Court accepted that there was inhuman and degrading treatment[358] but not torture by itself. Furthermore, the Court does not presume that every close relative of the disappeared inhuman and degrading treatment.[359]

d. Damages and Compensation: Types and Quantity

Compensation includes material and moral damages. The disappeared are awarded compensation for moral damages whenever it is proven that they "had been arbitrar[ily] det[ained] or torture[d]."[360] These amounts are paid to the heirs of the

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[354] Sing Sethi, "The European Court of Human Rights' Jurisprudence": 29.

[355] Ibid. Similarly in *Cicik v. Turkey* (February 27, 2001).

[356] *Akdeniz* (31 May 2001). Stronger in *Ipek v. Turkey* (2004).

[357] *Akdeniz*, ibid: Partly dissenting Opinion, Par. 1.

[358] Ibid: Pars. 36 and 98.

[359] Ibid: Par. 101. It "will depend on the existence of special factors which give the suffering … a dimension and character distinct from the emotional distress which may be regarded as inevitabl[e]."

[360] Ibid: Par 133. *Kurty* and *Cakiç* are mentioned as precedents.

disappeared as established by the IACtHR too. Moral damages are awarded also to "surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. . . ."[361]

The modality of compensation the ECtHR prefers is pecuniary compensation—fixed in sterling pounds because of its stability.[362] The amounts awarded are similar to those set by the IACtHR; the explanation is that most of the cases involve Turkey, a country whose standard of living is similar to countries in Latin America. Although the European Court does not use non-pecuniary measures—common in the Inter-American Court—the ECtHR considers its own decisions as reparations of moral damages by themselves; the IACtHR 'has relied heavily on the jurisprudence of the [European Court regarding moral damages]."[363] The ECtHR also includes in its decisions the state's obligation to pay legal costs and expenses for the process.

e. Settlement

Occassionally, the ECtHR accepts governmental requests to end the proceedings with a friendly settlement. However, settlements affect the victims' right to justice[364] because of their "unilateral nature . . . [and] loss of victim status which

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[361] *Akdeniz*.

[362] Ibid: Pars. 133-4.

[363] Ben Saul, "Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights," *American University International Law Review* vol. 19, no. 3 (2004): 556.

[364] In settlements, the ECtHR strikes the petition out of the list with basis on art. 37.1 of the ECHR. See: *Togcu v. Turkey*[2002] ECHR 407 (9 April 2002): Pars. 32-3, showing the secrecy of settlement procedures. Similarly in *T. A. v. Turkey* [2002] ECHR 406 (9 April 2002).

presupposes that the state acknowledges the violations and then fully compensates them."[365]

The problematic surrounding settlement is concisely exposed by dissenting Judge L. Loucaides, who underlined that Turkey does not recognize its responsibility and seems to dismiss the Court in favor of the Council of Ministers: "the solution adopted may encourage . . . States – especially those facing serious or numerous applications – to 'buying-off' complaints . . . through the payment of *ex gratia* compensation, without admitting responsibility and without any adverse publicity."[366]

3. EVALUATION OF THE RELATIONSHIP

Both courts are complementary of domestic efforts and only decide cases when all available domestic remedies are exhausted. European jurisprudence on disappearances is more recent than that of the IACtHR,[367] which is the paradigm in this area,[368] and it has developed differently on major issues such as settlement of cases and standard of proof.

Although both systems underline the need to promote friendly settlement, the European Court seems more forceful by ending the process without fixing the modality and quantity of the compensation. Even though a settlement seems more reasonable in Europe where the rule of law is better established, the ECtHR can foster impunity or partial justice because the government does not have to recognize the facts or its responsibility.

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[365] *T. A. v. Turkey* (2002): Concurring Opinion of Judge J. P. Costa.

[366] Ibid: Dissenting Opinion of Judge L. Loucaides.

[367] Singh Sethi, "The European Court of Human Rights' Jurisprudence": 29 and 30.

[368] Saul, "Compensation for Unlawful Death in International Law": 584-5.

Since, as a rule, the ECtHR sets a harder standard of proof than the IACtHR—sometimes beyond a reasonable doubt—it rarely finds patterns of disappearances.[369] Thus, it is difficult for the victims to prove that specific persons have been subjected to enforced disappearance and to presume that the disappeared are dead. However, the European Court does not adhere to precedent in its disappearance-related cases and has relaxed such standards in certain cases.[370]

For example, while in the *Kurt* case the ECtHR did not presume that the disappeared victim was dead, it did so in *Timurtas* based on the length of time that had passed since each of the victims disappeared—four and a half in *Kurt* and six and a half in *Timurtas*.[371] In addition, the ECtHR uses also a more stringent standard than the IACtHR when awarding compensation for moral suffering to the family, i.e., it demands evidence, which has to be qualified.

E. EVALUATION OF THE DECISIONS OF THE IACtHR IN DISAPPEARANCES CASES

The evaluation of the judicial implementation of the prohibition against disappearances is based mainly on the legitimacy—real and perceived—of the IACtHR and on its effectiveness.[372] The legitimacy of the Court is linked to its independence and to the protection it affords to the victim and to human rights in general. The efficiency of

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[369] See: Above, Fn. 353-4. However, some experts recommend that it follows the IACtHR's lead. See: Singh Sethi, "The European Court of Human Rights' Jurisprudence": 29.
Kurt, Par. 169.

[370] Singh Sethi, ibid: 30.

[371] Irum Taqi, "Note: Adjudicating Disappearance Cases in Turkey": 940-87. There is a reference in the article to the lack of qualitative difference between these two periods of time.

[372] As done regarding the implementation of the ban on torture.

its implementation is evaluated through the examination of the length of the process and the type of reparations it grants.[373]

Thus, this section is divided into three parts. First, the advantages and disadvantages disappearances-related decisions of the IACtHR present from the perspective of four main issues, i.e., (1) jurisdiction of the Court, (2) state-centrism of the Inter-American system of human rights, (3) victims' participation in the system, and, (4) the Court's degree of effectiveness with a focus on the duration of the processes and on the granting of adequate compensation in favor of the victims. And second, a summary of the IACtHR's significant contributions toward implementing the prohibition against disappearances. And third, a set of relevant recommendations to improve judicial implementation.

1. ADVANTAGES AND DISADVANTAGES OF THE USE OF THE IACtHR TO IMPLEMENT THE PROHIBITION AGAINST DISAPPEARANCES

a. Jurisdiction of the IACtHR

The IACtHR is only compulsory against states that have accepted its jurisdiction. Thus, the Court has no power to address state responsibility for previous violations. However, this temporal jurisdictional limitation does not affect the implementation of the ban on disappearances as it does that on torture because disappearances constitute a continuous crime that does not end until the victims' whereabouts are known and thus, democratic governments that did not participate in the initial violation still have the duty to investigate the crime and prosecute criminally its alleged perpetrators.[374]

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[373] Execution is beyond the scope of the dissertation but for its status, see: www.cidh.es.

[374] Fáundez Ledesma, *El sistema interamericano*: 24.

Nevertheless, the Court sometimes has accepted the *ratione temporis* limitation by rejecting the crime's continuity.[375]

In addition to its temporal limitation, the IACtHR has the aforementioned limitations based on the type of responsibility the Court can address and the type of subject matter it can decide on.[376] As a result, the IACtHR lacks criminal jurisdiction, which means that the Court can examine the facts surrounding the disappearances and establish state responsibility to compensate the victims and their relatives but cannot hand down a decision condemning the individual perpetrators of the crime.

As a consequence, the victims and their families still have to rely on domestic courts—from their own country or from abroad— to pursue the alleged perpetrators of the disappearances criminally. The other jurisdictional limitation of the Court—*ratione materiae* or based on the subject matter of the complaint—does not apply to the crime of disappearances because art. XIII of the Inter-American Convention on Enforced Disappearances recognizes the jurisdiction of the Inter-American Court of Human Rights.

b. State-centrism of the Inter-American System of Protection of Human Rights

Although the American Convention on Human Rights promotes judicial discretion due to its high level of abstraction relative to the Court and its duties, the judges of the IACtHR could have adopted a strict interpretation of that document. Nevertheless, the examination of the Court's jurisprudence on disappearances shows that as a rule it has favored discretion to protect individuals against the worst violations of human rights.

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[375] See: Above, footnotes 233-4.

[376] See: Above, Ch. III, Sec. E.1.a.

That is why deadlines are lifted even if this decision can be perceived as affecting the security we demand from the law, i.e., procedural stricture guarantees equal treatment to all participants in a process. For example, in the *Neira Alegría* case the Court rejected Peru's preliminary exception based on the Inter-American Commission's violation of the three-month deadline to start a process before the IACtHR.[377] The Court justified its position by underlining that the lateness was due to Peru's petition for an extension and "[a]ccording to the omnipresent principle of international relations that compels us to act in good faith, Peru cannot allege the expiration of the deadline when its government was the one that asked for the extension."[378]

In other cases the Court underlines that "the alleged victims, their relatives, or their representatives can demand the protection of rights beyond those compiled in the Commission's request as long as those rights are based on the facts alleged in such request."[379] Notwithstanding these favorable concessions to victims' rights, the protection of rights depends to a great extent on the Commission's—no state has brought a complaint on disappearances against another state before the IACtHR—diligence. Historically, the Commission failed to afford adequate protection. Up to the early 1990s, the Commission disregarded procedural deadlines, which in 1993 had a negative effect for human rights implementation because the IACtHR unanimously rejected beginning

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[377] *Neira Alegría y otros vs. Perú*, Excepciones Preliminares, Sentencia de 11 de diciembre de 1991, Serie C, no. 13: Par. 32.

[378] Ibid: Par. 34.

[379] *Gómez Palomino vs. Perú* (Serie C, no. 136): Par. 59. The Court decision mentions as precedent its own decision in *De La Cruz Flores* (Serie C, no. 115): Par. 122.

the procedure in the *Cayara* case,[380] which was a complaint involving forty victims of arbitrary execution and of disappearances.[381]

In addition, the danger of needing an intermediary institution to start a process[382] is reflected by the fact that "between 1979 and 1981, the . . . Commission submitted no contentious cases to the Court and requested no advisory opinions"[383] and by the type of state—small and weak—found responsible in the first decisions, i.e., Honduras. Moreover, the lack of individual *ius standi* could affect the adoption of provisional measures to protect witnesses and victims when the Commission usually takes too long to send a case to the Court.[384]

c. Victims' Participation in the System

To overcome the lack of *ius standi* of the victims and thus, to better protect their rights, the IACtHR has promoted the participation of the victims and their families once the process has started [385] and of NGOs—with access to resources comparable to those of governments—as *amici curiae* to boost the victims' position[386] in relation to the state's.

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[380] *Cayara* (Serie C, no. 14): Par. 60.

[381] Ibid: Par. 2.

[382] "Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer su Mecanismo de Protección": Par. 125, p. 50. A limitation repeatedly criticized by experts, including Judge Cançado Trindade.

[383] Saul, "Compensation for Unlawful Death in International Law": 524. See also: Ibid, 533.

[384] See: *Velásquez-Rodríguez* (Serie C, no. 4): Pars. 40-1.

[385] The 2001 reform of the Rules of Procedure furthered the Court's favorable disposition toward the individual. See: OEA (Departamento de Información Pública), "Temas Prioritarios de la OEA: Protección de los Derechos humanos," Actualized August 2004, http://www.oas.org/key_issues/spa /PEA derechoshumanos.htm (Accessed: March 1, 2005).

[386] E.g., "la Asociación Centroamericana de Familiares de Detenidos-Desaparecidos," in *Godínez Cruz* (Serie C, no. 8): Par. 19; and "Amnesty International, Association of the Bar of the City of New York, Lawyers' Committee for Human Rights, [etc]," in *Velásquez-Rodríguez* (Serie C, no. 4): Par. 38.

Moreover, states are not allowed to control the process. First, since direct evidence is difficult to gather, the IACtHR has opted from the beginning for a flexible standard of proof most favorable to the individual—[387]an individual disappearance is proven as long as it can be linked to a generalized practice in that state.[388] Second, the Court continues the proceedings *ex officio* in the absence of one of the parties.[389] Thus, the accused state cannot prevent a court decision—which could be unfavorable to its interests—from being handed down by abstaining from participation in the process.[390] Finally, once the state has accepted the Court's jurisdiction, it cannot reject it.[391]

Finally, the IACtHR is promoting accountability domestically by stating the illegality of auto-amnesties for disappearances—among other crimes. These amnesties, *de iure* and *de facto*, have been common in countries where disappearances were practiced more systematically. Thus, impunity for this type of crime has been widespread. However, the Court gives support to domestic efforts to end impunity as "in the *Trujllo Oroza Case,* in which Bolivia had released from custody the defendants, who were charged with … forcibly disappearing the victim, because the statute of limitations

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[387] The Convention does not provide a specific rule on this point.

[388] Saul, "Compensation for Unlawful Death": 551.

There is criticism of the decision of the Court in *Caballero Delgado y Santana* (Serie C, no. 17) in which the presumption of a specific crime of disappearances linked to state practice was not applied. For a more in-depth critique, see: Claudia Martin and "Diego Rodríguez, "Caballero Delgado and Santana: A Problematic Application of the American Convention," *Human Right Brief* vol. 3, no. 3 (Spring 1996).

[389] Art. 27 of the Rules of Procedure. Thus, a state cannot use missing a court date as an excuse.

[390] Pasqualucci, *The Practice and Procedure of the Inter-American Court:* 184.

[391] *Ivcher Bronstein*, Competencia, Sentencia de 24 Septiembre de 1999, Ser. C, no. 54: Pars. 52-55 and 56 (1) a and b (Puntos Resolutivos).

had run . . . The Bolivian State welcomed an internationally mandated solution to its domestic problem of impunity."[392]

d. Level of Effectiveness

Assessing the effectiveness of transitional justice mechanisms, including the use of tribunals, is complicated because "works that decipher its modus operandi and empirically evaluate its effects are in fact extremely rare."[393] However, based on the cases examined in this chapter, it is possible to present some preliminary findings on the effectiveness of the IACtHR in implementing the ban on disappearances.

First, confronted with no specific regulation of reparations in the American Convention on Human Rights, the IACtHR has gone beyond pecuniary compensation and has effectively adopted a variety of non-pecuniary measures. Among them it is relevant to mention the naming of public spaces in honor of the disappeared and the governmental recognition of the facts surrounding the disappearances and of their responsibility in public ceremonies.[394]

Second, the IACtHR is criticized for having limited effectiveness in three main areas, i.e., number of cases decided, amount of the reparations awarded, and execution of its decisions. (1) The number of cases decided is much smaller than that of the ECtHR (including 2006, the ECtHR has delivered 7,528 judgments; Up to 31 January 2006 the IACtHR has delivered 140 decisions, which refer to only 68 cases because there are

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[392] Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 249. For other cases, including non disappearances cases, see: Pasqualucci, ibid: 331-2 and 338-40.

[393] In Pierre Hazan, "Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice," *International Review of the Red Cross* vol. 88, no. 861 (March 2006): 22.

[394] For a more detailed examination of non pecuniary reparations and for specific cases, see: Above, Sec. C.2.b.ii.

multiple decisions per case),[395] a consequence mainly of the part-time nature of its work; its multiple tasks—including advisory decisions; the Commission's role as a gatekeeper to the Court's work; and fewer resources (IACtHR: US$1,391,300.00 for 2005 and 2006 each; ECTHR: 44,189,000 euros for 2006).[396]

(2) The amounts granted by the IACtHR as pecuniary compensation only started being significant, as a rule, after the Court had been handing down decisions for a decade. And these amounts have been increasing steadily since then with few exceptions.[397] The trend on the pecuniary compensation awarded by the IACtHR is summed up as follows:

> Over time, the Court seemed to become more generous and was coming closer to the view that **compensation for unlawful death** 'should always exceed those awarded in cases of lesser injury, to avoid making it cheaper for the state to kill the individual than to keep him or her alive.'

(3) In addition, executing the decisions of the Court remains problematic because the political organs of the OAS are not in charge of forcing states to comply;[398] a difference

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[395] ECtHR, "2006 Report," http://www.echr.coe.int; and IACtHR, "Report of the Court, 2006," http://www1.umn.edu/humanrts/iachr/Annuals/annual-06.pdf (Accessed: May 7, 2007).

However, Judge Thomas Buergenthal of the IACtHR assesses it differently. In an interview, he affirmed that the IACtHR had handed down nine advisory opinions and nine contentious cases because "the three Honduran cases . . . in fact come out to . . . nine separate judgments. It is actually quite a lot . . . in ten years . . . compared . . . to the first ten years of the . . . European Court . . . [Eight cases]." In Lynda E. Frost, "The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges," *Human Rights Quarterly* vol. 14, no. 2 (May 1992): 177.

[396] IACtHR, Report of the Court, 2006, http://www1.umn.edu/humanrts/iachr/Annuals/annual-06.pdf (Accessed: May 7, 2007): 5; and ECtHR, "The Budget of the Court," http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Budget/Budget/ (Accessed: May 7, 2007).

[397] "[I] is fair to say that up until at least 1997, total awards were indeed modest. As a rough indication, . . . the average total award per deceased victim . . . was [below $70,000] . . . There is surprisingly little variation in these awards, given that the victims lived in different states, had different average wages, and had different numbers of relatives and dependants. Exceptionally, the amounts awarded were significantly higher in two earlier cases from 1989 - U.S. $ 375,000 in Rodriguez and U.S. $ 325,000 in Cruz." In: Saul, "Compensation for Unlawful Death in International Law": 578.

[398] In Fáundez Ledesma, *El sistema interamericano*: 57 and 462; and Víctor Manuel Rodríguez Rescia, "Eficacia jurídica de las sentencias de la Corte Interamericana de Derechos Humanos," in *El futuro del sistema interamericano de protección de los derechos humanos*, Ed., Juan E. Méndez and Francisco Cox (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1998).

with the European system of protection of human rights, in which whenever a country fails to comply with the decision of the ECtHR, the Council of Europe will intervene, at least in theory. Not so in the Inter-American system, in which "[t]he General Assembly [of the OAS] has never issued a comment on State non-compliance with Court judgments."[399]

2. MAIN CONTRIBUTIONS OF THE IACtHR TO THE IMPLEMENTATION OF THE INTERNATIONAL BAN ON DISAPPEARANCES

Experts on the Inter-American system affirm that, historically, the system is in a phase in which it is being perfected;[400] an ideal phase to discern its contributions, without dismissing its main limitations, i.e., the lack of standing of individuals and of compulsory jurisdiction.[401] Both limitations are inconsistent with the progressive evolution of international human rights law in which the individual is object of the maximum degree of protection.[402] Moreover, the Court's decisions have only affected a small number of victims and its declarations of responsibility only affect states and not individuals.

Notwithstanding these general limitations, the IACtHR has significantly contributed to the implementation of the ban on disappearances in three main areas, i.e.,

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[399] Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*: 344.

[400] Fáundez Ledesma, *El sistema interamericano*: 33. According to Cançado Trindade who made the historical classification, the prior phases are "antecedentes" (historical), "formación" (formation) and "consolidación" (consolidation).

[401] "El Paso Siguiente: Del *Locus Standi* al *Jus Standi* de los Individuos Demandantes ante la Corte": 50-5; and *Hermanas Serrano*, ibid: Voto Razonado del Juez A. A. Cançado Trindade, 16. Judge A. A. Cançado Trinidade hopes that the IACtHRs will become a compulsory jurisdiction like the ECtHR. In *Hermanas Serrano*, ibid: Voto disidente del Juez A.A. Cançado Trindade, Pars. 4-6.

I agree with the Court's position that having only civil jurisdiction is not an imperfection. It works properly as a complement to domestic courts and is an adequate use of the scarce resources.

[402] The relevance of the individual in international law is a novelty. See: Janusz Symonides, "Access of Individuals to International Tribunals and International Human Rights Complaints Procedures," in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI*: 481 and *Hermanas Serrano*: Voto disidente del Juez A.A. Cancado Trindade, Pars. 9-29.

making the Inter-American system of protection of human rights viable, aiding to accountability at the domestic level, and advancing the international jurisprudence on disappearances. First, the Court accepted the first cases, involving the worst violations of human rights,[403] brought forth by Commission. In these cases, the IACtHR rejected unreasonable preliminary exceptions. Moreover, since the beginning, the Court has constantly boosted the role played by the victims, their families and their representatives in the judicial process.

Second, due to its decisions, the IACtHR has more legitimacy[404] than the domestic courts in the region. Therefore, these domestic courts defer to the jurisprudence of the IACtHR,[405] which is the most advanced in matters of disappearances. For example, in 2005, the Supreme Court of Argentina used the IACtHR's decision in *Barrios Altos* as a precedent to declare void the amnesty laws that prevented prosecuting members of the armed forces accused of gross violations of human rights, including disappearances.[406] The Court's legitimacy[407] is enhanced by the fact that it only decides

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[403] Fáundez Ledesma, *El sistema interamericano*: 291.v.

[404] Although former Judge Buergenthal stated that "the Honduran cases [on disappearances] . . . had an impact," former Judge Rigoberto Espinal Irías affirmed that "we can observe different distinct types of reactions. Some Hondurans, in the government sector as well as the general population . . . think these decisions damage the honor . . . of the country. But there also exist high government officials such as the current President of the Republic, Rafael Leonardo Callejas, who think that these decisions are an instrument to guarantee and ensure respect for human rights in Honduras." In Frost, "The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges": 194.

[405] Humberto Nogueira Alcalá, "Una Senda que merece ser transitada: la sentencia definitiva de casación de la quinta sala de la corte de Apelaciones de Santiago, rol 11.821-2003, caso Miguel Ángel Sandoval Rodríguez," *Revista Ius et Praxis* vol. 9, no. 2 (Talca, Chile: 2003).

[406] Human Rights Watch, News, "Argentina — Corte Suprema anula leyes de amnistía" (14 Junio 2005), http://www.hrw.org/spanish/press/2005/argentina.html (Accessed: May 7, 2007).

[407] "Brazil and Mexico . . . have accepted the contentious jurisdiction of the Inter-American Court . . . The struggle for legitimacy of the Inter-American human rights system has been largely won in Latin America but has yet to be won in the English-speaking states in the region." In Christina M. Cerna, "The

cases against countries that have accepted its jurisdiction and its judges come from different countries in the region and thus, cannot easily be accused of being biased in favor or against any specific government.

Finally, the Inter-American Court of Human Rights, which historically has been considered a junior partner of its European counterpart, has been a pioneer in the fostering of human rights norms relative to the ban on disappearances. One of the American Court's more remarkable contributions is the presumption of the crime of disappearances against a specific victim as long as there is evidence of a generalized practice of state-sponsored in the country where the crime occurred. In the words of one of the original judges of the IACtHR,

> One difficult evidentiary issue with which the Court had to deal is attributable to the fact that a government is not responsible for a person's disappearance simply because he or she disappeared in the country it governs. Responsibility for forced disappearances is therefore very difficult to attribute to governments, which is precisely why some governments engage in the practice. The Court concluded, however, that this evidentiary problem can be overcome if evidence of other disappearances fitting a common pattern points to a general practice. . . . The burden would then shift to the Government to show that it had no part in the specific disappearance.[408]

As seen in previous section D, the ECtHR has not been keen in applying this presumption to the cases of disappearances in Turkey. However, the "adjustment to the burden of proof required to prove State liability for the disappearance of civilians [in Imakayeva v. Russia and Luluyev v. Russia]"[409] is a hint of the cross-fertilization of ideas between the

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Inter-American System for the Protection of Human Rights," *Florida Journal of International Law* vol. 16, no. 1 (March 2004): 203.

[408] Thomas Buergenthal, "Remembering the Early Years of the Inter-American Court of Human Rights," *International Law and Politics* no. 37 (2005): 270-81.

[409] *Human Rights Brief* vol. 14, no. 2 [Updates from the Regional Human Rights Systems] (Winter 2007): 60. "In both cases the Court held that the Russian government had violated Articles 2 and 15 of the

American and the European courts. In these two cases, the victims (Chechen civilians) disappeared when a group of "servicemen in military uniforms [Russian], some of them masked,"[410] abducted them. The pattern of disappearances is evidence of the individual crime.

This and the other jurisprudential findings of the IACtHR—variety of non-pecuniary compensation, presumptions of death except in the case of disappeared children, and reinforcement of the continuity of the crime of disappearances—can have, potentially, an impact all over the world through the networks of judges and other public servants that try to advance human rights norms. According to the aforementioned words of Judge Thomas Buergenthal, this potential could be realized if the Inter-American Court were able to foster "interaction between [the] governments and the Court and between national judges and international judges."[411] as in the ECtHR.

The following chapter of the dissertation, which focuses on the implementation of the ban on disappearances using universal jurisdiction in the Spanish court system, gives further empirical support to the significance of intergovernmental networks to advance the norm that bans state-sponsored disappearances. Not only do the Spanish decisions name the pertinent precedents of international courts as legal basis for their decisions but they also need the cooperation of different branches of their own government and of foreign governments to administer justice and in doing so different conceptions on the

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Convention for the disappearances of the victims and for failing to conduct adequate investigations into the disappearances."

[410] *Human Rights Brief* vol. 14, no. 2: 60.

[411] Buergenthal, "Remembering the Early Years of the Inter-American Court of Human Rights": 279.

role of human rights norms are exchanged and, as seen in the previous case studies, they have been reinforced for the most part.

3. RELEVANT RECOMMENDATIONS

According to transitional justice scholars, accountability for past violations of human rights strengthens democracy,[412] which is the political system in which human rights can flourish. Regrettably, disappeared victims and their families were prevented from exercising their right to a fair trial during decades in Latin America. That is why it is necessary to support the IACtHR's use of its discretionary power, its position against amnesty laws, and its emphasis on non pecuniary compensation.

First, the IACtHR complies with the spirit of the Inter-American Convention of Human Rights by eliminating obstacles to accountability—a significant one being the lack of individual standing to initiate cases before the Court (*ius standi*)—[413]through the exercise of its discretionary power in favor of the protection of human rights.

Second, the Court should continue upholding its precedent of declaring amnesty laws void. Even though some scholars consider that the Court's rejection of amnesty

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[412] The United Nations has sponsored accountability mechanisms for conflict and post-conflict societies. See: Report of the UN Secretary General, "On the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," S/2004/616 (3 August 2004).

On the positive effects for democracy, see: "Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer su Mecanismo de Protección," Relator: Antônio Cançado Trindade, in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI* , San José, Costa Rica, 23 y 24 de Noviembre de 1999," tomo II (Corte Interamericana de Derechos Humanos, 2001): Par. 120.

However, other scholars reject accountability for the atrocities of past regimes and consider that it can undermine efforts to develop the rule of law. See: Jack Snyder and Lesli Vinjamuri, "Trials and Errors, Principle and Pragmatism in Strategies of International Justice," *International Security* vol. 28, no. 3 (Winter 2003/04): 5-44.

[413] Art. 61 (1) of the American Convention on Human Rights.

laws could have a negative impact on democratic transitions and consolidations,[414] it is important to underline that the crime of disappearances is continuous and thus the ban on disappearances continues being violated in the present. Therefore, impunity for disappearances affects negatively the rule of law in the present and, by perpetuating the myth that the violations were justified, it could affect the quality of the democratic regime in the future. For example, in Guatemala impunity for past violations has fostered further human abuses.

Finally, the Court's emphasis on non pecuniary reparations is appropriate for Latin America where governmental officials believe that they are entitled to violate human rights with impunity. Non pecuniary measures are commendable because they confront impunity and foster a culture that will reject any justification for disappearances. Since the disappeared are presumed dead, the non pecuniary compensation has a crucial social component. These measures are adopted to try to help the families of the disappeared through education and reconciliation ceremonies. Since disappearances affected for the most part communities perceived as outsiders by the population at large—indigenous people, the poor, social activists—[415]public ceremonies honoring the victims could help improve the relations between different social classes and strengthen the rule of law.

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[414] See: Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge, England: Blackwell Publishers, 2001) and Mary Margaret Penrose, "Impunity, Inertia, Inaction, and Invalidity: A Literature Review," *Boston University International Law Journal* vol. 17, no. 2 (Fall 1999): 269. See also: *Rodríguez v. Uruguay,* Human Rights Committee, U.N. Document CCPR/C/tq/D322/1988, P 12.2 (1994).

The Spanish transition to democracy is usually named as an example in which total amnesty for the crimes committed during the dictatorship assured the almost smooth transition to democracy and its subsequent consolidation. The alleged negative effects of voiding the amnesties are not as significant for Argentina and Chile, currently consolidated democracies, as they are for Guatemala and its weak democratic system.

[415] See: Above, Sec. C.2.b.ii.

CHAPTER VI

THE JUDICIAL IMPLEMENTATION OF THE BAN ON DISAPPEARANCES: THE USE OF UNIVERSAL JURISDICTION BEFORE THE SPANISH COURT SYSTEM TO PROSECUTE ABUSES COMMITTED IN LATIN AMERICA DURING THE COLD WAR

The prohibition against disappearances shares with the prohibition against torture its status as a *ius cogens* crime that can be prosecuted by the International Criminal Court (ICC). However, the crime of disappearances has not been the object of a comprehensive convention of universal reach such as that of the crime of torture (1984 Convention against Torture); the only legally binding convention on disappearances is an OAS-sponsored document.[1] Therefore, it is relevant to examine the steps states take to prosecute the crime of disappearances in its international dimension in the absence of a "universal convention," the obstacles to implement such a prohibition before a national jurisdiction, and how these obstacles are overcome judicially.

Disappearances[2] in internal conflict constitute a violation of human rights linked to the Cold War; more specifically to the fight against communism led by the military in

[1] Inter-American Convention on Forced Disappearances of 9 June 1994, OEA/Ser. L. V/II.92, doc. 31 rev. 3; original: Spanish, reproduced in http://www.memoriaviva.com/Desaparecidos/oea.htm (Accessed: May 13, 2004)

[2] Elías Padilla Ballesteros, *La memoria y el olvido: detenidos desaparecidos en Chile* (Santiago, Chile: Ediciones Orígenes, 1995): 33.

Called forced disappearances, too; I opt for disappearances because it conveys the same meaning, i.e., the victim vanished against his/her will while being under the custody of the state, in one word.

Latin America,[3] where this practice reached its zenith in the 1970s. As a crime against humanity its antecedent—[4]i.e., abuses derived from the Nazi's *Nacht und Nebel* decree[5] followed as a model by the Latin American military to fight insurgency—[6]is also relatively recent.

Although the military regimes have ended in Latin America, the crime of disappearances is a worldwide phenomenon that has continued after the end of the Cold War.[7] The UN Working Group on Disappearances in 2001 named as "[c]ountries with the highest number of outstanding cases since 1980: Algeria (1,074); Argentina (3,377); El Salvador (2,270); Guatemala (2,982); Iraq (16,384); Peru (2,368) and Sri Lanka (11,682)."[8] With 16,367 outstanding cases, Iraq has to be added to this list now.[9]

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[3] The military studied counterinsurgency techniques—including disappearances and torture—in the School of the Americas; a part of the US strategy against Communism. See: Nilson Cezaz Mariano, *Operación Cóndor: terrorismo de estado en el Cono Sur* (Buenos Aires, Argentina: Lohlé Lumen, 1998).

[4] As declared by the Permanent Assembly on Human Rights in 1987. See: The *Velásquez-Rodríguez* case (July 29, 1988): Par. 149.

[5] Approved by Hitler on 7 December 1941 to terrorize the citizenry: 'Efficient and durable intimidation is only obtained with … measures that prevent the criminal's family and the population from knowing the criminal's fate,' in Juzgado Central de Instrucción n° 5, "Auto de Procesamiento a 98 Militares Argenti-nos, Sumario 19/97-L," (Madrid: Audiencia Nacional, November 2, 1999): Facts, Fifteenth.

[6] Widely viewed as not conforming to the military's ideology; "us" against "them" mentality.

[7] Widespread, it "enshrouds all continents," in Georgina Elustondo, "Desaparecidos, un drama que castiga a más de 100 países," *El Clarín* (11 August 2003), http://www.clarin.com/diario/hoy/i-02015.htm (Accessed: May 28, 2004); and "[t]here are now 45,129 cases under active consideration . . . some . . . missing for more than 20 years." In UN Working Group on Enforced or Involuntary Disappearances, "UN Working Group on Enforced or Involuntary Disappearances Meets in New York," Press Release HR/4411 (13 May 1999), http://srch1.un.org/p1web-cgi/fastweb?state_id (Accessed: August 22, 2002).

[8] UN Working Group on Enforced or Involuntary Disappearances: Press Release HR/CN/987 (30 April 2001), http://srch1.un.org/p1web-cgi/fastweb?state_id (Accessed: August 22, 2002). See, also: E/CN.4/2006/56, "Report of the Working Group on Enforced or Involuntary Disappearances," (27 December 2005). This last report shows not noticeable improvement in countries related to the case studies examined in the dissertation: Argentina (3,375), El Salvador (2,270), Guatemala (2,898), and Peru (2,368).

[9] E/CN.4/2006/56, ibid: 134.

The crime of disappearances comprises several activities. First, a group of individuals, who work for the government,[10] kidnap a person. Then the kidnapped suffers—besides unlawful deprivation of freedom—torture at the hands of the kidnappers and/or others. Finally, the victim is *trasladada* or removed from the detention facility, and is never heard of again. Although the victim is presumed dead,[11] what really happened after the detention is unknown as there is no official death certificate.

Such complexity adds to the following differences between disappearances and torture.[12] Disappearances are difficult to prove because there is no *corpus delicti*, and often the prosecution is based on hearsay evidence; torture is easier to prove due to the existence of a body and scars, and corroborative direct eyewitness testimony. Moreover, while disappearances are categorized as continuous crimes whose commission only ends when the abducted person appears—dead or alive; each act of torture constitutes a separate crime.

Since preexistent regulation at the domestic level proved insufficient to prosecute this complex crime, international efforts are relevant. The most comprehensive

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[10] Police inaction when confronted with citizens' calls for help provide further evidence of the official character of the disappearances: "If any neighbor or caretaker of-the building involved [in the disappearance-related operation] got in touch with the local Police headquarters or with a radio patrol-car asking for help they would be told that the police were aware of what was going on, but could do nothing." In *Nunca más =Never Again: A Report*, Argentinean National Commission on Disappeared People (London, England and Boston, MA: Faber and Faber, in association with Index on Censorship, 1986).

Luis Moreno Ocampo, "La importancia de la prueba en el juzgamiento de la desaparición forzada de personas," in *Jornadas sobre el Tratamiento Jurídico de la Desaparición Forzada de Personas*, Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Buenos Aires, 24 y 25 de marzo 1987 (Buenos Aires, Argentina: Asamblea Permanente por los Derechos Humanos, 1987):132-3.

[11] The main reasons for the presumption of death are: First, a "refusal [on the part of the authorities] to disclose the fate or whereabouts of the person concerned, or . . . to acknowledge the deprivation of . . . liberty, thereby placing that person outside the protection of the law," in United Nations Working Group on Enforced or Involuntary Disappearances, Press Release HR/4411. And second, absence of any physical remains of the victims. See: Juzgado Central de Instrucción no. 5, "Auto de Procesamiento a 98 Militares Argentinos": Facts, Fifteen.

[12] As seen in: Above, Chs. III and IV.

regulation of the crime is the one the Organization of American States (OAS) sponsored, as studied in the previous chapter.[13] Such regulation was a consequence of the prevalence of disappearances in Latin America—especially in Guatemala and Argentina.[14] However, this chapter focuses on UN and European instruments.

Similarly to chapter four this one is divided into five sections. First, the international regulation of disappearances, subdivided into UN and European-sponsored documents. Second, the national level regulation regarding disappearances. Third, cases involving disappearances perpetrated in Latin America during the Cold War that have been prosecuted before the Spanish courts organized by country. Fourth, how other authorities cooperate with the Spanish courts. And finally, an evaluation of the judicial implementation in Spain of the ban on disappearances.

A. INTERNATIONAL REGULATION

Beside the OAS Convention on Disappearances, the most relevant instruments against disappearances at the international level are UN and Council of Europe-sponsored documents. This level is of interest because when the practice of disappearances is systematic and/or widespread, it constitutes a crime against humanity.[15] Thus, it is possible to prosecute it regardless of the place and time of commission of the crime, i.e.,

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[13] *Jornadas sobre el Tratamiento Jurídico de la Desaparición Forzada de Personas*, Facultad de Derecho y Ciencias Sociales de la Universidad Nacional de Buenos Aires: 4.

[14] Term born in the Guatemalan civil war. See: Commission on Human Rights, "Commission on Human Rights Continues Debate on Torture, Detention, Involuntary Disappearances," Press Release HR/ CN/843 (3 April 1998), http://srch11.unorg/plweb-cgi/fastweb?state_id (Accessed: August 22, 2002); Iain Guest, *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the UN* (Philadelphia, PA: University of Pennsylvania Press, 1990): 32; and Alfredo Balsells, "La Comisión para el Esclarecimiento Histórico," in *La memoria y el futuro: las comisiones de la verdad en la experiencia internacional* (Montevideo, Uruguay: Grupo de Madres y Familiares de Uruguayos Detenidos Desaparecidos, 2002): 107.

[15] Amnesty International, "14 Point Program for the Prevention of 'Disappearances'" in Amnesty International, "Rwanda: The Hidden Violence: 'Disappearances' and Killings Continue" (New York, NY: Amnesty International, 1998).

a court can use universal jurisdiction to prosecute the accused and the crime cannot be subjected to any statute of limitations, as seen in the chapters on torture.

Among the UN-sponsored documents, the focus is first on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which provide the general framework for the protection of human rights. Second, the more specific 1992 UN Declaration on the Protection of All Persons from Forced Disappearances. And, finally, a reference to the 1984 Convention against Torture (CAT) is important because it has legal effects and is applicable to the crime of disappearances.

1. THE UNIVERSAL LEVEL: UDHR, ICCPR, UN DECLARATION ON FORCED DISAPPEARANCES, AND THE CAT

a. The UDHR and the ICCPR

Although disappearances are not named explicitly in the UDHR,[16] the practice of disappearances is a complex crime that violates several of its articles, including "the right to life, liberty and the security of person;"[17] the prohibition of torture;[18] and the prohibition against servitude,[19] when the kidnappers force the victim to provide certain services. Procedurally, it infringes on the right to equal treatment before the law and the prohibition of "arbitrary arrest, [or] detention."[20]

The ICCPR is more detailed but still lacks a reference to disappearances. Nevertheless, several activities that constitute the crime of disappearances violate rights

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[16] See: Above, Ch. IV.

[17] Art. 3 of UDHR.

[18] Art. 5 of ibid.

[19] Art. 4 of ibid.

[20] Articles 7 and 9 respectively of ibid.

the ICCPR protects such as the right to life;[21] the prohibition of torture;[22] and sometimes the prohibition against servitude.[23] In addition, disappearances violate the prohibition against illegal detentions or the right not "be subjected to arbitrary arrest or detention [and the right not to] be deprived of his liberty except . . . [as] established by law.[24] Moreover, victims of disappearances are not legally indicted and the kidnappers are not accountable to the judiciary except in a minimal percentage of the cases because the political environment in the country prevents the family from using habeas corpus to find the disappeared.[25] Therefore, [the right to] be brought promptly before a judge . . . and . . . to a trial within a reasonable time"[26] is also violated. Furthermore, the victims of illegal detention are "entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[27]

The ICCPR also establishes the right to compensation for any victim of an unlawful arrest or detention—[28]always the case in disappearances. This "enforceable

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[21] Art. 6 (1) of the ICCPR: "No one shall be arbitrarily deprived of his life."

[22] Art. 7 of the ibid, which adds "free consent to medical or scientific experimentation."

[23] Art. 8 (2) of ibid: "No one shall be required to perform forced or compulsory labour."

[24] Art. 9 (1) of ibid.

[25] Only in Argentina did a few judges answer habeas corpus petitions properly. Generally, the judiciary remained passive. See: Luis Marcó del Pont, "El Estado terrorista para asegurar la impunidad de los crímenes," in *Jornadas sobre el Tratamiento Jurídico de la Desaparición Forzada de Personas."* From this author's description of how the defense lawyers were threatened and disappeared in large numbers during the military regime, it can be inferred that the judges as a group complied with the demands of the military regime mainly out of fear for their personal security and that of their families. See: Ibid, 62-3.

[26] Art. 9 (3) of the ICCPR.

[27] Art. 9 (4) of ibid.

[28] Art. 9 (5) of ibid.

right" is usually reserved to the family of the disappeared as the victim cannot exercise it in most of the cases because he/she is dead.

b. The 18 December 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearances[29]

Although a mere declaration, it confirms that the crime of disappearances is an independent crime. The declaration is "without prejudice to the provisions enunciated in the Universal Declaration of Human Rights or in any other international instrument, and shall not be construed as restricting or derogating from any of those provisions."[30] One of those provisions is the aforementioned 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[31] The analysis of the Declaration on Disappearances is limited to the three main characteristics of the crime, the rights the crime violates, how responsibility is decided, and the duties of the state.

According to article 1 (1) of the Declaration on Disappearances, "[a]ny act of enforced disappearance is . . . a grave and flagrant violation of the human rights . . . proclaimed in the Universal Declaration of Human Rights," which for the 1993 Vienna Convention on Human Rights[32] constitutes a crime against humanity. Furthermore, the crime of disappearances is a continuous crime committed "as long as the perpetrators continue to conceal the fate and the whereabouts of . . . [the] disappeared and these facts

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[29] GA Res. 47/133.

[30] Art. 21 of the UN Declaration on the Protection of All Persons from Enforced Disappearances. From now on, UN Declaration or UN Declaration on Disappearances.

[31] See: Above, Ch. IV, Sec. A.2.

[32] "The Vienna Declaration and Programme of Action," http://www.unhchr.ch/html.menu5/wchr.htm (Accessed: November 1, 2002): Pars. I-30, II-57, II-60, and II-62.

remain unclarified."[33] Similarly, the abduction of the children of the disappeared keeps on happening until the children are returned to their respective families or their biological filiation is known.[34] Sometimes this process is hampered by disappeared children who reject the truth about their past.[35]

The crime of disappearances cannot be subjected to statutes of limitations. As an example, the UN Working Group on Disappearances admitted four cases of disappearances in Spain; two of them from 1947 and 1949 when the situation in Spain, under Franco, was similar to that in Latin America.[36] Since those crimes from the 1940s can be prosecuted, there is more reason to defend the prosecutions against crimes from the 60s, 70s, and 80s.

Article 1 (2) of the UN Declaration specifically states that the crime of disappearances violates "the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates . . . the right to life." Additionally, it attacks "the right to family life as various economic, social and

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[33] Art. 17 (1) of the UN Declaration on Disappearances.

[34] Art. 20 (3) of ibid.

[35] The reason is that "they believe that [their biological families] are guilty of all that happened [under the dictatorship]." [Translation]. However, later on they may overcome these negative thoughts. In "Con esta lucha crecí y me trastorné," *El Clarín* (26 June 2001), as compiled in "Trabajo Práctico sobre los desaparecidos durante la Dictadura militar 1977/83," http://tq.educ.arg.grp0002/trabajos/desaparecidos.htm (Accessed: June 1, 2004).

See also: Lisa Avery, "A Return to Life: The Right to Identity and the Right to Identify Argentina's 'Living Disappeared,'" *Harvad Women's Law Journal* vol. 27 (2004): 235.

[36] "[T]he UN decided to accept only those that occurred after [its] foundation." In Izquierda Unida de Hortaleza, "Las fosas de la guerra colocan a España en la lista de desaparecidos de la ONU," (20 June 2003), http:// www.iu-hortaleza.org-rticle.php?op=Print&sid=385 (Accessed: June 1, 2004).

Spain was characterized then by an authoritarian regime, the promotion of traditional catholic ideology, and no political opposition.

cultural rights."[37] Not only do the relatives of the disappeared suffer psychologically but they can lose the main provider for the family too—males usually, who disappeared in a higher number than females. Cultural rights are violated through the targeting of people with dissenting ideologies and the kidnapping of children who "were placed outside of their family."[38]

The practice of disappearances is never justified. "No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked."[39] Moreover, those accused of disappearances cannot excuse their criminal behavior saying they were following orders.[40] Nevertheless, the court can apply mitigating circumstances to "persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance."[41] Thus, the courts balance the rights to know the victims' whereabouts and to demand accountability, via prosecution of the accused, when they are deciding the scope of the mitigation.

The crime of disappearances generates "[t]he international responsibility of the State . . . in accordance with the principles of international law."[42] This responsibility

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[37] See: Office for the High Commissioner for Human Rights (OHCHR), "Fact Sheet no. 6 (Rev. 2), Enforced or Involuntary Disappearances," http://www.unhchr.ch/html/menu6/2/fs6.htm (Accessed: May 5, 2004).

[38] Art. 20 of the UN Declaration on Disappearances.

[39] Art. 7 of ibid.

[40] "No order or instruction of any public authority, civilian, military or other. . . . Any person receiving such an order or instruction shall have the right and duty not to obey it." In art. 6 (1) of ibid.

[41] Art. 4 (2) of ibid.

[42] Art. 5 of ibid.

includes criminal[43] and civil liability.[44] However, to impose such liability, the state needs to prosecute the accused before a non-military court following the principles of a fair trial.[45] Nevertheless, the Declaration does not require universal jurisdiction:

> Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State. . . . All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible . . . who are found to be within their jurisdiction or under their control.[46]

c. The 1984 CAT

The Convention Against Torture (CAT) is relevant because the relatives of the disappeared—until they know the victims' fate—are at least suffering from cruel and inhuman treatment. For example, "[i]n a study from 1988, medical doctors from the CODEPU (Uruguayan Commission on Disappeared People) discovered [these persons suffered from]: anxiety, depression, headaches, insomnia, difficulty to relate to others, tiredness, persecution mania, and suicidal tendencies."[47]

All these torture-like symptoms are the consequence of government actions: First, by sponsoring the disappearances; and second, by denying information on the victims' whereabouts. Thus, the relatives of the disappeared can use the CAT—which has legal

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[43] Art. 18 (1) of the UN Declaration on Disappearances establishes no right to amnesty and art. 18 (2) limits the possibility of pardon.

[44] Compensation to the victim and his/her family (art. 19 of ibid).

[45] Art. 16 of ibid. specifies that the accused is not guaranteed privileges or immunities. In its paragraph 4 it refers to the accused being guaranteed a fair trial.

[46] Article 14 of ibid. However, "should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible . . . who are found to be within their jurisdiction" is an opening for any state to use universal jurisdiction if it decides to do so.

[47] Cezaz Mariano, *Operación Cóndor*: 112 and 114. He calls it "indirect torture," which is not a legal term.

effects—to demand justice. Moreover, the European Court of Human Rights (ECtHR) justifies in several decisions the prosecution of alleged disappearances using article 3 of the European Convention of Human Rights, which forbids torture and cruel and inhuman treatment.[48]

2. THE EUROPEAN LEVEL: THE 1950 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS[49]

Spain—as a member of the European Union and of the Council of Europe—has to comply not only with universal conventions, but also with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The issues of interest from the European regulation that are analyzed in this subsection[50] are the rights the crime of disappearances violates, the responsibility for this crime, and the mechanisms of implementation of the ECHR.

Similarly to the international/UN level, the European system of protection of human rights lacks a specific regulation of disappearances too. Thus, to prosecute those accused of disappearances the courts have to apply the second section of the ECHR, which refers to individual rights such as life;[51] prohibition of torture, servitude, and illegal detention;[52] and the right to a fair trial.[53] The ECHR does not limit its protection to European citizens: "Everyone whose rights and freedoms as set forth in this

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[48] Frank Hoffmeister, "Cyprus v. Turkey. App. No. 25781/94," *American Journal of International Law* vol. 96, no. 2 (April 2002): 445-52.

[49] Instituto Interamericano de Derechos Humanos (IIDH), "La Dimensión Jurídica de los Derechos Humanos: Complete Texts."

[50] See: Above, Ch. IV.

[51] Art. 2 of the ECHR.

[52] Articles 3, 4 and 5 respectively of ibid.

[53] Art. 6 of ibid.

Convention are violated shall have an effective remedy before a national authority. . . ." [Emphasis added].[54] Thus, Latin Americans can use any mechanism available domestically in Europe—including judicial ones—to protect their rights.

Those accused of disappearances cannot invoke the principle of non retroactivity of the penal law[55] because disappearances include actions that constituted crimes according to international conventions and penal codes applicable in the countries where they happened. Moreover, those articles used to punish disappearances, i.e., "[a]rticle 2, except in respect of deaths resulting from lawful acts of war, . . . 3, 4 (paragraph 1) and 7,"[56] are non derogable. Since there is no justification for disappearances under any circumstances including "[i]n time of war or other public emergency threatening the life of the nation,"[57] those accused of the crime can be prosecuted before the ECtHR[58] regardless of how dangerous they thought the victims of the disappearances were.

B. DOMESTIC REGULATION

Spain's duty to adapt its law to the international regulation notwithstanding, since the domestic laws are more detailed, it is necessary to refer to the Spanish procedural and criminal law applicable to the prosecution of disappearances—underlining that the regulation of torture is relevant too.

This section analyzes first, disappearances under Spanish law—their relevant characteristics, the criminal types they constitute, how to decide responsibility, and

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[54] Art. 13 (1) of the ECHR.

[55] No need to apply the exception, used for Nazi crimes, of art. 7.2 of ibid.

[56] Art. 15 (2) of ibid.

[57] Art. 15 (1) of ibid.

[58] Sec. IV of ibid. establishes the Court. See: Above, Ch. V, Sec. D. Sec. IV.

punishment afforded to those declared guilty; second, the main obligations of the court relative to this crime; and, finally, the key obstacles to its prosecution in Spain.

1. DISAPPEARANCES UNDER SPANISH LAW: RELEVANT CHARACTERISTICS, CRIMINAL TYPE, RESPONSIBILITY, AND PUNISHMENT

Due to the prevalence of international law, the domestic level regulates disappearances similarly to the international one. Nevertheless, since international law does not cover all the cases, this section focuses mainly on what the Spanish regulation adds to the international one.

a. Relevant Characteristics

Disappearances are **state-sponsored** crimes. Thus, they are committed—according to a pre-established plan—by persons who work for the government. Moreover, it affects a considerable number of people. Therefore, the violation of the prohibition against disappearances constitutes a **crime against humanity**, which means it can be prosecuted using universal jurisdiction and it cannot be subjected to a statute of limitations—a characteristic of less interest than in torture because disappearances is a **continuous crime**.

The crime of disappearances is **intentional**.[59] That is why the accused cannot shield themselves saying they ignored the illegality of their actions because public officials know that, first, they need an indictment to detain any person, unless there is an imminent threat—not the case here. Second, torture is illegal. And, third, it is forbidden to execute anybody without a judicial verdict that imposes such punishment.

[59] "Auto de Ampliación del Auto de Procesamiento de Cavallo (5 October 2000)": Fundamento de Derecho, Décimo.

b. Criminal Type

Although the Spanish Penal Code did not regulate any crime that could be identified with the crime of disappearances until the 25 November 2003 reform of the Spanish Penal Code,[60] the courts applied art. 167 which punishes "[t]he authority or public servant who . . . commits one of the crimes described in the prior articles [which include practicing illegal detentions or abductions (art. 163) and keeping secret any information relative to the whereabouts of the disappeared victims (art. 166)]. . . ."[61]

Since the aforementioned articles do not cover all the activities that comprise the complex crime of disappearances, one can typify disappearances in Spanish law as genocide—when they target a given group; terrorism or attacks against the country's legality; "specific coercions;"[62] and torture.[63] It constitutes torture because:

> The illegality of the detention, accompanied by the absence of guarantees—such as administrative, medical and judicial supervision . . . , duration, physical circumstances, information available to the family relative to the place of detention, right to defense, etc—is, at the least, a mental suffering provoked intentionally; that is torture in the sense of article 1 of the Convention [Against Torture].[64]

Moreover, since disappearances in the Southern cone were part of the Cóndor operation—"an illicit association shaped as an armed band that committed . . . homicides, assault and battery, coercions, and illegal detentions that became enforced disappearances

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[60] Disappearances are punished specifically in article 607 bis 2, 6°of the Spanish Penal Code, which does not mention them by name but describes them as "detaining a person and not acknowledging such deprivation of freedom or not telling about the person's whereabouts," which acquire the status of crime against humanity when they are systematic.

[61] Art. 167 of the Spanish Penal Code.

[62] In the Spanish Code, *coacciones específicas* or to compel someone to act under duress.

[63] "Auto de Procesamiento a 98 Militares Argentinos": Fundamentos de Derecho, Séptimo.

[64] "Auto de Ampliación del Procesamiento de Cavallo": Fundamento de Derecho, Octavo, in fine.

in most of the cases"—[65]the courts can include the crime of terrorism (art. 572 of the Spanish Penal Code) among the counts in the indictment against the alleged violators of the prohibition against disappearances.

c. Individual Responsibility and Punishment

As happens with torture, Spanish courts interpret the Spanish Penal Code as establishing that the responsibility for disappearances encompasses not only those who perpetrated the crime directly in any of its phases of kidnapping, illegal imprisonment, torture, or subsequent disposal of the victims, but also those who ordered and planned it and the ones who later on covered up the crime and denied any knowledge of the disappearances.[66] Since many disappearances remain unresolved, democratic governments have the duty to provide the victims' families with all the available information about the victims' whereabouts. Whenever the government does not comply, it can be accused as an accessory to the crime and of denying justice to their citizens.

Until the more recent specific regulation,[67] punishment depended on the type of crime the courts believed the disappearances constituted. Usually the punishment will be a combination of deprivation of freedom for a period of time—anywhere from 2 to 12 years—[68]and disqualification from holding any public office or job.[69] Fines are not

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[65] J.C. Gutiérrez and Myrna Villegas Díaz, "Derechos humanos y Desaparecidos," http://www.nuncamas.org-investig-bilbio_contreras_diaz.htm (Accessed: June 1, 2004): Subsec. 5.2.

[66] Authors and accomplices are responsible. In Title II of the Penal Code, arts. 28 and 29. See: "Auto de ampliación del procesamiento de Cavallo": Fundamento de Derecho, Décimo.

[67] See: Above, Fn. 60. When it constitutes a crime against humanity, it is punishable with 12 to 15 years of deprivation of freedom as a crime against humanity.

[68] See: Book II, titles III-IV and V-VIII of the Spanish Penal Code. The punishment is starker when the criminal types applied are genocide or terrorism.

[69] For a period of eight to twelve years. See: Art. 167 of ibid.

applied because the accused were working for the government.[70] And regardless of the focus on criminal prosecution, the demand for civil responsibility—which can be combined with the penal one—is relevant to repair the losses and suffering of the relatives of the disappeared.[71] In these cases the government is responsible in a subsidiary way for "the damages caused by those criminally responsible of intentional crimes . . . [because they] were authority figures, its agents, and hired by the government or . . . public servants in the exercise of their job and related duties."[72]

Once the criminal responsibility is proven, it is the time to establish the civil responsibility of the accused. In addition—and this is quite different from the American system—"it is understood that all the expenses caused by the process are legally the duty of all those criminally responsible."[73]

2. OBLIGATIONS OF THE COURT RELATIVE TO THE PROHIBITION OF DISAPPEARANCES

Although the crime of disappearances lacks an enforceable convention at the international level beyond the OAS regulation, it is a crime against humanity and thus, it is part of *ius cogens*. That is why Spain—as a democratic country respectful of international law—is legally justified in accepting lawsuits against those individuals accused of disappearances. Moreover, Spain has to provide justice to the victims, to respect the rights of the accused to a fair trial, and must act when it has jurisdiction—territorial, subject, and/or universal.

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[70] Although art. 163 (4) of the Spanish Penal Code refers to fines as punishment in cases in which the abduction responds to a citizen's arrest outside legality, this is never the case in disappearances.

[71] Title V, Chapter 1 of ibid.

[72] Article 121 (1) of ibid.

[73] Article 123 of ibid.

a. Granting of Justice to the Victims and the Accused[74]

Since the crime of disappearances is categorized as a continuous crime, it prevents governments from using the excuse of the lapse of time since the commission of the crime to avoid prosecuting those accused because this crime is not subjected to any statute of limitations. Thus, after the accused have been indicted, the Spanish courts have the duty to do everything they can to end impunity. That is why it is not enough to prosecute those accused of disappearances present in its territory; Spanish courts must request the cooperation of foreign countries to obtain extraditions and the needed information to foster further prosecutions.

The duty of the Spanish court regarding the accused is the same as in the case of torture, i.e., the courts have to guarantee a fair trial to all of the accused. Nevertheless, in disappearances the courts need to proceed with added care to justify their decisions due to elusive evidence caused by the unavailability of corpses and/or direct witnesses of the abduction and subsequent violations of the rights of the disappeared. Thus, the court must proceed with caution when weighing hearsay evidence.

b. Jurisdiction of Spanish Courts: Territorial, Subject, and Universal

Territorial jurisdiction is not applicable in any of these cases because the violations occurred outside of the territory of Spain. Nevertheless, Spain was able to use active subject jurisdiction against Julio Scilingo, the only accused physically present in its territory, but could not base jurisdiction on the fact that there were "576 Spaniards and children and grandchildren of Spaniards that are now disappeared after being kidnapped

[74] As seen: Above, Ch. IV, Sec. B.2, regarding torture.

in . . . Argentina"[75] because Spanish courts—as a rule—do not have passive subject jurisdiction or jurisdiction based on the nationality of the victims of the crimes.

However, Spanish courts could use universal jurisdiction—[76]legally established for genocide and terrorism—to prosecute the disappearances that happened in Latin America during the Cold War. According to the *Furundzija* case—[77]referred to by the Spanish courts to justify their jurisdiction—[78]torture also legitimizes universal jurisdiction because "each State has the capacity to investigate, prosecute, and punish or extradite those individuals **accused of torture** and that are located in the territory under their jurisdiction."[79] [Emphasis added]. *Furundzija* is applicable to the prosecution of disappearances because the victims were tortured before they vanished and their families are indirectly subjected to, at least cruel and inhuman treatment, as long as they do not know about the victims' fate. Therefore, Spanish courts have the right to prosecute disappearances committed by foreigners abroad against the citizens of any country.

3. MAIN OBSTACLES TO THE PROSECUTION OF THOSE ACCUSED BEFORE THE SPANISH COURT SYSTEM[80]

What can prevent the start of a criminal process against a person accused of the crime of disappearances? First, the accused could be a head of state or other high-ranking member of the government, whose office provides immunity that would cause

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[75] "Auto de Procesamiento a 98 Militares Argentinos": Antecedentes, Décimosexto.

[76] "Auto de Ampliación del Procesamiento de Cavallo": Fundamento de Derecho, Noveno.

[77] Decision of the ICTY (Dec. 10, 1998): Pars. 141, 143 and 145. It refers to torture as an international crime that can be the object of universal jurisdiction and uses *Demjanjuk* as precedent.

[78] Auto de ampliación del procesamiento de Cavallo": Fundamento de Derecho, Noveno.

[79] *Furundzija*: Par. 156.

[80] Beyond lack of resources and lawsuits. The focus is on violation of international criminal law except jurisdictional issues already dealt with. See: Above, Ch. IV, Sec. B. 2. b.

the dismissal of the criminal process; this is similar to what happens with torture.[81] Second, the principle of non retroactivity of the penal law could come into question. And finally, other courts' activities could interfere with the process before the Spanish courts, which could be accused of violating the prohibition against double jeopardy.

a. Immunity of the Head of the State[82]

When prosecuting a crime that involves high government officials, the courts will examine the status of the accused to determine whether immunity is applicable to them. Since the crime of disappearances is still being executed in the present, the officials who ordered the disappearances are not in power anymore.[83] Thus, even though they could have had immunity for past actions, immunity does not extend to the present.

As a consequence, immunity works differently in cases involving disappearances than it does in the prosecution of the crime of torture. In cases of torture, the activities prosecuted happened in the past, i.e., when those prosecuted were in power and could sometimes try to justify their activities as an integral part of past public duties. Not so in unsolved disappearances because until the whereabouts of the victims are known, the crime is being committed and thus, immunity is not applicable.

b. Non-retroactivity of the Penal Law

The central issue is that domestic penal codes and the international level lacked a criminal type called disappearances. Therefore, the defense is going to try to prove that when the accused was engaged in those activities that could constitute a violation of the

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[81] See: Above, Ch. IV, Sec. 3.

[82] Immunity is relevant. That is why Pinochet appointed himself senator for life to obtain immunity for past crimes.

[83] It can foster accountability. On the Chilean transition constraints, see: Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: The Johns Hopkins University Press, 1996): 207-9.

ban on disappearances, there was no law that prohibited them. Moreover, the defense, is going to content that more recent legislation that declares the activities as illegal is irrelevant because of the obligation of the court to respect the principle of non-retroactivity of the penal law.

However, it is necessary to reply to the aforementioned that, first, unsolved disappearances are still being committed, which means that laws approved after the abductions happened are applicable. And second, the individual activities that make up the crime were penalized in the different countries at the time of their commission because all forbade "'homicide,' 'illegal detentions and deprivation of liberty,' 'torture,' . . . 'kidnapping of minors,' and even 'slavery.'"[84]

c. Obstacles Linked to Processes Started Abroad

Domestically, when a court affirms its territorial or subject jurisdiction to proceed with a trial, this jurisdiction is, as a rule, accepted without taking into account the alternative jurisdictional interests of foreign courts. For example, if the court of country A starts a trial based on the fact that the crime was committed on the territory of A, the court of country B does not have the right to demand the end of the trial because the accused of the crime is a citizen of country B. However, the "novelty" of the use of universal jurisdiction beyond piracy and slavery, seems to justify the perception that this type of jurisdiction has a lesser status than the other types and as such can be easily dismissed.

As a result, although the Spanish criminal prosecution of alleged violations of the prohibition against disappearances committed by non-Spaniards during the Cold War in Latin America should be understood as exercising a type of jurisdiction which is

[84] Iain Guest, *Behind the Disappearances:* Prologue, 1.

established by law, some consider the use of universal jurisdiction as complementary to the judicial implementation of the prohibition against disappearances in the countries where the crimes happened.[85] Nevertheless, such complementary perspective can be perceived by the families of the victims as a denial of justice because it will postpone or, in the worst case, end trials in Spain without guaranteeing accountability in their respective countries.

That is why, although Spanish courts should end their activities—as mentioned in the chapter on torture—[86]when foreign processes are conducted fairly and they are not a sham. However, Spanish courts should proceed ahead when, first, such processes dismissed allegations without examining the evidence. Second, foreign courts declared that the crimes were subjected to statutes of limitations and thus had expired. And, third, when the crimes were condoned without protecting the rights of the victims.

C. CASES BEFORE THE SPANISH COURT SYSTEM

Although disappearances affected many Latin American countries, to show how judicial mechanisms implement human rights I am going to focus mainly on cases related to Argentina, Chile, and Guatemala due to the magnitude of the violations; other countries are named when relevant. Thus, this section examines, first, the common issues that affected the disappearances prosecuted in Spain, and second, specific cases prosecuted in Spain, grouped by country.

[85] See: Below, Sec. D.1.a.

[86] See: Above, Ch. IV, Sec. B.3.c.

1. COMMON ISSUES AFFECTING THE DISAPPEARANCES PROSECUTED IN SPAIN[87]

The common issues are, first, a Cold War context characterized by social unrest and state terrorism; second, the use of governmental officials and secrecy to limit interference by citizens; third, the high number of victims and the systematic nature of the disappearances; and fourth, measures adopted against the accused.

a. Historical Context

The disappearances happened in the larger international context of the fight against Communism;[88] a fight which became extremely violent in Latin America due to social unrest caused by the left and by paramilitary groups from the right. Although the military justified the coups against legitimate regimes based on how the leftist opposition used terror to produce social change,[89] there is widespread agreement among scholars that by the time of the coups "the guerrilla organizations [were] practically . . . extinct."[90]

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[87] Apart from its complexity: "[T]his indictment consists of 51judicial decrees and 453 rulings . . . 78 declarations before this court, and also 85 affidavits received via the Foreign Affairs Ministry, …" See: "Auto de Procesamiento a 98 Militares Argentinos": Antecedentes, Décimosexto.

[88] U.S. central role due to its fight against Communism and its goal of "deepening, widening . . . its . . . domination over Latin America." In Antonia García Castro, *La mort lente des disparus au Chili: sous la négociation civils-militaires, 1973-2002* (Paris, France: Maisonneuve et Larose, 2002): 41.

[89] The military saw themselves as "saviors" of Western civilization. In José Gabriel Vazeilles, *La ideología oligárquica y el terrorismo de Estado* (Buenos Aires, Argentina: Centro Editorial de América Latina, 1985): 87. For the perspective of an Argentinean military regime supporter's view, see: Ambrosio Romero Carranza, *El terrorismo en la historia universal y en la Argentina* (Buenos Aires, Argentina: Ediciones Depalma, 1980). And for a recent general summary of the national security doctrine in Latin America, see: J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America* (Lanham, MD: Rowman & Littlefield, 2005): 3-4 and 36-7.

[90] For Argentina, see: "Trabajo Práctico sobre los desaparecidos durante la Dictadura militar 1976/83," *Clarín* (26 June 2001), http://tq.educ.ar/grp0002/trabajo/sdesaparecidos.htm (Accessed: June 1, 2004). A regime's ideologue corroborated it: "Happily, the terrorists were defeated . . . four years ago," see: Ambrosio Romero Carranza. In *Crónica de la subversión en la Argentina: con un estudio preliminar de Armando Alonso Piñeiro* (Buenos Aires: Depalma, 1980): 245. For Chile, see: Informe Rettig: 20.

"Guerrillas appeared *after* coups had already installed military regime in Brazil and Paraguay, and guerrilla organizations were virtually defeated before coups were carried out in Argentina and Uruguay. Revolutionary groups in Chile such as MIR or the Socialist Party, while believing armed struggle was

As a result, the brunt of the repression affected civilians who were categorized as subversives, not armed enemies.

Since democratic means could have curtailed the guerrillas' excesses, the military's inhuman response can be explained by their extremist ideology—a mixture of national security doctrine,[91] Franco's military principles,[92] Nazi anti-Jewish sentiment, and fervent anticommunism—which made them classify everyone as friend or foe, without gradation. For the military juntas, enemies meant anybody unsupportive of the regime.

Such shared ideological background facilitated the birth in Santiago de Chile on 21 October 1975 of a common plan known as the *Cóndor* operation.[93] Through it the military governments carried out their version of state terrorism,[94] which included disappearances, among other crimes. The existence of the plan bolstered the practice of the crime of disappearances because cooperation among different governments guaranteed secrecy and neutralized any attempts to harness evidence of the crime. For

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justified, were primarily political and did not carry out armed activities before the 1973 coup." In McSherry, *Predatory States*: 27-8.

[91] Joseph Comblin, *Le pouvoir militaire in Amèrique Latine, l´Idéologie de la sécurité national,* J.P. Delarge, éditeur (Paris, France: 1977); Francisco Leal Buitrago, "Surgimiento, auge y crisis de la Doctrina de la Seguridad Nacional en América Latina y Colombia," in *Análisis Político* no. 15 (enero-abril, 1992); and Pedro N. Miranda M., *Terrorismo de estado: testimonio del horror en Chile y Argentina* (Chile: Editorial Sextante, 1989): Introduction, 13-30.

For a more current analysis with a focus on Operation Cóndor, see: Peter Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* (New York, NY: The New Press, 2003) and McSherry, *Predatory States,* ibid.

[92] See: Padilla Ballesteros, *La memoria y el olvido*: 27-28 (Latin America) and 29-32 (Chile).

[93] For a brief explanation of the plan, see: Gutiérrez and Villegas Díaz, "Derechos Humanos y Desaparecidos": Sec. 1.1; and for US involvement, see: John Dinges, *The Condor Years* (New York, NY: The New Press, 2004). For the doctrine of Seguridad Nacional (DSN) or national security, see: Derechos Humanos en Chile, "Marco ideológico del régimen militar," http://www.chipsites.com/derechos/dictadura_autores_4_esp.html (Accessed: June 1, 2004).

"Operation" and "Plan" can be used interchangeably but in Spanish "operation" is preferred.

[94] Cezaz Mariano, *Operación Cóndor*: 15. For origin and description: Ibid, 15-21.

example, security forces of several states "swapped" prisoners, i.e., persons kidnapped in country A, were disposed of in country B or C. This made it difficult for the relatives of the disappeared to know exactly where to address their demands for habeas corpus.

b. Involvement of Government Officials and Secrecy

In Guatemala—not part of the Cóndor plan—the government, especially the armed forces, executed the majority of the disappearances;[95] the guerilla forces were responsible for less than 5% of them. In states party to the Cóndor Plan,[96] all the disappearances were government-sponsored. To avoid dissent among such forces—trained to uphold the law—authorities sought to involve in the crime everyone possible:[97]

> The regular forces . . . might seal off a neighborhood and provide logistical support. The disappearances were generally carried out by . . . five or six men, under the command of a lieutenant, . . . [from] the various intelligence services of the armed forces . . . [after] a 'green light' from the local police . . . to prevent the police from responding to distress calls from any concerned neighbor.[98]

Governmental participation also secured the silence of society at large due to the fear that the government would abuse any persons suspected of having "terrorist" links.[99]

Secrecy surrounded disappearances. First, victims ignored why they were being abducted. Known as "'clandestine subversives'—many of whom [did] not know each other, but . . . participate[d] in neighborhood or union activities—[they] are included in the group to be destroyed . . . without explanation . . . and [without hope] because

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[95] El Latinoamericano, "Definiciones sobre la guerra civil en Guatemala," http//www.stormpages.com /marting/definici.htm (Accessed: May 28, 2004).

[96] See: Above, Sec. C.1.a.

[97] Guest, *Behind the Disappearances*: 32-3.

[98] Antonius C.G. M Robben, Ed., "State Terror in the Netherworld: Disappearance and Reburial in Argentina," in *Death Squad: the Anthropology of State Terror*, Ed., Jeffrey A. Sluka (Philadephia, PA: University of Pennsylvania Press, 2000): 94 and Padilla Ballesteros, *La memoria y el olvido*: 67and 38-66.

[99] "[The disappearances] . . . were so terrifying . . . because they were . . . intensely private." In Robben, "State Terror in the Netherworld," ibid: 96.

'renditions' are inadmissible."[100] Beyond ideological differences, there are no legitimate charges to justify an indictment of those who were victims of the disappearances.

Second, in countries with a degree of respect for the rule of law, abductions took place in a secretive way to minimize solidarity between society at large and the victims. For example, in Argentina abductions happened at night in the victims' home usually. But where the rule of law was/is less developed—as in Guatemala—abductions usually happened in broad daylight, especially when used against the lower classes, i.e., indigenous peoples or the poor.

Third, after the kidnapping, secrecy is guaranteed because nobody knows where the victims were moved to, and whether they are dead or alive.[101] That is why the military and their civilian supporters deny the disappearances, claiming as the Argentinean authorities did, that, "since they [the alleged victims] are unpatriotic, they just are escaping [from the country]."[102]

c. Scope of the Crime: Total Number of Victims

Agreement on an exact number of disappearances is rare[103] due to lack of sufficient evidence—due to a several causes, including the fact that whole families

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[100] "Auto de Procesamiento a 98 Militares Argentinos": Hechos, Noveno.

[101] "As in the . . . 'Nacht und Nebel' decree . . . [secrecy] provide[s] a guarantee for the authors' impunity." In "Auto de Procesamiento a 98 Militares Argentinos": Hechos, Noveno.

[102] Ibid: Fundamentos de Derecho, no. 2.

[103] Agreement when the number is around 200: E.g. Bolivia, (report of FEDEFAM), Brazil, Uruguay, and Paraguay. For **Uruguay**, see: Catholic World News, "Uruguayan Bishops Request Location of Missing Be Revealed," http://www.cwnews.com/news/viewstory.cfm?recnum=4300 (Accessed: June 1, 2004); for **Paraguay**, see: Padilla Ballesteros, *La memoria y el olvido*: 38. Disagreement when it surpasses 200: E.g. in **Argentina**, the official number grew from 8,960 in the 1984 CONADEP report to 12,000 in its additions, see: The Vanished Gallery, "How Many Desaparecidos Were There? Which is the Right Number? http://www.yendor.com/vanished/how-many.html (Accessed: May 26, 2004); and the "Auto de ampliación del auto de procesamiento contra Cavallo": Hechos, Fourth.

disappeared and thus nobody can claim any of the victims as disappeared, others do not want to inquire about the disappeared out of fear of reprisals from any of the supporters of the previous regime, some suffer from "voluntary" amnesia, and some ignore the existence of children who were born to the disappeared women.

Uncertainty in the numbers causes errors on the indictments and complicates the different processes.[104] Disagreement notwithstanding, even the lowest official numbers—20,000 disappearances—prove the enormity of the crime. Although the number of kidnapped babies and children is not as elevated as that of the adults, their abduction was systematic enough to be a crime against humanity too. Out of a number of 260 (500 according to other estimates) disappeared children, only 64 were found in Argentina by 1999.[105]

Although the dissertation focuses on Argentina, Chile, and Guatemala, the following table covers all the countries that participated in the Cóndor plan—plus Guatemala due to its historical significance.[106] The first column shows the estimated number; the second, the official one.

On underreporting, see: "Auto de Procesamiento contra Ricardo Miguel Cavallo" (1 Sep. 2000): Hechos, decimotercero; and Iain Guest, ibid.: 30. Self-interest is also a factor: governments have to pay compensations and tend to underreport; human rights groups and the media seek impact and tend to overreport—due to conceptual imprecision too.

[104] Errors "consist in omissions or material errors provoked by lack of cooperation from Argentinean authorities." (Translation). In "Auto de corrección del listado parcial de víctimas españolas desaparecidas o asesinadas en Argentina" (8 July 1997).

[105] *Niños desaparecidos, jóvenes localizados en la Argentina de 1976 a 1999* (Buenos Aires, Argentina: Abuelas de Plaza de Mayo: Temas, 1999).

[106] See: Above, Fn 14.

COUNTRIES WHERE THE DISAPPEARANCES HAPPENED	NUMBER OF DISAPPEARED	
	ESTIMATED	OFFICIAL[107]
ARGENTINA	15,000 to [+30,000]	+ 12,000
BOLIVIA	155	155
BRAZIL	125	125
CHILE	+3,000	+1,000 [2,723]
GUATEMALA	<20,000 to [50,000]	+6,200
PARAGUAY	140	140
URUGUAY	160	160
TOTAL	38,580 [78,580]	+19,780 [21,503]

Table 1. The Disappeared in States Party of the *Cóndor Plan* Plus Guatemala: Estimated and Official Numbers.[108]

d. Measures Adopted against the Accused

Since Spanish legislation rejects trials *in absentia* and only two of the accused were in Spain—one voluntarily and the other through an extradition from Mexico—the courts had to send several orders of capture through the Interpol and extradition petitions too. Once in Spain, the accused were provisionally detained while awaiting trial.[109]

[107] State or international organization-sponsored Truth Commissions.

[108] For **Argentina**, see: Georgina Elustondo, "Desaparecidos, un drama que castiga a más de 100 países;" 20,000 after the declassification of US documents, in Diario Granma, "Elevadas cifras sobre desaparecidos en Argentina," http://www.granmacubaweb.dcu/2003/12/08/interna/articulo04.html (Accessed: June 1, 2004). For **Chile**: From 11 September 1973 to 14 November 1989—day of the last disappearance. The official no. appears in http://www.memoriaviva.com/Desaparecidos/desaparecidos.htm (Accessed: May 28, 2004). Although the "Comisión Nacional de la Verdad" only recognizes 957 and the Catholic Church's "Vicaría de la Solidaridad" lists 984 (see: Padilla Ballesteros, *La memoria y el olvido*: 38), the bracketed number seems more exact because it is used by the government to calculate reparations—official deceased included. See: Red de información Jurídica, "Comisión de la Verdad," http://www.cajpe.org.pe?/RIJ/cverdad/cv2d.htm (Accessed: June 1, 2004). For **Guatemala**, see: "El Latinoamericano, "Definiciones sobre la guerra civil": the estimated number is 40,000 including killings. Forced disappearances are +6,000; around 200,000 according to Amnesty International, "El Legado Mortal de Guatemala: El pasado impune y las nuevas violaciones de derechos humanos" (Madrid, Spain: EDAI, 2002): 12. Official and estimated totals between brackets result from adding the highest figures.

[109] "Auto de Procesamiento a 98 Militares Argentinos": Fundamentos de Derecho, Décimotercero.

In addition, to guarantee the civil responsibility that could derive from the crime—if proven in the trial—and due to the lack of sufficient data to know beforehand the exact amount the accused will have to pay, "it is agreed, starting in this moment, to secure and seize [the belongings of the alleged accused] in the quantities established plus a third, as established in the LEC [or the Spanish Law of Civil Procedure]."[110]

2. SPECIFIC CASES BEFORE THE SPANISH JUDICIARY: ARGENTINA, CHILE AND GUATEMALA

a. Argentina: The Accused, Evidence against Them and Responsibility

As soon as Argentina began its transition to democracy,[111] Spain and other European countries used the judiciary to confront the disappearances of their own citizens there.[112] For example, in 1983 "the General Consular Representative of Spain brought before the *Juzgado Federal de lo Criminal* number 5 of Buenos Aires . . . a petition of habeas corpus relative to 27 disappeared Spanish citizens, then added one more."[113]

Nevertheless, judges appointed during the military regime hampered access to the courts. For example, "Federal judge Manlio Martínez . . . dismissed the case

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[110] "Auto de Procesamiento a 98 Militares Argentinos": Fundamentos de Derecho, Décimocuarto.

[111] Limited to individuals prosecuted in Spain. However, the leaders of the School of the Americas could be accused as accessories because "[b]y 1976 six hundred Argentine officers had graduated from the School, having undergone training which lasted for up to forty weeks, concentrating on the techniques of irregular warfare and counter-intelligence. The methods and theory of torture were an important feature of the course. . . . [Those who graduated] usually became instructors . . . joining a group which included a number of Frenchmen who had served . . . in . . . Algeria." in John Simpson and Jana Bennett, *The Disappeared and the Mothers of the Plaza: The Story of 11,000 Argentineans who Vanished* (New York, NY: St Martin's Press, 1985): 54.

[112] "[N]ear 200 Spaniards and more than 100 of Italian ancestry." [Translation]. In Esteban Cuya, "Desaparecidos alemanes y de origen alemán en Argentina en los años de la dictadura militar: Es necesario superar el pasado: Verdad y Justicia," *Coalición contra la Impunidad*, http://www.desaparecidos.org/arg/coalicion/mayo.html (Accessed: May 28, 2004).

[113] Ministerio de asuntos exteriores de España en respuesta al pedido de la diputada María Angeles Maestro Martín, "Informe oficial sobre los desaparecidos españoles en Argentina." (20 Febrero 1997), http://www.derechos.org/nizkor/arg/doc/martin.html (Accessed December 4, 2003).

provisionally based 'on lack of sufficient evidence.'"[114] Moreover, "[i]n June 1987, all charges were dropped against Astiz and nineteen other ESMA operatives under the 'due obedience' law."[115] To placate the military during the Argentinean transition to democracy, the government of Raúl Alfonsín (1983-89) approved this "due obedience" law, which meant that lower ranking officials would escape prosecution as long as the alleged violations of human rights were a result of following their superiors' orders. Thus, Argentineans had to seek justice somewhere else, and they took advantage of the individual's easier access to the court system in several European countries.

In order to initiate the criminal process in Spain, the courts used documentary evidence on the Cóndor operation, the membership of those accused in the military, and their service in the *grupos de tareas* or "working groups" in charge of the kidnappings. In the end, 98 members of the Argentinean military were indicted[116] of which I focus on the prosecutions against Julio Scilingo and Ricardo Miguel Ángel Cavallo as the most illustrative. The other accused are examined according to their positions as high officials, medical doctors and counter-insurgency operatives.

i. Adolfo Scilingo[117]

A relevant case not only because Scilingo's voluntary confession provided profuse details regarding the violations of human rights that occurred while Argentina was controlled by the military, but also because he was physically in the hands of the

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[114] "Auto de procesamiento a 98 Militares Argentinos": Hechos, Vigésimo.
For links to decisions of Argentinean courts up to 19 March 2004, including the unconstitutionality of amnesty laws and pardons, see: http://www.nuncamas.org/juicios/juiprinc.htm

[115] Guest, *Behind the Disappearances*: 400.

[116] "Auto de Procesamiento a 98 Militares Argentinos": Parte Dispositiva.

[117] Ibid: Fundamento de Derecho, Undécimo.

Spanish authorities from the beginning. Although Scilingo was an active member of the Mechanized School of the Navy (ESMA), from October 1976 to December 1977 he was in charge of the electricity and motor vehicles section that did not handle directly the disappearances and torture. Nevertheless, he confessed to being a participant in the *vuelos de la muerte* or death flights twice and to the kidnapping of "a 45-year-old male moved to the ESMA," who remains disappeared.[118]

Since Scilingo followed orders, his defense and the office of the prosecutor wanted the court to end the process against him. However, it is already established doctrine that following orders is no excuse for this type of crimes.[119] The investigative phase finished, the oral one started on 14 January 2005. On 17 January 2005 he denied his participation in any human rights violations and said that he had made a false declaration as a means of revenge against Massera, who threatened his sister.[120]

The court considered that there was evidence enough of Scilingo's participation in throwing thirty persons from a plane to their deaths based on his confession and other declarations—including a book on the subject—his correspondence, and witnesses' corroboration.[121] Thus, the *Audiencia Nacional,* on its verdict of 19 April 2005 condemned him as the direct author of thirty deaths for which he is punished with twenty one years for each of them (to be served concurrently) plus five years for illegal

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[118] "Auto de Procesamiento a 98 Militares Argentinos": Hechos, Décimosexto, Segundo Motivo 5°, 2°.

[119] "Recurso de Adolfo Scilingo ante el Tribunal Constitucional" (Madrid 16 septiembre 1999): Segundo Motivo, 6°.

[120] Mar Roman, "Scilingo confiesa haber mentido para vengarse de líder de la Junta," (Madrid, 18 January 2005), http://www.miami.cm/mld/elnuevo/10672157 (Accessed: January 19, 2005).

[121] Audiencia Nacional, "Decision of 19 April 2005": Fundamentos de Derecho, 2°.

detention.[122] On 4 July 2007, the Supreme Court (10 to 5) decided on appeals to increase Scilingo's punishment to 1,084 years of prison because he has been found guilty of crimes against humanity based on his participation on two "death flights" in which thirty people day and on his service at the ESMA. However, torture charges against Scilingo were dismissed.[123] Finally, the 1 October 2007 decision of the Spanish Supreme Court upheld Scilingo's conviction for crimes against humanity based on the proven counts of illegal detentions and homicide[124] and punished him with 19 years of prison per each count of homicide, 4 years of prison for each count of illegal detention he committed directly and 2 years of prison for each count of illegal detention in which he participated as an accomplice.[125]

ii. Ricardo Miguel Cavallo

The accused covered up his identity by using the aliases Miguel Ángel Cavallo, Sérpico and Marcelo.[126] Thus, he hampered the process further. Nevertheless, once his identity was established, the documentary evidence confirmed that "he participate[d] . . .

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[122] Audiencia Nacional, "Decision of 19 April 2005": Verdict, 1. Plus the impossibility of holding public positions.

[123] José Yoldi, "El Supremo eleva a 1.084 años la pena de Scilingo por crímenes contra la humanidad," *El País* [Andalucía Ed.] (5 July 2007): 25.

[124] Sentencia no. 798/2007 (1 de octubre de 2007): Fundamento de Derecho, sexto, 6.
For a brief assessment of this decision, see: Richard Wilson, "Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity," *ASIL Insight* vol. 12, no. 1 (January 30, 2008), http://www.asil.org/insights/2008/01/insights080130.html

[125] Segunda sentencia no. 798/2007 (1 de octubre de 2007): Verdict.
For further details, see: Above, Ch. IV, Sec. C.2.a.iii.

[126] BBC News, "Torture Suspect Faces Extradition," (27 August 2000), http://news.bbc.co.uk/1/hi/rold/americas/898110.stm (accessed: 7/3/03). From now on referred to as Cavallo.

in the disappearances and elimination of persons . . . part of the encompassing plan of genocidal repression created and sponsored by the Military Juntas. . . ."[127]

The court reached this conclusion based on Cavallo's service in the *Grupo de Tareas* 3.3.2 of the Mechanized School of the Navy (ESMA) and as the official in charge of "la PECERA . . . between January 1979 and March 1980."[128] This was an installation inside the ESMA dedicated to forcing some of the prisoners into servitude. As aforementioned, the Nuremberg precedent justifies deducing participation in atrocities from a person's membership in a group proven to engage in those illegal activities.

Moreover, the court considers that there is enough circumstantial evidence to prosecute him for "**alleged direct and active participation and knowledge**, allowing them and co-participating . . . in detentions, kidnappings, transferences of detainees, disappearances, [and] physical and psychological torture . . . at the ESMA."[129] All the aforementioned activities constitute the crime of disappearances.

His case is relevant because he was awaiting trial in Spain for 264 disappearances and 159 kidnappings—[130]after the Supreme Court of Mexico granted his extradition for the crimes of genocide and terrorism—and for his activities outside Argentina since March 1980,[131] which underlines the transnational nature of his crimes. However, in March of this year, he was extradited to Argentina, where human rights groups expect him to stand trial for violations committed during the military regime in Argentina.

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[127] "Auto de procesamiento a Cavallo": Antecedentes de Hecho, Décimoquinto.

[128] Ibid.

[129] Ibid: Antecedentes de Hecho, Décimoquinto.

[130] Ibid: At least 22 witnesses accused him of torture.

[131] Ibid: Antecedentes de Hecho, Décimosexto. Others with similar chores appear in: Ibid, 15.h.

iii. Other Accused

Several of the accused had command responsibility because they were members of the military juntas.[132] The following have it due to their functions and their position (the number of disappeared for which they are accused appears between parentheses): Arriola and Anaya are responsible for the disappearance of René Haidar; Acosta (204); Barbuzzi (15); Capdevila (24), Donda Tigel (29), Febres (34); García Velazco[133] (94); González (204); Malugani (15); Massera (212); Salvio Olegario Menendez (6); Pernías (208); Perrén (102); Peyón (221); Rioja (102); Rolón (83); Scheller (216); José Suppisich (19); Vañek (164); Vildoza (227); and Whamond (184).

There is evidence of direct participation in the crime of disappearances against Alfredo Ignacio Astíz (12); Guillermo Antonio Minicucci, who moved the now disappeared Alicia Elena Alfonsín to the ESMA; and Jorge Perrén who participated in the disappearance of Omar Massera, Horacio Palma, Conrado Gómez y Assales; the only civilian accused is Gonzalo Torres de Tolosa.

Emilio Eduardo Massera was accused of command responsibility regarding the disappeared children because he approved plans ordering that "pregnant detainees will be kept alive until the babies were born; the babies were then to be given, according to the order established in . . . the ESMA, to military, naval, or civilian families who petitioned

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[132] Generals Jorge Rafael Videla and Leopoldo Fortunato Galtieri, Almirantes Emilio Eduardo Massera, Armando Lambruschini (responsible for 34 disappeared), and Jorge Isaac Anaya; Brigadiers Omar Rubens Graffigna, Basilio Lami Dozo, and Eduardo Viola y Orlando Ramon Agosti (these last two were dead by the time of the indictment). In "Auto de procesamiento a 98 Militares Argentinos": Hechos, 8.

[133] Married to a Spaniard, he acquired Spanish nationality in 1978. His whereabouts are unknown.

[for babies to adopt] previously."[134] In addition, medical doctors were accomplices of the military authorities because they delivered the babies and forged birth certificates to facilitate the illegal adoptions. One of those doctors, Jorge Luis Magnacco, was chief of gynecology of the Naval Hospital since 1975 and of obstetrics from October 1977 to April 1979. The following table lists those accused of disappearing children and the number of children in whose abductions they are allegedly involved:

OTHER ACCUSED	COMMAND RESPONSIBILITY	DIRECT INVOLVEMENT
Jorge Eduardo Acosta	13	----------
Adolfo Donda Tigel	2	----------
Héctor Antonio Febres	8	----------
Lambruschini	3 (2 from ESMA)	----------
Emilio Eduardo Massera	13 born in the ESMA	----------
Vildoza, Jorge Raúl	13 ESMA	2[135]

Table 2. Command Responsibility and Direct Involvement in the Disappearances of Children in Argentina.

b. Chile: The Accused, Evidence against Them, and Responsibility

Until recently Chileans[136] confronted starker obstacles than the Argentineans[137] to end impunity because the Chilean judiciary had remained to a great extent in the hands of

[134] "Auto de procesamiento a 98 Militares Argentinos": Hechos, Décimosegundo. An official under his direct command—Mendia—has explained it as a well-traced plan.

[135] One of them recuperated his identity in 1998.

[136] "Informe Rettig: informe de la Comisión Nacional de Verdad y Reconciliación," *La Nación* (Chile, February 1991).

[137] The Argentinean amnesty law allowed prosecuting children abductions. In *Los niños desaparecidos y la justicia: Algunos Fallos y Resoluciones.* (Buenos Aires, Argentina: Abuelas de Plaza de Mayo, 1988): 21.

Pinochet's supporters, who controlled the transition.[138] Thus, the Chilean Supreme Court tended to confirm the lower civilian courts decisions to defer to the military justice the prosecution of human rights abuses, which meant a *de facto* amnesty for the accused.[139] But in 1998, three members of the DINA were tried for kidnapping and disappearances[140] And "[as] of October 2006, courts had convicted 109 other agents of [Pinochet's] regime for crimes including 'disappearances,' extrajudicial executions, and torture. Thirty-five former generals of the army, air force and police have been convicted or are facing trial."[141]

As happened with the prosecution of torture, Pinochet was the main individual accused because he was in charge of adopting and promoting human rights violations as part of Chile's national policy. During the long and failed process to obtain Pinochet's extradition—due to Home Secretary Jack Straw's decision not to grant the extradition based on Pinochet's frail health—[142] "Garzón . . . [had to] renew his efforts to convince Britain's courts that the 1,196 cases of disappearances . . .[were] continuous crimes . . .

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[138] For the negative behavior of the judiciary and especially of the Supreme Court, see: Patricia Verdugo, *Tiempos de días claros: los desaparecidos* (Santiago, Chile: Ediciones Chileamérica, 1990): Ch. XI; and Brian Loveman, *Chile: the Legacy of Hispanic Capitalism*, 3rd Ed. (New York, NY: Oxford University Press, 2001): 263-4. The Chilean transition happened in March 1990. See: Linz and Stepan, *Problems of Democratic Transition and Consolidation*: 206.

[139] AI, "Chile: Transition at the Crossroads: Human Rights Violations Under Pinochet Rule Remain the Crux, AI Index: AMR 22/01/96, http://www.web.amnesty.org/library/Index/engAMR22001196 (Accessed: November 24, 2004).

[140] "Abogado de Pinochet compara 'Operación Cóndor,' con acuerdos Madrid-París," (15 May 2004), http://barcelona.indymedia.org/newswire/display/90213/index.php (Accessed: November 24, 2004).

[141] BBC News, "Pinochet Dead at 91: Legacy May Aid Victims," (11 December 2006), Human Rights Watch 2006, Compiled by Kandy Ringer, http://bbsnews.net/article.php/20061211160342617/print (Accessed: May 25, 2007).

[142] BBC News, "Pinochet Set Free" (2 March 2000), http://news.bbc.co.uk/1/hi/uk/663170.stm (Accessed: November 16, 2004).

and therefore c[ould] be included . . . even if the victims disappeared before 1988."[143] However, the English courts established that the extradition of Pinochet to Spain could only be based on the charges of torture committed after 8 December 1988.[144]

i. Augusto Pinochet

There is agreement that Pinochet was the main sponsor of the Cóndor plan, launched while he was in charge of a military government that "subverted . . . the constitutional order to unfold efficiently the plan of disappearance and systematic elimination of members of national groups . . . taking advantage of the help and coordination of other countries, especially Argentina."[145]

Although there is no evidence of his physical participation in such crimes, he had command responsibility.[146] Not only did he approve the Cóndor plan but he received direct information on the disappearances and starting on 17 December 1974 he was in charge of all the decisions.[147] As a result, at the beginning he was accused of 79 disappearances, a number that increased to 1,198 or the official number of disappeared in Chile during his dictatorship.[148] The crime is still being committed because Pinochet and

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[143] Chile: "Spanish Judge Throws more Charges at Chile's Ex-Dictator," http://www.converge.org.nz/lac/articles/news990426a.htm (Accessed: November 24, 2004).

[144] "Letter from Jack Straw about the Extradition of Pinochet" (15 April 1999), http://www.derechos.org/nizkor/chile/juicio/straw.html (Accessed: January 26, 2006).

[145] "Auto de procesamiento a Pinochet": Razonamientos Jurídicos, 2°.

[146] Manuel Contreras Sepúlveda has declared that he was "directly subordinated to Junta President . . . Pi.nochet," in Dinges, *The Condor Years*: 64 and see: "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte y se ratifica la prisión provisional del procesado, así como las órdenes internacionales de detención, de fecha 16 y 18 de octubre de 1998," (Madrid, 30 April 1999): Hechos, Primero.

[147] "Auto por el que se acuerda remitir a las autoridades inglesas la resolución por la que se amplía la querella contra A. Pinochet a 9 casos adicionales por supuestos de tortura" (Madrid, 26 de marzo de 1999): Razonamiento Jurídico, Segundo; and Hechos, Segundo.

[148] "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte y se ratifica la prisión provisional del procesado, así como las órdenes internacionales de detención, de fecha 16 y 18 de octubre de

his entourage have not provided any information about the disappeared. Due to Pinochet's death on 2006, the proceedings against him have ended.

ii. Other Accused

Command responsibility extends to the members of the Chilean Military Junta other than Pinochet and to those in charge of the secret police. The members of the Junta were José Merino Castro, in charge of the Navy; Gustavo Leigh Guzmán who presided over the air force; and César Mendoza Durán, the chief of the *carabineros* or policemen; and José Toribio Merino Castro. The members of the Junta decided everything by unanimity until Pinochet assumed total control on 17 December 1974.[149]

Other accused are Fernando Matthei Aubel and Rodolfo Stange Oelckers, who became part of the Junta later on as Leigh and Mendoza's replacements.[150] The responsibility also extends to Manuel Contreras Sepúlveda—the officer in charge of the secret police or DINA and then of the SDI; he was appointed directly by Pinochet. Other members of the DINA accused in Spain are Eduardo Iturriaga Newman, alias Luis Gutiérrez, in charge of *la Dirección de Operaciones Exteriores* or an Department of Operations Abroad; [151] Marcelo Moren Brito, in charge of the DINA in Villa Grimaldi.[152]

1998": Hechos, Séptimo (d); and "Auto por el que se acuerda remitir a las autoridades inglesas la resolución por la que se amplía la querella contra A. Pinochet a 9 casos adicionales por supuestos de tortura," ibid: Razonamiento Jurídico, Segundo.

[149] "Auto por el que se amplía el procesamiento de A. Pinochet Ugarte y se ratifica la prisión provisional del procesado así como las órdenes internacionales de . . . 1998": Hechos, Tercero.

[150] See: Miguel Miravet, "Denuncia presentada en nombre y representación de la Unión Progresista de Fiscales" (Valencia 4 July 1996): Hechos, Primero.

[151] "Auto por el que se admite la ampliación de querella presentada por Izquierda Unida contra Augusto Pinochet y las querellas contra éste y otros presentadas por la Agrupación de Familiares de Detenidos y Desaparecidos en Chile" (Madrid, 16 Octubre de 1998): Hechos, Único.

[152] Miguel Miravet, "Denuncia presentada en nombre y representación de la Unión Progresista de Fiscales": Hechos, Décimo.

In the first lawsuit accepted in Spain in 1996, those aforementioned individuals were accused of seven disappearances, including that of two babies. Such lawsuit is important for referring to a decision of the Supreme Court of Chile of 30 May 1995 that stated that 'forced disappearances was a method of elimination used mainly by the DINA . . . [that] respond[ed] to a pre-fixed plan and a centralized coordination that together reveal the intention to exterminate certain types of people.'[153]

c. Guatemala: The Accused and Jurisdictional Issues

Guatemala is "cited as the first nation in the Americas to systematically employ the enforced disappearance of persons … [and] Guatemala's disappeared persons, alone, account for approximately 50 percent of all of Latin America's disappeared persons."[154] Although the practice of disappearances shared commonalities with the cases studied above there are two relevant differences. First, the number of victims increased with the passing of time.[155] The 1985 Inter-American Report for Guatemala states that the disappearances were more systematic starting between 1975 and 1985[156] and "this practice was remarkably more intense in the period between 1983 and 1984."[157] Second,

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[153] Miguel Miravet, "Denuncia presentada en nombre y representación de la Unión Progresista de Fiscales": Hechos, Cuarto.

[154] Frank M. Afflitto, "The Homogenizing Effects of State-Sponsored Terrorism: The Case of Guatemala," in *Death Squad*: 116.

[155] See: Anantonia Reyes Prado, "Aportes para la discusión: un movimiento por los DDHH en Guatemala," *La Insignia* (Guatemala, 20 Julio 2003), http://www.lainsignia.org/2003/julio/der_035.htm (Accessed: May 28, 2004).

[156] "Tercer Informe sobre la situacion de los derechos humanos en la Republica de Guatemala," OEA/Ser.L/V/II.66 (Doc. 16) (3 October 1985), http://www.cidh.oas.org/countryrep/Guatemala85sp/Cap.2.htm (Accessed: May 28, 2004): Ch. 2, A.

[157] Ibid: A, 6. Between 1984-85 there were 52 more cases of disappearances, ibid. H. 61. The CEH stated that "the period from 1978 to 1985 was the bloodiest." See: Guatemala Hoy (26 February 1999), http://www.c.net.gt/ceg/diario/feb99/di990226.html (Accessed: May 28, 2004).

disappearances happened in a situation of civil war that extended from the mid-1960s up to 1996.

i. The Accused

Three Guatemalan dictators—Efraín Ríos Montt, Óscar Humberto Mejías Víctores, and Fernando Romeo Lucas García; and other high-ranking officials were prosecuted[158] due, to a great extent, to the efforts of Rigoberta Menchú Tum, the principal plaintiff in the criminal case in Spain.[159]

The figure of General Ríos Montt is of particular relevance because despite having one of the worst records of human rights violations, he still has run as a candidate for the Guatemalan presidency to obtain, among other advantages, immunity from prosecution.[160] Ríos Montt's creation of the Civic Action Patrols (CAPS), which carried out 70,000 killings—mostly of Mayans—[161]is to a great extent, the basis of the indictment against him.

ii. Jurisdictional Issues: The *Audiencia Nacional*, the Spanish Supreme Court, and the Spanish Constitutional Court

After investigative judge Guillermo Ruiz Polanco accepted the lawsuit against those accused of human rights violations that had occurred in Guatemala and affirmed Spanish universal jurisdiction on 27 March 2000 with basis on the Argentinean and

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[158] Donaldo Álvarez Ruiz, Germán Chupina Barahonaq, Pedro García Arredondo, and Benedicto Lucas García. In Juzgado Central de Instrucción n° 1 de la Audiencia Nacional, "Auto de 27 marzo del 2000. Basado en Diligencias Previas 331-99." It is signed by Judge Guillermo Ruiz Polanco.

[159] There is an *acción popular* or popular action based on 101 and 270 of LEC, a *querella* or action exercised by the son and grandson of a disappeared woman, and individuals and associations became part of the *querella* later on. See: "Auto of March 25, 2000": Antecedentes and Fundamentos de Derecho, Cuarto, Quinto and Sexto.

[160] Tim Gaynor, "Guatemala Fears Worst as Montt Seeks Power," *The Independent* (8 November 2003), http://www.independent-media.tv/item.cfm?fmedia_id=362&fcategory_desc=Under%20R (Accessed: January 5, 2004).

[161] Ibid.

Chilean precedent—rejecting the prosecutor's limited focus on territorial and subject jurisdiction—the prosecutor appointed to the case appealed the decision stating the jurisdiction of the Spanish courts using the so-called *recurso de reforma* before the *Audiencia Nacional*, which sided with the prosecutor.[162] The basis of the *Audiencia Nacional*'s 13 December 2000 decision was a new doctrine establishing the complementary nature of Spanish courts in cases of universal jurisdiction.[163] Thus, according to this doctrine, Spanish courts can only proceed when there are legislative or juridical obstacles to effective justice in the country where the crimes happened.

According to the *Audiencia Nacional*, since in Guatemala there are no amnesty laws that prevent prosecution and not enough time had passed from the restoration of peace until Rigoberta Menchú initiated the process in Spain to accuse Guatemala of juridical inactivity because the civil war ended only in 21 December 1996, the *Audiencia Nacional* considered this case different from those in Argentina and Chile and deferred the prosecution to the Guatemalan courts.[164]

However, the decision of the *Audiencia Nacional* was appealed via a *recurso de casación* (annulment appeal) before the criminal section of the *Tribunal Supremo* or Supreme Court of Spain[165] based on three main reasons. First, a denial of justice to the victims. Second, misrepresentation of the action of the Guatemalan courts when confronted with a series of crimes including disappearances. And third, the

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[162] "Decisión de la Sala de lo Penal de la Audiencia Nacional, rollo de apelación 115/2000, diligencias previas 331/99 (13 December 2000)": Parte Dispositiva, 1°.

[163] Ibid: Razonamiento Jurídico, Segundo.

[164] Decisión de la Sala de lo Penal de la Audiencia Nacional, rollo de apelación 115/2000, diligencias previas 331/99 (13 December 2000)": Razonamientos Jurídicos, Tercero and Cuarto.

[165] Recurso de Casación no.: 803/2001; decision reached on 25 February 2003.

establishment of the principle of the subsidiary nature of the activity of the Spanish courts, i.e., of the need to defer any case to courts with territorial and subject jurisdiction.[166] The Supreme Court of Spain in its decision of 25 February 2003 stated the following: first, the Supreme Court—following Spanish constitutional doctrine—[167]rejected the appeal to reverse the lower court's decision (*Audiencia Nacional*) denying Spanish jurisdiction because "access to justice . . . is fully complied with via a reasoned decision however contrary it is to the result the party was seeking;"[168] it is irrelevant that the reasons the *Audiencia Nacional* used are different from those provided by the parties to the process.

Second, the Supreme Court considered that the accusation did not provide sufficient proof of the inactivity of the Guatemalan courts, so the *Audiencia Nacional* was right to say that 'there is no proof of rejection by the State on whose territory [the alleged crimes happened].'[169] And third, the Supreme Court limited the scope of universal jurisdiction and thus rejected the precedent set in the Argentinean and Chilean cases:

> The universal jurisdiction of the Spanish Courts to prosecute the crime of genocide cannot be deduced from the dispositions of the Convention on . . . Genocide. . . . Furthermore, there is no evidence of the presence of the alleged culprits in Spain or that Spain has denied their extradition. . . . There is no evidence of the direct connection between the crime and a Spanish interest. . . . [The Court] reaches similar conclusion relative to … the crime of terrorism.[170]

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[166] "Sentencia del Tribunal Supremo no. 327/2003," (25 February 2003): Fundamento de Derecho, Segundo.

[167] It mentions several decisions of the *Tribunal Constitucional*: "STC 32/1982; 26/1.983, de 13 de abril; 90/1.983, de 7 de noviembre; 89/1.985, de 19 de julio; 93/1.990 de 23 de mayo; 96/1991, de 9 de mayo; 7/1.992, de 30 de marzo, entre otras." See: Ibid.

[168] "Sentencia del Tribunal Supremo no. 327/2003" (25 February 2003), ibid: Fundamento de Derecho, Tercero.

[169] Ibid: Fundamento de Derecho, Cuarto.

[170] [Translation], ibid: Fundamentos de Derecho, Undécimo.

The Supreme Court reached this conclusion—limiting the use of universal jurisdiction—through its interpretation of article 23.4 of the LOPJ, art. 6 of the Convention on Genocide, art. 17 of the Statute of the ICC, the European Convention on Terrorism of 27 January 1977, the decision of the Belgian Supreme Court in the case against Ariel Sharon, and the decision of the ICJ in the *Congo vs. Belgium* case of 14 February 2002.[171]

In the *fallo* or verdict, the Supreme Court agreed with the *Audiencia Nacional* except to establish that Spanish courts can decide cases based on accusations of torture, and against Spanish victims of the crimes—beyond the scope of this chapter because the victims were killed.[172] Although all the members of the Supreme Court agreed and signed the verdict, seven justices wrote a partially "dissenting opinion" called *voto particular* because they opposed limiting the applicability of the principle of universal jurisdiction[173] and ascribing a subsidiary role for the Spanish courts in the prosecution of crimes against humanity, i.e., that Spanish courts should defer criminal cases to foreign courts with territorial and subject jurisdiction.[174]

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[171] For the further details, see: "Sentencia del Tribunal Supremo no. 327/2003," (25 February 2003): Fundamentos de Derecho, Quinto to Undécimo.

[172] Ibid: Fallo, 20.

[173] "Sentencia del Tribunal Supremo no. 327/2003": Voto Particular, Fundamentos de Derecho, Primero, and Sexto to Octavo; Fundamentos Noveno and Décimo criticize the use of the German court decisions and of the ICJ *Congo vs. Belgium* decision to limit the scope of universal jurisdiction because these decisions are not applicable to the case examined by the Spanish Supreme Court. These justices also name a series of decisions that confirm the use of universal jurisdiction and that the majority did not use, i.e., the Barbie case and the decision of the Lords in the Pinochet case, among others. In Fundamento Décimo-segundo of ibid. these judges underline that the requirement for a connection (e.g., territory) between the prosecuting country and the crimes being prosecuted limits the use of universal jurisdiction.

[174] "Sentencia del Tribunal Supremo no. 327/2003": Voto Particular, Fundamento de Derecho, Segundo.

The partially dissenting justices considered that the inactivity of the Guatemalan courts had been proven because more than two years had passed since the decision of the *Audiencia Nacional* and the Guatemalan courts continued rejecting accusations based on human rights violations. Furthermore, they considered that Spain and Guatemala[175] have a strong connection that could show that Spain has an interest in prosecuting those crimes object of the indictment. Since only the representatives of the accusation appealed the decision in *casación*, and the Supreme Court decided issues beyond the accusation's petition, the dissenting opinion considered that the decision constituted a *reformatio in peius* (amending the decision appealed to produce a worse result)[176] against the party who initiated the process against the accused. The dissenting opinion shows how the verdict that denies the universal jurisdiction of the Spanish courts is contrary to the advancement of human rights.

This limitation affects the case against the Chilean general Hernán Julio Brady Roche who according to two decisions of the Supreme Court can only be prosecuted in Spain for the killing of Spaniards and not for other crimes, such as disappearances. "Spanish courts have jurisdiction to prosecute the facts object of the criminal indictment against the general . . . as long as it agrees with the doctrine the Tribunal set en banc in the verdict relative to the 'Guatemalan case.'"[177]

On 26 September 2005, the Spanish Constitutional Court declared the previous two decisions examined here (of the *Audiencia Nacional* and the Spanish Supreme Court)

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[175] "Sentencia del Tribunal Supremo no. 327/2003": Voto Particular, Fundamento de Derecho, Décimosegundo.

[176] http://www.en.wikipedia.org/wiki/Reformatio_in_peius (Accessed: May 24, 2007).

[177] "Sentencia n° 319-2004 del Tribunal Supremo español en el caso del Gral. Chileno Hernán Julio Brady Roche solving recurso de casación no. 1812-2002" (Madrid: 8 March 2004): Primera Sentencia, Fundamentos de Derecho, Quinto.

unconstitutional and thus affirmed the legality of the use of universal jurisdiction by the Spanish courts. It is a significant decision for the implementation of human rights because it confirms that universal jurisdiction is as valid as the other jurisdictions, i.e., the Spanish courts do not have a subsidiary role. Thus, as long as there is no trial pending against the accused, Spain does not have to defer to the jurisdiction of other countries.

D. COOPERATION FROM OTHER DOMESTIC AND FOREIGN AUTHORITIES

Since disappearances can be typified in Spanish law as torture, section D of chapter four on the Spanish courts' need for cooperation from domestic and foreign authorities is applicable here. Nevertheless, it is necessary to underline two types of cooperation that, although helpful to the prosecution of torture, are essential to prosecute disappearances, i.e., access to secret documents and to specialized forensic services.

In order to prosecute the crime of disappearances the lists of victims elaborated by relatives and friends aided by eyewitnesses are insufficient. Thus, access to official archives is vital to establish solid evidence that disappearances were part of a government -sponsored plan and to know where/how the accused disposed of the bodies; information on specific disappearances is rare because governments denied they existed and oftentimes kept no records.

Once a burial site for disappeared victims is located and the government authorizes the exhumation,[178] specialists such as forensic anthropologists,[179] molecular

[178] For an overview of the relevance of forensic scientists, the need to train them and to set standards, see: Commission on Human Rights, "Report of the Secretary-General on Human Rights and Forensic Science Submitted Pursuant to Commission on Human Rights Resolution 1992/24," E/CN.4/1993/20 (5 February 1993).

[179] Forensic anthropologist Clyde Snow is well known for his work in Argentina. He presented evidence against the military in a 1985 trial; identified human remains; and trained in this field a group of

biologists and chemists[180] try to establish how the victims were killed and their identities. For the latter purpose a bank with the relatives' DNA is vital. Moreover, DNA tests are used to determine the filiation of the disappeared children who are living with the families that adopted them illegally.

This section is divided into three parts. First, an analysis of the actions of the domestic authorities focusing on the executive and the office of the prosecutor, with a reference to a 1983 legislative report on the Spanish disappeared in Latin America; second, a study of the role of the executive and the courts in Argentina and Chile; and of the cooperation provided by Paraguay and the U.S. regarding access to relevant documents. Finally, I summarize how the cooperation at home and abroad affected the judicial implementation of the ban on disappearances.

Although the process in the Guatemalan case has finally started, it is too early to examine it because it is still on its investigative phase.

Argentinean professionals that established the *Equipo Argentino de Antropología Forense* (EAAF). See: Christina Bellelli and Jeffrey Tobin, "Exchanges – Interamerican Dialogue: Archaeology of the Desaparecidos" vol. 14, no. 2 (March - April 1996), http://www.saa.org/publications/saabulletin/14-2/SAA9.html (Accessed: May 21, 2007).

For an overview of the work of forensic anthropologists in the field with a special focus on Guatemala, see: Victoria Sanford, *Buried Secrets: Truth and Human Rights in Guatemala* (New York, NY: Palgrave Macmillan, 2003): Ch. 1. In addition, I was present at Victoria Sanford's first hand account of her experiences in Guatemala which was very useful to understand the difficulties faced in the process of identifying human remains. The difficulties are not only due to lack of resources but also to the existence of widespread threats to witnesses of the massacres and to the experts that are in the field during the exhumation process. In Lecture by Victoria Sanford, NEH Summer Institute 2006 (July 25).

For another example of threats against forensic experts in Guatemala, see: AAAS Human Rights Action Network, "Guatemalan Forensic Anthropology Foundation again Facing Death Threats," http://shr.aaas.org/aaashran/alert.php?a_id=316 (Accessed: April 17, 2007).

[180] Mary-Claire King was one of the pioneers in using a genetic test that "matches mitochondrial DNA sequences which are maternally inherited" to prove the filiation of disappeared children in Argentina. Later on she used her expertise in different parts of the world including Bosnia and Rwanda. See: http://www.washington.edu/alumni/columns/sept96/king2.html (Accessed: May 21, 2007).

For an in-depth analysis of the problems surrounding disappeared children in Argentina, in which Dr. King is named, see: Lisa Avery, "A Return to Life: The Right to Identity and the Right to Identify Argentina's 'Living Disappeared'" *Harvard Women's Law Journal* vol. 27 (Spring 2004): 235.

1. DOMESTIC AUTHORITIES

As seen in the chapter on torture, in order to fulfill its duties, the judiciary needs the help of the executive, especially of the government *strictu sensu*—prime minister and competent secretaries—and the office of the prosecutor.[181] However, the legislative is relevant to the prosecution of disappearances due to a 1983 report on the Spanish disappeared in Latin America which underlined the existence of direct Spanish interests in the prosecution of disappearances.

a. The Executive: Council of Ministers, Foreign Affairs Minister, and the Chief of the Executive

Since the crime of disappearances legitimizes the use of universal jurisdiction, the government must comply with judicial requests of extradition. That is why, notwithstanding the executive's thoughts that extraditions could undermine Spanish interests,[182] it formulated the aforementioned petitions of extradition of Cavallo, Pinochet, and the lesser known regarding 40 Argentineans.[183]

Nevertheless, even though in 2003 "the Argentinean authorities . . . show[ed] . . . their disposition to extradite, . . . a sign that the petitions . . . would not produce a 'political' or diplomatic conflict with Argentina,"[184] the Spanish Council of Ministers decided on 27 August 2003 not to reformulate the petition and to defer to the Argentinean

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[181] See: Above, Ch. IV, Sec. D.1.

[182] For economic ones, see: Elena Hita, "Iberoamérica ha dejado de ser un cáncer," *El Mundo, Suplemento de Nueva economía* 161, http://www.el-mundo.es/nuevaeconomia/2003/161/1044805667.html (Accessed: January 26, 2005).

[183] See: Autos of 19 and 20 August 2003.

[184] "Formalización de la demanda contencioso administrativa en el caso de la soclicitud de extradición de militares argentinos realizada ante la sala contencioso-administrativa, sala 3ª del Tribunal Supremo" (Recurso 002/2412003) (24 Febrero 2004): Hechos, Tercero.

courts because the Argentinean executive and legislative had lifted the obstacles to the prosecution of disappearances in Argentina. [185]

We can conclude, therefore, that the executive followed the rule of law but opposed the use of universal jurisdiction to prosecute violations of human rights; thus, it did not use the diplomatic channels to try to change foreign political decisions relative to extradition. For example, Abel Matutes—the Spanish Minister of Foreign Affairs under the Aznar administration—gave to the Spanish Ambassador to England the order to tell the British authorities that the Spanish government was not going to appeal Home Secretary Jack Straw's decision to deny, based on humanitarian reasons, Pinochet's extradition to Spain.[186]

This conclusion is further justified by the following comment of the then Spanish Prime Minister—José María Aznar (1996-2004)—regarding Straw's denial of the extradition of Pinochet: "First of all, I obey the verdicts of the courts. A different thing is if I agree with them. . . . Second, . . . one must be careful when trying to teach lessons. . . . [T]hat scenario [that Pinochet would be tried in Spain] . . . didn't happen. . . . I thought about that scenario [and] . . . it wasn't the most comfortable."[187] [Translation].

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[185] In "Formalización de la demanda contencioso administrativa en el caso de la soclicitud de extradición de militares argentinos realizada ante la sala contencioso-administrativa,: Hechos, Cuarto.

[186] "Auto del Tribunal Supremo denegando los recursos de súplica interpuestos por las representaciones procesales de Don Marcos Roitman Rosenmann y Don Carlos de Miguel y Lorenzo contra el Auto de este mismo tribunal de February 1, 2000": Razonamientos Jurídicos, Tercero, 2, http://www.derechos.org/nizkor/chile/juicio/matutes2.html (Accessed: January 10, 2005). The *querella* is from 27 January 2000.

"Carta del Marqués de Tamarón, Embajador de España en Londres, informando al Crown Prosecution Service de la intención del Gobierno español de no recurrir la decisión del Ministro del Interior británico en relación con la extradición a España de A. Pinochet," (London, 17 January 2000), http://www.derechos.org/nizkor/chile/juicio/tamaron.html (Accessed: January 23, 2006).

[187] Victoria Prego, *José María Aznar: Un presidente para la modernidad (1996-)* [Colección 25 Años de Democracia n° 4, Texto revisado de la edición de Plaza & Janés, 2000] (n.p.: Biblioteca El Mundo, 2002): 132.

b. Office of the Prosecutor

The office of the prosecutor followed the doctrine of the unity of the process, i.e., it perceived the process against the Argentinean and Chilean military as a whole instead of a series of processes against different individuals. That is why "Rubira [Chief Prosecutor] consider[ed] that since Jorge Rafael Videla—former chief of state—is one of the accused, the court must recognize his immunity, and such privilege should be applied to all the co-authors."[188] Rubira also requested the end of the case against all the accused because they were deprived of access to the original documents; the criminal section of the *Audiencia Nacional* refuted the validity of the prosecutor's conclusion[189] and ruled that the Scilingo case had standing on its own as an independent process.

Furthermore, the office of the prosecutor demanded the end of the different processes based on their subjection to a statute of limitations, the existence of amnesty, and the argument of following orders—all of them invalid reasons to end the prosecution of crimes against humanity and especially of the crime of disappearances which is a continuous crime and thus cannot be subjected to a statute of limitations until the whereabouts of the victims are known and cannot be the object of amnesty.

Fungariño, the Chief Prosecutor of the Spanish *Audiencia Nacional*, declared in Chile on 2 October 1997 that the case against the Argentinean and Chilean military was unjustified because their actions did not constitute genocide. His personal opinion was

[188] "El fiscal pide de nuevo el archive de la causa contra Scilingo," *El País,* (2 July 2003).

[189] Ibid.

contrary to that of the Council of Prosecutors of the Supreme Court, which is of higher rank than the Council of Prosecutors at the *Audiencia Nacional*.[190]

As aforementioned,[191] members of this office considered inapplicable the principle of universal jurisdiction to these cases. Even when Cavallo arrived in Spain after Mexico granted his extradition and was placed under detention without bail, the office of the prosecutor petitioned the court to set him free.[192] Later on the prosecutor asked the court to end the process against Cavallo.[193] And as mentioned before, the prosecution against Cavallo in Spain ended with his extradition to Argentina.

Nevertheless, the office of the prosecutor—as corresponds to a democratic institution—is made up by individuals with different ideas from those sponsored by the higher ranks. Therefore, a member of the Progressive Union of Prosecutors initiated the prosecution against the Argentinean Military:

> The prosecutor D. Carlos Castresana . . . presented a lawsuit before el *Juzgado* number 5 of the *Audiencia Nacional* based on the kidnapping and subsequent disappearance of 35 Spanish citizens living in Argentina during the 1976-83 period . . . [asking the Court] to keep on prosecuting . . . the disappearance of 266 persons . . . directly linked to Spanish citizens, and also the disappearances of Argentinean citizens and of other nationalities. [Translation].[194]

Although all the members of the office of the prosecutor must adopt the same doctrinal position and they "must act always as representatives of the Institution and as delegates

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[190] "Comunicado sobre la reunión de fiscales de sala del Tribunal Supremo" (28 December 1997), http://www.derechos.org/nizkor/chile/juicio/funga.htaml (Accessed: November 24, 2004).

[191] See: Above, Ch. IV, Sec. D.1.

[192] Laura Vales, "Prisión incondicional sin fianza para que el genocida no escape,"*Página 12* (Argentina 2003), http://200.61.159.98/diario/elpais/subnotas/22078-8390.html (Accessed: July 3, 2003).

[193] Ibid.

[194] "Carta de Amnistía Internacional, Sección española al presidente del gobierno español D. José María Aznar López," http://www.derechos.org/nizkor/arg/mil-juicio.html (Accessed: December 4, 2003).

of their immediate chief," [195] the cases examined show that dissenting opinions exist and can produce instability.

c. The Legislative and the Spanish Disappeared in Argentina, Chile, and Guatemala

On 30 June 1983 a special report from an Investigative Commission in the Spanish Senate[196] described the abuses committed in Argentina, Chile, and Guatemala; underlined the "special bond" between Spain and the Argentinean people, not the military; and emphasized the need to show support not only to the victims but to the judges that applied the law against the military's abuses too. [197]

> Where are we placing the limited number of Argentinean Judges who complied with their duty; who met with the demands of trust of a people, not of a Junta or of a transitory Government installed by whatever means? Where are we placing those men if their brave stance in the middle of indignity is silenced?[198]

It can be deduced from this statement that some of the members of the Commission supported demanding—by whatever legal mechanisms the Spanish government could use—further investigation and prosecution of the crimes in Argentina to end impunity. But they do not go as far as promoting universal jurisdiction because they focus on the Spanish disappeared.

> We, Spaniards . . . have suffered a most painful civil war . . . which is etched in our memory as a model of what we should never repeat no matter the circumstances. . . . The aforementioned provides us with the humility necessary to

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[195] Art. 23 of the Estatuto Orgánico del Ministerio Fiscal (OMF).

[196] Established by the Senate on 29 December 1982, see: "Dictamen de la Comisión Especial de Investigación sobre Desaparición de Súbditos Españoles en Países de América" (Palacio del Senado, 5 July 1983), http://www.derechos.org/nizkor/espana/doc/senado.html (Accessed: December 29, 2004).

[197] "Dictamen de la Comisión Especial de Investigación sobre Desaparición de Súbditos Españoles en Países de América": Verbal comments of Mr. Francisco Moreno Franco, president of the Commission on Foreign Affairs. These comments were made during the official presentation of the "dictamen" in the Spanish Senate and are available, in the previous link, together with the "dictamen".

[198] Ibid.

> avoid the easy temptation to judge the history of other peoples. . . . We declare our absolute respect for the American peoples and our total solidarity with the process of recuperation of the freedoms initiated by the Argentinean people.[199]

In 2003, during the Aznar administration, Spanish parliamentary groups other than the then in power *Partido Popular* or popular party not only "[e]xpressed their support for the judicial proceedings … which entail[ed] the recognition of the jurisdiction and competence of ordinary domestic courts in the cases of . . . Cavallo and . . . Scilingo" but also "[r]equested the Spanish government to abandon its obstructing attitude toward the accomplishment of the right to justice and to not place any obstacle that will prevent the trial from going forward in a transparent form, permitting the case to arrive at a verdict based on crimes against humanity in ordinary jurisdiction"[200]

2. FOREIGN AUTHORITIES

As seen in the chapter on torture, the degree of cooperation depends on what is requested from the foreign authorities. Of special interest to the prosecution of disappearances is the access to documents—usually guarded as state secrets—that prove the existence of governmental plans to disappear their enemies.

Only in cases in which commissions to investigate human right violations have been established, do the courts have an easier access to documents or to the data they contain. For example, the Reports from the CONADEP (*Comisión Nacional de Desaparecidos* or National Commission on Disappeared People of Argentina), the "Rettig" Commission (Chile), and the CEH (*Comisión de Esclarecimiento Histórico* or Commission of Historical Clarification of Guatemala) provided partial access to relevant

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[199] [Translation]. "Dictamen de la Comisión Especial de Investigación sobre Desaparición de Súbditos Españoles en Países de América": Sec. XI.

[200] "Statement by Spanish parliamentary groups in relation with the trial's opening phase in the cases of Adolfo Scilingo and Miguel A. Cavallo," (11 December 2003): Points 1 and 8.

documentation; the rest is on classified archives. Thus, Spanish courts petitioned foreign authorities to lift the secrecy blocking access to certain documents.

a. Argentina

Although a sector of the judiciary favored prosecuting those accused of human rights violations and even convicted some of them, for a long time the decisions of the executive and the legislative meant impunity for the violation of the prohibition against disappearances committed during the Cold War. Moreover, the Argentinean executive hampered prosecution in Spain by denying cooperation.

i. The Executive

In 1983 the Argentinean government denied permission to a special commission from the Spanish Senate that wanted to travel to Argentina to investigate the fate of the Spanish disappeared.[201] Since it happened at the beginning of the democratization process, the denial could be the product of the executive's attempt to appease the military and avoid any destabilizing event.

However, as democracy became increasingly consolidated, the Argentinean executive continued being reluctant to cooperate. Thus, in 1996 it rejected a petition of information—*comisión rogatoria*—alleging basically that the Spanish authorities did not specify the type of information requested, which referred mainly to the nationality of the disappeared, the subjection of the crime to a statute of limitations, and the filiation and/or location of the disappeared children.[202]

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[201] Ministerio de asuntos exteriores de España en respuesta al pedido de la diputada María Angeles Maestro Martín, "Informe oficial sobre los desaparecidos españoles" (20 February 1997).

[202] "Reaction toward the response to Spanish comisión rogatoria of 6/16/96, received in Argentina on 11/21/96" (Auto of 26 February 1997).

As a consequence, the Spanish authorities were right to believe that their Argentinean counterparts had no intention to help them prosecute the crime of disappearances. In the words of the Argentinean Minister of External Relations and Worship, "Even if the mistakes were corrected, it must be said that the Argentinean government has decided to reject the petition of international assistance."[203]

Moreover, on 26 January 1998, President Carlos Menem (1989-99) rejected, via decree 111, the Spanish petitions for cooperation. And on 27 February 1998 he stated that "the petitions . . . can be seen as 'stalking judicially' the Armed Forces and that he had instructed them to firmly oppose and destroy the effects of Baltasar Garzón's decisions."[204] Thus, the Argentinean executive was intentionally violating international law because article 29 of the Treaty of Extradition and Judicial Assistance on Penal Matters between Spain and Argentine prescribes that cooperation cannot be denied in these cases.[205]

Finally, in 2003 the aforementioned climate started to change. First, the Argentinean police detained 26 alleged violators of human rights in July 24, 25 and 26 based on Judge Garzón' extradition petitions; second, the Argentinean foreign affairs minister declared publicly on 28 July 2003—using a "*nota verbal*"—that "ten of the

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[203] "Argentinean response" (Buenos Aires, 15 January 1997), http://www.derechos.org/nizkor/arg/espana/coop.html (Accessed: November 24, 2004).

[204] Ibid: Hechos, 2.3.

[205] The cases involve crimes against humanity. For a critique of such decree, see: "Texto de la denuncia presentada contra Carlos Saúl Menem, Guido Di Tella y Raúl Granillo Ocampo por violación del tratado de colaboración judicial con España en el caso de los españoles desaparecidos en Argentina": Hechos 2.2. Inconstitucionalidad e ilegalidad manifiestas del decreto n° 111-98, http://www.derechos.org/nizkor/arg/espana/menem.html (Accessed: November 24, 2004).

detainees are now in the hands of the Argentinean courts, available for extradition."[206] Third, the Argentinean President—Néstor Kirchner (2003-2007)—supported the repeal of the amnesty laws.[207]

ii. The Courts

The Argentinean judiciary is exceptional because some judges were successful in liberating certain illegally detained citizens during the military regime and from the moment democracy was restored they accepted indictments against those accused of human rights violations. Even when President Raúl Alfonsín (1983-89) approved amnesty laws and President Carlos Menem (1989-1999) pardoned those who were serving time, some judges continued investigating.

However, since the executive holds the information needed to prosecute the accused, the executive's lack of cooperation forces the courts to end any prosecution against the accused. For example, on 14 November 1983—when Argentina was starting its transition to democracy—the Spanish General Consul in Argentina presented an habeas corpus petition in favor of the Spanish disappeared but the petition did not prosper because there was no sufficient evidence available.[208]

Amnesty in Argentina applied to the most heinous violations of human rights—except the kidnapping or "disappearance" of children. Thus, Eduardo Acosta is serving time for the disappearance of at least 15 children. But the accused were upset with the

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[206] "Texto de la denuncia presentada contra Carlos Saúl Menem, Guido Di Tella y Raúl Granillo Ocampo por violación del tratado de colaboración judicial con España en el caso de los españoles desaparecidos en Argentina": Hechos, Third.

[207] "Argentina: Legislators Back Amnesty Repeal," *The New York Times* (14 August 2003): A-10; and "the lower house of Congress approved a bill to revoke [them]."

[208] Dictamen de la Comisión Especial de Investigación sobre Desaparición de Súbditos en Países de América."

imprisonment of their colleagues and were able to get a presidential pardon for them. Although "Judge Claudio Bonadio charged former President Galtieri along with 30 other military officers for the disappearance of a dozen Montonero subversives in 1980,"[209] and Suárez Masón was condemned for 43 deaths and 24 kidnappings;[210] President Menem pardoned them due to pressures from the military. However, impunity has been attacked directly in June 2005 when the Argentinean Supreme Court declared the amnesty laws void[211] and thus confirmed Federal Judge Gabriel Cavallo's 2001 decision on the unconstitutionality of amnesty laws.[212]

b. Chile

Differently from the Argentinean case, during the dictatorship (1973-1990) the Chilean judiciary did not protect the citizens in any instance.[213] Afterwards, Augusto Pinochet continued controlling the courts. Although some individuals in official positions wanted to prosecute members of the prior regime, their chances were limited because the highest authorities promoted impunity. Thus, cooperation has been minimal.

i. The Executive

Since the first democratic administration was too engaged in countering the anti-democratic elements in different institutions of the state to provide adequate cooperation,

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[209] The National Security Archive, "State Department Opens- Files on Argentina's Dirty War," http://www.gwu.edu-nsarchivNSAEBBNSAEBB73index2.htm (Accessed: May 26, 2004).

[210] Dario Gallo, "Nunca fui blando," *Revista Noticias* año XIX, no. 1032 (Buenos Aires, 5 October 1996). "Menem … vía indulto- lo rescató para siempre," http://www.derechos.org/nizkorargmasonhtml (Accesed: March 25, 2004).

[211] See: Human Rights Watch, "Argentina, Corte Suprema anula leyes de amnistía, http://www.hrw.org/spanish/press/2005 /argentina.html (Accesed: January 25, 2005). The Supreme Court decision is based on *Barrios Altos,* Sentencia de Fondo de 14 Marzo 2001, Serie C, no. 75.

[212] http://www.hrw.org/spanish/press/2003/argentina_corte.html (Accessed: January 25, 2005).

[213] See: Verdugo, *Tiempos de días claros*: 297-311.

the focus is on the administrations presided by Eduardo Frei (1994-2000)—second democratically elected President after Pinochet's dictatorship—and by Ricardo Lagos (2000-2006)—the third one. The current one, presided by Michelle Bachelet since March 2006, is beyond the scope of the dissertation.

The process to extradite Pinochet provoked similar public declarations from the Christian Democratic President Frei and the then Socialist candidate Lagos in favor of prosecuting Pinochet in Chile instead of in Spain. Moreover, the Socialist José Miguel Insulza, the Foreign Affairs Minister in Frei's cabinet "pleaded [in England] for Pinochet's release … on … compassionate grounds and on the pretense that Pinochet would face some form of judicial process in Chile." [214] It was a pretense in the sense that at that time there was no indication that the Chilean courts could have prosecuted Pinochet because of the amnesty law in place.[215] Thus, anti-universal jurisdiction stances cannot be explained by the Left-Right divide but by perceived state interests.

However, once Lagos became president, he rejected generalized impunity and "proposed . . . immunity or reduced sentences for military officers who provide useful, verifiable information about human rights crimes to the courts."[216] Although granting total immunity from prosecution is negative from the perspective of accountability,

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[214] Mauricio Saavedra, "Chilean Socialist Party seeks to Rescue Pinochet," World Socialist Web Site (1 December 1998), http://www.wsws.org/news/1998/dec1998/chil-d01.shtml (Accessed: November 16, 2004).

[215] AI, "United Kingdom: No to Empty Promises: Chilean Law Guarantees Pinochet Total Impunity," AI Index: EUR 45/31/98 (1 December 1998), http://web.amnesty.org/library/print/ENGEUR450311998 (Accessed: May 25, 2007). "'Jack Straw must keep in mind that even two modest proposals introduced by the civilian government . . . to allow for the investigations into the fate of the disappeared without establishing responsibility—were dismissed by Congress,' Amnesty stressed. At present, Augusto Pinochet is also covered by parliamentary immunity in his capacity as senator for life." They underline the power of the military in Chile in the late 1990s.

[216] Saavedra, "Chilean Socialist Party seeks to Rescue Pinochet" and Larry Rohter, "Chile's Leader Presses Rights Issues Softly but Successfully," *New York Times* (Sep. 7, 2003): 3.

reduced sentences should be praised if "verifiable information" on the whereabouts of the disappeared is obtained. President Lagos' attitude had practical effects because "'[j]udges [we]re ignoring the amnesty law for the purposes of investigation,' … and 'no court ha[d]s applied the amnesty law since [he] took office.'"[217] In addition, the executive "handed over [on 13 July 2004] to the university of Granada [Spain] 756 blood samples from relatives of those attacked by the dictatorship"[218] to be used as evidence.

ii. The Courts

The reform of the judiciary was taken up in the late 1990s—around the time the Spanish indictment against the Chilean military began to have effects abroad.

> [Chilean] courts began . . . re-interpreting the amnesty law. . . . Even before Pinochet's arrest, several judges ruled that the amnesty could only be applied after an investigation. In cases of forced disappearances, they went a step further. Since the bodies of the victims had not been found, they held that disappearances were actually crimes of ongoing, aggravated kidnapping.[219]

Even with the end of the dictatorship, implementation of the prohibition against disappearances continued being problematic because only military courts—biased in favor of the accused—could prosecute alleged violators of the prohibition against disappearances,[220] and higher courts rejected the lower courts' doctrine that amnesty and

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[217] Rohter, "Chile's Leader Presses Rights Issues Softly but Successfully," ibid.

[218] Manuel Altozano, "Científicos españoles ayudan a identificar desaparecidos chilenos," *El País* (14 July 2004).

[219] Stacie Jonas, "The Ripple Effect of the Pinochet Case," *Human Rights Brief* vol. 11, no. 3 (Spring 2004): 36.

When countries confront impunity with a wide array of methods, the phenomenon is referred to as a 'justice cascade.' See: Kathryn Sikkink and Carrie Booth Walling, "Errors about Trials: The Political Reality of the Justice Cascade and Its Impact," Paper Presented at the Annual Meeting of the American Political Science Association (APSA) (2005).

[220] "Impunity and the Judicial System," htpp://dons.usfca.edu/~rassma2/impunity.html (Accessed: October 9, 2002). The Chilean Supreme Court was central in fostering impunity. Thus,

> From 1985 the Supreme Court began confirming rulings by lower courts to apply the 1978 Amnesty Law, even in cases involving 'disappearances' before the facts had been established in

immunity do not apply to disappearances—a continuous crime.[221] An important exception occurred on 5 December 1995 when

> The Penal Chamber of the Supreme Court ruled to confirm the first ever conviction in a 'disappearance' in Chile. Two former police officers and a civilian had been convicted in September 1993 by a civilian judge for the 'disappearance' . . . in 1974 of two Mapuche Indians, Juan Chequepan, aged 15, and Jose Llaulen, aged 39. . . . The Court also confirmed civilian jurisdiction in the case, arguing that the crimes could not be considered to have been carried out in the course of duty. . . . The original sentence of three years' imprisonment and a fine of US $12,000 was confirmed.[222]

However, wider accountability involving crimes of disappearances sponsored by the Chilean government started slowly in 2003 when Manuel Contreras—the official in charge of the DINA—Raúl Iturriaga, Miguel Krasnoff, and Gerardo Urrich were prosecuted and sentenced for the 1974 disappearance of Luis San Martín.[223]

Later on, Contreras and four aides were found guilty of the 1974 disappearance of Miguel Ángel Sandoval. "On January 5, 2004, the 5th Bench of the Santiago Appeals Court upheld [based on domestic and international law arguments] the conviction [of Contreras and four aides]. . . . This was the first appellate level decision upholding the interpretation of forced disappearance as an ongoing, non-amnestiable crime of

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full. One of the most striking rulings of this kind was in October 1986 after a significant investigation by Santiago Appeals Court Judge Carlos Cerda into the "disappearance" of ten prisoners in 1976. This led to charges against 38 members of the armed forces and two civilian collaborators. The Supreme Court closed the case and twice sanctioned Judge Cerda with two months suspension in 1986 and 1991 because he had contested the closure of the case and application of the 1978 Amnesty Law by a lower court. In Amnesty International, "Chile: Transition at the Crossroads: Human Rights Violations under Pinochet Rule Remain the Crux," AI Index: AMR 22/01/96 (March 1996): 16.

[221] Ibid.

[222] AI, "Chile: Transition at the Crossroads: Human Rights Violations under Pinochet Rule Remain the Crux," AI Index: AMR 22/01/96 (March 1996): 27.

[223] Gustavo González, "Secret Report on Testimony from Torture Victims Triggers Debate," *Inter Press Service* (10 November 2004), http://www.globalpolicy.org/intljustice/wanted/2004/1110torture report.htm (Accessed: November 24, 2004).

aggravated kidnapping. . . ."[224] Moreover, the Chilean Supreme Court confirmed such decision on 17 November 2004.[225]

Pinochet has proven more elusive to prosecute. Judge Juan Guzmán twice opened a process against Pinochet for disappearances,[226] but in both cases, although Pinochet's immunity was taken away, the Chilean Supreme Court ordered the end to the processes based on Pinochet's mental health.[227] Nevertheless, in May 2004 the Chilean Supreme Court adopted a relevant decision from the perspective of the prosecution of the crime of disappearances in Chile, i.e., it agreed to take away Pinochet's immunity for the Cóndor operation.[228] In November 2004, the Chilean Supreme Court

> [U]pheld the conviction of several high-level military officials, including former secret police chief Manuel Contreras, for the 1975 disappearance of Miguel Angel Sandoval. The milestone verdict marked the Supreme Court's first decision not to apply the Amnesty Law in the sentencing phase of a forced disappearance case. It also represented a unique development in Chilean jurisprudence by extensively citing international law to support its conclusions. . . . [I]n January 2005, Contreras and other high-level members of Pinochet's secret police were jailed for his crime.[229]

Notwithstanding Pinochet's ability to elude prison, the fight to end impunity had some effects on the former dictator before he died in 2006:

> For the last years of his life, Pinochet was dogged by his past. His immunity was stripped in six major cases, ranging from death squads and abductions to the

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[224] Gustavo González, "Secret Report on Testimony from Torture Victims Triggers Debate," ibid.

[225] Global Policy Forum, "Pinochet Spy Chief Denied Amnesty, http://www.globalpolicy.org/intljustice/wanted/2004/1118denied.htm (Accessed: November 24, 2004).

[226] Human Rights Watch, "Chile: Supreme Court Removes Pinochet's Immunity," (Washington DC: 26 August 2004), http://www.hrw.org/english/docs/2004/08/26/chile9269.htm (Accessed: December 14, 2004). Immunity not granted for 18 disappearances.

[227] Human Rights Watch, "Chile: Supreme Court Removes Pinochet's Immunity."

[228] Stacie Jonas, "Pinochet: Fit to Be Tried," (Silver City, MN: *Foreign Policy in Focus*, 4 February 2005): 2, http://www.fpif.org/papers/0502pinochet_body.html (Last Accessed: January 18, 2008).

[229] Ibid: 3.

> hiding of millions abroad, and at the time of his death, he was under house arrest. One hundred and nine other agents of his regime have now been convicted of human rights crimes.[230]

c. Request for Information from Paraguay and the United States

Although the Spanish courts are not prosecuting any citizen of Paraguay or of the US, both countries have in their custody official documents on the violations of human rights in Latin America during the Cold War and specifically on the Cóndor plan. Such documents are vital to be used as evidence in the Spanish trials.

i. Paraguayan "Archive of Terror"[231]

Judge Garzón asked the Paraguayan authorities for documentation relative to the Cóndor operation on 15 January 1998, and less than eight months later he added a petition for certified and affidavit copies of the documents filed in the "Archive of Terror,"[232] found by Marin Almada—detained from 1974 to 1977—José Agustín Rodríguez—a Paraguayan judge—and Francisco de Vargas—a human rights activist—on 22 December 1992 in the seat of the Department of Investigations of the Police in Lambare, which is close to Asunción.

Among the more than three tons of documents, a "'rap sheet' or summary reports in alphabetical order with photos and fingerprints of thousands of Paraguayan and foreign

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[230] Reed Broody, "Pinochet: Justice and the General," *The International Herald Tribune*, opinion (11 December 2006), http://www.iht.com/articles/2006/12/11/opinion/edbrody.php (Accessed: May 25, 2007).

[231] For a brief history of how the documents that form the Archive were secured and the general description of such documents, see: R. Andrew Nickson, "Paraguay's Archivo del Terror" *Latin American Research Review* vol. 30, no. 1 (1995): 125-9.

[232] "Providencia por la que el Magistrado Juez Baltasar Garzón solicita ampliación de rogatoria a Paraguay para la obtención de documentos relacionados con la 'Operación Cóndor'" (Madrid, 4 September 1998).

prisoners—many of them on the lists of disappeared"—were found.[233] The finding is significant not only for the trials—"a key element in the verdicts in Paraguay, Argentina, Chile, France, and Spain against members of the repressive system . . . [including] Captain Alfredo Astiz, . . . former President Jorge Videla, . . . [and] Generals Augusto Pinochet and Manuel Contreras"—[234]but also for the relatives of the disappeared, which can finally know what happened to the victims.

ii. The United States: Request for Information from Kissinger and from the Clinton Administration

Judge Garzón presented a *comisión rogatoria* to the English Crown Prosecutor Service, so the English authorities would ask questions to Henry Kissinger "as a WITNESS relative to the US declassified documents due to his official position and limited to the facts investigated in the present process [against the Argentinean and Chilean military]."[235] Kissinger left London before he could be questioned.

Moreover, Garzón petitioned the Clinton administration to provide the information the U.S. had on the Cóndor plan and on the human rights violations that happened in the Southern Cone during the military regimes. Since there is a bilateral treaty of cooperation between the US and Spain—Mutual Legal Assistance Treaty—the American authorities cannot directly reject Spain's petition. Nevertheless, at first the Clinton administration only sent already available public documents unrelated to the

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[233] Dinges, *The Condor Years*: 240. For further details, see: 238-41.

[234] Andrea Machaín, "Herencia de un pasado de terror" *BBC* (Monday, 23 December 2002), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2599000/2599839.stm (Accessed: May 11, 2007).

[235] Baltasar Garzón Real, "Comisión Rogatoria para Interrogar a Henry Kissinger" (Madrid: 17 April 2002), reproduced in "Comisión Rogatoria para interrogar a Kissinger," *La Insignia* (20 April 2002), http://www.lainsignia.org/2002/abril/der_023.htm (Accessed: November 16, 2004).

Spanish petition.[236] Members of the Congress of the United States sent a letter, on 21 October 1998, to President Clinton requesting the release of key information.[237] Finally, the Clinton administration decided to declassify new documents but it was been done in a quite controlled way to avoid incriminating past American administrations in the atrocities committed in Chile under Pinochet's rule.[238] The documents have not been useful in court but I agree with Kornbluh's statement that "the declassified documents would help to render the verdict of history."[239]

3. CONCLUSIONS ON THE COOPERATION PROVIDED

Domestically, as happened with the prosecution of torture committed abroad, the Spanish executive has followed the law but has not supported universal jurisdiction actively. That is why it has complied with the requests of the other branches of the government, including the legislative. For example, on the issue of the fate of the Spanish disappeared the conservative executive answered a Congresswoman's petition for information.[240] On 31 May 2005 the Spanish Supreme Court decided that the Council

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[236] Kornbluh, *The Pinochet File*: 478.

[237] "We urge you to direct the Justice Department and other relevant agencies to act with haste in delivering the appropriate solicited material. Your involvement now will send a clear signal that you plan to take all steps necessary to stop international terrorism and bring to justice those responsible for heinous crimes against humanity, including the killing of an American citizen on American soil." In "Members of Congress Call on Clinton to Release Key Information on General Pinochet," http://www.derechos.org/nizkor/chile/juicio/cong.html (Last Accessed: 15 January 2008).

[238] Kornbluh, *The Pinochet File*: 479. "In late November, Secretary of State Madeleine Albright convened a meeting of her top advisors to determine what the U.S. should do. No one at the meeting, according to participants, argued that the United States should support Spain's effort to bring Pinochet to justice. Rather, the prevailing position was that establishing a 'Pinochet precedent' in international law would not benefit U.S. interests and that Washington, for the sake of stability and Chile's sovereignty, should respect Chilean government's efforts to have Pinochet released and returned to his homeland."

[239] Ibid: 498, in fine.

[240] Ministerio de asuntos exteriores,"Informe oficial sobre los desaparecidos españoles."
Although the prosecutions were initiated under a Socialist government, the bulk of the judicial cooperation developed under a conservative one because the Conservative José María Aznar was

of Ministers should have forwarded the petitioned of extradition of 39 Argentinean military and one civilian, accused of disappearances among other crimes, to the Argentinean authorities.[241]

Even though the office of the prosecutor is more difficult to evaluate due to its multilayered organization, it can be stated that at the end the Councils of Prosecutors of the *Audiencia Nacional* and of the Supreme Court accepted the legality and legitimacy of the Spanish jurisdiction in the Argentinean and Chilean cases; and previously a prosecutor initiated the process against the Argentinean military. Nevertheless, other prosecutors have appealed against the jurisdiction of the courts.

Cooperation from foreign authorities should have not presented great obstacles because Spain has valid cooperation treaties with Argentina, Chile, and the U.S. Nevertheless, cooperation—especially from their respective executives—can be characterized up to 2003 as negative in the cases of Argentina and Chile. The absence of cooperation with the Spanish courts is related to undemocratic elements in the military and the ruling classes in Argentina and Chile. However, in recent years, the consolidation of democracy in these countries has improved the opportunities for cooperation.

From the perspective of the human rights implementation the lack of cooperation of the Clinton administration with the Spanish efforts to end impunity in the Chilean cases was more problematic than the lack of cooperation from Argentina and Chile

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proclaimed President of the government on May 5, 1996, the year when the prosecutions against the Argentinean and Chilean military started. See: Prego, *José María Aznar: Un presidente para la modernidad*: 19.

[241] In EFE, "Militares fueron procesados en Madrid por desaparición españoles" (1 January 2005), http://www2.terra.com/noticias/articulo/imprime_articulo.cfm?i... (Accessed: May 12, 2006).

because the United States is a consolidated democracy that is known for upholding the rule of law, which includes ending impunity for crimes against humanity.

The change of attitude of the Argentinean executive toward cooperation with the Spanish judiciary[242] has not increased the number of accused present in Spain because of the Spanish government's decision not to proceed with the petitions of extradition. Nevertheless, it could have been helpful for the Cavallo case, which started in Spain, as seen in section C of the present chapter but has now ended with his extradition to Argentina.

E. EVALUATION OF THE PROSECUTION OF THE CRIME OF DISAPPEARANCES BEFORE THE SPANISH COURT SYSTEM

As seen in the chapter on torture, the evaluation is based mainly on the legitimacy—real and perceived—and effectiveness of the courts. With basis on these criteria, the evaluation is divided into, first, advantages and shortcomings of the use of Spanish courts to prosecute the crime of disappearances committed abroad by foreigners with a focus on issues of legitimacy of the courts, effects on democratic transition and/or consolidation in the countries where the abuses were committed, respect for fair trial principles, and effectiveness of the court with a special reference to the fostering of prosecutions abroad. Second, an overall positive balance of the implementation of the prohibition against disappearances in Spanish courts. And third, a set of relevant recommendations to improve judicial implementation.

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[242] On 30 September 2005 "the government of Argentina announced the establishment of a commission to investigate the disappearances of Spanish citizens during the military dictatorship in place in Argentina from 1976 to 1983." In EFE, "Militares fueron procesados en Madrid por desaparición españoles" (1 January 2005), http://www2.terra.com/noticias/articulo/imprime_articulo.cfm?i... (Accessed: May 12, 2006).

1. ADVANTAGES AND SHORTCOMINGS OF THE USE OF SPANISH COURTS TO PROSECUTE DISAPPEARANCES COMMITTED ABROAD BY FOREIGNERS

a. Perceived Legitimacy of the Courts

As a state Spain has the right to protect its own citizens. Thus, it is legitimate for Spain to request information—via diplomacy, and later on through the courts—about the fate of the more than 500 Spaniards and descendants from Spaniards[243] disappeared in Latin America, especially in Argentina. Even in the absence of Spanish victims, it has an interest in prosecuting what constitutes a crime against humanity.[244]

Moreover, the cases analyzed were initiated in Spain with support from the relatives of the disappeared due to the inactivity of their respective governments. That is why, "the State in which the crimes that grant the use of universal prosecution happened cannot complain of interference with its sovereignty. . . . [Spanish judges] are using their power [judicial] to preserve the communal interest of the civilized humanity. . . ."[245] Considering that the countries studied recognize the principles Spain is applying, imperialism is absent. However, even more than in the case of torture, Spain can be perceived as imposing justice in a foreign country instead of dealing with its own disappeared during the civil war and Franco's dictatorship. "Franco's regime drafted a plan of political extermination and persecution documented in the instructions of the

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[243] "Auto de procesamiento a 98 Militares Argentinos": Antecedentes, Décimosexto. At first the legislative branch established an investigative commission and provided an open list of "3 in Chile, one in Guatemala, and 35 in Argentina and 174 children, grandchildren and spouses of Spaniards in Argentina." In "Dictamen de la Comisión Especial de Investigación sobre Desaparición de Súbditos." Children and grandchildren of Spaniards are Spaniards legally.

[244] Law 44/71, of Nov. 15, 1971 which incorporated into Spanish law the Convention against Genocide ratified in 1968. It established the crime of genocide in the Spanish Penal Code in 1971, too.

[245] [Translation]. In Juzgado Central de Instrucción n° 1 de la Audiencia Nacional, "Auto de 27 marzo del 2000. Basado en Diligencias Previas 331-99": Fundamento de Derecho, Sexto.

generals responsible for the coup against the government of the Republic."[246] Similarly to what happened in Argentina, the children of the defeated were targeted for ideological conversion.[247]

Since Spain waited until 2003 to conduct the first exhumations of the remains of Spaniards illegally killed by Francoist forces,[248] it seems Spanish courts want to impose a timetable to Latin American countries by demanding cooperation. Those countries have their own sovereignty and the right to decide when and how to confront this crime. For example, the Uruguayan President's declaration of respect to "[t]he pain of the relatives of the disappeared . . . [so] they have 'the natural right to decide what is they want to know.'"[249]

b. Effects on the Democratic Transition and Consolidation in the Countries Where the Disappearances Were Committed

Democracy cannot be consolidated without the rule of law;[250] an important part of the law in a democratic regime is the one regarding the protection of human rights. According to it, governments are bound to investigate disappearances, compensate the victims and prosecute the accused. Nevertheless, until recently, the Latin American democracies have extensively violated their duties to end impunity for past disappearances.

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[246] Equipo Nizkor, "La cuestión de la impunidad en España y los crímenes franquistas," (14 April 2004).

[247] Ibid: Sec. VI, Plans of Action, no. 10.

[248] Javier Cuartas, "La memoria recuperada en el valle asturiano de la represión: una fosa de Valdediós escondía los cadáveres de enfermeras de un hospital psiquiátrico fusiladas tras la guerra," *El País* (28 July 2003): 22. All the victims are presumed to be civilians.

[249] Pablo Chargonia, "La impunidad en tiempos de Batlle," Cerronet, Política y Sociedad, (Mayo 2001), http://www.internet.com.uy/cerronet/chargonia_desaparecidos (Accessed: May 28, 2004).

[250] "All significant actors—especially the democratic government and the state—must respect and uphold the rule of law." In Linz and Stepan, *Problems of Democratic Transition and Consolidation*: 10.

The absence of prosecution undermines democratization in two main ways. First, it strengthens the anti-democratic elements in the country because the alleged violators believe their actions were justified.[251] And, second, it weakens the victims' support for democracy, as successive governments are unable to locate the disappeared. Since Spanish courts are lessening both problems by reaffirming that disappearances are a crime and that those responsible are going to be prosecuted, they mainly serve justice and democratic consolidation.

According to Kathryn Sikkink and Carrie Booth Walling data supports the correlation between trials and strong transitions to democracy:

> If we compare regions that have made extensive use of trials to regions that have not made extensive use of human rights trials of any other region. . . . Ninety one percent of the countries in the region [Latin America] are now considered democratic, well above the level for Eastern Europe and the former USSR (67%) or Asia & Pacific (48%) or Africa (40%) [where there have been few or no trials].[252]

However, some consider that the demand for justice coming from Spanish courts can disrupt the process of democratization in Latin American countries because of the strength of the military and economic elites in most of the continent. This danger was especially high until the late 1990s in states where the military controlled the transition to democracy, especially in Chile and Brazil.[253] Since the members of the military are by far the main violators of the prohibition of disappearances, they are going to use their power to oppose any judicial action. Nevertheless, as the Southern Cone democracies are

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[251] AI, "Uruguay: 'Desaparecidos,' ni verdad secuestrada ni memoria prohibida," AI INDEX: AMR 52/002/2001 (May 17 2001).

[252] Kathryn Sikkink and Carrie Booth Walling, "Errors about Trials: The Political Reality of the Justice Cascade and Its Impact": 26.

[253] See: Linz and Stepan, *Problems of Democratic Transition and Consolidation*: 166.

being consolidated, the democratic governments have taken away such military prerogatives.[254]

As a consequence, democratic governments in Latin America until recently have rejected justice and favored stability. Sometimes they have done it following the majority's opinion, which is the essence of a democracy. For example, in 1989 the Uruguayans approved via referendum an amnesty law for the military for human rights abuses during the dictatorship. Thus, according to some, if Spanish officials support democracy, they should stop interfering with these countries' decisions.[255]

c. Respect for Fair Trial Principles[256]

There is no reason to sustain that the victims' rights are violated by the attempts to prosecute those accused of disappearances because the relatives and friends of the disappeared have played an active role in bringing forth the criminal prosecutions and have done so overcoming serious obstacles including "fear, . . . mistrust of the judicial system still under the power of the former military or lack of economic means"[257] Moreover, the interest of the relatives and friends of the disappeared in the criminal prosecutions is underlined by the fact that even though many of witnesses could not

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[254] Rut Diamint, "Civilians and the Military in Latin American Democracies," Human Security no. 2 (Disarmament Forum, 2002), http://www.unidir.org/pdf/articles/pdf-art1444.pdf. More recently, David Pion-Berlin, "Political Management of the Military in Latin America," *Military Review* vol. 85, no. 1 (January – February 2005): 19.

[255] http://www.law.harvard.edu/academics/graduate/cwe/chayes/right.html

[256] "[T]he emerging role of the victims . . . serves to criticize the[ir] complete forgetting . . . previously." In Daniel Rothenberg, "'Let Justice Judge:' An Interview with Judge Baltasar Garzón and Analysis of His Ideas," *Human Rights Quarterly* vol. 24, no. 4 (2002): 952.

[257] Magriet Blaauw, "'Negación y silencio o reconocimiento y revelación de la información," *Revista Internacional de la Cruz Roja* no. 848 (Diciembre 2002 - 11 Junio 2003). In Foro por la Memoria, http://www.pce.es/foroporlamemoria/excavaciones/los_desaparecisos_negacion_ (Accessed: May 28, 2004).

afford traveling to Spain, their depositions were included in the criminal procedure via affidavits.

A fair trial involving the prosecution of disappearances presents added difficulties to the main one studied in the chapter of torture due to the lack of corpses. The principle of equality and of presumption of innocence should prevent indictments based on what some may consider insufficient proof of a crime because few persons are able to overcome the perception that a person who is indicted must be guilty to some degree.

The problematic involved in proving the crime is overcome in part with documentation from the Archive of Terror. And the case of Argentina, Scilingo has provided first-hand accounts of the infamous death flights and provided proof of his direct participation in thirty disappearances in a voluntary confession—given in the presence of his lawyer and in a country with his same language.[258] Thus, the proceedings were fair and he was able to defend himself adequately.

Nevertheless, the prosecution of the accused of the crime of disappearances is based to a great extent on conjectures and hearsay evidence. First, eyewitnesses' statements relative to how the disappeared were kidnapped by a group of men, presumably working for the government, are sufficient to prove the crime. And second, rarely is the crime linked to specific criminals because of the absence of official detention records. Thus, all those working in a given facility presumed to have dealt with disappearances are accused of the crime.

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[258] France prosecuted Astiz in *absentia* in 1990. Ministère des Affaires Etrangères, "Argentina adopts a law annulling its amnesty for crimes against humanity," Statements made by the Ministry of Foreign Affairs Spokesperson (Paris, 13 August 2003), http://www.diplomatie.gouv.fr/actu/articletxt.gb.asp?ART=36562 (Accessed: January 26, 2005).

In addition, since the prosecution occurs in Spain—outside of the territory where the violations occurred—access to witnesses and documentation is diminished and thus it affects the overall fairness of the prosecution.

d. Effectiveness: Fostering Prosecutions Abroad

After more than ten years since the beginning of the processes in Spain, the first foreign national accused of disappearances in Argentina has been subjected to trial before a panel of 3 judges from the *Audiencia Nacional*. However, the trial started against Cavallo ended with his extradition to Argentina. Therefore, the results seem meager.

But the efficiency of the courts is not evaluated solely on the basis of those actually tried and sentenced but whether the prosecutions provided evidence of how the disappearances happened, how widespread they were, and their intellectual and material authors, which they have done and whether it has had any effect abroad. Moreover, the different processes have helped Latin America to start ending impunity via judicial cooperation first, and then via the opening of their own prosecutions.

In addition, it has had an impact on the starting of a Spanish movement to end impunity for the crimes committed during the Francoist dictatorship. For example, "[o]n Thursday, while the reparations debate was taking place in parliament, the Association for the Recovery of Historical Memory filed a complaint at the National Court, asking it to investigate the disappearance of 30,000 people during the Civil War and Franco's dictatorship."[259]

[259] Ciaran Giles, Associated Press Writer, "Spain Debates Law on Reparations for Victims of Civil War, Franco Dictatorship" (Madrid, Spain, 14 December 2006), http://abcnews.go.com/International/wireStory?id=2725463&CMP=OTC-RSSFeeds0312 (Accessed: May 14, 2007).

After so many investigations, information requests from the authorities of the countries where the disappearances happened, and the time and money spent, some feel that the judicial processes lack results. First, only one guilty verdict has been handed down in Spain, i.e., in the Scilingo case; and second, no breakthroughs on the location of the bodies have occurred. Most of Latin Americans are Catholic and in Catholic culture the burial place of a corpse is essential to mourning a loved one.

According to those who are against the judicial prosecution, the demands for justice are counterproductive to find the whereabouts of the disappeared because the threat of an indictment may prevent a free exchange of information between the democratic authorities and the officials from the prior regime which could end the suffering of the families of the disappeared. As a result, for some it seems better to give the alleged criminals immunity in exchange for information.

2. MAIN CONTRIBUTIONS OF THE SPANISH COURT SYSTEM TO THE IMPLEMENTATION OF THE BAN ON DISAPPEARANCES

As mentioned on the chapter on torture, Spanish courts are convenient fora to prosecute violations against human rights committed in Latin America during the Cold War because of the common language and judicial culture. Furthermore, until recently Spain[260] was one of the few fora where the relatives and families of the disappeared had the chance to initiate a process in which the circumstances of the disappearances can be investigated and the violators of the crime can be prosecuted.

The lack of judicial activity until recently and the obstacles that interfere with effective prosecutions, such as amnesties and pardons in most of the countries affected by

[260] The situation started to change in 2004 in Chile and in 2005 with the decisions of the Chilean Supreme Courts to void the amnesty laws that prevented accountability.

disappearances, have been overcome by the processes in Spain, which have created "a ripple effect"[261] in other countries. For example, "Iosi Sarid proposed following the same path as Spain and demanded the extradition of Argentinean military . . . [to] Israel. . .."[262]

One of the ways in which justice is being obtained even in these countries is via a conceptual refinement of disappearances by the Spanish courts which consider it a permanent kidnapping that will only end with the information on the exact location of the victims' whereabouts. This concept has been "applied by the judges since the Pinochet case in the trials relative to the detained-disappeared, which has made easier the advances of the justice because it overcomes the application of the amnesty laws."[263]

The efforts of the Spanish courts to prosecute the crime of disappearances have involved cooperation from authorities in Western Europe, Latin America, and the United States. Thus, the prosecution of the transnational crime of disappearances is a transnational endeavor. [264] One of the most problematic areas for cooperation is that of exhuming the remains of the victims. Foreign courts like Spain's usually will make general requests and the local authorities can decide not to cooperate by pointing out the lack of a well-crafted petition or lack of resources.

With all its drawbacks, the prosecution of the crime of disappearances in Spain has advanced the implementation of human rights law because Spain—by seeking

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[261] Jonas, "The Ripple Effect of the Pinochet Case": 36-8.

[262] "Un informe con décadas de retraso: Desaparecidos judíos argentinos," (November 18, 2003), http://www.wzp.org.il/es/recursos/view.asp?id=1541&subject=120 (Accessed: May 27, 2004).

[263] Manuel Délano, "Los familiares creen que el Gobierno ofrece verdad a cambio de impunidad," *El País* (14 August 2003): 3.

[264] "Escrito fundamentado por el que la Acusación Popular en la causa por desaparecidos durante la dictadura military argentina se pronuncia y solicita la extradición de Augusto Pinochet Ugarte," (Madrid, 23 Octubre 1998): Hechos, Cinco.

criminal responsibility for crimes against nationals of all countries—has surpassed the 1980s quests for justice of the judiciaries of France, Germany, Italy, and Sweden in favor of their disappeared nationals. The Scilingo precedent has been used as a legal basis to initiate a lawsuit to demand an investigation into the whereabouts of fifty five disappeared during the Spanish civil war.[265] Thus, Spanish courts are prosecuting disappearances using a human rights perspective, which underlines the principles of equality and universality.

These efforts notwithstanding, the use of universal jurisdiction to prosecute abuses committed during the Guatemalan civil war was initially undermined in the Spanish Supreme Court. Since impunity is rampant in this Central American country,[266] the partial change in the Spanish doctrine was an impediment to the implementation of human rights law,[267] which was overcome with the decision of the Spanish Constitutional Court of 26 September 2005 in which universal jurisdiction was strengthened because this decision confirmed that universal jurisdiction is as valid as the other jurisdictions, i.e., the Spanish courts do not have a subsidiary role. Therefore, as long as there is no trial pending against the accused, Spain does not have to defer to the jurisdiction of other countries.

Overall the implementation of the ban on disappearances before the Spanish Courts shows that human rights norms are being fostered though the activities of the

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[265] Natalia Junquera, "Familiares de 55 desaparecidos en la Guerra Civil piden a Garzón que investigue su paradero: Tres denuncias en la Audiencia Nacional califican estos sucesos de crímenes 'de lesa humanidad,'" *El País* [Andalucía Ed.] (19 July 2007): 22.

[266] Amnesty International, "El legado mortal de Guatemala."

[267] It does not void universal jurisdiction to prosecute the Argentinean and Chilean cases. In addition, the plaintiffs in the Guatemalan case could initiate a process in other amenable fora in Western Europe or before the ICC because of the continuous nature of the crime of disappearances.

courts, i.e., there is strong evidence of a 'ripple effect.' However, it is also evident that there is no monolithic position in any of the states analyzed and it is usual for different branches of the governments to disagree on the enforcement of human rights norms. Executives comply usually with the petitions of their own courts and legislatures but they seem to behave more cautiously when confronted with request from foreign governmental branches. Nevertheless, in the cases of disappearances transgovernmental networks can overcome limitations imposed by the governments through direct contact, when it is allowed by the domestic regulation of each of the countries.

3. RELEVANT RECOMMENDATIONS

Since ending impunity strengthens democratic principles,[268] the efforts of the Spanish courts to prosecute those accused of the crime of disappearances are welcome. More specifically, it is important for Spanish courts, notwithstanding the costs in terms of money and time, to reinforce the use of universal jurisdiction, to take advantage of the new Spanish regulation regarding crimes against humanity, and to end impunity for the crimes committed under the Franco regime.

First, regarding universal jurisdiction, Spanish courts have to underline unequivocally that exercising universal jurisdiction to prosecute genocide and crimes against humanity is not a subsidiary type of jurisdiction. As established in the October 2005 decision of the Spanish Constitutional Court, Spanish courts do not have to defer to other foreign courts once a trial involving crimes that justify the use of universal jurisdiction has started in Spain. Otherwise, cases like that of Cavallo—extradited from Mexico to Spain and then from Spain to Argentina after being in Spain for more than four

[268] See: Above, Ch. V, Sec. E.3.

years—will occur again, which is a disservice to justice because no verdict has been reached and much money and time has been spent.

Second, the criminalization of crimes against humanity, by an organic law of 25 November of 2003, provides a clear basis for future trials against those accused of disappearances in Latin America and in other parts of the world, including Spain (connected to the civil war and the Franco regime). Since the whereabouts of many of the victims of the crime remain unknown, this regulation will be applicable to acts of disappearances that occurred during the Cold War. Although the extradition of Cavallo to Argentina signals that the courts in Spain may not be amenable to prosecute crimes against humanity, this deference to Argentinean courts can also be perceived as a way to obtain justice by sending the accused to a country with direct interest in the case and that has promised to prosecute him. Thus, the relatives of the disappeared should still be encouraged to demand the prosecution in Spain of any individual accused of the crime.

Third, without forgoing its international obligations toward the prosecution of crimes against humanity committed abroad, Spanish courts should be committed to end impunity regarding the crimes against humanity of the Franco era, which include disappearances. Ending impunity in disappearance-related cases may be limited to exhuming the remains of the victims, allowing their families to bury them properly, and facilitating information to the relatives of the victims regarding what happened to these victims before they disappeared. Prosecuting those accused of the disappearances may not be possible because most of them are dead and there is no access to the names of those who participated in the violations of the ban on disappearances.

CHAPTER VII

CONCLUSIONS: PRESENT AND FUTURE TRENDS IN THE JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

The judicial implementation of human rights at the international and national levels has acquired renewed relevance due to the launching by the George W. Bush (2001-current term scheduled to end in 2009) administration of the War on Terror/ism to respond to the 9/11 attacks in American soil. The manner in which the War on Terror has been framed and executed presents three relevant similarities with the doctrine of national security, which justified the heinous attacks against human rights in Latin America during the Cold War.

First, ideologically the War on Terror is extremist because it does not admit any gradation. Thus, individuals who fail to support the administration's views and more specifically those who defend the need to respect international human rights law are categorized as unpatriotic or, in the worst cases, as enemies: "Bush has painted the world in black and white . . . [and] has distinguished between those who are 'evil' and those who are 'good,' between those who are 'for us' and those who are 'against us' . . . . The War on Terrorism is a 'crusade.'"[1] As seen in the case studies, any opponent to the Latin American dictatorships was catalogued as a subversive or enemy of the state.

[1] Ivo Daalder and James M. Lindsay, "Bush's revolution," [Reprinted from *Current History* (2003): 367-76], in *Taking Sides: Clashing Views on Controversial Issues in American Foreign Policy*, 3rd Ed., Eds., Andrew Bennet and George Shambaugh (Dubuque, IA: McGraw Hill/Dushkin, 2006): 27.

Second, claiming that they must take measures to guarantee the security of the society at large, the higher echelons of the government justify the relaxation of human rights standards whenever an individual is considered a suspected terrorist.[2] An example of the negative effects of this policy, albeit isolated, is the treatment afforded on 22 July 2005 in England to a suspected terrorist, i.e., a Brazilian worker, Jean Charles de Menezes, who was shot seven times in the head after being immobilized in the floor by police agents.[3] In this case the police ignored the principles of presumption of innocence and of a fair trial. The justification for this suspension of rights was that the day before the shooting failed bomb attacks had been planned against London and the officers mistook de Menezes with one of the alleged bombers.[4] Criminal charges against the officers involved in the killing of de Menezes were dismissed in July 2006.[5] However, in October 2007, the police were found "guilty of a catastrophic series of errors during the operation that led to firearms officers shooting Jean Charles de Menezes dead … The force was fined £175,000 and ordered to pay £385,000 costs."[6]

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[2] They are dehumanized. And it is necessary "to find them and **to hunt them down**." [Emphasis added]. In White House, "Guard and Reserves 'Define Spirit of America,'" Remarks by the President to Employees at the Pentagon (The Pentagon: September 17, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/ 20010917-3.html (Accessed: February 1, 2006).

[3] BBC News, "Leak Disputes Menezes Death Story," (Wednesday, 17 August 2005), http://news.bbc.co.uk/1/hi/uk/4157892.stm (Accessed: February 1, 2006).

[4] Ibid.

[5] AI, "Europe and Central Asia: Summary of Amnesty International's Concerns in the Region: July-December 2006," (AI Index: EUR 10/001/2007).

For an account of the efforts of the family of the victim to demand justice and the negative response on the part of the English authorities, see: "The Jean Charles de Menezes Family Campaign: Timeline of the Case": http://www.justice-4jean.com/timeline.html

[6] James Sturcke, "Met Police Guilty over De menezes Shooting," g*uardian.co.uk* (Thursday, 1 November 2007), http://www.guardian.co.uk/uk/2007/nov/01/menezes.jamessturcke2 (Accessed: April 25, 2008).

Third, once the violation of the rule of law is acceptable to foster security, the possibility of systematic and widespread violations of human rights law increases. Some of these violations are closer to the two types of violations analyzed in the dissertation, i.e., torture and disappearances. Regarding torture, the United States altered its concept to an extreme in which torture basically was defined as practices that cause certain death or serious disability[7] and it has also condoned it, if not directly practiced it, in the territory of the United States.[8]

In addition, there are allegations that disappearances are occurring as a consequence of the secrecy surrounding the detention of individuals accused of terrorism. Not only do we ignore the exact number of detainees in Guantánamo and in the different prisons in Iraq but there is a proliferation of secret prisons too. Although there are allegations of the existence of secret prisons in Egypt, Jordan, Morocco Poland, and

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[7] U.S. Department of Justice, Office of Legal Counsel, "Memorandum for Alberto R. Gonzales Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Washington, DC: August 1, 2002).

For a poignant critique of "the torture memos," see: Gene Healy and Timothy Lynch, "Power Surge: The Constitutional Record of George W. Bush" *CATO Institute* (Washington, DC: 2006): 8-10.

[8] In order to justify violating constitutional and legal prohibitions against torture, the Bush administration has confined suspected terrorists in Guantánamo Bay based on the allegation that the U.S. Constitution, federal laws, and federal courts jurisdiction do not apply to Guantánamo Bay because it is not part of US territory. For example, Yoo states: "[T]he base remains within Cuba's sovereignty." In John Yoo, *War by Other Means* (New York, NY: Atlantic Monthly Press, 2006): 143. However, the Supreme Court has affirmed that Guantánamo is under the jurisdiction of the United States.

In addition, the U.S. has surrendered prisoners to countries where there is certainty that torture is practiced by public servants. Sometimes, agents of the US government are present when the torture and torture like activities are being practiced.

Extraordinary renditions present a serious problem because those accused of terrorism are sent to countries outside of the US jurisdiction. For the latest developments, see: Human Rights Watch, "Cases Involving Diplomatic Assurances against Torture: Developments since May 2005," *Human Rights Watch* no. 1 (January 2007).

The practice of extraordinary renditions has affected other democracies known for having some of the best records on human rights protection such as Sweden. In Human Rights Watch, "Sweden Violated Torture Ban in CIA Rendition: Diplomatic Assurances Against Torture Offer No Protection From Abuse," (New York, 10 November 2006).

Rumania—[9]among others—their location is unknown.[10] Thus, judicial control is unavailable and prisoners are defenseless. Their situation is comparable to the one experienced by thousands of Latin Americans and their families during the Cold War.

Although these similarities make it possible to apply the general findings of the dissertation relative to judicial implementation of human rights to the crimes of torture and disappearances happening as a consequence of the War on Terror, it is necessary to establish three caveats. First, the conclusions apply only to democratic states—either consolidating or in transition—due to the link between the effectiveness and the independence of the judiciary.[11] Second, they should apply mainly to systematic and widespread abuses, i.e., crimes against humanity. Finally, they refer only to courts that respect the principles of due process of law and fair trial.[12]

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[9] Johan Huizinga, "Is Europe Being Used to Hold CIA Detainees?" *Radio Netherland Wreldomroep* (25 November 2005), http://www2.rnw.nl/rnw/en/currentaffairs/region/internationalorganisations/eur051125?view=Standard (Accessed: January 10, 2006).

[10] "The existence and locations of the facilities . . . are known to only a handful of officials in the United States and . . . to the president and a few top intelligence officers in each host country." In Dana Priest, "CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11." *Washington Post* (November 2, 2005): A01, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01 (Accessed: November 14, 2005).

Furthermore,

> "[A] startling probe on ABC's Nightline on May 13, 2004, 'The Disappeared,' focused on super-secret CIA interrogation operations overseas, about which ABC News' Chris Bury said: 'We don't know where they are being held. We don't know how many of them there are. We don't know what the rules are.' The prison system is 'so secret that its very existence is classified. The inmates are believed to make up a who's who of the top Al Qaeda leadership. But even their names are classified. Some of them may never be released. For all practical purposes, they have just disappeared.' They are called 'high-value' detainees." In Nat Hentoff, "Disappearing Prisoners: Are They Dead? Are They Alive? Where is the Media? Does Anybody Out There Care?" *Village Voice* (2 July 2004), http://www.villagevoice.com/generic/show_print.php?id=54830&page=hentoff&issue=04 (Accessed: August 26, 2005).

[11] Nowhere are courts totally independent. And according to the available evidence—such as the activity of the French judiciary during the *ancien régime*—that would not necessarily be good. The level of independence referred to is that needed to uphold the law without bending to the wishes of the executive.

[12] I oppose military tribunals because they lack all the guarantees of a fair trial.

This concluding chapter is organized into five sections. The first section examines the relevant general and specific advantages and shortcomings of the judicial implementation of international human rights at the international level. The second section focuses on the advantages and shortcomings of the national level. The third section, based on the two prior ones, analyzes the main reasons the two levels should be combined to foster the implementation of human rights law with an emphasis on how the courts, using their reputation, have added new content to the interest of the states in protecting human rights.

The fourth section summarizes five relevant trends—proliferation of judicial mechanisms at the international level, widespread use of universal jurisdiction at the domestic level, geographic and substantive unevenness of judicial implementation, and multifaceted approaches to implementation—relative to judicial implementation globally. And, finally, the fifth section presents a list of the main recommendations to improve judicial implementation, based on the case studies analyzed in the dissertation.

A. RELEVANT ADVANTAGES AND SHORTCOMINGS OF JUDICIAL IMPLEMENTATION AT THE INTERNATIONAL LEVEL

The advantages of permanent international courts can be seen more easily than those of *ad hoc* tribunals which seem to be the result of political expediency. Permanent courts share in common with national courts that they work according to rules established before the crimes being prosecuted happened. Thus, since none of the accused can allege that the principle of *nullum crimen sine lege* or non retroactivity of the penal law was violated, permanent courts are perceived as more neutral and legitimate.

From the case studies, it can be concluded that the relevant advantages of any type of international courts include, first, their higher degree of legitimacy for the most part, i.e., as a product of international consensus the probability that any process before them will proceed with respect to human right standards increases. Consequently, there is a second advantage, i.e., the implementation of the decisions of the court will be easier to carry out because the courts represent the whole community and it is more difficult, but not impossible, to accuse them of handing down decisions for political gain. And, third, the judges and prosecutors who work in such courts are experts in international law who are relieved of the burden of dealing with other issues while they serve at the court.

Until the International Criminal Court (ICC) started working on 1 July 2002,[13] permanent international courts had only civil jurisdiction; those with criminal jurisdiction were geographically and temporally limited—[14]a shortcoming when confronting violations of human rights that amount to crimes against humanity. The IACtHR and the ECtHR suffer from such limited jurisdiction—geographically, temporally, and content-wise. A second shortcoming is that international courts usually are complementary of national efforts, i.e., they cannot be used as a court of first resort. Thus, justice can be denied for long periods of time. Finally, due to their location and their deference to the state, individuals find it harder to access international courts.

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[13] BBC News, "International Court Opens Its Doors," (Monday, 1 July 2002), http://news.bbc.co.uk/1/hi/world/2077221.stm (Accessed: February 1, 2006).

[14] Nuremberg and Tokyo Tribunals and, starting in the 1990s, the two *ad hoc* tribunals for Rwanda and the former Yugoslavia.

1. RELEVANT ADVANTAGES

a. Legitimacy

Although international courts, whether permanent or *ad hoc*, are historically speaking a new phenomenon that dates back to the aftermath of WWI with the establishment of the Permanent Court of International of Justice (PCIJ), they have acquired from the beginning and as a result of the activities of their members a degree of legitimacy unparalleled by other international organisms.[15] That is why the PCIJ, the direct predecessor of the International Court of Justice (ICJ), was praised for its work by the Committee in charge of judicial organization, before being succeeded by the ICJ.[16] This legitimacy is presumed in states that show deference to international law, which includes the countries object of the case studies. Since these mechanisms at the international level are created by agreements among different states, they function according to neutral rules representative of different judicial cultures, and their members do not serve a specific country but the international community, it is logical that governments perceive them as more adequate toward accountability than foreign domestic courts and even their own courts which may be unwilling to prosecute the violations of the prior regime.

For example, the IACtHR was/is perceived as legitimate in Latin America to such an extent that lack of decisions did not affect its standing because it was easy to pinpoint to the culprits of the Court's inaction, i.e., the different states and the Commission. The

[15] Their positive reputation helps further the implementation of human rights. On the relevance of the reputation of institutions, see: Robert O. Keohane, "Comment: International Relations and International Law: Two Optics, *Harvard International Law Journal* vol. 38, no. 2 (Spring 1997): 502.

[16] Manley O. Hudson, "The Succession of the International Court of Justice to the Permanent Court of International Justice," *American Journal of International Law* vol. 51, no. 3 (July 1957): 571.

degree of legitimacy increased with its first decisions in which the Court tackled the issue of torture and disappearances. For example, while criticizing the limited repercussions of the decisions of the Court as a rule, Judge Thomas Buergenthal presented—as part of his assessment of the role of the IACtHR—a relevant anecdote on the impact of the Court's decisions:

> We were interviewing some *campesinos* in a small village where serious human rights violations had taken place during El Salvador's long civil war. One of the witnesses . . . concluded with the demand that the government comply fully with the 'Velásquez Rodríguez Law.' Our chairman responded, 'you mean the Velásquez Rodríguez Case?' 'Yes,' the old man replied, 'the law that does away with impunity and makes governments pay for their human rights violations.'[17]

Thus, the IACtHR has been awarding the victims of human rights violations a modicum of accountability denied domestically, i.e., it decides on the responsibility of the state and on its duty to end impunity at home, and grants the victims a variety of pecuniary and non pecuniary compensatory measures[18] Moreover, it has been expanding individual participation in the different phases of the process with exception of its initiation.[19] Another example of the increasing legitimacy of the Court happened in 1999 when the

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[17] In Thomas Buergenthal, "Remembering the Early Years of the Inter-American Court of Human Rights," *International Law and Politics* no. 37 (2005): 279-80.

[18] The alleged violators can still accuse the court of being biased against a certain political ideology, an accusation difficult to escape from because most of the crimes the IACtHR has to decide were committed by what could broadly be referred to as regimes from the authoritarian Right. Nevertheless, some cases involving more recent violations have been committed by democratic governments.

For example, in Colombia between the 15 and 20 of July 1997 forty-nine people disappeared; some were tortured and the IACtHR decided the case in *Masacre de Mapiripán vs. Colombia*, Sentencia de 7 de Marzo de 2005, Serie C, no. 122. For further details, see: Above, Ch. 5.C.3.a.

In addition, under a leftist government in Argentina two men were "disappeared" in 1990 at the hands of the local police. See: *Garrido y Baigorria vs. Argentina*, Reparaciones, Sentencia de 27 de Agosto de 1998, Ser. C, no. 39: Pars. 3-14. In the two cases, the respective democratic government recognized its responsibility. For further details, see: Above, Ch. 5.C.3.a.

Moreover, in *Raxcacó Reyes vs. Guatemala*, Sentencia de 15 de Septiembre de 2005, Serie C, no. 133: Par. 145.2 (Declarative Sec.) and 145.9 and 10-11 (Dispositive Sec.), the IACtHR found Guatemala responsible for subjecting Mr. Raxcacó Reyes to torture and inhumane conditions in prison, where he is awaiting the death penalty since 1999 and states that Guatemala has to reform the conditions in the prison, and give Mr. Raxcacó Reyes access to medical care and to educational services.

[19] See: Above, Ch. V, Sec. B.2.c.

then Peruvian President, Alberto Fujimori, threatened the judges of the IACtHR with abandoning the compulsory jurisdiction of the Court if the IACtHR handed down a decision against Peru and its counterterrorist measures.[20] Thus, the legitimacy of the Court trumped what was called by some Fujimori's 'reelection plot.'

b. More Compelling toward Implementation

International courts are more compelling toward implementation because they have a higher degree of legitimacy when compared to domestic courts. Since states create the courts and the general rules that govern them, it is difficult to deny their effects under allegations of imperialism. In the case of Latin American countries, which for the most part are monistic in relation to international law, decisions of international courts are granted legal effects and can even override domestic law.[21] Notwithstanding this advantage, it does not necessarily mean that states are going to comply with all the provisions of every international decision equally.

As a result, although the decisions of the IACtHR impose on states the duty of prosecuting civil and criminally those accused of torture and disappearances and to introduce legislative changes to favor the protection of human rights, states sometimes are unwilling or unable to comply. The lack of implementation is linked to: (1) the domestic judiciary, which denied prosecution in the first place because in some countries amnesty laws were passed to foster their respective transitions to democracy and in other countries the courts have been filled with judges whose allegiance rests with the past

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[20] See: "Outlaw," *The Economist* vol. 352, no. 8127 (10 July 1999): "The Americas" Sec. and Jo-Marie Burt, "Fujimori vs. the *Inter-American Court*," *NACLA Report on the Americas* vol. 33, no. 1 (July – August 1999): 5.

[21] For a succinct but poignant discussion of the monistic and the dualist perspectives, see: Edwin Borchard, "The Relation between International Law and Municipal Law," *Virginia Law Review* vol. 27, no. 2 (December 1940): 137-48.

authoritarian regimes. And, (2) to the legislative branch of government, necessary to change the law, and that may be controlled by supporters of the prior regime. As a consequence, these reforms cannot be enacted automatically.

Nevertheless, Latin American governments usually publish without delay the decisions of the IACtHR and tend to pay compensation to the victims and their families quickly, especially in processes ending with state recognition of responsibility for the violations.[22] Similarly, symbolic gestures such as naming an institution after the victim's name have been commonly implemented. From the perspective of the victims and their families these measures are a first step toward the legal recognition of the violations they suffered.

c. Expertise and Dedication

The members of international courts tend to be specialists in international law. Their expertise helps to specify and fill the gaps in the regulation of the court, too, as does the constant working of the court and the interaction among judges, prosecutors and the defense. Such interaction, especially when we talk of permanent courts, is the source of unwritten rules that make processes run smoother.

As a consequence, the decisions of the IACtHR show how the judges' international law expertise has helped them interpret the regulations that apply to the court so that they can further the implementation of human rights to the benefit of

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[22] "It may be sufficient for a case to be referred to the Court to bring about change within a State. Several States Parties, including Argentina, Bolivia, Ecuador, Peru, Venezuela and Suriname, have accepted international responsibility for human rights violations when confronted with litigation before the Court. . . . The contentious judgments, advisory opinions and provisional measures of the Court have also resulted in changes both nationally and internationally." In Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, England: Cambridge University Press, 2003): 331-2.

However, Pasqualucci underlines that "[s]tates have been less responsive to Court orders to end impunity and identify, prosecute and punish those responsible for human rights violations." In: Ibid, 339-40.

individuals. As seen in the case studies, the Court had to develop some of its own rules, which does not mean arbitrariness *per se* but that judges can use their discretionary powers to overcome deficiencies in the legislation.[23]

Moreover, although international courts receive limited funding when compared with domestic courts,[24] it is important to underline that while domestic courts have to deal with violations of domestic and international law, international courts have a material delimitation, i.e., the justices of international courts dedicate their time exclusively to implement a specific area of international law.

2. RELEVANT SHORTCOMINGS

a. Jurisdictional Limitations: Geographical, Material and Temporal

At the international level we find a variety of mechanisms of judicial implementation but they are insufficient to properly prosecute all those accused of human rights violations. The explanation is that notwithstanding their international nature, the scope of their jurisdiction does not extend to the whole world (geographic limitations) or to all crimes (material limitations), regardless of the time in which they were committed.

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[23] Non pecuniary measures. See: Above, Ch. III, Sec. C.2.c.iii; and Ch. V, Sec. C.1.c. and C. 2.b.v.

[24] For example, the expenses for the best funded international courts are less than those for the Spanish court system: The expenses of the ICTY from its establishment in 1993 to 2007 and for the ICTR from its establishment in 1994 to 2007 are over a billion dollars each. See: Katherine Boyle, "Tribunal Update: Uncertain Future for War Crimes Tribunals" *Institute for War & Peace Reporting*, TU No. 475 (The Hague: 3 November 2006), http://www.iwpr.net/?=tri&s=f&o=325095&apc_state=henptri200608 (Accessed: May 31, 2007). An amount closer to two billion dollars— €1,622,453, 210—was allotted to the Spanish administration of justice in the 2007 budget. In "Presupuestos Generales del Estado (2007): Resumen económico por programas del presupuesto de gastos." And the 2007 budget for the US Federal Court system was of $4,821million dollars. See: "Budget of the United States Government, Fiscal Year 2008": Appendix, pp. 45-50, http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAIdocID=645931157124+0+0+0&WAISacti (Accessed: May 31, 2007).

The IACtHR is clearly underfunded because its budget has not reached two million dollars annually. See: OAS, "Informe anual de la Corte Interamericana de Derechos humanos, 2004 (San José, Costa Rica: 2005): V. Asuntos administrativos y financieros, Table comparing the overall regular fund of the OAS and that of the Commission and the Court, 62.

In addition, international courts may only be able to impose certain types of punishment (material limitations) and prosecute crimes committed in a given period of time (temporal limitations). Even the ICC suffers from temporal, material, and territorial limitations.[25]

Geographic limitations are evident in the two *ad hoc* tribunals, for the former Yugoslavia and for Rwanda, and in regional courts such as the IACtHR and the ECtHR. Furthermore, material limitations affect these courts too. First, the two regional courts mentioned and the ICJ only have civil jurisdiction. Thus, they decide on the responsibility of the states for denial of justice, not on the penal and civil responsibility of individuals who have to be prosecuted before national courts. Second, these courts can only decide cases involving crimes subjected to their jurisdiction, and thus this limitation interferes with implementation. For example, the jurisdiction of the IACtHR does not extend to genocide which torture and disappearances can amount to and the jurisdiction of the ICC is limited to aggression, war crimes, genocide, and crimes against humanity.

Temporal limitations are less important relative to the crime of disappearances because of its continuous nature, i.e., as long as the whereabouts of the person are not confirmed the crime is considered to be in the phase of execution. Nevertheless, the majority of the violations of human rights lack this characteristic. For example, many torture activities analyzed in the case studies could not be prosecuted at the international/regional level because they were committed in a time over which these courts have no jurisdiction. For example, the ICC can only prosecute violations that occurred after 1 July 2002.

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[25] International Criminal Court, "Jurisdiction," http://www.icc-cpi/about/ataglance/ jurisdiction. html (Last Accessed: February 1, 2006). See: Art. 7 of the Statute of Rome of 17 July 1998 (Temporal Jurisdiction); art. 4.2. of ibid. (Territorial Jurisdiction); and art. 5 of ibid. (Content Jurisdiction).

b. Complementary to National Efforts

International judicial mechanisms are courts of last resort. Individuals can only seek redress at the international level after domestic judicial efforts have failed. As a result the international level is dependent on the processes followed before national courts—in charge of the initial prosecution of a violation of human rights law. Although inactivity at the national level can trigger an intervention internationally, it is only under certain circumstances and it always involves the passing of a considerable amount of time and the loss of money for the defense and for those representing the victims.

In the Latin American cases studies, notwithstanding the victims and their relatives' knowledge of the unwillingness to prosecute and/or unfairness of their respective national courts, the IACtHR as a rule demanded the initiation of the process domestically before accepting a case.[26] Thus, the victims were burdened with enduring impunity derived from the whims of the domestic judiciary which maintained processes open for years: some favorable decisions in the lower levels were reversed on appeal; others were stalled in the implementation phase. In addition, the lengthier the process, the more chances there were to intimidate the victims into giving up their needed participation, as witnesses, in the prosecution of the accused of human rights violations.

c. Difficult Individual Access: Lack of *Ius Standi*

The international level is reserved, with increasing exceptions, to demands of justice presented by states against other states. Since states do not give priority to the prosecution of past violations of human rights that occurred in other countries, lack of individual *ius standi* jeopardizes prosecution. Even though granting *ius standi* to another

[26] As aforementioned, see: Above, Ch. V, Fn. 156.

institution could minimize the negative effects of this limitation, the case studies relative to the IACtHR show its insufficiency to protect victims' rights.[27]

As aforementioned, the existence of intermediaries between individuals and the IACtHR—i.e., the need for the Commission or an OAS member state to bring a case before the Court—affects the implementation powers of such court even in the cases in which the prosecution of violations of human rights has started. Individuals cannot participate in equal conditions throughout the process due to their lack of standing. Thus, they are at the mercy of the generosity of the court, which can degenerate into arbitrariness. Since discretion may translate into not treating all the victims equally, the Courts could be perceived as not adhering to the rule of law. Such perception affects the implementation of human rights negatively.

Finally, even when individuals are granted *ius standi*—as before the ECtHR—their access to such courts can be complicated due to practical obstacles that states do not have to confront—at least not to the same extent—including asking for leave from the workplace or school to attend the process, disbursing high amounts of money to pay lawyers and experts, and lack of familiarity with the intricacies of the process.

B. RELEVANT ADVANTAGES AND SHORTCOMINGS OF JUDICIAL IMPLEMENTATION AT THE DOMESTIC LEVEL

Due to the use of universal jurisdiction, when talking of implementation of international human rights it is important to distinguish between domestic courts and foreign domestic courts. Nevertheless, since the case studies focused on foreign domestic courts, the conclusions refer for the most part to this last type of courts.

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[27] See: Above, Ch. V, Sec. C.1.b (*Velásquez-Rodríguez* Case).

Victims of human rights violations seek justice before foreign domestic courts because they offer the following advantages: first, they provide enhanced individual responsibility through criminal jurisdiction. Second, judges in domestic courts serve for life and therefore have a higher degree of independence and more means to fulfill their duties. And third, their decisions provide a model to follow at home and thus have a "ripple effect."

Leaving aside that prosecuting violations of human rights is not the main objective of domestic courts—and even less those violations committed abroad by foreigners—[28]I am going to focus on specific relevant shortcomings of domestic courts once they have accepted to hand down a decision in a case involving a violation of human rights through the use of universal jurisdiction. There are three relevant shortcomings. First, the court is perpetrating an invasion of sovereignty; second, such prosecution could easily constitute a violation of due process because it involves different legal cultures; and, third, domestic judges lack a specialization in international human rights and due to their workload cannot focus on the implementation of human rights.

1. RELEVANT ADVANTAGES

a. Enhanced Individual Responsibility through Criminal Jurisdiction

Domestic courts focus on individual civil and/or criminal responsibility but indirectly include state responsibility. As seen in the Chilean and Argentinean cases, the Spanish decisions summarized the main facts and at the same time that they established the culpability of dozens of military men, the evidence admitted showed that torture and

[28] It cannot be named as a shortcoming because domestic courts are in place to apply the laws of the country, which may or may not include international human rights. In general, the implementation of international human rights law is not a priority.

disappearances were widespread practices sponsored by the government.[29] However, as a rule, domestic courts do not decide cases involving state responsibility for human rights violations.

Although *ad hoc* tribunals—such as Nuremberg, Tokyo, Rwanda, and Yugoslavia—declare individual responsibility, the permanent courts object of the case studies, i.e., IACtHR and ECtHR—only decide on state responsibility. Nevertheless, the decisions of the American and the European courts can serve as the basis for individual responsibility, which only the appropriate domestic courts (those with territorial, subject, or universal jurisdiction) can declare.

In addition, the possibility of prosecuting the accused criminally enhances the accountability effects of individual responsibility. With the exception of the ICC, the ICTY, and the ICTR, only domestic courts can declare criminal individual responsibility, which translates into possible jail time and the duty to compensate the victims and their families. These types of decisions provide retribution for the violations of human rights and can prevent future violations by establishing that once responsibility has been proven, the crime has legal consequences.

b. Higher Degree of Independence and Effectiveness of the Judges due to Tenure

In Spain, domestic judges serve for life—not so in the *Tribunal consitucional or* Constitutional Tribunal— [30]so unless they commit certain crimes they cannot be removed

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[29] State responsibility is shown in the factual sections of the Spanish decisions. For example, "Auto por el que se amplía la querella contra Augusto Pinochet Ugarte a 9 casos adicionales por supuestos delitos de torturas," (Madrid, 26 March 1999) and "Auto de ampliación del Auto de Procesamiento de 1 de septiembre del 2000 contra Ricardo Miguel Cavallo." For other examples, see: Above, Sec. C of Ch. IV and VI.

[30] Ley Orgánica 2/1979 del Tribunal Constitucional (3 October 1979): Art. 16.2 [Published in: B.O.E. (Official Gazzette of the State), no. 239 (5 October 1979)].

from their position. This means their degree of independence from the executive is greater than that of judges serving in international courts which are, as a rule, appointed directly by governments and depend on them for renewal. Therefore, while domestic judges can oppose governmental wishes without it constituting grounds for dismissal, international judges could feel more constrained to follow governmental guidelines.

At the domestic level, judges can order the executive to comply with their decisions more easily. And since by law,[31] the executive has to obey court decisions, these decisions are more easily implemented. Therefore, in cases of extradition the domestic court will send the petition to its own government which has to proceed with it even when it goes against its perceived interests. For example and as aforementioned, although the Spanish executive was against petitioning for the extradition of Pinochet, it sent such petition to the English executive.

Judges from domestic courts can expect the cooperation, according to the rule of law, of their respective executives to comply with their decisions and this can facilitate cooperation from foreign executives which will appreciate reciprocity in the future. However, international courts do not have a specific government supporting them and

[31] However, in Latin America, the different branches of the government are still getting used to the rules of democracy. As a result, the executives of most of the countries in the region do not automatically comply with the decisions of the courts.

An example of the excessive power of the executive branch in Latin America in comparison with the other branches of the government is the letter that the 48 Argentineans, whose extradition was asked for by Judge Garzón, sent to the Spanish government in which they "demanded [to Prime Minister José María Aznar] that the judge 'be punished' and 'his order of detention be declared void.' This information appeared in Juan Ignacio Irigaray, *El Mundo* (Madrid, 3 January 2000) and is accessible in Equipo Nizkor, "Los 48 argentinos cuya detención reclama Garzón exigent a Aznar que castigue al juez," http://www.derechos.org/nizkor/arg/espana/carta.html (Accessed: June 1, 2007).

therefore their decisions can be more easily dismissed by individual executives arguing that the court members are crafting impracticable decisions.[32]

c. Model to Follow at Home: "Ripple Effect"

Torture and disappearances as crimes against humanity can be prosecuted in foreign domestic courts. When these courts accept cases based on accusations of torture and disappearances committed by foreigners and/or against other foreigners they are showing that accountability at the domestic level is possible even if it is on foreign soil. Moreover, since most of the cases studied show respect to the principles of fair trial and of deference to the victims of the abuses of human rights and their families, they provide an adequate blueprint on how to prosecute violations of human rights law where such violations took place. Nevertheless, there was an important exception albeit temporary, i.e., the decisions of the Spanish *Audiencia Nacional* and *the Tribunal Supremo* which denied the jurisdiction of Spanish courts to decide cases involving allegations of genocide and terrorism that occurred during the Guatemalan civil war. However, later on these decisions were repealed by the decision of the Spanish Constitutional Tribunal, which in fundamental rights matters is the supreme court of Spain.[33]

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[32] For example, the two *ad hoc* tribunals have not received full cooperation from the states where several of the indictees remain at large and where relevant information for the trials is being kept:

"[Charles Munyaneza, 43, and Celestin Ugirashebuja, 55—local mayors accused of organizing the genocide in their provinces of southern Rwanda, and who are now leading ordinary lives with their families in the UK … [In addition] Rwanda took months before approving the transfer of detainees in government custody to testify in Arusha [seat of the ICTR] … [and] have not yet provided a large number of documents necessary for trials." In IRIN, "Rwanda: International Criminal Tribunal for Rwanda (ICTR), (Nairobi: 27 June 2006), http://www.irinnews.org/Report.aspx?ReportID=59475 (Accessed: May 31, 2007). "Carla del Ponte, the prosecutor for the ICTY, … is accusing Croatia, Serbia and Montenegro, Republika Srpska (the Serbian part of Bosnia and Herzegovina), and the Bosnian Croat party in Bosnia and Herzegovina of not cooperating with the tribunal … The general view is that Belgrade could deliver indictees such as Ratko Mladic and are directly or indirectly protecting him and others." In IRIN In-Depth, "The International Criminal Court for the Former Yugoslavia (ICTY), http://www.irinnews.org/Report.aspx?INDepthId=7&ReportID=34538 (Accessed: May 31, 2007).

[33] See: Above, Chs. IV and VI, Sec. C.2.

At home, victims of human rights violations and their families are used to a judiciary that either rejects prosecution or encounters legal obstacles to do so. Once a foreign domestic court has granted justice denied at home, it gives support to those members of the judiciary who favor justice where the violations occurred. Moreover, judges tied up with amnesty laws can provide transnational cooperation by bringing into custody those accused and by sending documentation and other evidence abroad.

Even when the activity of the foreign domestic courts ends in the investigative phase, the cases analyzed hint to the possibility of a multidimensional "ripple effect" against impunity.[34] For example, Spanish courts started the prosecution against members of the Argentinean military but left extradition pending when the Argentinean executive removed legal obstacles to prosecution. Moreover, the failed petition of extradition of the now deceased Pinochet opened up the possibility of prosecution of the former dictator in his own country. And in an unexpected twist, welcomed by many of the victims of the Spanish civil war, calls for accountability for the crimes of Spain's own past have been revived.[35]

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[34] Stacie Jonas, "The Ripple Effect of the Pinochet Case," *Human Rights Brief* 11 (Spring, 2004): 36.

Judge Baltasar Garzón's arrest warrant against Pinochet, guaranteed that "[i]n the weeks and months following the arrest, requests for Pinochet's extradition were received from three other countries: Switzerland, Belgium, and France." In Michael Byers, "The Law and Politics of the Pinochet case," *Duke Journal of Comparative and International Law* no. 10 (1999 - 2000): 423.

Similarly, the agreement of the Argentinean Judge Rodolfo Canicoba Corral to comply with Judge Garzón's petition of preventive detention of the Argentinean military, can be said to have influenced "[t]he Parliament of Israel [which] adopted by unanimity a document demanding the extradition of the former members of the Argentinean armed forces allegedly implicated in the disappearances of Jews or Israeli citizens during the military dictatorship," in Clarín.com, "El Parlamento israelí aprobó el pedido de extradición de militares argentinos" (29 July 2003).

[35] Marcelo Risi, "España, un caso insólito de impunidad," *BBC Mundo.com*, http://news.bbc.co.uk/hi/spanish/international/newsid_4696000/4696473.stm (Accessed: October 7, 2005).

2. RELEVANT SHORTCOMINGS

a. Invasion of Sovereignty

Although states seemed to embrace the human rights paradigm when the Cold War ended, decisions handed down by foreign courts according to foreign norms are not welcomed. Instead of considering these decisions as a step toward justice, authorities see them in the worst of cases as an invasion of their sovereignty, i.e., a foreign power is imposing its own rules; and many times as a reminder of the inadequacies of its own judicial system. As seen in the case studies, the Chilean and Argentinean governments did oppose initially the use of universal jurisdiction by Spanish courts to prosecute the crimes of torture and disappearances committed during the Cold War in Latin America,[36] which thwarted implementation.

Notwithstanding this perception of imperialism, it is important to underline that foreign judiciaries are not imposing their law but international law, which those governments alleging an invasion of sovereignty have promised to abide by. From a legal and theoretical perspective universal jurisdiction is a worthwhile mechanism, not a means to impose oneself on other countries. This conclusion is supported by the case studies on the prosecution, by Spanish courts, of the crimes of torture and disappearances committed during the Cold War in Latin America.[37] Nevertheless, future cases could show imperialist designs behind the use of universal jurisdiction.

Regarding the accusation of underlining the deficiencies of its own judiciary, the decisions of the foreign court can weaken even more domestic courts, whose power rests on authority. It could be that whatever respect was left for them will disappear because

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[36] See: Above, Ch. IV (On Torture) and VI (On Disappearances), Sec. D.

[37] See: Ibid, Sec. E.

citizens will wonder why their own courts did not listen to them. Finally, it can be speculated, based on the time and resources consumed in the prosecution in Spain of torture and disappearances committed in Latin America, that prosecution before foreign courts could be a victim of its own success because aware of the advantages of a limited number of foreign courts, victims could flock to them—Spain has admitted indictments also indictments against the government of China and of Morocco—and overburden foreign judicial systems.

b. Different Legal Cultures in the Country Where the Violations Took Place and in the Country Where the Violations Are Being Prosecuted

A legal culture, which includes laws, informal rules and specific language, cannot be understood in a short period of time. Based on the years needed to complete a law degree in different parts of the world, understanding the basic laws of a country can take at least four years with prior knowledge of the language; informal rules mean adding several years; and mastering the language to a level useful in court takes even longer. Thus, it is realistic to expect that in a trial taking place before a domestic court, individuals alien to a given legal culture are going to be at a disadvantage when compared to those used to the legal culture of that court.

Although not so relevant in the contemporary case studies analyzed because of the similarities between the Spanish and the Latin American legal cultures, the differences between the legal culture of the country where the violations of human rights took place and that of the country where the violations are going to be prosecuted can represent a serious shortcoming affecting not only the accused but the victims as well.

An important element of any legal culture is the language. Thus, a person cannot participate effectively as a witness or provide for his/her defense properly without knowing the language used in the court. Similarly, the judges need to be able to understand the evidence presented to them. As seen in the historical chapter, language and access to proper translation and interpretation services played a central role in the International Military Tribunals for Nuremberg and for the Far East, and in the Israeli court system. No language-related complaints were heard against Nuremberg—where language barriers were overcome with state-of-the-art interpretation and translation services.[38] However, the Tribunal for the Far East was characterized by poor interpretation and translation services, which had a negative impact on the right to fair trial of the defendants.[39] The Israeli court system overcame the language barriers in the Eichmann and Demjanjuk cases with professionalism.[40] As a rule, language barriers affect domestic and international courts differently. While international courts are forced by treaty law to provide for the translation of documents and will have sometimes one judge who speaks the same language as the defendant or adequate interpretation and/or defense, these resources will not always be available and/or required at the domestic level.[41]

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[38] See: Above, Ch. 2, Fn. 95.

[39] See: Above, Ch. 2, Sec. A.3.b.

[40] See: Above, Ch. 2, Secs. C and D.

[41] For example, although in Spain there is a long tradition of individuals providing their services of interpretation before the court system, none of the laws regulating the administration of justice mentions directly the need for certified interpreters. In practice, "any person that pledges an oath before the court can provide the services of interpretation." In Josep Peñarroja Fa, "Historia de La Profesión: Historia de los Intérpretes Jurados," Asociación de Traductores e Intérpretes Jurados de Cataluña (ATIJC), http://www.atijc.com/es/historia.htm

The contemporary cases examined underscore the relevance of legal culture to a fair trial. Although Latin American countries and Spain have not only a common language[42] but also a legal system with similar sources, lawyers still need to take a crash course on the differences to comply with the requirements of fair trial. Even more so, a defendant prosecuted before a foreign court with a different language can easily accuse it of violating his right to a fair trial notwithstanding the presence of adequate legal defense.

c. Lack of Specialization in International Law

Generally, domestic courts deal with processes involving the violation of domestic, not of international, law. Ordinary crimes—ranging from homicide to robbery—are sufficient to backlog the court. As a consequence, when professionals are studying and being trained to work in the courts the focus is on domestic law. This happens also in countries that consider international law as integral part of their law. For example, traditionally Spanish law students only take two courses of international law—public and private—out of a total of twenty-five subjects.[43] Later on, those trained to become judges and prosecutors are even less exposed to international law.[44]

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[42] Castilian is the authoritative language as a rule. Art. 231 of the Ley Orgánica 6/1985 del Poder Judicial (1 July 1985), in B.O.E. no. 157 (2 July 1985).

[43] The Curriculum for Spanish law schools was approved by a Decree of August 11, 1953 published in the Official Gazette of Spain (B.O.E.) on August 29, 1953.

[44] In order to become a judge or a prosecutor in Spain, it is necessary to pass a competitive exam, which is a requirement to be admitted to the school in which future judges and prosecutors are trained; only individuals who have a diploma from a law school (*licenciados en derecho*) can take part in the competitive exams.

To prepare for the competitive exam, individuals have to prepare thoroughly a total of 348 lessons, of which only four examine international law directly (three with European Union law and one with crimes against the international community including crimes against humanity, genocide, and war crimes). For the summary of the 348 lessons, see: "Acuerdo de 23 de febrero de 2000, del Pleno del Consejo General del Poder Judicial, por el que se convocan pruebas selectivas para la provisión de 300 plazas de alumnos de la Escuela Judicial para su posterior aceso a la Carrera Judicial por la categoría de Juez y se aprueba la adaptación del programa que ha de regir en las pruebaws selectivas enlos términos que se contemplan en el anexo I para turno libre, y asimismo, la aprobación, en los términos que se contemplan en el anexo II, del programa que ha de regir las mismas pruebas en la modalidad corrrelativa de concurso-oposición." *B.O.E.*

The lack of expertise is more blatant in the area of human rights, in which the absence of a continuous string of precedents makes the judiciary—conservative as a rule due to their duty to uphold existing law—hesitant to use seemingly innovative mechanisms of implementation. Since the success of a lawsuit against those accused of crimes against humanity depends on the willingness and knowledge of a specific judge, different levels of expertise could provoke inequality in dealing with these abuses and thus violate not only the right to a fair trial but of equal protection of the law when demanding justice.[45]

In addition, the resources available to domestic courts can be spread too thinly to cover trials involving international law, which as a rule are more demanding in comparison with their domestic counterparts—especially in universal jurisdiction cases. For example, in the Pinochet case, the members of the Spanish court system had to spend time and money translating extradition papers into English, sending orders to the Interpol, and demanding information from different countries including the US.

C. COMBINATION OF THE INTERNATIONAL AND DOMESTIC LEVELS TO FOSTER THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

Although from a practical point of view the best forum to prosecute violations of the law, including those that affect human rights, is the place where they were committed —the evidence, the accused, and the victims are more easily accessible—the cases of torture and disappearances analyzed in the prior chapters showed the unavailability of

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(10 March 2000), modified by "Acuerdo de 14 de marzo de 2001 (BOE de 20 de marzo de 2001)" y por "Acuerdo de 27 de febrero de 2002 (BOE de 20 de marzo de 2002)."

[45] Arts. 10 and 11 of the UDHR (right to fair trial) and art. 7 of ibid. (equal protection of the law).

this forum. As a consequence, the victims and their families had to find alternative fora to prosecute the accused. Since the violations studied are crimes against humanity, they could be prosecuted before international and foreign domestic courts based on the principle of universal jurisdiction.

Assuming that the victims of the violations of human rights and their families are seeking the widest possible form of redress and taking into account that international and domestic courts present a series of relevant shortcomings and advantages, judicial implementation of human rights will benefit from the combination of the international and national levels whenever possible. By combining the two levels, the victims of human rights violations and their families will obtain decisions relative to state and individual responsibility, reparations, and preventive measures.

Notwithstanding the general conclusion in favor of combining the two levels; certain relevant factors—characteristics of the violations, circumstances under which they took place, domestic responses to such violations, and type of justice sought—can influence the preference for one of the levels instead of both. Thus, this section deals first with an explanation of those relevant factors and then with a preliminary outline of cases in which the prosecution of human rights violations will benefit from using either the international or the domestic level, and those prosecutions better served with a combination of both levels.

1. RELEVANT FACTORS TO DECIDE WHICH FORUM TO USE WHEN PROSECUTING HUMAN RIGHTS LAW VIOLATIONS

Since prosecutions are lengthy, complicated and costly, it is important to know beforehand which forum is more adequate to seek justice in a given case. The case studies analyzed show that the following factors—some of them concurrent to the

violation of human rights and others subsequent[46] to the alleged crime—are relevant in deciding where to demand judicial implementation of human rights violations:

a. Concurrent Factors

i. Characteristics of the Human Rights Violations

For the purpose of the dissertation the significant characteristics of human rights violations are circumscribed to the nature of the violation as *ius cogens*, its degree of severity, its level of incidence, and the condition of member of a "protected minority" on the part of the victim.

Any violation of human rights which belongs to the category of *ius cogens* forces states to provide justice for the violations committed during a prior regime even if those violations were not criminalized domestically when they took place. In addition, severe and widespread violations of human rights constitute crimes against humanity, which as aforementioned are not subjected to statutes of limitations. Disappearances are *per se* a crime against humanity; one case suffices.

Sometimes the targets of the violations are minors, women, ethnic and/or religious minorities, or members of economic deprived communities. Since attacks against these less favored groups could hint at administrative practices condoned by the government, the degree of severity and the scope of the abuse are less relevant to their characterization as crimes against humanity.

ii. Circumstances under Which the Violations Took Place

Most human rights—the prohibitions against torture and disappearances are exceptions—can be legally suspended under emergency situations or threats to internal

[46] In the case of continuous crimes such as disappearances, all the factors can be considered concurrent until the whereabouts of the victims are known.

security including terrorism which grants governments a wider discretion to act. However, the time of commission, the alleged perpetrators' position in the governmental hierarchy, and the degree of governmental involvement in the violation is crucial to the judicial implementation of derogable and non-derogable [cannot be suspended] human rights alike.

Time of commission is essential to determine the jurisdiction of any court because courts can only exercise jurisdiction over acts that were considered crimes at the time of commission—principle of *nullum crimen sine lege*. Since most human rights violations are executed in a given moment—disappearances being a significant exception—their prosecution could be impracticable due to time constraints.

The perpetrators of such abuses can belong to one or more of the following categories: (1) public servants or paramilitaries that do not work officially for the government. (2) Civilian or military personnel. And, (3) lower- or high-ranking public servants with or without immunity from prosecution. Therefore, different courts—civil or military—could have jurisdiction over them. In addition, violations could be part of state sponsored policies as was the case with torture and disappearances in Latin America. In this case, human rights violations become ingrained administrative practices that outlast the end of the authoritarian regimes and thus, complicate the implementation of human rights because the new democratic regime continues perpetrating abuses.

b. Subsequent Factors

i. Domestic Responses to Such Violations[47]

The focus of these conclusions is on countries going through a process of

[47] Exceptional cases in which countries have used all the means at their disposal to end impunity are not of interest here because they preclude outside implementation except to review denials of justice.

transition to democracy and/or consolidation, which will as a rule experience an ongoing fight between sponsors and opponents of accountability.[48] Since in Latin America total amnesia of past abuses has been avoided, these countries have experienced a varied degree of truth seeking, judicial implementation, and legal and constitutional reform.

In general, governments in Latin America opted for truth commissions instead of judicial implementation but the specifics differ greatly from one state to the other. Argentina conducted one of the most thorough truth commissions and at the same its judiciary has been more active in the prosecution of alleged perpetrators. However, Argentinean Presidents Raúl Alfonsín (1983-89) and Carlos Menem (1989-99) promoted impunity by limiting the scope of judicial implementation and granting amnesties and pardons (effectively revoking judicial decisions in some cases); similarly, President Fernando de la Rúa (1999-2001).[49]

Chile's truth commission is considered incomplete because it does not specify responsibility. Moreover, judicial implementation has been denied until recently.[50] Impunity has been more rampant in Guatemala where a thorough UN sponsored truth commission equated the atrocities of the government—responsible for 95% of the abuses—and of the guerilla. As a result, governmental perpetrators of abuses were never prosecuted and violent harassment of human rights activists continues.[51]

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[48] Although democracy demands accountability and an independent judiciary, the elements of the prior regime can still hold much power as in Chile or Guatemala and will fight against accountability.

[49] See: Above, Sec. D of Chs. IV and VI.

[50] L. Jara Díaz, "Bow our Heads in Gratitude: The Women Who Cared about the Disappeared Won," *The Republic* vol. 2, no. 69 (Vancouver, 7 August 2003), http://republic-news.org/archive/69-repub/69_diaz.html (Accessed: January 27, 2006).

[51] Velia Jaramillo, "Guatemala: el regreso de la guerra sucia," (17 March 2001), http://www.rebelion.org/ddhh/guatemal150301.htm (Accessed: June 1, 2004).

In the majority of these countries laws, and even constitutions, have been reformed as a response to past abuses. Moreover, they have ratified the main international human rights treaties and have subjected themselves to the jurisdiction of the IACtHR and of the ICC.[52] In addition, they are trying to get rid of the military jurisdiction used to prevent accountability. The opponents of accountability agreed to these reforms and the acceptance of the international duty to promote human rights—including ending impunity—with the understanding that such reforms and duties would only be applicable to future abuses. Thus, all of these countries have approved amnesty laws to protect the abusers of the past from criminal prosecution and have granted pardons to the few who were criminally prosecuted for these past violations.

ii. Type of Justice Sought by the Victims and Their Families

Torture and disappearances in the context of Latin America constitute crimes against humanity that states have the duty to prosecute. Legally, all these countries can be criticized for violating the rule of law. Domestically, the evaluation of such action or inaction depends on the aspirations of the victims and their families, which vary according to their personal ideology, socio-economic conditions, external threats, or a combination of the three.

Certain sectors of society, including the perpetrators of abuses, want to forget what happened and are satisfied with the approval of laws to protect their rights under the

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For a more detailed account, including other violations of human rights in Guatemala after the 1996 Peace Accords, see: Human Rights Watch, "World Report 2002: Guatemala," http://www.hrw.org/Wr2k2/americas6.html (Accessed: December 12, 2004).

[52] Argentina (8 Feb. 2001), Barbados (10 Dec. 2002), Bolivia (27 June 2002), Brazil (20 June 2002), Colombia (5 Aug. 2002), Costa Rica (7 Oct. 1998), Dominican Republic (12 May 2005), Ecuador (5 Feb. 2002), Honduras (1 July 2002), Mexico (28 October 2005), Panama (21 Mar. 2002), Paraguay (14 May 2001), Peru (7 December 2000), Uruguay (28 June 2002), and Venezuela (7 June 2000). http://www.icc-cpi.int/asp/statesparties.html (Last Accessed: January 21, 2008).

For OAS members that have accepted the jurisdiction of the IACtHR, see: Below, Appendix A.2.

new democratic regime. Thus, they value reconciliation and prevention of future crimes. Others will be satisfied with knowing the truth. For example, many "*abuelas de la plaza de Mayo*" just want to know the whereabouts of their children and grandchildren.

Nevertheless, a significant group of victims and their families demand retribution for the violations. Retribution can be obtained by different means, which can be summarized as: First, court decisions declaring individual and state responsibility and/or compensation to the victims for suffering and for losses produced by the violations. And second, non judicially-ordered administrative compensation to victims of the abuses in cases in which they are satisfied with a monetary compensation as done in Argentina and in Chile.[53] A public servant checks that the beneficiary complies with all the requirements and pays the amount pre-established in the law that created such benefit. They are similar to social security benefits in the U.S.

2. FAVORED LEVEL OF JUDICIAL IMPLEMENTATION BASED ON CONCURRENT AND SUBSEQUENT FACTORS RELATIVE TO THE HUMAN RIGHTS VIOLATIONS

The power to prosecute is among the most zealously protected by a country. As a consequence, it is logical to assume that when states do not exercise this power and victims are faced with impunity at home, the first option for the victims will be to seek justice from an international court to which their government has surrendered a limited

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[53] Examples of laws awarding reparations to victims of human rights violations are (1) the 1994 Argentinean "Ley de beneficio a las personas ausentes por desaparición forzada y a las fallecidas por el accionar de las fuerzas armadas (Ley 24.411 of 7 December 1994)," http//www.nuncamas.org/document/nacional/ley24411.htm (Accessed: June 5, 2006): Arts. 1° and 2°. Both the disappeared and their heirs are awarded an extraordinary benefit equal to the monthly wages of civil servants of category A. The reparations will be paid to the heirs of the disappeared.

And (2) the 1992 Chilean Ley 19.123 de reparación (8 February 1992), CODEPU, "Informe de Derechos Humanos (1990-2000), http://www.derechos.org/nizkor/chile/doc/codepu00/cap1.htm (Accessed: May 11, 2007): 1.B. It awards "a monthly pension to the relatives of the victims of human rights violations and of the victims of political violence, . . . free medical attention . . . [access to] higher education . . . for those under 25 and covers registration costs for those attending high school [and] . . . to the children of the victims, the option not to serve in the conscripted armed forces."

portion of its judicial prerogatives; foreign domestic courts will be their second option.[54] Based on the relevant factors explained in the prior subsection, when is each level or a combination of both more adequate?

a. International Level

The international level is the best suited to declare state responsibility—sought in cases in which human rights violations are part of national policies, i.e., constitute administrative practices—because foreign domestic courts lack jurisdiction to impose punishment, even punishment limited to reparations, against other countries. In our international system, all countries are equal[55] and any existing grievance has to be solved either via diplomacy, international courts, or arbitration; unilateral embargoes and freezing of assets are extrajudicial methods that respond to a breaking down of diplomatic relations.

In addition, since violations of derogable human rights during an emergency or threats to internal security may involve subjective political judgments too specific to a given country, international courts seem to be a more legitimate mechanism to prosecute violations in those cases than domestic courts: A foreign court could be accused of interfering with the politics of another country, which is also beyond the scope of their jurisdiction. An example would be that of jailing anti-government demonstrators who obstruct traffic, which may be evaluated differently by Western European and American judges.

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[54] And legal systems and courts are also "as far as systemic characteristics and political institutions go . . . the most *system-specific*." In Gregory S. Mahler, *Comparative Politics: An Institutional and Cross-National Approach,* 4th Ed. (Upper Saddle River, NJ: Prentice Hall, 2003): 126.

[55] This is a legal fiction necessary to conduct international relations. As such it is enshrined in art. 2.1. of the Charter of the United Nations.

Similarly, when the violations do not reach the level of severity and of recurrence to be considered crimes against humanity, the international level is the best solution to avoid frictions between countries which could start a retaliatory "war," i.e., since you are looking at a case of police brutality in our country, our courts will be open to decide cases against your police forces. That is why localized accusations of denial of justice involving torture against the police in any Western European country are solved by the ECtHR, not foreign domestic courts.

Finally, although foreign domestic courts may criticize other countries' laws in their decisions, international courts are the only ones that can force countries to get rid of laws that contradict human rights standards: When countries sign treaties accepting the jurisdiction of any international court, they assumed a duty to do everything possible to respect international standards, including reforming their legal system. As a consequence of all the aforementioned, the international level will satisfy partially those victims seeking retribution, truth and prevention because a detailed examination of the role of individuals in the violations is usually not included in the decisions—relevant exceptions are the *ad hoc* Tribunals for Yugoslavia and Rwanda and the ICC. Those wanting reconciliation will feel at ease only as long as the court decisions do not specify responsibility so members of the prior regime are not antagonized.

b. Domestic Level: **Seeking Justice in Foreign Courts**

Since domestic courts do not have temporal limitations except those established by the prohibition of *ex post facto* laws, they can prosecute crimes against humanity when regional courts are unavailable because the violations were committed before individual countries accepted the jurisdiction of these regional courts. In addition, due to

the fact that foreign domestic courts have a criminal component that was absent from the regional courts studied, they are better suited for establishing individual responsibility. However, foreign domestic courts play a lesser role than regional courts in establishing state responsibility. That is, foreign domestic courts will expose government involvement in the violations during the factual-finding phase of the trials but cannot declare the responsibility of the state and impose on it the duty to pay reparations to the victims.

The domestic level (referring to courts outside of the country where the violations were committed) is also convenient in cases in which those accused of abuses are high ranking officials, including members of the government with diplomatic immunity because prosecution of individuals who still may hold the reins of power where the violations were committed can provoke instability and is usually prevented by a judiciary populated with friends of the prior regime.[56] Thus, in these cases prosecution before a foreign court can afford justice whenever the alleged perpetrator is under the jurisdiction of that court, or will be via extradition. For example, Scilingo was in Spain and Cavallo was extradited from Mexico; both were Argentineans who committed crimes against their fellow citizens in Argentina.

Moreover, the wealth of information gathered for the prosecution can provide a legitimate source of evidence regarding those violations of human rights perpetrated by

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[56] The use of Spanish courts has been hailed as beneficial by groups that defend victims' rights. For example, see: "María Reina Salazar, President of the Hispanic-Guatemalan Committee of Human Rights (CDHHG) [declared]: 'I hope that many countries follow the example of Spain . . . because in our countries impunity continues." [Translation of "María Reina Salazar, presidenta del Comité de Derechos Humanos Hispano Guatemalteco (CDHHG), 'Ojalá muchos países siguieran el ejemplo de España . . . porque en nuestros países la impunidad sigue vigente.'"]. In BBC Mundo-América Latina, Celebran decisión de España (Wednesday, 5 October 2005), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_43130000/4313900.stm (Accessed: October 7, 2005).

the prior regime. For example, based on the data compiled in the cases against the Argentinean and Chilean military, Spanish Judge Baltasar Garzón wrote a petition of extradition against 40 Argentineans accused of human rights abuses during the Cold War and in July 2003 Argentinean Federal Judge Rodolfo Canicoba Corral took the first steps to facilitate extradition by placing them in preventive detention.[57]

Therefore, since these processes satisfy demands for individual retribution and truth, individuals should use this type of courts when impunity domestically is almost total and the efforts to find the truth are minimal. Theoretically, prevention is present too because of the threat of prosecution against abusers. An added advantage is that the handing down of judicial decisions punishing individuals for their past abuses can trigger prosecution at home and create a body of evidence that can be used in the home country, and thus provide further satisfaction of the demands for justice.

Finally, foreign domestic courts in which individual victims can directly trigger prosecution are even better for two main reasons: (1) Initiation of the process depends only on the merits of the case, not on the politics of the prosecutor's office. As a consequence, if there is enough evidence of possible crimes against humanity, the courts will accept it; and (2) it avoids the presumption of imperialistic design that will be present in processes started *ex officio*. Victims of the same nationality of the accused—not a foreign government—decided to demand their prosecution, denied at home.

c. Combination of Both

Even though the case studies show that oftentimes the domestic level is the only one available or that individuals will cover all their bases by using both levels, violations that constitute crimes against humanity produce practices that can survive the regime that

[57] See: Above, Chs. IV.D.2 and VI.D.2.

introduced them. Thus, the prosecution of individuals—including those who claim immunity—is insufficient. What is needed is declaring state responsibility and finding ways to modify such policies, to which only the international level is amenable. This means that whenever possible, both levels should be used.

Furthermore, declarations of responsibility by two different levels of courts using similar arguments will reinforce implementation by giving more legitimacy to the prosecution. As a result, the decisions emanating from each level will be easier to execute. Combining the two levels also favors prevention in the sense that the cooperation of both levels to end impunity will send the message that future abusers could confront prosecution anywhere in the world—at least in the democratic world: At home when legal and judicial obstacles to prosecution are removed; and abroad through the use of universal jurisdiction.

3. GENERAL CONCLUSIONS

First, the historical and contemporary case studies show that judicial implementation is a favored mechanism to obtain retributive and preventive justice against the violation of human rights law because truth commissions are not sufficient by themselves to guarantee retribution and prevention. For example, the South African Truth and Reconciliation Commission used the possibility of indicting those who did not disclose their participation in abuses during apartheid as a threat. The Argentinean, Chilean and Guatemalan Truth Commissions—to a higher or a lesser degree—have not satisfied the thirst for justice of the victims of abuses during the Cold War and their relatives.[58]

[58] I follow the position of the International Center for Transitional Justice, which considers truth commissions, judicial implementation, and other mechanisms as complementary:

More specifically, international courts are well suited for establishing compensation—sometimes in very creative ways (see the IACtHR)—and setting guidelines underlining needed legislative reforms where the abuses occurred. Foreign domestic courts are best for determining individual criminal responsibility and thus provide deterrence. And both types of courts help end impunity where the crimes were committed by facilitating or promoting the prosecution of other accused where the violations took place. However, judicial implementation needs to be established as a "standard" response to these abuses—Nuremberg and Tokyo were outliers for decades.

Second, the contemporary case studies show that states are better understood as disaggregated entities, in which different types of intergovernmental networks—domestically and across borders—play a decisive role toward shaping the interests of the state.[59] Thus, it is possible to contend (1) that the cross-fertilization of ideas involves not only the European and the Inter-American Courts, but also the domestic level courts—resolutions of Spanish courts regarding the prosection of crimes against humanity refer to the Eichmann and the Barbie decisions. In general, "judges [and other governmental officials] around the world interact with one another aware of their membership and participation in a common enterprise—regardless of their actual status as state, national,

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> In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes [Mission Statement, http://www.ictj.org/en/about/mission/ (Accessed: June 1, 2007)].

[59] Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004): 100.

regional, or international judges."[60] And, (2) governments do not have just one interest. The different branches of the governments pursue different interests, which can foster or hinder judicial implementation of human rights. "It would not be up to "the state" to uphold human rights . . . [but] would be up to the members of the executive branch, the judiciary, and the legislature."[61]

Thrid, overall, these interactions at different levels and among individuals with different backgrounds indicate that in democratic states the respect for the rule of law is increasingly including the protection of universal human rights. For example, notwithstanding the interest of the Spanish government in not antagonizing their Latin American counterparts, they circulated judicial petitions as established in Spanish law. In addition, while officials from the Argentinean government—disrespectful of the independence of the judiciary—wanted the Aznar administration to punish Judge Garzón for his investigation into human rights violation,[62] the Spanish executive knows that it has has no right to punish a judge who is complying with his duties. The behavior of the Spanish executive in this matter could foster more respect for the rule of law in other countries.[63]

Fourth, since the protection of international human rights includes any victim of gross violations of human rights, past or present, it seems that a human rights norm that promotes accountability is being crystallized in the international relations realm. The "ripple effect" of the Spanish prosecutions has helped in fostering this norm, which has

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[60] Slaughter, *A New World Order*: 100-1.

[61] Ibid: 35.

[62] See: Above, Fn. 31.

[63] See: Above, Ch. VI, Fn. 187.

not yet faded. Thus, on 24 December 2007 the Italian authorities detained the Uruguayan Fernández Troccoli, a former military man, for his involvement in the disappearance of several Italian citizens during the Cold War and as part of the Cóndor plan. Uruguay petitioned for the extradition of Mr. Fernández Troccoli on similar charges but against Uruguayan citizens.[64] This norm that promotes accountability is significant because, if it crystallizes, it will affect from the way in which foreign policy is conducted to the manner in which rights discussion are framed domestically. In the next section I specify the trends main the implementation of human rights norms.

D. MAIN TRENDS IN THE JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW

Although there are indications that the War on Terror has affected the judicial implementation of human rights—alteration of international human right standards, establishment of secret prisons in different countries, use of extraordinary renditions to countries where torture is widespread,[65] suspension of *habeas corpus*,[66] and denial of

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[64] EFE, "Detenido el ex militar uruguayo Fernández Troccoli por la Operación Cóndor," *El País* (24 December 2007), http//:www.elpais.com

[65] Despite the outcry, renditions existed before: "CIA Director George J. Tenet, testifying . . . before the commission investigating the Sept. 11 attacks, said the agency participated in more than 70 renditions in the years before the attacks." In Dana Priest and Joe Stephens, "Secret World of US Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light." *The Washington Post* (Tuesday, 11 May, 2005): A01.

[66] "Within weeks of the attacks against the World Trade Center and Pentagon on September 11, 2001, the United States government began a massive dragnet search targeting non-citizens from North Africa, the Middle East and South Asia. Approximately 1,200 people were imprisoned. . . .[some detainees] were forced to wait weeks and even months before receiving any kind of hearing before an immigration judge." In "Human Rights Features (HRF) during the 58th Session of the Commission on Human Rights (CHR)," http://www.hrdc.net/sahrdc/hrfchr58/issue2.htm (Accessed: May 11, 2003).

Two well-known examples of American citizens who were denied the right to *habeas corpus* based on the War on Terror are Yaser Esam Hamdi and José Padilla. However, Hamdi was granted the right to habeas corpus by the decision of the Supreme Court in *Hamdi v. Rumsfeld* (542 U.S. 507, 2004) and Padilla's situation has improved after the Supreme Court's decision in *Hamdam v. Rumsfeld* (29 June 2006).

"President Bush's attorneys tried to advance the astonishing notion that habeas corpus petitions could be filed—as long as they were all immediately thrown out of court. President Bush's attorneys failed

regular jurisdiction—[67]it is early to comprehend the exact scope of its influence and what will be its lasting effects.[68] Moreover, based on my case studies, judicial implementation is still gathering momentum. The clearest examples are the 2005 decision of the Spanish Constitutional Court declaring the universal jurisdiction of Spanish courts to prosecute foreigners accused of genocide, terrorism and tortures that occurred in Guatemala and the admission of a lawsuit against Chinese abuses in Tibet.[69] More recently, on 24 December 2007, "the Italian Judiciary issued extradition arrest warrants against 146 persons … involved in the so-called *Operation Cóndor* in the 1970s and 1980s."[70] The accused in

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to persuade the Supreme Court that his 'enemy combatant' policy was lawful." In Healy and Lynch, "Power Surge": 14.

Due to the *Hamdam v. Rumsfeld* decision, "[t]he Bush administration . . . guaranteed the basic protections of the Geneva Conventions to captives in the war on terrorism and asked lawmakers yesterday to restore the military tribunals now in limbo." In Calvin Woodward (The Associated Press), "Geneva Rights Come to Gtimo" *AmNY* (Wednesday, 12 July 2006): 6.

[67] After 9/11, the American executive defended the suspension of due process to confront terrorists, a policy declared illegal by the 29 June 2006 decision of the Supreme Court of the U.S (8 to 3) in the case of *Hamdan v. Rumsfeld*. See: Human Rights Watch, "U.S.: Guantánamo Ruling Rejects Unfair Trials: Administration Should Try Suspects in U.S. Courts" (Washington DC, 29 June 2006), http://hrw.org/english/docs/2006/06/29/usdom13663_txt.htm (Accessed: June 30, 2006).

However, the reality is that the military commissions do not follow the principles of due process—for example they provide no guarantee of a lawyer of your choice and no pre-established procedural rules. In Jennifer Daskal, "This Was a Trial" *The International Herald Tribunal* (Guantánamo Bay, Cuba: Sunday, 1 April 2007). According to Daskal:

> "[T]he Australian's [David Hicks] conviction shows in painful detail just how illegitimate and dysfunctional the military commissions truly are. . . . Hicks began the day with three lawyers . . . but within hours was down to one. . . . Joshua Dratel, chief defense counsel for Hicks for several years . . . was dismissed by the judge, because while he agreed to abide by all 'existent' rules, he refused to agree to 'all' rules for the tribunal without first knowing what those rules stated. . . . [Finally] Hicks entered a plea of guilty – apparently choosing not to test his fate in a system that deems statements obtained through severe physical abuse an acceptable form of evidence."

[68] This is beyond the scope of the dissertation. A serious analysis of the issue should be done by the end of the decade in which there will be a significant amount of data and some historical perspective.

[69] Comité de Apoyo al Tibet, "Spanish Lawsuit Seeks Justice for Tibetan Victims," (Madrid, 29 June 2005), http//www.phayul.com/news/article.aspx?article=Spanish+Lawsuit+Seeks+Justice+For+Tibetan+Victi… (Accessed: January 26, 2006).

[70] David Fleischer, "Brazil Focus," [Weekly Report] (22 December 2007 – 4 January 2008): 6-8.

this last case come from the different countries that were part of the *Cóndor Plan* and their indictment is based on the disappearances of Italian citizens and persons of Italian descent.

Thus, while appreciating the future impact of the War on Terror on judicial implementation, this section focuses on five significant trends that—based on the case studies—characterize the post-Cold War era and will continue in the foreseeable future. Sixty years after the first successful attempts to implement human rights law internationally—Nuremberg and Tokyo—the following trends have become stronger: proliferation of international judicial mechanisms, widespread use of universal jurisdiction by domestic courts, geographical and substantive unevenness of the system, centrality of the individual in international law, and use of a multifaceted strategy to seek justice.

1. PROLIFERATION OF JUDICIAL MECHANISMS AT THE INTERNATIONAL LEVEL[71]

Notwithstanding its apparent novelty, judicial implementation at the international level was already in place in the 1920s through the PCIJ—which became the current ICJ. For a limited period of time there was a Permanent Court of Arbitration in Central America.[72] Then, as a direct consequence of WWII, the transitory courts of Nuremberg and Tokyo were established. And later on, two permanent courts—of regional scope—were created to protect human rights, i.e., the ECtHR and the IACtHR.

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[71] *Caso Hermanas Serrano Cruz vs. El Salvador.* Excepciones Preliminares del 23 Noviembre del 2004, Serie C, no. 118: Par. 42. And on suggesting that the Court should return to its progressive decisions, see: Ibid, Par. 49.

[72] Manley O. Hudson, "The Central American Court of Justice," *American Journal of International Law* vol. 26, no. 4 (July 1957): 759-86.

This trend has only been reinforced in the post-Cold War era. First, the UN has sponsored several transitory courts to confront genocide and crimes against humanity in localized parts of the world, including the *ad hoc tribunals* for the former Yugoslavia and for Rwanda, and the hybrid courts (which combine domestic and international laws and judges) for East Timor, Sierra Leone, Kosovo, and for Côte d'Ivoire.[73] Moreover, there are serious efforts to have an effective hybrid court in Cambodia—efforts thwarted due to lack of resources and the interference by the Cambodian government.[74] And second, the beginning of the work of the ICC, a standing court with subsidiary criminal jurisdiction, albeit substantively and temporally limited as aforementioned.[75]

2. WIDESPREAD USE OF UNIVERSAL JURISDICTION BY DOMESTIC COURTS

Universal jurisdiction was traditionally used to supplement classical jurisdiction which was inapplicable to crimes committed in places subjected only to international authority—international waters and more recently international space—and violations that involve more than one country—slave trafficking. But the Nuremberg and Tokyo tribunals broadened the scope of universal jurisdiction to the prosecution of crimes that due to their severity and degree of incidence repel all humanity.[76] Based on this

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[73] United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," S/2004/616* (August 23, 2004): 13, par. 38.

[74] Notes from a lecture by Peter Maguire, "Facing Death in Cambodia," *Spring 2005 Human Rights Seminar Series,* Graduate School and University Center of the City University of New York (New York: 14 April 2005) [Discussant Craig Etcheson].

[75] See: Above, Fn. 13 and International Criminal Court, "Situations and Cases," http://www.icc-cpi.int/cases.html

[76] On the heinousness basis of universal jurisdiction nowadays and the rejection that piracy had such justification, see: Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation," *Harvard International Law Journal* vol. 45, no. 1 (Winter 2004): 183.

precedent, Israeli courts used universal jurisdiction to prosecute Eichmann and Demjanjuk, both accused of crimes against humanity.

In the post-Cold War era the use of universal jurisdiction has increased and it is not limited to the prosecution of WWII crimes but encompasses abuses that happened during the Cold War—basically in Latin America—and after the Cold War, in different parts of the world including the Balkans and African countries. The novelty of these more recent cases is that they involve the civil and criminal prosecution of crimes committed by foreigners against foreigners abroad; the Israeli cases involved crimes against the Jewish people, who—even though citizens of other countries when the crimes were committed—were considered as nationals of Israel. However, in many cases there is a past colony/metropolis relationship, which is not a condition *sine qua non* for this type of prosecution as seen in the case of *Filártiga v. Peña-Irala* in which American courts found a Paraguayan liable for torturing another Paraguayan national in Paraguay.[77]

The following more recent examples are evidence of the strength of this trend. The Spanish Council of Ministers "agreed to broaden the petition of extradition of the Argentinean Ricardo Taddei, who was under custody of his country since last April 26, to include the charges of illegal detention and torture. . . . [H]e participated in 28 illegal

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[77] *Filártiga v. Peña-Irala*, 630 F.2d 876, 2d Cir. (30 June 1980), http://homepage.ntlworld.com/jksonc/docs/filartiga-630F2d876.html (Accessed: December 8, 2006). It ends stating that "[a]mong the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostes humani generis,* an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."

On its significance for judicial implementation, see: Michael Ratner, "Civil Remedies for Gross Human Rights Violations," in *Human Rights in the World Community: Issues and Action*, Eds., Richard Pierre Claude and Burns H. Weston (Philadelphia, PA: University of Pennsylvania, 2006): 390-2.

detentions, some of which remain disappeared."[78] And on 30 October 2007, Judge Garzón has started the proceedings, based on a lawsuit of four inhabitants of Western Sahara, against thirteen—mostly retired—Moroccan governmental officials accused of genocide and tortures committed in Western Sahara. Similarly, the French judge, Patrick Ramaël, has started the proceedings against five Moroccans accused of killing another Moroccan.[79]

3. UNEVENNESS OF THE SYSTEM OF JUDICIAL IMPLEMENTATION: GEOGRAPHICAL AND SUBSTANTIVE LIMITATIONS[80]

Geographically, judicial implementation at the international level is more common in Western Europe than in other parts of the world: Decisions from Western European domestic courts can undergo not only the scrutiny of the ECtHR but also of the European Court of Justice (ECJ), which is not limited to human rights issues. More recently the scope of Western European domestic courts has broadened to end impunity globally.

However, absent the efforts of Western European courts, judicial implementation outside this region—with the partial exception of the Balkans, Rwanda, East Timor, and

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[78] J. M. L. "España pide permiso a México para reextraditar al torturador Cavallo a Argentina," *El País* [Andalucía Ed.] (26 May 2007): 38. [Translation].

[79] Ignacio Cembrero, "Garzón investigará un supuesto genocidio en el Sáhara Occidental," (31 October 2007), http://www.elpais.com (Accessed: 31 October 2007).

[80] I do not treat the accusations of selectivity—civil and criminal proceedings involve mainly perpetrators who belong to the Right—against the courts that have prosecuted those accused of the international crimes of torture and disappearances because the absence of leftists among the accused is a consequence of the fact that the Right was responsible for most of the violations of human rights committed in Latin America during the Cold war. Although Fidel Castro could be indicted, he may still be granted immunity. More recently, the indictments against Communist China show that there is no anti-Right bias in the Spanish court system.

parts of the Americas—is limited.[81] Furthermore, even Western Europe suffers from impunity, including that relative to abuses from the Spanish civil war (1936-39) and the subsequent Francoist regime (1939-1975/8).

From the perspective of the type of violations object of implementation at the international level, it is possible to distinguish between the European system—which covers basically all human rights against all its members through compulsory jurisdiction—and the Inter-American one—which does not extend to genocide and can only deal with torture whenever the country accused of this violation has accepted its jurisdiction in the matter. In addition, domestic courts will only use universal jurisdiction for human rights abuses that amount to crimes against humanity, the most common being genocide, terrorism, and torture. Finally, even the aforementioned abuses are only partially implemented because prosecution has been limited to crimes perpetrated by dictatorships. For example, alleged genocide practices in Australia against the Aborigines have not been prosecuted.[82]

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[81] On the role of the two *ad hoc* tribunals for Yugoslavia and Rwanda, see: Geert-Jan Alexander Knoops, *International and Internationalized Criminal Courts: The New Face of International Peace and Security* (The Hague, Holland: Boom Juridische uitgevers, 2003): 7-9.

For an analysis of the hybrid courts of Kosovo, Sierra Leone, and East Timor, see: Laura A. Dickinson, "The Promise of Hybrid Courts" *American Journal of International Law* vol. 97, no. 2 (April 2003): 295-310.

For the role of the Inter-American Court of Human Rights, see: Above, Chs. III and V. Finally, for references to the activity of domestic courts in the Americas, see: Above, Chs. IV and VI.

[82] The 1997 "Human Rights and Equal Opportunity Commission … concluded that between 1910 and 1970 between one in three and one in ten indigenous children were forcibly removed from their families and communities," which according to art. II (e) of the 1948 United Nations Convention on the Prevention and Punishment of Genocide, "[f]orcibly removing children of the group to another group" constitutes genocide. However, there is no recognition of this claim of genocide on the part of the Australian government." In Brett Stone, "Report Details Crimes Against Aborigines" *World Socialist Web Site* (7 September 1999), http://www.wsws.org/articles/1999/sep1999/geno-s07_prn.shtml (Accessed: May 29, 2007). This year, the Australian Parliament apologized. However, reparations are not expected. In: Rod Mcquirk, "After Apology, Aborigines Press for Reparations" *Boston Globe.com* (Canberra: 14 February 2008).

4. CENTRALITY OF THE INDIVIDUAL

Although many scholars have assumed that international law regulates only relations among states, nowadays the individual is included among the subjects of international law too. More specifically, if we talk of international human rights the individual is at the core of such law. Nevertheless, it is only in our days that the individual is provided with adequate venues to participate in the system and protect his/her rights.[83] Decisions from foreign domestic courts underline the position of the individual as holder of rights against his/her own government and other individuals. These decisions send the message that reasons of state are secondary to the rights of the victims and their families.

But the role of the individual goes beyond that of bearer of rights, i.e., individuals play an active role by agreeing to use existing laws, approved by governments, to implement human rights. Thus, in Spain the law recognizing universal jurisdiction was in place, as it was internationally. Nevertheless, until certain individuals decided to apply it—including private citizens and associations of victims, judges, and prosecutors—it was ineffective. The poster child for this type of activism is Judge Baltasar Garzón, who has been compared to the Italian super-judges, such as Giovanni Falcone, who prosecuted the Mafia in earnest.[84] Even though the relevance of individual efforts cannot be denied, it is

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[83] Memoria del Seminario: "El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI," tomo II. A.A. Cançado Trindade, Informe (San José, Costa Rica, 25 de Mayo del 2001): Par. 167, p. 64.

[84] Judge Garzón was informed that certain members of the Consejo General del Poder Judicial said of him in 1993: 'ese tío arrogante, que va de Giovanni Falcone por la vida, y eso es muy peligroso.' In Pilar Urbano, *Garzón: El Hombre que Veía Amanecer* (Travessera de Gràcia, Barcelona, Spain: Plaza & Janés Editores, 2000): 60. Pilar Urbano also mentions the impact of the Italian super-judges among Spanish judges and prosecutors in 1995: "Había en los ambientes judiciales españoles cierta 'mística heroica,' en emulación del movimiento italiano de 'manos limpias' y antimafia, que ya tenían un granado

also important to underline that none of them work in a vacuum and thus cooperation is the crux of past and future judicial implementation.

5. MULTIFACETED STRATEGIES TO SEEK JUSTICE[85]

Until the post-Cold War era individuals demanding justice for human rights abuses were at the mercy of the whims of their governments. It can be said that, with the exception of the civil suits to demand responsibility using the ATCA before the courts of the United States, the only options were the ineffective court system at home or waiting for the decision of any government or the organ of an international organization to initiate a process before an international court. Nowadays the newfound significance of the individual in international law combined with the increase in the fora available to demand human rights protection has opened up the possibility of using different mechanisms.[86]

Assuming that individuals want the widest form of justice, it is logical that they will agree to a combination of truth commissions, judicial implementation, and executive and legislative reforms. Focusing on judicial implementation and taking into account the unevenness of the system, individuals demand justice domestically, in foreign courts and at the international level. It is usually done in a successive manner but it can be

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martirologio de jueces y fiscales asesinados por . . . grupos criminales con poder. Y existía el 'síndrome Falcone,' de jueces con conciencia de que podía haber por ahí una bala que llevara su nombre," ibid, 222-3.

Other judges and prosecutors, apart from Garzón, have been involved in the efforts but are less known. For example, the Prosecutor Carlos Castresana, who brought the case against the Argentinean military before Judge Garzón in 24 March 1996; Judge García Castellón, who admitted later on that year the lawsuit against the Chilean military for human rights violations; and Judge Santiago Pedraz, who is currently in charge of the Guatemalan case.

[85] Individuals basically follow all/several of these steps. First, they decide what type of justice they are seeking. Second, they gather the support of experts, authorities, and associations domestically and abroad. Third, they promote the creation of truth commissions whose reports can be admissible in court. And finally, they find out which courts are the most favorable for their purposes.

[86] Currently, the individual is considered one of the subjects of international law. In addition, after the end of the Cold War we have seen the proliferation of judicial mechanisms.

combined. Since there is no agreement by legal scholars and practitioners on the duty to prosecute using universal jurisdiction,[87] victims and their representatives sometimes send petitions to initiate prosecutions to several courts to increase the probability of a trial as done by Rigoberta Menchú.

E. RECOMMENDATIONS TO FOSTER A MORE EFFECTIVE JUDICIAL IMPLEMENTATION OF HUMAN RIGHTS LAW

Based on the main advantages and shortcomings of the international and domestic levels, and on the relevant trends in judicial implementation, I am presenting five recommendations to foster a more effective judicial implementation of human rights law, which can be grouped as follows: first, spreading compulsory and universal jurisdictions. Second, facilitating individual access to the courts. Third, increasing domestic and transnational cooperation with the judiciary. Fourth, reinforcing the relationship between the international and the national levels of implementation. And finally, investing substantially in human rights education could be an important preventive measure. In each subsection I will briefly refer to concrete measures to achieve the more general goals and to the feasibility of what I am proposing—based on the existence of structures in place or the need for legislative reform, and the resources needed.

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[87] Certain treaties impose on any state party to them the duty to use universal jurisdiction: For example, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Grave Breaches Provisions of the Geneva Conventions. See: Human Rights Watch, "Universal Jurisdiction in Europe: State of the Art" vol. 18, no. 5 (D) (June 2006): 2.

For some countries it is a duty, for others a right. See: Amnesty International, "Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation," AI Index: IOR 53/002/2001 (September 2001).

1. SPREADING COMPULSORY AND UNIVERSAL JURISDICTIONS

The case studies focused on violations of human rights which constitute crimes against humanity, i.e., crimes that are not subjected to statutes of limitations and that in principle every country should have the duty to prosecute. Nevertheless, there is no agreement among legal scholars and practitioners relative to the duty to prosecute and as a consequence many prosecutions do not succeed.

Internationally, the IACtHR with its optional jurisdiction obstructs judicial implementation. To overcome this shortcoming it should adopt compulsory jurisdiction as recommended by important members of the court.[88] This is what the ECtHR has done. Thus, all the members of the Council of Europe are subjected to the ECtHR automatically.

Domestically, implementation is more difficult because countries are reluctant to prosecute crimes to which they do not have any direct link. Nevertheless, since countries have the duty to abide by international law—but they may not always comply with this duty—the widespread use of universal jurisdiction will facilitate the prosecution of crimes against humanity. The example of states with favorable provisions on this respect—as Spain—should be followed.

Nevertheless, due to the novelty of the use of universal jurisdiction for criminal prosecutions, the first step to take would be to elaborate a list of crimes amenable to universal jurisdiction and under what circumstances states will have a duty to prosecute.

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[88] "[A]rticle 62 should enshrine the *automatism* of the compulsory jurisdiction of the Court relative to all the States party to the Convention." In Relator: Antônio Augusto Cançado Trindade, "Informe: Bases para un proyecto de protocolo a la convención americana sobre derechos humanos, para fortalecer su mecanismo de protección": Par. 117, p. 47. In *Memoria del Seminario El sistema interamericano de protección de los derechos humanos en el umbral del siglo XX*I, tomo II San José, Costa Rica, 32 y 24 de Noviembre de 1999. Corte Interamericana de derechos humanos, 2001.

On its feasibility, recent events are inconclusive because while Belgium has limited the scope of universal jurisdiction, the Spanish Constitutional Court has reinforced it. In general and outside Europe, it would be difficult for this recommendation to become a reality at the domestic level because of lack of political will among the different states and more specially in the United States which basically forced Belgium in 2003 to reform its law on universal jurisdiction under threat of changing the location for the NATO headquarters.[89] The U.S. disliked the previous law because under it, members of the U.S. government could be indicted.[90] However, after the ICC hands down its decisions on Darfur universal jurisdiction could be reinforced.

2. FACILITATING INDIVIDUALS' ACCESS TO THE COURTS: GRANTING THEM *IUS STANDI*

Even when courts have compulsory and universal jurisdictions, they may not start a process to prosecute a given violation of human rights. The reason is that in most countries individuals, except in civil court, must rely on overburdened prosecutors with their own political agendas—[91]and other intermediaries—for a trial to start. This obstacle exists even in civil law countries, considered the best milieu for these prosecutions. Internationally, the ECtHR recognizes individual standing but the IACtHR does not.

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[89] Human Rights Watch, "Universal Jurisdiction in Europe": 2; and Human Rights Watch, "Belgium: Universal Jurisdiction Law Repealed" (Brussels, 1 August 2003), http://hrw.org/english/docs/2003/08/01/belgiu6280.htm (Accessed: April 25, 2008).

[90] "Just as the parliamentary debate was coming to a head in March 2003, a complaint was filed against former U.S. President George Bush Sr. and other senior figures by the families of Iraqi victims of a U.S. attack on a Baghdad shelter in the 1991 Gulf War which left over 400 persons dead." In Reed Broody, "Belgium Curtails Anti-Atrocity law Under US Pressure," *ACLU International Civil Liberties Report,*http://sdshh.com/ICLR/ICLR_2003/12_Brody.pdf (Accessed: April 25, 2008): 2.

[91] "Among those entrusted with critical discretionary options in the American system of criminal justice, the public prosecutor occupies a pre-eminent place. Daily, … he is entrusted with the decision whether and how persistently to investigate a person or condition in the effort to make a criminal case." In H. Richard Uviller, "The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA," *Michigan Law Review* vol. 71, no. 6 (May 1973): 1146-7.

Exceptionally, some countries recognize a wider access of individuals to the court and thus overcome the limitation of *ex officio* prosecutions or those prosecutions that can only start at the petition of the office of the prosecution.[92] Spain is the best example because it grants any individual—national or foreigner—the right to initiate criminal processes in which they have an interest as a victim.[93] Although the limited presence of domestic legal provisions fostering the universal jurisdiction worldwide can be seen as a drawback, I see it as a model for future reforms which could foster a more democratic judiciary.[94]

However, granting an individual the right to initiate criminal procedures is not necessary except in cases in which prosecutors reject international regulation. It is more feasible in international courts—the IACtHR with basis in the right to individual petition of art. 44 of the American Declaration of Human Rights could have it—than in domestic ones due to zealous protection of one's own legal culture. Domestically, it would be easier to set up preliminary hearings for the victims and to estables the duty of prosecutors to initiate processes under certain circumstances.

3. INCREASING DOMESTIC AND TRANSNATIONAL COOPERATION WITH THE JUDICIARY

One of the criticisms generally directed against judicial implementation is the length of time it takes to prosecute the accused. This drawback is more apparent in

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[92] Micah S. Myers, "Student Note: Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations," *Stanford Journal of International Law* 25 (Fall 2005): 212.

[93] Using the *acción popular*. See: Above, Ch. IV, Sec. C.1.a.

[94] "Private party-initiated complaints are indispensable in bringing suspected perpetrators to the attention of judicial authorities where police and prosecutorial authorities may lack the . . .will to pursue certain cases because of concern about coming into conflict with . . . the positions of the executive. . . . States should not engage in law reform to prevent the instigation of prosecutions simply because such cases might be politically inconvenient." In Human Rights Watch, "Universal Jurisdiction in Europe": 9-10.

processes involving the violation of human rights which are even lengthier than regular trials based on territorial or subject jurisdictions due to a variety of obstacles including legal obstacles to initiate a process, and difficulties to gather pertinent information to use as evidence and to apprehend the alleged culprits.

When the implementation involves international and foreign domestic courts, the obstacles are compounded due to the distance and the need to rely on foreign governments. All these obstacles can be overcome with cooperation from the executive, legislative, and judicial branches. Transnationally, it is necessary to increase cooperation among different courts and governments worldwide. Executives and legislatives can streamline access to official documents and extradition processes.

Domestically, the executive and the legislative should remove obstacles to prosecution—repealing amnesty laws and adapting other laws to international standards—and facilitate accountability by providing additional resources to the courts. For example, the President of the House of Representatives of Chile proposed "increase[ing] the appointment of special judges . . . [because] there is no ethical justification for the delay in prosecuting, providing justice and making reparations to the victims of the crimes against humanity and their families."[95]

In general, the feasibility of an increase in cooperation is quite high because of the passing of time since the abuses happened. However, extradition of a country's citizens and access to classified documents, which could implicate a foreign government in the abuses, seems more difficult as shown by how slowly the Clinton administration

[95] Isabel Allende Bussi, "A 30 años del Golpe de Estado: Los Derechos Humanos en Chile," *El País* (Opinion, 16 August 2003). She was then the President of the House of Representatives of Chile.

responded to the February 1997 Spanish request regarding access to certain classified documents relative to the Cóndor plan.[96]

4. REINFORCING THE RELATIONSHIP BETWEEN THE INTERNATIONAL AND THE DOMESTIC LEVELS OF IMPLEMENTATION

As aforementioned, although justice is better served domestically, societies shattered by widespread abuses are not able to provide it. The reason is that no country can overhaul its whole administration of justice and replace it with a new batch of democratically trained judges, lawyers, and prosecutors. Since educating a well-versed law professional can take at least a decade,[97] who will be in charge of prosecuting meanwhile?[98] That is why, after WWII in Germany and similarly after the dictatorships in Latin America, the members of the court system remained the same for the most part. Meanwhile the victims will demand some sort of implementation and as a consequence judiciaries from different countries and different levels will have to interact with each other.

However, the type of cooperation among different courts worldwide I am referring to goes beyond exchanging information and expertise. Since courts can act independently of each other or accept a subsidiary role—defer to other courts with territorial and subject jurisdiction—there is a need to establish the exact relationship

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[96] Peter Kornbluh, "Prisoner Pinochet. The Dictator and the Quest for Justice," *The Nation* (21 December 1998) [Transnational Institute], http://www.tni.org/detail_page.phtml?page=pin-docs_kornbluh2&print_format=Y (Accessed: April 25, 2005).

[97] I am assuming three to four years of law school; one to two years to specialize; and a minimum of four years of practice.

[98] "Although international involvement in dealing with past war crimes and abuses is important to guarantee justice for all, it remains crucial for wounded societies to strengthen their own national systems in order to ensure sustainable peace and the rule of law." In Ivan Simonovic, Comment: "Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses," *Yale Journal of International Law* 29 (Summer, 2004): 361.

among them and the role of precedent. Usually international courts only decide of cases once domestic remedies have been exhausted and foreign domestic courts are considered subsidiary. However, since domestic courts are starting to act without deference to their peers abroad,[99] efforts should be made to reduce the handing down of contradictory decisions. In general, what is needed is a more structured relationship between them,[100] which the already existing transnational networks of judges make feasible.[101]

5. INCREASING INTERNATIONAL INVESTMENT IN INTERNATIONAL HUMAN RIGHTS EDUCATION

The relaxation of international human rights standards due to the War on Terror[102] is showing once more the need to educate regular citizens and authorities at all levels on the meaning of these rights and on their compulsory nature. On the preventive side, basic education in human rights should be available to everybody in school and more specific education should be an essential part of the training of civil servants.[103] The best way to increase people's knowledge in this area is to make it part of the school curriculum, i.e., in primary school students should be introduced to the idea of human rights in history and civics classes. In high school, human rights workshops should be required for graduation.

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[99] For example, the Spanish courts and the trial against Cavallo; now ended. Cavallo has been extradited to Argentina.

[100] Jenny S. Martinez, "Towards an International Judicial System," *Stanford Law Review* 56 (November, 2003).

[101] See: Slaughter, *A New World Order* and The American Society of International Law, "Transnational Judicial Dialogue," http://www.asil.org/judicial/transnational/ (Accessed: May 29, 2007).

[102] "Today, as the twenty-first century unfolds, the mentalities and methods of Operation Condor persist. . . . [It] still casts a long shadow over Latin America, the United States, and the world." In J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America* (Lanham, MD: Rowman & Littlefield, 2005): 254.

[103] It is not enough with a couple of sessions on its importance if human rights principles are dismissed as wishful thinking by their superiors and society at large.

It is also necessary to train the lawyers and judges who have the duty to provide redress once the violations have happened. Since many law practitioners lack an in-depth knowledge of international human rights law, it is advisable to spend resources in educating lawyers and judges with solid principles in this area. And, generally, they should be given a more international perspective of the law.

Although these measures would be extremely beneficial, they may be difficult to put into place. Since schools are already overburdened, training teachers in human rights could put an excessive drain on their resources. In addition, due to security worries after 9/11, training of police forces focuses more on neutralizing threats by any means possible than on teaching respect for human rights. Thus, investment in this area could be difficult to promote. Nevertheless, as of April 2008 domestic courts in Spain and in Latin America, and international and regional courts continue to hand down resolutions regarding crimes against humanity. Thus, it is plausible that states may be compelled—sometimes by the courts, other times by their own citizens—to include human rights education into the training of their officers. Human rights education should not be reserved to post-conflict situations[104] but be incorporated into everyday life.

[104] Vivienne O'Connor and Colette Rausch, Eds., *Model Codes for Post-Conflict Criminal Justice: Model Criminal Code*, vol. 1 (Washington D.C.: United States Institute of Peace Press, 2007): Part II, Secs. 1-5.

APPENDIX A

OAS MEMBERS AND INTERNATIONAL TREATIES

A.1. Parties to the IACHR and Their Ratification of Three Main Treaties

Parties to the IACHR	ICCPR[1]	Non-Applicability of Statutory Limitations[2]	CAT[3]
ARGENTINA	8 Aug.1986	26 Aug. 2003	24 Sept. 1986
BARBADOS	5 Jan. 1973	----------	----------
BOLIVIA	12 Aug. 1982	6 Oct. 1983	12 Apr. 1999
BRAZIL	24 Jan. 1992	----------	28 Sept. 1989
CHILE	10 Feb. 1972	----------	30 Sept.1988
COLOMBIA	29 Oct. 1969	----------	4 Dec. 1987
COSTA RICA	29 Nov. 1968	----------	11 Nov. 1993
DOMINICAN REP.	4 Jan. 1978	----------	----------
ECUADOR	6 Mar. 1969	----------	30 Mar. 1988
EL SALVADOR	30 Nov. 1979	----------	17 June 1996
GUATEMALA	5 May 1992	----------	5 Jan. 1990
HAITI	6 Feb. 1991	----------	----------
HONDURAS	25 Aug. 1997	----------	5 Dec. 1996
MEXICO	23 Mar. 1981	15 Mar. 2002	23 Jan. 1986
NICARAGUA	12 Mar. 1980	3 Sept. 1986	5 July 2005
PANAMA	8 Mar. 1977	21 June 2007	24 Aug. 1987
PARAGUAY	10 June 1992	----------	12 Mar. 1990
PERU	28 Apr. 1978	11 Aug. 2003	7 July 1988
SURINAME	28 Dec. 1976	----------	----------
TRINIDAD & TOBAGO	21 Dec. 1978	----------	----------
URUGUAY	1 Apr. 1970	21 Sept. 2001	24 Oct. 1986
VENEZUELA	10 May 1978	----------	29 July 1991

Table A.1. *Source:* Data from http://www2.ohchr.org (Last Accessed: January 18, 2008).

[1] The 16 December 1966 International Covenant on Civil and Political Rights (ICCPR) entered into force on 23 March 1976. All the parties to the IACHR are parties to it.

[2] The 26 November 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity entered into force on 11 November 1970.

[3] The 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 26 June 1987.

A.2. Parties to the IACHR that Accept the Compulsory Jurisdiction of the IACtHR and Their Position (Ratification or not) regarding the Regional Conventions Banning Torture and Disappearances

Parties to the IACHR	Acceptance of the IACtHR's jurisdiction	Inter-American Convention on Torture[4]	Inter-American Convention on Disappearances[5]
ARGENTINA	5 Sept. 1984	31 March 1989	28 Feb. 1996
BARBADOS	4 June 2000	----------	----------
BOLIVIA	27 July 1993	21 Nov. 2006	5 May 1999
BRAZIL	10 Dec. 1998	20 July 1989	----------
CHILE	21 Aug. 1990	30 Sept. 1988	----------
COLOMBIA	21 June 1985	19 Jan. 1999	12 Apr. 2005
COSTA RICA	2 July 1980	8 Feb. 2000	2 June 1996
DOMINICAN REP.	25 Mar. 1999	29 Jan. 1987	----------
ECUADOR	24 July 1984	9 Nov. 1999	27 July 2006
EL SALVADOR	6 June 1995	5 Dec. 1994	----------
GUATEMALA	9 Mar. 1987	29 Jan. 1987	25 Feb. 2000
HAITI	20 Mar. 1998	----------	----------
HONDURAS	9 Sept. 1981	----------	11 July 2005
MEXICO	16 Dec. 1998	22 June 1987	9 Sept. 2002
NICARAGUA	12 Feb. 1991	----------	----------
PANAMA	9 May 1990	28 Aug. 1991	28 Feb. 1996
PARAGUAY	11 Mar. 1993	9 Mar. 1990	26 Nov. 1996
PERU	21 Jan. 1981	28 Mar. 1991	13 Feb. 2002
SURINAME	12 Nov. 1987	12 Nov. 1987	----------
TRINIDAD AND TOBAGO	28 May 1991 (ret. 26 May '98)	----------	----------
URUGUAY	19 Apr. 1985	10 Nov. 1992	2 Apr. 1996
VENEZUELA	24 June 1981	26 Aug. 1991	19 Jan. 1999

Table A.2. *Source:* Data from http://www.oas.org (Last Accessed: January 18, 2008).

[4] The 9 December 1985 Inter-American Convention to Prevent and Punish Torture entered into force on 23 February 1987. The date that appears on the table is that of the day of deposit of the instrument of ratification or accession. The following three countries signed it but did not ratify it: Haiti (13 June 1986), Honduras (11 March 1986) and Nicaragua (29 September 1987).

[5] The 9 June 1994 Inter-American Convention on the Forced Disappearance of Persons entered into force on 28 March 1996. The date that appears on the table is that of the day of deposit of the instrument of ratification or accession. The following two countries signed it but did not ratify it: Brazil (10 June 1994) and Chile (10 June 1994).

APPENDIX B

SPANISH LAW AND COURTS

B.1. Spanish Ratification of Relevant International Treaties

UN AND COUNCIL OF EUROPE-SPONSORED TREATIES	RATIFICATION DATE
ICCPR[1]	27 Apr. 1977
Non-Applicability of Statutory Limitations[2]	----------
CAT[3]	21 Oct. 1987
On Genocide[4]	13 Sept. 1968 (Accession)
ECHR[5]	10 Apr. 1979
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[6]	28 Apr. 1989 (*)
European Convention on Extradition[7]	21 Apr. 1982 (*)

Table B.1. *Source:* Data from http://www2.ohchr.org and http://conventions.coe.int (Last Accessed: January 18, 2008).

[1] The 16 December 1966 International Covenant on Civil and Political Rights (ICCPR) entered into force on 23 March 1976.

[2] The 26 November 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity entered into force on 11 November 1970.

[3] The 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into forced on 26 June 1987.

[4] The 9 December 1948 Convention on the Prevention and Punishment of the Crime of Genocide entered into force on 12 January 1951.

[5] The 20 March 1952 European Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 18 May 1954.

[6] Signed on 26 November 1987, it entered into force on 1 February 1989.

[7] Signed on 13 Dec. 1957.

(*) Date of the Spanish instrument of ratification.

B.2. Significant Spanish Domestic Regulation Regarding the Implementation of the Bans on Torture and Disappearances

Domestic Regulation	**1978 Spanish Constitution**	**1995 Spanish Penal Code**[1]	**1985 LOPJ**[2]
Universal Jurisdiction	**Art. 10 (2)** Monistic system re Int'l Law	----------	**Art. 23.4** Crimes amenable to it
Individual *ius standi*	**Art. 24 (1)** **Art. 125**	----------	----------
Crimes against Humanity	----------	**Art. 607 (1)** Definition of genocide and penalties **Art. 607 (2)** Crime of genocide denial or justification **Art. 607 bis (1)** Definition of crimes against humanity **Art. 607 bis (2)** Penalties	----------
Crime of Torture	**Art. 15** Right not to be tortured	**Art. 173 (1)** Definition **Art. 173 (2)** Description of torture and penalties **Arts. 174 to 176** Torture committed by public servants	----------
Crime of Disappearances	----------	**Art. 607 bis (2) 6°** Brief definition and penalty	----------

Table B.2. Spanish Main Regulation of Universal Jurisdiction, Individual *ius standi*, Crime of Torture, and Crime of Disappearances.

[1] Approved by Organic Law (Ley Orgánica) 10/1995 of 23 November 1995. Some modifications were introduced by Organic Law 15/2003 of 25 November 2003, which entered into force on 1 October 2004.

[2] *Ley Orgánica del Poder Judicial* or law that regulates the workings of the judicial branch of the government.

B.3. Spanish Courts Involved in the Proceedings Examined in the Dissertation

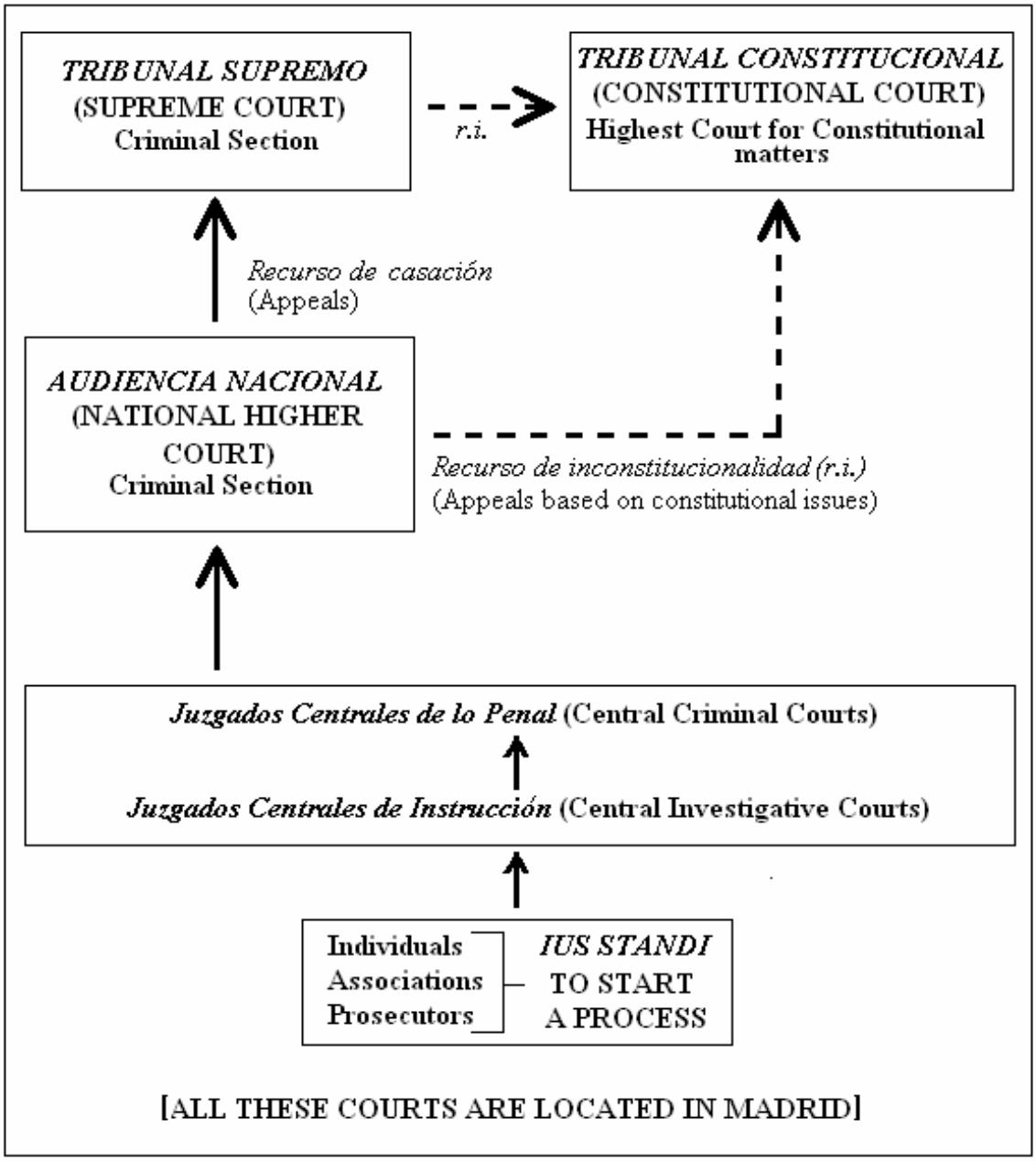

Figure B.1. Hierarchy of Spanish Courts Relevant to the Dissertation

B.4. Main Sections of an Indictment and of a Court Decision, including the Verdict, in a Spanish Criminal Trial (in Spanish with an English Translation)

- **Main Sections of an Indictment**

EXCERPTS IN SPANISH FROM AN ACTUAL COURT RESOLUTION	TRANSLATION INTO ENGLISH
Procedimiento: SUMARIO 19/97-L TERRORISMO Y GENOCIDIO	**Proceedings**: no. of the indictment based on Terrorism and Genocide
JUZGADO CENTRAL DE INSTRUCCIÓN NÚMERO CINCO AUDIENCIA NACIONAL MADRID	**Court**: Investigative Central Court of Instruction, ascribed to the National High Court **Location**: Madrid
AUTO	**INDICTMENT**
En Madrid a dos de noviembre de mil novecientos noventa y nueve	**Date**: Madrid, 2 November 1999
ANTECEDENTES	**BACKGROUND**
PRIMERO. - El presente procedimiento se inicia (...)	FIRST. - This process starts (…)
SEGUNDO. - Por Auto de 10 de junio de 1996 son admitidas las querellas formuladas por la Asociación Libre de Abogados, la Asociación Argentina Pro Derechos Humanos de Madrid (...)	SECOND. - The 10 June 1996 resolution admits the lawsuits of the Free Association of Lawyers, the Argentinean Association in Favor of Human Rights of Madrid (…)
HECHOS	**FACTS**
PRIMERO. - De lo actuado se desprende que en la República Argentina, al menos durante todo el año 1.975 (...)	FIRST. - From the proceedings it can be concluded that in the Argentinean Republic at least throughout 1975 (…)
RAZONAMIENTOS JURÍDICOS	**LEGAL ISSUES**

PRIMERO. - Los hechos relatados en esta resolución son legalmente constitutivos de (...)	FIRST. - The facts transcribed in here constitute legally (…)
DISPONGO 1. Declarar procesados por los hechos y presuntos delitos que se fijan en esta resolución a las siguientes personas (...)	**I DECIDE** 1. To declare that the following individuals are indicted for the facts and alleged crimes stated in this resolution (…)
Así lo acuerda, manda y firma D. BALTASAR GARZÓN REAL, MAGISTRADO-JUEZ del Juzgado Central de Instucción número Cinco. Doy fe.	It is agreed upon, ordered and signed by Mr. BALTASAR GARZÓN REAL, Judge Magistrate of the Central Court of Instruction no. Five. I will swear to that.
DILIGENCIA.- Seguidamente se cumple lo acordado, doy fe.	**STEPS OF THE PROCEEDING** . - That which was agreed upon has been carried out, I swear.

Figure B.2. Main Sections of an Indictment in Spain. *Source*: Data comes from "Auto de Procesamiento a 98 Militares Argentinos" or "Indictment against 98 Argentinean Military Personnel" of 2 November 1999 as it appeared in Equipo Nizkor, http://www.derechos.org/nizkor/arg/espana/gar/html (Last Accessed: 18 January 2008).

- **Main Sections of a Spanish Court Decision including the Verdict**

EXCERPTS IN SPANISH FROM AN ACTUAL COURT DECISION INCLUDING THE VERDICT	**EXCERPTED TRANSLATION INTO ENGLISH**
AUDIENCIA NACIONAL **SALA DE LO PENAL** **SECCION TERCERA** **SUMARIO 19/1997** **ROLLOS DE SALA 139/1997** **JUZGADO C. INSTRUCCIÓN N° 5**	**Court: Higher National Court** **Criminal Section** **Third Division** **No. of the Indictment: 19/1997** **No. of the Documents in the Criminal Section: 139/1997** **Central Investigative Court no. 5**
La Sección Tercera de la Sala de lo Penal de la Audiencia Nacional, constituida por los Sres. Magistrados: Don Fernando García Nicolás, como presidente; Don Jorge Campos Martínez; y Don José Ricardo de Prada Solaesa, como ponente, previa la oportuna deliberación, ha dictado la siguiente:	The Third Division of the Criminal Section of the Higher National Court, constituted by the following Magistrates: Mr. Fernando García Nicolás, President; Mr. Jorge Campos Martínez; and Mr. José Ricardo de Prada Solaesa, Speaker, based on previous discussion of the case, has adopted the following:
SENTENCIA NUM. 16/2005	**DECISION NO. 16/2005**
En Madrid, a diecinueve de abril de dos mil cinco.	In Madrid, on 19 April 2005.
Se ha visto en juicio oral y público la presente causa seguida por un delito de genocidio, terrorismo y torturas, contra: **Adolfo Francisco SCILINGO MANZORRO** (...)	The oral and public phase of the trial based on allegations of genocide, terrorism and torture has taken place against **Adolfo Francisco SCILINGO MANZORRO** (...)
I. ANTECEDENTES	**I. BACKGROUND** (…)
II. HECHOS PROBADOS **PRIMERO. El Contexto. El Plan Sistemático** (...)	**II. PROVEN FACTS** **FIRST. The Context. The Systematic Plan** (…)
SEGUNDO. Participación del Procesado	**SECOND. Participation of the Accused in the**

	Crime (…)
III. FUNDAMENTOS DE DERECHO	**III. LEGAL BASES**
PRIMERO. (...)	**FIRST.** (...)
SEGUNDO. Determinación de la prueba válida. Análisis probatorio (...)	**SECOND. Admissible evidence. Analysis** (...)
TERCERO. Autoría	**THIRD. Responsibility**
CUARTO. No concurrencia de circunstancia genérica ... modificacativa de la responsibilidad criminal	**FOURTH. No mitigating circumstances** (…)
QUINTO. Las penas	**FIFTH. Penalty** (…)
SEXTO. Responsibilidad Civil (...)	**SIXTH. Civil Responsibility** (...)
SÉPTIMO. Costas (…)	**SEVENTH. Trial Costs** (…)
Vistos los preceptos citados y demás de pertinente y general aplicación.	Based on the norms mentioned and any others applicable to the case specifically and generally.
Por lo expuesto en el ejercicio de la función jurisdiccional que nos confiere el artículo 117 de la Constitución española,	Based on the aforementioned and in the exercise of the juridical function granted to us by article 117 of the Spanish Constitution,
El Tribunal dicta el siguiente	The Tribunal adopts the following
IV. FALLO (…)	**IV. VERDICT** (…)

Figure B.3. Main Sections of a Court Decision, including the Verdict. *Source*: Data comes from "Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo,"of 19 April 2005, Equipo Nizkor.

APPENDIX C

SOCIOLOGICAL PROFILE OF THE VICTIMS OF THE REPRESSION IN ARGENTINA AND CHILE AS A BASIS FOR THE ALLEGATIONS OF GENOCIDE AGAINST THE MILITARY REGIMES

The sociological profile of the victims does not include Guatemala because of the obvious ethnic origin of the majority of the victims—Mayans "represented 91% of the forced disappearances."[1] However, I want to underline that during the Guatemalan civil war more 5,000 children disappeared;[2] it is presumed that many of them ended up being adopted or forced to enroll in warlike activities. This number is higher than in any of the other countries but so is the total number of disappearances.

C.1. The Victims in Argentina

Since, as aforementioned, the guerrillas accused of destabilizing the country were inoperative by the time of the coup,[3] who did the military target? A typical victim would be a young (between 21 and 40 years of age)[4] male, [5] and professionally, he would be—more likely—a worker but could be a student or a white collar employee too.[6] In

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[1] http://www.envio.org.ni/utils/imprimir.php (Accessed: December 29, 2004).

[2] CICR, "Guatemala: Buscarán niños desaparecidos en el conflicto armado interno," (January 2000)http://www.icrc.org/Web/spa/sitespa0.nsf/htmlall/5TDP8C?OpenDocument&View=defa... (Accessed: December 12, 2004).

[3] Ambrosio Romero Carranza, Alberto Rodríguez Varela, and Eduardo Ventura Flores Pirán, *Historia política y constitucional de la Argentina 1776-1976* (Buenos Aires, Argentina: Editorial A-Z 1979): 213-4.

[4] 80% of the disappeared. In Auto de Procesamiento a 98 Militares Argentinos": hechos, cuarto. Similarly, in "Auto de ampliación del auto de procesamiento contra Cavallo": hechos, cuarto.

[5] 70% were males. In "Auto de Procesamiento a 98 Militares Argentinos," ibid.
10% of the females were pregnant; thus, 3 % of all disappeared were pregnant women; it can constitute genocide. See: Report "Nunca Más" in English.

[6] 30.2%, 21%, and 17.9% respectively. In Auto de Procesamiento a 98 Militares Argentinos," ibid: hechos, cuarto.

addition, religion was significant because in an almost exclusive Catholic country, 13 % of the victims were Jewish.[7]

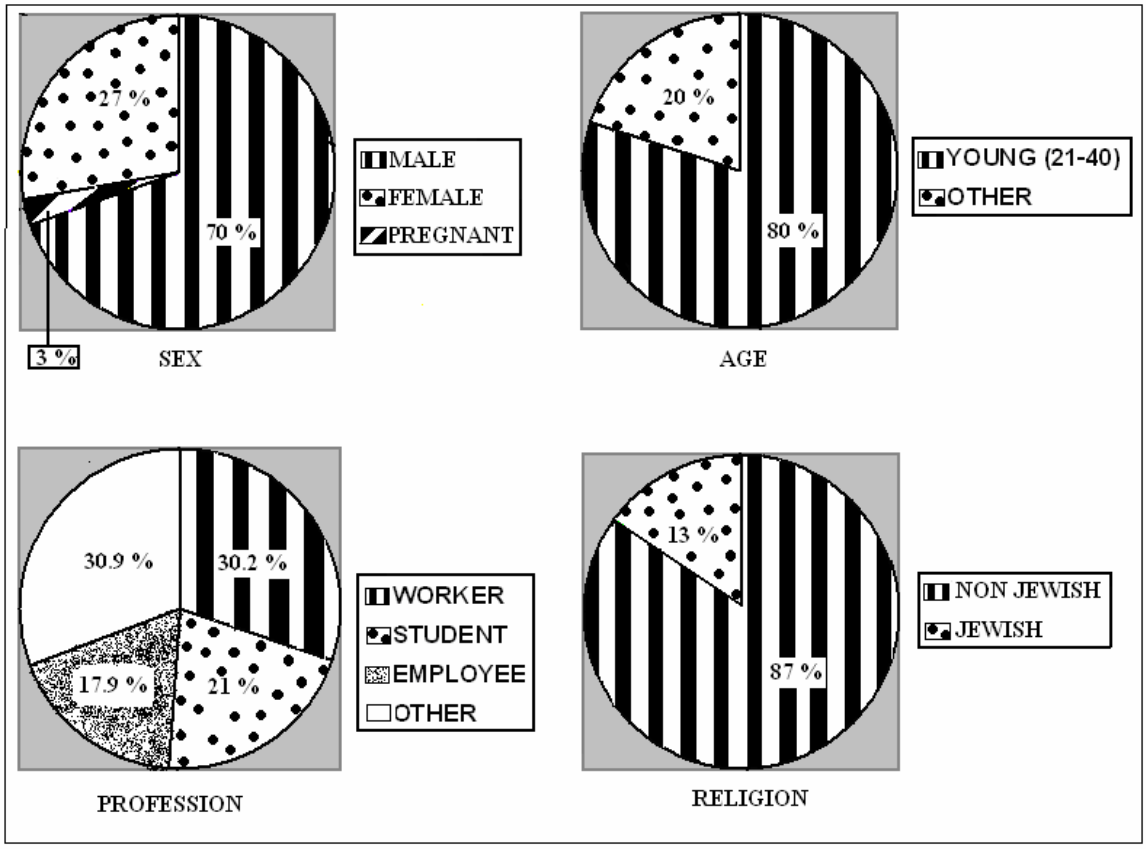

Figure C.1. Argentina: Percentage of the Disappeared According to Sex, Age, Profession, and Religion. *Source*: Data from the "Auto de Procesamiento a 98 Militares Argentinos": Hechos, Fourth; and "Auto de ampliación del auto de procesamiento contra Cavallo:" Hechos, Fourth.

The victims' sociological characteristics—combined with a pre-conceived plan and a Fascist ideology—prove that the military targeted certain sectors of society. Even though the Convention on Genocide is not interpreted to include social groups, the military regime perceived the sector of society which was unsupportive of its policies as a group to be exterminated. Thus, from this perspective, an allegation of genocide can be made.

[7] "Auto de ampliación del auto de procesamiento contra Cavallo": hechos, undécimo; 20 % in: Hagashamá, "Víctimas y familiares de desaparecidos judíos atestiguan por primera vez en Israel," (1 April 2001), http://www.wzp.org.il/es/recursos/view.asp?id=761&subject=120 (Accessed: May 27, 2004).

C.2. The Victims in Chile

Although the profile of the disappeared in Chile is more clearly male than in Argentina,[8] there are similarities in the other categories of age and occupation (see: Below, Fig. C.2). Age-wise, 68.03 to 68.24% of all the victims are between the ages of 21 and 40.[9] By occupation, workers and peasants constituted 34.45 % of the disappeared; students were 19.02 %; white collar employees were 11.31 %—it goes up to 22.79 % when professors and administrators are included among the employees.[10]

Nevertheless, the ethnical composition of Chile presents a significant difference with that of Argentina because Chile's alleged ethnical homogeneity is incomplete due to the existence of an important minority, i.e., the Mapuche Indians, who constitute 10% of the Chilean population Since the Mapuche are in the margins of society—[11]some do not speak Spanish—the number of 300 disappeared Mapuche is approximate.[12] Although 300 is not a large number in absolute terms, it is relatively high because the overall numbers of disappeared in Chile are around a couple of thousands. Moreover, the constant disruption to their way of life that the Mapuche suffered under Pinochet continues in our days.

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[8] See: Above, Fig. C.1. In Chile 93.79% of the victims were male.

[9] If we include those in the age group from 16 to 20, the percentage of young people increases to 79.63/79.83 % of the total. The lower percentage results from including 3 victims lacking personal data.

[10] Professors and administrators were 11.48% of the disappeared.

[11] Mapuche Stichting, "Who are the Mapuche?" (the Netherlands) http://www.mapuche.nl /english/mapuche.htm (Accessed: November 16, 2004).

[12] In "the Auto de procesamiento a Pinochet," (10 December 1998): antecedentes de hecho, décimoctavo; and "Nómina parcial de ejecutados políticos de la nación mapuche durante el régimen de Pinochet," http://members.aol.com/mapulink3/chile-e/doc-02.html (Accessed: November 16, 2004).

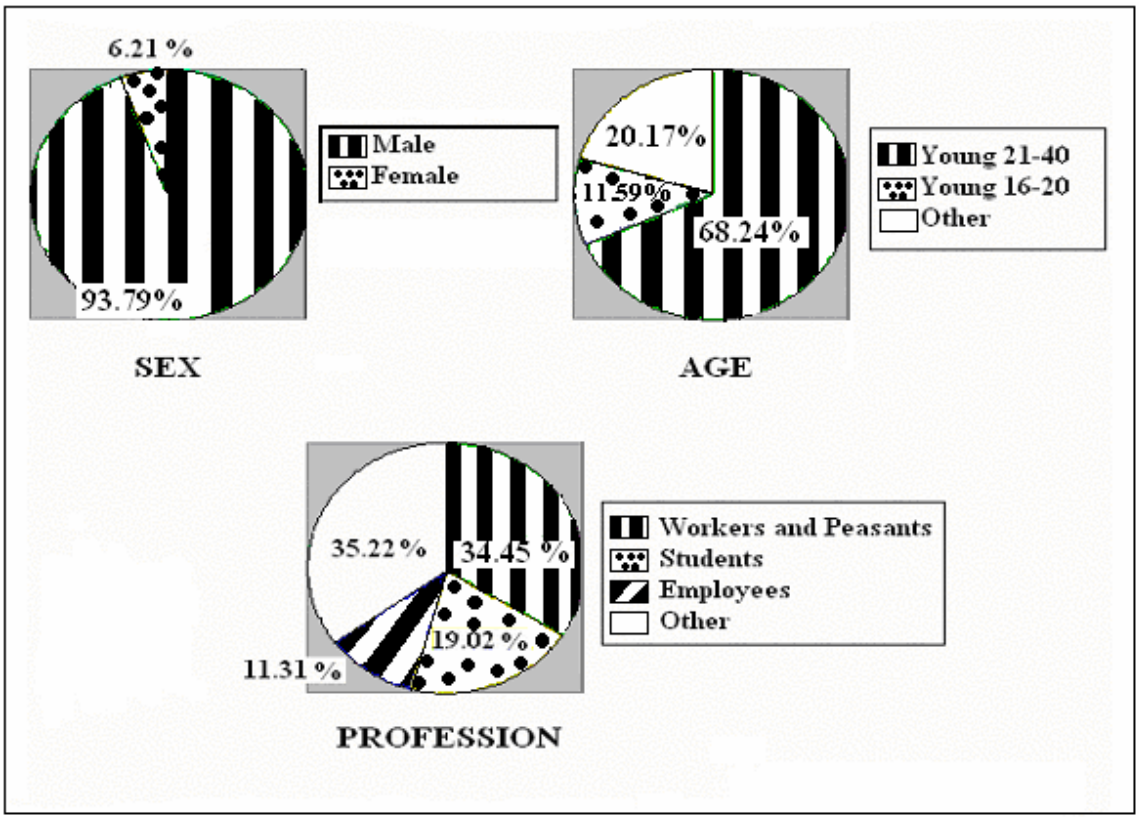

Figure C.2. Chile: Percentage of the Disappeared According to Sex, Age, Profession, and Religion. Source: My calculations based on data from Padilla Ballesteros, *La memoria y el olvido*: Graph 3, 111.

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