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Inter-American Court, Crimes Against Humanity and Peacebuilding in South America

Joan Sánchez

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Institut Català Internacional per la Pau
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Gran Via de les Corts Catalanes, 658, baixos 08010 Barcelona (Spain)
T. +34 93 554 42 70 | F. +34 93 554 42 80
recerca.icip@gencat.cat | http:// *www.icip.cat*

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THE AUTHOR

Joan Sánchez Montero is Doctor in Law by the Autonomous University of Barcelona (UAB), Spain and qualified as a lawyer at the Catholic University of Táchira (UCAT) Venezuela. At this Institution she has worked as Research and Postgraduate Coordinator and as Undergraduate and Postgraduate Lecturer in penal law and international protection of human rights. She currently lives in Montevideo, Uruguay.

This article is based on her Doctoral Dissertation (2008) "The Observance of the Principle of International Legality in the Progressive Development of Crims Against Humanity", supervised by Dr. Claudia Jiménez Cortés (UAB).

ABSTRACT

The present work contains a general overview of the sentences of the Inter-American Court of Human Rights (IACtHR), which have recognised that crimes against humanity are pre-existing in customary law, and do not prescribe, nor can they be subject to amnesty or pardon. Specific attention is paid to the consequent restrictions and opportunities offered by said verdicts to countries such as Argentina, Chile, Uruguay and Peru, which find themselves in postconflict transition processes and where peace has been negotiated with certain groups and state structures that are responsible for carrying out crimes against humanity. In doing so, special attention is paid to the impact of the recognition of the nature of crimes against humanity on the notion of the principle of legality, *stricto sensu*; on the development and evolution of the doctrine and the practice of international human rights law in the inter-American context; and finally on the aforementioned processes of transitional justice.

Keywords: international public law, international penal law, international human rights law, transitional justice, culture of peace.

RESUMEN

En el presente trabajo se efectúa un estudio genérico de las sentencias de la Corte Interamericana de Derechos Humanos (CIDH) donde se

ha reconocido la preexistencia consuetudinaria y el carácter imprescriptible, inamnistiable e inindultable de los crímenes contra la humanidad, resaltando las consecuentes restricciones y oportunidades que ofrecen dichos fallos a estados como Argentina, Chile, Uruguay y Perú que se hallan en procesos de transición postconflictiva y donde se ha negociado la paz con determinados grupos y estructuras estatales responsables de la comisión de crímenes contra la humanidad. Para ello se resalta el impacto del reconocimiento de la naturaleza misma de los crímenes contra la humanidad sobre la noción del principio de legalidad *stricto sensu*, sobre el desarrollo y evolución dogmática y práctica del derecho internacional de los derechos humanos, en lo que al ámbito interamericano respecta, y finalmente, sobre los mencionados procesos de justicia transicional.
Palabras clave: derecho internacional público, derecho internacional penal, derecho internacional de los derechos humanos, justicia transicional, cultura de paz.

RESUM

En aquest treball es realitza un estudi genèric de les sentències de la Cort Internamericana de Drets Humans (CIDH), en què s'ha reconegut la preexistència consuetudinària i el caràcter imprescriptible, inamnistiable e inindultable dels crims contra la humanitat, ressaltant les conseqüents restriccions i oportunitats que ofereixen aquestes sentències a estats com Argentina, Xile, Uruguai i Perú, que es troben en processos de transició postconflictiva i on s'ha negociat la pau amb determinats grups i estructures estatals responsables de la comissió de crims contra la humanitat. Per aquest motiu, es ressalta l'impacte del reconeixement de la natura mateixa dels crims contra la humanitat sobre la noció del principi de legalitat *stricto sensu*, sobre el desenvolupament i evolució dogmàtica i pràctica del dret internacional dels drets humans, en el que a l'àmbit interamericà respecta, i finalment, sobre els mencionats processos de justícia transicional.
Paraules clau: dret internacional públic, dret internacional penal, dret internacional dels drets humans, justícia transicional, cultura de pau.

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ACRONYMS

ACHR	American Convention on Human Rights
DINA	National Intelligence Directorate in Chile
ECHR	European Court of Human Rights
IACoHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal

1. PRELIMINARY CONSIDERATIONS ON TRANSITIONAL JUSTICE AND PEACEBUILDING

"El olvido está lleno de memoria"
Mario Benedetti

A. TRANSITIONAL JUSTICE AND PEACEBUILDING: A STRAINED RELATIONSHIP

In any conflict, the early strengthening of all those institutions which contribute to peacebuilding plays a crucial role in ending the conflict and avoiding its resurgence in the future. But despite this affirmation, to judge from the experience of many countries and international organizations in their efforts to build peace within conflict scenarios, it seems that this lesson has still not been learned.

There is no doubt that the whole world is currently in the process of identifying and understanding the challenges which it faces when it comes to creating peace. One of the most important aspects of peacebuilding is transitional justice, which includes all forms of judicial and extrajudicial arrangements that facilitate and enable a state, on the basis of truth, justice and reparation, to make the transition from authoritarianism to democracy, or from war to peace. Therefore, transitional justice aims not only to reveal the identity and whereabouts of the victims of human rights violations and their perpetrators or other participants, but also to establish the facts relating to human rights violations in authoritarian regimes and in situations of armed conflict, and thus to shape the way in which society will deal with the crimes committed and the necessary reparations.

According to Ambos, the success of transitional justice depends on how far this manages to contribute to real social reconciliation and to the consolidation of democracy and of the domestic judicial

system.[1] Practice has shown that the struggle for justice generally coincides with efforts by the state in favour of peace. Thus transitional justice aims at the same time to ensure both justice and peace. However, as we will see below, in many cases it has been necessary to hold back from the criminal prosecution and/or the punishment of those responsible for serious human rights violations in order to facilitate a peaceful transition, though the sustainability of this transition is put in question, since in such cases the strengthening of the institutions has not reach the level required to avoid the events being repeated in the future. This has had the effect of bringing about a political reconciliation which does little or nothing to overcome existing deep social divisions and in which the reputation of the domestic judicial system is severely weakened due to its not having fulfilled its responsibility to do justice when faced with such abominable acts, creating a sense of social dissatisfaction and resentment among the victims' next of kin and in a large part of the population which can in the future easily trigger off violent acts of various kinds: increased crime, suicide, private vengeance, creation of insurgent groups, social unrest, *coups d'état*, organised crime, crimes against humanity, genocide, among others.

In relation to the perpetrators and other participants, it may be added that the implementation of such solutions of impunity, far from rehabilitating them, merely confirms them in their belief that attacks on human dignity are not very important or serious. If the state renounces or restricts the exercise of its punitive power when faced with events of this kind, it is failing to exert the psychological coercion necessary so that these or other individuals refrain from repeating them in the future. The acceptance of solutions in which the guarantee of an end to violence is given in exchange for a very high degree of impunity represents a denial of the crucial role of international criminal law in the maintenance of human coexistence, and the social costs such solutions imply make it impossible to achieve a lasting peace.

1. Ambos, K., "El marco jurídico de la justicia de transición" ["The legal framework of transitional justice"]. *Transitional Justice. Reports from Latin America, Germany, Italy and Spain,* Montevideo, Konrad Adenauer, 2009, p. 28-29.

The term transitional is attributed to justice insofar as it provides legal mechanisms which facilitate the move from one regime or political situation to another, and to the extent that it bases itself on previous judicial practices while laying the basis for the post-conflict judicial system. Seen in this way, transitional justice is not limited merely to dealing with the human rights violations committed in a state in a given moment, but goes much further. It aims to establish a new political and judicial order on the basis of justice, and is thus an issue of crucial importance in building peace.

In recent decades, Latin America has been a fertile area for the implementation of both the most varied forms of crimes and human rights violations, and of erroneous political solutions, which were useful in the short term but had no long term sustainability, for the reasons already mentioned.

There are many mechanisms of transitional justice, thus Mendez[2], for example, points to the severe punishment of the perpetrators, Elster[3] to the specific context of transitional justice in which the different interests of the parties enter into play that, far from favouring, often end up hampering the process, and Acorn[4] to the need to address the needs of the victims as a necessary foundation for stable reconciliation processes. It is evident that even now in the 21st century there is little consensus about the degree of effectiveness of specific transitional justice mechanisms in building a lasting peace. However, only those taking into account the needs of the victims and which aim for the punishment of the perpetrators and other participants in the events are consistent with the current developments, at a theoretical and practical level, in international human rights law, for which the only conceivable interest is justice.

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2. Méndez, Juan, "In Defense of Transitional Justice", *Transitional Justice and the Rules of Law in New Democracies,* Notre Dame and London, University of Notre Dame Press, 1997.
3. Elster, Jon, "Coming to Terms with the Past. A Framework to the Study of Justice in the Transition to Democracy", *Archives Européennes de Sociologie,* Vol. 34, Nº 1, pp. 7-48.
4. Acorn, Annalise, *Compulsory compassion: a critique of restorative justice*. Vancouver, University of British Columbia Press, 2004.

B.STATE SOVEREIGNTY AND INTERNATIONAL IMPACT: A PERMEABLE BARRIER

The impact of international law and case law on state sovereignty is more and more evident. International human rights law and the different mechanisms for the prosecution and punishment of international crimes have now developed to the point that they have the capacity to apply international standards, whether these are customary or based on conventions. We can see an example of this in the case of the prosecution of the late former Serbian President, Slobodan Milosevic, and of many of his colleagues, before the *ad hoc* International Criminal Tribunal for the former Yugoslavia and in the creation of the International Criminal Court.

There are other examples, speaking now of the internal jurisdiction of states, in which the perpetrators of international crimes are persecuted applying the principle of universal jurisdiction. The first of these is the case – in the end unsuccessful – of the former Chilean dictator, Augusto Pinochet, who was arrested in 1998 in London, under a warrant issued by the Spanish judge Baltasar Garzon, to be prosecuted for committing crimes against humanity during his regime. Secondly, there is the case of the prosecution and conviction before Spanish courts of Adolfo Scilingo for crimes against humanity committed in Argentina during the dictatorship. Under this principle, recognised not only by some domestic judicial systems and by the case law of international criminal courts – thus giving a basis for its application – but also by conventional international law itself,[5] criminal law should be applied, in exceptional cases, on an extraterritorial basis, regardless of the nationality of the victims or the perpetrators, and where ever the offense was committed, when it is a question of prosecuting and punishing the perpetrators of international crimes.[6]

5. In terms of conventions, the principle of universal jurisdiction has been included in the UN Convention Against Torture and in the Preamble of the Rome Statute of the International Criminal Court, as well as in treaties which, although they do not include it expressly, allow the state to make use of it, as in the case of the Genocide Convention.
6. The range of international crimes which allow the application of universal jurisdiction is quite broad. Thus it includes violations of the laws and customs of war, crimes against humanity and violations of the Article 3 common to the four Geneva Conventions of

It could be said that the general conception of the principle of universal jurisdiction is based on the very grave harm to the interests of the international community caused by specific types of crimes and that this allows, or even obliges, states to prosecute and punish their perpetrators, regardless of their nationality or that of the victim, and still less of the place in which the offenses were committed. This absence of limitations for reasons of place, and of criteria for active and passive personality, is what merits it the term "universal". Thus this international institution, which is recognised and applied by some States, such as Germany, Belgium and Spain, among others, allows the prosecution of international crimes committed by anyone, wherever they are, on the basis of their exceptional seriousness and the need to prosecute and punish those responsible. This double foundation explains clearly why the international community, through all its members, whether states or international organisations, must intervene by pursuing legal action and condemning the perpetrators of such acts. The very essence of universal jurisdiction, in view of the interests it protects, means it can not respond to political or national interests; it is a matter which concerns everybody.

As can be seen, the cases mentioned in which this principle was applied were domestic legal procedures from different areas which had a significant impact both internally and internationally, given that the application of this principle is complex and involves not only international but also domestic law. States are empowered to confer universal jurisdiction on their own courts for certain crimes as a result of a national decision, but must also take into consideration the rules or principles of international law governing the application of this concept and the crimes which can be prosecuted under it.

However, it must be said that there is great diversity in the impact of the internationalisation of justice and of the broadening of the competencies and capabilities of international intervention in the processes of peacebuilding. The peacebuilding policies adopted by a state must

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1949, the latter since the International Criminal Tribunal for the Former Yugoslavia (ICTY) included it in its sentence in the case of The Prosecutor v.. Tadic.

be subject to the constraints imposed by internationally accepted rights and obligations, for example, "internal" armed conflicts can not seek a unilateral solution. Currently some international norms that protect individuals against human rights violations, whether or not they have been ratified by states, have supranational judicial bodies which guarantee them, by imposing economic sanctions, by insisting that domestic legislation conform to international standards, by ordering their investigation, prosecution and punishment, or by ordering the imprisonment of those responsible. This occurs because such conduct is condemned by the entire international community. However, much more progress still needs to be made in this direction.

Despite the existence of international norms, and of a set of principles that give them rationality and coherence, their adaptation to domestic legislation and needs has in practice been very varied, leading us to ask which legal standard should prevail in such cases, given the supranational status of international conventional and customary norms, and of the general principles of law recognised by civilised nations.

To answer this question, we would have to go into the analysis of the debates that are now emerging about the sources of law, in order to weigh up the preferential application of custom and of the international treaties signed and ratified by sovereign states. In this sense the positions are divided between those who favour the increasing formalisation of the obligations of States in the written form of treaties, and those who reduce their importance, giving more emphasis to the application of previously existing custom based on historical sources and practices. Thus on the basis of this criterion, amnesties, pardons and any type of exclusion of liability for serious human rights violations are now widely rejected by the case law of international tribunals and by other mechanisms of the international system for the protection of human rights, including the United Nations Human Rights Council, despite them having been for many years the most common way of resolving internal conflicts. With respect to the institutional framework of transitional justice, nothing has been said concerning its supremacy over other forms of conflict resolution.

Given that it is located in the intersection between law and politics, transitional justice disposes of a series of mechanisms, which include truth commissions, reparations, forgiveness, the construction of historical memory and judicial processes. These processes, besides pointing the way forward and having, together with the other mechanisms, a function of promoting social reconciliation, can be used as tools to achieve objectives of a political nature, with room for a diverse range of institutional arrangements. The particular forms that can be taken by transitional justice and by other aspects related to peacebuilding, on the one hand reveal, and on the other hand depend on, the characteristics of the specific context in which the conflict takes place. They underline very specifically that alongside the existence of a system of international law which has experienced great advances in recent years, transitional justice reveals the strengths and weaknesses of the various actors involved in such processes and their ability to negotiate and support them, as well as the weight and expertise of institutions in achieving transition agreements.

To sum up, while the case law of the international courts, as a judicial mechanism of transitional justice, has implications for the domestic legal order, showing states the right way to proceed in the face of human rights violations, at the same time it offers them the opportunity to fulfil their duty of guaranteeing respect for the right to truth, justice and reparations for victims and/or their next of kin, as a crucial factor in building peace. However, other factors related to the context, such as the interests of the actors, the strength and experience of the institutions and resources, among others, will assist or hinder the achievement of that objective.

C. TRANSITIONAL JUSTICE AND POPULAR WILL: THE SWORD OF DAMOCLES

In the field of transitional justice, adopting the mechanism of exempting the perpetrators of human rights violations and their accomplices from their responsibility, by means of a decision by the majority, can be a valid solution in political and democratic terms, but makes

no contribution to the achievement of a sustainable peace, given the high social costs involved in agreeing an end to violence in return for conceding a high degree of impunity. This lack of viability follows, then, from the state ignoring the right to truth, justice and reparations for the damages suffered by a minority or, what comes to the same thing, attempting in vain to build a lasting peace on the basis of impunity.

Beyond the rule of the majority, the mechanisms of transitional justice have generated a certain learning process and rootedness within institutions, teaching about the value of the respect for human rights and about legitimate democratic rules. At the same time, they have promoted reconciliation between the parties, enabling them to go into electoral competition free of the desire for revenge and willing to resolve their differences peacefully, through the competent judicial bodies.

Thus the debate arises with respect to the choice of the outcome which is most suitable for building peace, between the majority's choice of reconciliation and forgetting, or attending to the needs of a victimised minority which calls for the clarification of the facts, the punishment of the guilty and proper reparations to help heal their injuries. For building peace, the last option is more viable, however the situation is complex and can create internal tensions which could threaten internal harmony. Thus democracy and justice, both of which are fundamental pillars in the construction of peace, can run the risk of being juxtaposed. Hence, in our opinion, it is highly recommended to look for mixed solutions, in which the mechanisms of transitional justice are not used mechanically but rather taking into account the specific context in which they will be implemented, so that they respond as closely as possible to the needs of both sectors.

Given the complexity of the choice of the mechanism, or of the combination of mechanisms, of transitional justice which is most suitable for the construction of peace, which does not follow prescribed formulae but should rather is adapted to the specific context, it only remains to say that what is really important in this area not is the novelty nor the independence in selecting the route, but the effectiveness of the

mechanisms chosen, not only to bring the conflict to an end, but also to prevent its recurrence in the future.

2. CRIMES AGAINST HUMANITY AND THE PRINCIPLE OF LEGALITY

Today, *nullum crimen, nulla poena sine lege*, the fundamental basis of any social and democratic State of Law, is not just a principle of justice but also an internationally recognised human right. Thus the prohibition of legal retroactivity should be considered a fundamental principle of criminal law as well as a customary and peremptory rule of international law which must be observed in all circumstances by national and international courts. And it is precisely this transformation of the principle of legality in *rule of law* which has led to a fundamental and progressive change in the method of creating and applying international criminal law.

The primordial characteristic of the principle of legality in international criminal law is that it has freed itself of one of the principal components of the continental conception of domestic criminal law: the requirement for the absolute reserve of formal law through its strict written expression.

In its place, at the international level, it is considered sufficient for the guarantee aimed for with this principle to be fulfilled that the prohibited conduct has been predetermined with a high – if not complete – level of specificity through an international standard, whether this is based on conventions, originates from custom or comes from the general principles of law. In this sense one cannot talk of the retroactive application of law. This could certainly be understood as a degradation of the principle according to the parameters of continental criminal law. However, as Fernández points out, "case law emphasises that the principle of legality can not be interpreted in the same way in the domestic legal system and in international law, since the formation of the rules is very different in each system and, as against internal 'law',

which is formal and precisely dated, at international level, the categorisation as a crime can be established on the basis of a treaty, custom or the general principles of law".[7]

This more liberal notion of the rule of law, in which custom and the general principles of law are accepted as sources, excluding the traditional requirement of *lex scripta*, and more in line with the nature of international law, becomes evident in the prosecution and punishment of gross violations of human rights, of the greatest offenses to the inherent dignity of the human being, as is the case of crimes against humanity.

The whole course of the definition of crimes against humanity, beginning from the very core of the law of war, would over the centuries progressively turn into the possibility of calling to account those who attack the civilian population, considering such action to be criminal conduct related to the law of war and armed conflict. Thus it was understood and applied by the International Military Tribunal (IMT) in Nuremberg . In its judgments, as well as assigning individual responsibility under international law, this tribunal opened the customary path which has led to the recognition in conventions, institutions and case law of crimes against humanity, and while this has provoked controversy, it has at the same time shown that there is an international consensus concerning the criminalisation of such conduct and its method of progressive conceptualisation, the gradual identification of the contextual elements, of the subtypes and of their ability to adapt to specific contexts.

Capellà summarises the model of crime revealed by this process of categorisation of crime, embodied at the level of international law, as follows: *"Crimes against humanity are inhumane acts and persecutions when these are committed in the framework of serious attacks on any civilian population"*.[8] Meanwhile Bassiouni, taking the view-

7. Fernández Pons, Xavier, "El principio de legalidad penal y la incriminación internacional del individuo", *Revista Electrónica de Estudios Internacionales* ["The principle of legality and the international incrimination of the individual", *Electronic Journal of International Studies]*, Nº 5/2002, p. 8
8. Capellà y Roig, Margalida, *La Tipificación Internacional de los Crímenes contra la Humanidad,* [*The International Criminal Classification of Crimes against Humanity*] Tirant, 2005, p. 389.

point of the protection of the civilian population as a whole, states in briefer and more general terms that this category of crimes has come to mean *"any atrocious act committed on a large scale"*.[9]

In recent times the conversion of this general notion of crimes against humanity into something more solid, through a formulation which is more functional and more tailored to each situation and jurisdiction, has enabled to be really enforced before both international and domestic courts. In this sense one could argue that the main achievement of its international positivisation has not been so much the deterrent effect of the rule – as has been shown repeatedly in history – but rather to provide, in a certain way and with the methods of international law, guarantees of legal security both to the perpetrators and the victims of the crime.

In achieving this objective, the establishing of a principle of the rule of law consistent with the specific nature of international law in general, and international criminal law in particular, has played a crucial role. It could also be said that behind this objective lies the need for the judicial classification of those crimes whose incorporation was so criticised at Nuremberg. For this reason, they had to be accompanied, throughout the process of their conceptual evolution, by other developments in the field of international criminal law, such as the regulation of the international incrimination of individuals and of the principle of *nullum crimen sine lege*, which was developed as a general principle of criminal law and as a rule prohibiting the retroactive application of criminal laws, being recognised as such in the international human rights instruments of international law, international humanitarian law and in the various statutes and case law of the international criminal courts.

Without going into the complex study of the customary and conventional conceptual development of this category of international crimes, we may emphasise its nature and how the fact of belonging to *jus cogens* and possessing distinctive characteristics which follow

9. Bassiouni, M.C., "Crimes against humanity", *Crimes of War: What the public should know*. W.W. Norton, 2007, p. 135.

from that origin, have influenced the decisions of the Inter-American Court of Human Rights (IACtHR), which has declared the nullity of pardons and amnesties on the basis of pre-existing customary norms, even when these have not been incorporated into domestic law. This has allowed, in consequence, the prosecution under international law of crimes that occurred in the past, inasmuch as it has had the effect of obliging states to fulfil their obligations to investigate, prosecute and punish the perpetrators or instigators of human rights violations, regardless of the date of their commission and their internal judicial classification, and to satisfy the right to truth, justice and reparation of victims and/or their next of kin, as fundamental pillars for building peace in Latin America.

3. CRIMES AGAINST HUMANITY, *JUS COGENS* AND SUPRANATIONAL REGIONAL PROTECTION

Although the legal instruments adopted subsequently to Nuremberg have deepened the definition of crimes against humanity, this category of crimes was already clearly taken into account by the laws or customs of war in the late nineteenth and early twentieth century. The law of war, or *jus in bello,* began to contain provisions whose purpose was none other than to safeguard the civilian population and combatants in all situations, including those not addressed by the conventional norms.[10] With this aim the *"principles of international law"* derived from *"established custom"* as well as the *"laws of humanity"* and *"the demands of public conscience"* were invoked. This was fully expressed in 1907 in the preamble to the Hague Convention (IV) Re-

10. See in this regard, the Separate Opinion of Judge Antonio Cançado Trindade in the Sentence of the IACtHR in the case of Masacre de Plan de Sánchez vs. Guatemala of 29 April 2004, par. 21.

specting the Laws and Customs of War on Land, better known as the *Martens Clause*. It is in this clause, which is the basis of the continued applicability of the principles of international law, the laws of humanity and the dictates of public conscience, which we find coming together the principles and customary rules relating to the protection of the civilian population, flowing from both the practice of States and from the *"Laws of humanity"*, or from the latter category in particular, being considered as an expression of the *reason of humanity* which places limits on the *reasons of state* (*raison d'état*).[11]

From then on the first attempts were made to prosecute and punish those responsible for violations of *the laws of humanity*, and crimes against humanity would begin their formal path to independence and to their subsequent customary and conventional development.

There is now widespread agreement concerning the kinds of inhuman acts that constitute this category of crimes, which are essentially the same as those which were recognised nearly eighty years ago. In the light of the ongoing development of customary and conventional international law, genocide, apartheid and slavery are crimes against humanity. Also considered crimes against humanity have been systematic or large scale murder, torture, enforced disappearances, arbitrary detention, imposition of a state of servitude, forced labour, persecutions on political, racial, religious or ethnic grounds, rape and other forms of sexual abuse, arbitrary deportations or forcible population transfers, among other inhumane acts.

It is worth mentioning that crimes against humanity, defined as any widespread and/or systematic attack on the civilian population, with knowledge of the attack, have a number of elements which follow from their nature. Thus their contextual or common elements are: a) the existence of an attack; b) the attack must be widespread or systematic;

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11. Cançado T., A. "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal", *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* ["Reflections on uprooting as a Human Rights problem before the Universal Judicial Conscience" *The New Dimension of the Needs for Protection of Human Beings at the Beginning of the XXI Century*], 1a. ed., San Jose, Costa Rica, UNHCR, 2001, pp. 19-78, esp. pp. 58-78.

c) the attack must be directed against some civilian population; d) the acts of the perpetrator must be part of the attack; e) the perpetrator must know that there is a widespread or systematic attack directed against a civilian population and that their actions are part of this attack.[12] But there are also a number of non-limiting sub-types which have in turn their own characteristic features: a) murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial or religious grounds i) Other inhumane acts, among others.

One of their main characteristics is that they do not lapse with time. This characteristic was established at conventional level by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the General Assembly of United Nations, through Resolution 2391 (XXII) of 1968, which in reality only serves to enshrine in conventional terms an already existing principle of international law. This was also laid down by the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, adopted by the Council of Europe on 25 January 1974, and by Article VII of the Inter-American Convention on Forced Disappearance of Persons. Later, in 1998, this point would be reaffirmed in Article 29 of the Rome Statute of the International Criminal Court whereby *"The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."* This would launch the universal conventional recognition of this principle.

In practical terms, the nonapplicability of any statute of limitations to such crimes has been recognised internationally by regional human rights courts such as the IACtHR and the European Court of Human Rights (ECHR), and internally by the ordinary courts of countries such as Argentina, Chile, Peru and Spain.

In crimes against humanity, the nonapplicability of any statute of limitations is integrated into the principle of universal jurisdiction, which leads to their permanent persecution, without limitations of time or place, and regardless of the nationality of the victims and vic-

12. ICTY *Kunarac et al.* Appeal Sentence, para. 85; ICTY *Blaskic,* Appeal Sentence, para. 124.

timisers. Thus the state jurisdictional bodies, in compliance with the provisions of their legislation and/or their obligations under international law, have taken on the commitment to apply the principle of universal jurisdiction to prosecute the perpetrators of crimes against humanity, taking into account the specificities of this category of crimes, such as the fact they do not prescribe. While the principle of universal jurisdiction enables the prosecution of this type of crime without constraints of place, the nonapplicability of any statute of limitations allows their judicial persecution without time constraints.

Crimes against humanity and the rules governing them are part of *jus cogens* and therefore are peremptory rules of general international law which can not be modified by treaties or by domestic law, as recognised by Article 53 of the Vienna Convention on the Law of Treaties (1969):

> "Article 53. Treaties conflicting with a peremptory norm of general international law: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Therefore, both in theory and practice, no country can ignore their international duty and their commitments under it in their treatment of this category of crimes, independently of their state sovereignty, expressed in the desire of each state to define the way in which it regulates its domestic law. Thus no state may legislate or implement any measures which restrict the prosecution of these crimes.

For the reasons expressed *supra*, the principle of legality poses no obstacles to the prosecution and punishment *ex post facto* of crimes against humanity, given that the prevalence of criminal proceedings comes as a result of *lex praevia*, on the basis of all the international norms to which we are subject. On the other hand, neither does *nul-*

lum crimen sine lege impose any impediment, since the characterisation of the acts being charged as crimes against humanity has been made under a customary norm and this is regarded as a norm of international law which has been in place for a long time. For this reason, such crimes may be prosecuted and punished even if they were carried out long before their recognition in conventions such as, for example, the Rome Statute of the International Criminal Court.

Also because they belong to *jus cogens* not only do such crimes not prescribe but neither can they be subject to pardons or amnesties. For this reason their status overrides any "legal" impediment which aims to avoid their prosecution and punishment. Consequently, any provisions for amnesty, statutes of limitations, pardons or the establishment of any type of limitations of responsibility which aim to prevent the investigation, prosecution and punishment of the perpetrators of such crimes, are absolutely null and void, because they violate non-derogable rights recognised by international human rights law.

To sum up, any action or decision taken by a state which aims to prevent or restrict the prosecution and punishment of crimes against humanity, as defined by international law – even such measures are provided for within its domestic legislation – is considered an act of complicity on the part of the state, given that it leads to limiting the rights of victims to truth, justice and reparation and constitutes a clear breach of the state's obligations under international customary norms belonging to *jus cogens*. Therefore, overriding any internal commitment that the State might have, there will always be their international human rights commitments, whether these are conventional or customary, given that these are peremptory norms which are guardians of the public or general interest and can not be excluded by the sovereign will of the parties which are obliged to comply with them.

A. EXPERIENCES FROM THE EUROPEAN COURT OF HUMAN RIGHTS

Before plunging into the study of the impact on the decisions of the IACtHR of the nature of crimes against humanity and the status of the

norms governing their application, it is necessary to refer to other parallel experiences in this regard from the European system of international human rights protection, which will serve as a reference point to assess their level of development.

Article 7 of the European Convention on Human Rights, which defines the principle of legality which is applied, includes a proviso aimed at preventing impunity for criminal acts, in accordance with the general principles of law recognised by civilised nations or by the international community at the time of their being committed.

The European Court of Human Rights (ECHR) recognised, almost at the same time as the IACtHR, the validity of the *ex post facto* prosecution and subsequent sentence imposed on those responsible for crimes against humanity, under the principle that such crimes can not be subject to statutory limitations, and that it is irrelevant whether at the time of the commission of the act this was classified as such in the domestic law of the State in which it was committed; both courts thus recognised the binding nature of customary norms with respect to crimes against humanity.

In this regard it is worth recalling the famous *"Case of the fatal shootings at the Berlin Wall"*,[13] where the perpetrators had already previously been sentenced by the courts of the Federal Republic of Germany[14] as both the intellectual authors – *Streletz, Kessler and Krenz* – and direct authors – *KHW*– on being held responsible for the deaths of people who had tried to cross the Berlin Wall from the early sixties until its fall. Thus in 2001 the Grand Chamber of the ECHR ruled in this case and attributed individual criminal responsibility at national and international level for crimes defined and covered by the rules of international human rights law.

It is also worth mentioning, in the same context, the case of *Kolk and Kislyiy v. Estonia* which was the result of a conviction for crimes

13. Ambos, K., *Acerca de la antijuridicidad de los disparos mortales en el muro [Concerning the illegality of the fatal wall shootings]*, Universidad Externado de Colombia, translated by Claudia López Díaz, 1999. TEDH, *Streletz, Kessler y Krenz v. Germany*, [GC], (Nº. 34044/96, 35532/97 and 44801/98), Decision of 22 March 2001.
14. These sentences were ratified both by the Federal Court of Justice - BGH- on 3 November 1982 and by the Federal Constitutional Court - BvertG.

against humanity imposed by the courts of that country for acts committed in 1979. Unlike the cases of "*Streletz, Kessler and Krenz v. Germany"* and *"KHW v. Germany*", in this case, the ECHR did give an opinion about the validity of crimes against humanity as rules of customary international law and on their specific characteristics.

At a European level, the non-applicability of statutory limitations to crimes against humanity and its retroactive application was confirmed by the decision of the Fourth Section of the ECHR of 17 January 2006 (Case of *Kolk and Kislyiy v. Estonia*), in which they declared the following:

> [...] The Court notes that deportation of the civilian population was expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945 (Article 6 (c)). Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission. Accordingly, responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War...
>
> Moreover, the Court recalls that the interpretation and application of domestic law falls in principle within the jurisdiction of the national courts (see *Papon*, cited above, and *Touvier*, cited above, p. 162). This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, *mutatis mutandis*, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).
>
> The Court notes that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their

commission. The Court sees no reason to come to a different conclusion. It is noteworthy in this context that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Nuremberg Charter was enacted. Moreover, on 11 December 1946 the United Nations General Assembly affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member State of the United Nations, it cannot be claimed that these principles were unknown to the Soviet authorities. The Court thus considers groundless the applicants' allegations that their acts had not constituted crimes against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that…"

It is from here that the ECHR reiterated that Article 7.2 of the Convention expressly provides that it will not impede the trial and punishment of any person for any act or omission which, at the time committed, was criminal according to the general principles of law recognised by civilised nations. This applies to crimes against humanity, for which the rule that they were not subject to time limitations was already established by the Statute of the International Military Tribunal at Nuremberg in 1945.[15]

These judgments have had several implications, among them the fact that they have avoided European models of impunity being transferred to Latin America, thus breaking the false assumption that standards which must be applied under European jurisdiction have no bearing on the jurisdiction of the IACtHR and the Pact of San José, Costa Rica.

15. ECHR *Kolk and Kislyiy v. Estonia*, Decision of 17 January 2006, p. 9. See also ECHR, *Papon v. France* (No 54210/00) Decision of 25 October 2002, and ECHR *Touvier v. France* (No. 29420/95) Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 161.

B. EXPERIENCES FROM THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Commission on Human Rights (IACoHR), in its Report No. 28/92 of 2 October 1992, had already noted the incompatibility of the laws of impunity with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (ACHR).

For its part, in its previous rulings the IACtHR reiterated this doctrinal approach in relation to crimes against humanity, taking into account their special characteristics. Thus it has ratified the character of *jus cogens* which covers the prohibition of these crimes, with the obligations resulting therefrom for States, basically to prosecute those responsible and the non-applicability of statutory limitations, amnesty or pardon for this type of actions.

During the 1990s, the Court avoided making any statement concerning its position on the principle of international legality in relation to human rights and International criminal law. It began to fill this doctrinal vacuum in 2001 in the case of *"Barrios Altos"*, when it recognised, without going any deeper, the existence of a customary rule in the matter of crimes against humanity under which the alleged perpetrators of such crimes can and should be prosecuted. It is therefore a matter of applying the principle of legality in its international dimension, *sensu lato*, when determining its jurisdiction in this type of crime.

The case of *Barrios Altos* is paradigmatic, since it has the very specific feature of occurring almost at the end of the war against Sendero Luminoso in Peru, after Alberto Fujimori's "self-coup" on 5 April 1992. The acts committed in 1994 consisted basically of a massacre carried out against Peruvian citizens, originally from Ayacucho, who were displaced and living in a poor neighbourhood of Lima known as Barrios Altos. The perpetrators had been identified as belonging to the "Colina Group". This group had not been officially recognised and was completely illegal, but it was made up of officers on active duty and subject to the chain of command of the Peruvian Army and Intelligence Service.

In the opinion of the prosecution, which began criminal proceedings in 1995, these events constituted crimes against humanity, but by that time Congress had enacted a total and complete amnesty which exonerated from liability those responsible for human rights violations committed between 1980 and 1995.

In the domestic courts the events were not defined as crimes against humanity, since they felt that in the absence of this type of criminal offence under Peruvian law, the events could only be described as common crimes which were covered by the amnesty laws that had been enacted, thus giving, in their view, full compliance with the principle of legality in the strict sense envisaged in the Peruvian legal system.

So, and after the exhaustion of these instances, the case reached the Inter-American Commission on Human Rights. The commissioners decided that there was a violation of Peru's obligations under the American Convention, as the IACtHR had already declared in many other decisions –including reports 28 and 29 of 1992, which were the first in which this was said– in connection with Argentina and Uruguay. They also stated that amnesty laws, even if they are called something else, are incompatible with the Convention if they have the legal effect of preventing the investigation and punishment of crimes against humanity.

The IACtHR therefore held Peru internationally responsible both for the massacre of *"Barrios Altos"* and for the two amnesty laws passed by Congress, stating explicitly these "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law".[16]

16. See IACtHR, *Caso of Barrios Altos v. Peru,* Judgment of March 14, 2001, Series C, No. 75. So important was this sentence that some give it a large part of the credit for the consequent isolation of Peru in the International Community and the subsequent collapse of the Fujimori government.

This criterion was applied by the IACtHR to other cases from the Peruvian courts, such as the case of "*Castillo Páez*",[17] in which the Court also noted that the amnesty in those terms violated the state's obligations under the American Convention.

In this case it can be seen that the ultimate aim of the decision of the IACtHR is to correct a situation by invoking the principle of legality in its international dimension. In this case, it is not a question of declaring that a person has been punished for a crime which was not in force at the time of its being committed, but on the contrary, that given that there is a previously existing law –in this case the international customary norm– which penalises said conduct, the State is violating the Convention if it evades its duty of prosecution and punishment.

In the opinion of the judge Cançado Trindade, conduct which seriously infringes human rights, defined as acts of genocide, crimes against humanity or other atrocities, were already condemned by the human conscience, long before their being characterised as crimes or included in international conventions. Today, international crimes are condemned by both general and conventional international law. This process was driven by the universal juridical human conscience, which, in his view, is the ultimate material source of all law.[18]

The current stage of conventional and general international law has defended the set of rules that constitute *jus cogens* as an open category, which expands to the extent that it instigates universal juridical conscience on the principle of humanity. The impact of this development has generated a genuine process of the humanisation of international law. On this basis the commission of atrocities not only results in individual penal liability, but also in aggravated international liability for the State which violates the absolute prohibitions arising from *jus cogens*.

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17. IACtHR *Case of Castillo Páez v. Peru,* Background. Judgment of November 3, 1997. Series C No. 34, para. 90.
18. See in this regard, the Separate Opinion of Judge Antonio Cançado Trindade in the Sentence of the IACtHR in the case of *Massacre of Plan de Sánchez vs. Guatemala* 29 April 2004, para. 13.

More recently the Court has declared in this sense in the case of *"La Cantuta"* [19] considering that the acts committed "to the detriment of the victims of extra-legal execution or forced disappearance, are crimes against humanity that cannot go unpunished, are non-extinguishable and cannot be the subject-matter of amnesty".[20]

But their clearest declaration, and referring directly to Chilean jurisdiction, was that pronounced in the decision of 6 September 2006 in the case of "Almonacid-Arellano et al. v. Chile".[21]

Mr. Almonacid Arellano was arrested and murdered at his home on 16 September 1973 by some policemen who fired at him in front of his family as he was leaving his house; he died the next day.

Later, on 18 April 1978, the de facto government that ruled the country issued Decree Law No. 2191, by which amnesty was granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from 11 September 1973 to 10 March 1978, provided they were not at that time subject to legal proceedings or had been already sentenced.

Already in 1998 the widow of Mr. Almonacid had exhausted all legal remedies in Chile, without success. However, when the case arrived at the IACtHR, this ruled that Mr. Almonacid had been the victim of a crime against humanity,[22] and that although such an offence was not included in Chilean law, by the time of the events it had been previously established by the rules of customary international law, on the basis of the principles of Nuremberg.[23] It also added that, by their nature, such crimes are not susceptible of amnesty,[24] which in their opinion revealed that Chile had breached its obligation to prosecute and punish those responsible for these events. In an excerpt from the ruling, the IACtHR notes:

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19. IACtHR *Case of La Cantuta v. Peru,* Merits, Reparations and Costs. Series C No. 162, Case of 29 November 2006., Paras. 167-169.
20. *Ibid,* Para. 225.
21. IACtHR. *Case of Almonacid Arellano et al v. Chile,* Series C No. 154, Case of 26 September 2006.
22. *Ibid,* Para. 104.
23. *Ibid,* Paras. 97-99.
24. *Ibid,* Para. 115.

> "Indeed, as a crime against humanity, the offense committed against Mr. Almonacid-Arellano is neither susceptible of amnesty nor extinguishable. As explained in paragraphs 105 and 106 of this Judgment, crimes against humanity are intolerable in the eyes of the international community and offend humanity as a whole. The damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished. In this sense, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity clearly states that 'no statutory limitation shall apply to [said internationally wrongful acts], irrespective of the date of their commission.'
>
> Even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this peremptory rule".[25]

And further that:

> "[...] states cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty."[26]

The Court thus concludes that the Chilean state had breached its obligations under Articles 1.1 and 2 of the American Convention on Human Rights, and violated the rights embodied in Articles 8.1 and 25 thereof, to the detriment of victims. It further added that by seeking to grant amnesty to persons responsible for crimes against humanity, Decree Law No. 2191 was incompatible with the American Convention and therefore had no legal effect, in light of the treaty.

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25. IACtHR. Case of *Almonacid* ... paras. 152-153.
26. *Ibid,* Para., 114.

That is to say, on the IACtHR determining in this case that Mr. Almonacid had been victim of a crime against humanity –in force under customary international law when the acts were committed– the absence of internal prosecution as such and the fact of having granted amnesty to those responsible, made the Chilean government internationally liable for having breached its obligations, adopted under the American Convention on Human Rights and in this situation, where under the existing international norms and its features the crime is not extinguishable nor susceptible of amnesty under customary measures, even laws enacted by the legitimate state authority are invalid.

The IACtHR incorporated this element of its argumentation in this sentence to the case of *Almonacid Arellano et al v. Chile*. To support its position the Court recalls the case law of the International Criminal Tribunal for Former Yugoslavia (ICTY) in the cases of Tadic,[27] Kupreskic and Kordic, in the sense that a single act by a perpetrator which seriously violates human rights can constitute a crime against humanity, if it is committed within the context of a systematic process, and is the "product of a political system based on terror or persecution". The characterisation of such behaviour as crimes against humanity, where both the victim and humanity are victimised, affecting their individual and universal human conscience, based on International Humanitarian Law and contemporary International Criminal Law, should, in our opinion, also be integrated into the conceptual universe of International Law of Human Rights. In this sense the decision of the IACtHR in the case of Almonacid Arellano is a first step in this direction.

This argument rests on the conviction, included in international human rights law and in the latest dictates of international criminal law, that it is inadmissible to grant impunity to those actions which most seriously damage the fundamental juridical goods protected by both branches of international law. The criminal classification of such conduct and the prosecution and punishment of its perpetrators or other participants is an inescapable obligation of the State, and may not be

27. See: ICTY *Tadic,* Case of 7 May 1997, para. 649; ICTY *Kupreskic,* Decision of 14 January 2000, paras. 550-551; ICTY *Kordic,* Decision of 26 February 2001, paras. 176-179.

impeded by measures such as amnesty, pardon, prescription, the acceptance of exclusive causes of incrimination, or others that might lead to the same results –such as placing limitations on the exercise of universal jurisdiction– and might grant impunity to acts which gravely harm those paramount legal interests. Thus far from impeding or limiting the prosecution of this category of crimes, the state is obliged to provide for the safe and efficient national and international sanctioning of such conduct.

In every state that claims to represent social, democratic, legal and judicial values, the minimum penal intervention of the state must be demanded, which leads to the rational classification of illegal acts, but which in turn requires that certain very serious acts are invariably provided for in the punitive legislation, and that they are investigated and effectively sanctioned.

The judgments issued by the IACtHR in this area represent a major achievement in the difficult and vital task of reconciling case law and the doctrine of international law so as to allow these norms to be transmitted, without fail, into ordinary jurisdiction. This significantly increases the efficacy of the fight against the existing models of impunity and at the same time produces a preventive effect, of an undoubted deterrent value, against the repetition of terrible acts, such as those that were carried out in Latin America for decades.

According to Benedetti, *"oblivion is full of memory"*,[28] meaning that victims and/or their next of kin will only be able to rebuild their relations with their dead and with their equals in a context of sustainable peace when their rights to truth, justice and reparations have been satisfied. In this sense, the defence of these rights by the IACtHR is a major contribution to peacebuilding in transitional justice processes in Latin America and an important example to be followed by other states, including Spain[29] which at the present stage of evolution of

28. Benedetti, M., *El Olvido Está Lleno de Memoria* ["Oblivion is full of memory"], Bogota, Planeta, 2001, pp. 13-19.
29. Law 46/1977 of 15 October 1977 still in force in Spain, has for more than three decades prevented the prosecution and punishment of those responsible for crimes perpetrated during the Civil War and the Franco dictatorship. It is worth mentioning that not only

contemporary international law still defend the validity of laws of impunity and other limitations on the prosecution and punishment of those responsible for past atrocities, questioning the justification and appropriateness of their prosecution and thus violating obligations arising from *jus cogens* which as SIMMA correctly notes, have been created precisely for the purpose of protecting the most fundamental interests and values of the international community as a whole.[30]

4. SOUTH AMERICA, DOMESTIC COURTS AND THE APPLICATION OF PRINCIPLES

While the regional courts for the international protection of human rights have created doctrine relating to the application of the principles of the prohibition of prescription, amnesty, pardon, and any other type of exclusion of liability with respect to crimes against humanity, there are also some domestic courts which have ruled to that effect. To refer to these decisions, without trying to make an exhaustive study, we will focus on the authoritarian regimes, or regimes of internal conflict, which preceded the wave of transitions of some South American countries – Argentina, Uruguay, Chile and Peru– characterised by the commission of gross violations of human rights qualified as crimes against humanity, which for this reason attracted worldwide attention.

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was this amnesty law passed prior to the Constitution but also contradicts its provisions and the international obligations taken on by the Spanish State at that time, such as the International Covenant on Civil and Political Rights. It should also be added that, given the nature of crimes against humanity, the fact that statutory limitations do not apply to them and that they belonging to *jus cogens*, it would be advisable to declare this law null and void, as unconstitutional and because it constitutes a "legal" obstacle to effective the prosecution and punishment of perpetrators, since it breaches general peremptory norms of international law. Its existence is unlawful and undermines the rights of victims and/or their next of kin to obtain justice.

30. Simma, B. "From Bilateralism to Community Interest in International Law", 250 *Recueil des Cours de l'Académie de Droit International de La Haye* (1994) p. 289.

The levels of repression were different in each of these countries and the intensity of the crimes committed was qualitatively and quantitatively less than that recorded in countries like Honduras, Guatemala and El Salvador – due to the circumstances and intensity of the sense of threat felt by the ruling classes, the ability shown by civil society to respond to violations of human rights and the military's own perception of the repression required to neutralise the political order.[31]

It is noteworthy that in each of the cases studied "legal" obstacles were established to impede the prosecution of those responsible for such crimes as a solution which would ensure a peaceful transition process. However –despite its going against *jus cogens*– this solution, expressed in decrees of pardon, amnesty or in the declaration of statutes of limitations or other exclusions of responsibility, would remain in effect in some cases.

In contrast, other decisions, which recognised the binding nature of the judgments issued by the IACtHR, the existence under customary law and the characteristics of crimes against humanity, even when these were not classified as such domestically, would declare the nullity of the impunity measures implemented.

Thus, the analysis of the South American experience becomes more complex given the diversity and importance of the solutions and initiatives implemented during these transition processes. However, through the study of the legal solutions applied in these countries – whether maintaining in force or declaring null and void any "legal" obstacle to the prosecution of such crimes– we will highlight the contribution of the judgments issued by the IACtHR in the dismantling of the structures of impunity.

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31. Frühling Ehrlich, H. "La defensa de los Derechos Humanos en el Cono Sur. Dilemas y perspectivas de futuro" ["Defending Human Rights in the Southern Cone. Dilemmas and future prospects"], in FRÜLING EHRLICH, H. (Ed.): *Represión política y defensa de los Derechos Humanos* [*Political repression and Human rights advocacy*], Chile, CESOC, 1986, pp. 16-17.

A. ARGENTINA AND THE LAWS OF IMPUNITY

In Argentina, under the dictatorship of Rafael Videla (1975-1983), numerous grave violations of fundamental human rights recognised in the American Declaration of the Rights and Duties of Man, which would later be classified as crimes against humanity, were committed by act or omission by public authorities and their agents. These violations caused harm in a massive and systematic way to thousands of people – both nationals and foreigners– who were arbitrarily arrested, subjected to cruel, inhuman or degrading treatment and finally executed, and most of whom were never heard of again. The prosecution and punishment of these events in Argentina was marked by a climate of impunity in which the State at all times hindered access to justice for the victims and/or their next of kin, by means of decreeing impunity laws.

This attitude began to change in 1990 when the *Court D'Assises de Paris* condemned the Argentinian Lt. Cmdr Astiz,[32] in his absence, to a life sentence for the kidnapping, torture, rape and murder of the French nuns Domon and Duquet, which would lead to a series of prosecutions in several European countries including Italy, Switzerland, Sweden, Germany and Spain, which in turn initiated an ongoing process in favour of the activation of cases in Argentinian territory.

These actions by the domestic courts of third party states led in 1998 to the proposition of the members of parliament Cafiero and Bravo to declare null and void the laws of "Punto Final" (1986) and "Due Obedience" (1987), though the only result was the repeal of this proposition through the approval of Law No. 24942.

One of the most symbolic sentences, with great impact at both national and international level, was issued on 6 May 2001. In the case of *Simon, Julio, Del Cerro, Juan Antonio concerning the abduction of minors of less than ten years of age*,[33] the Argentinian Federal

32. Judgement of the *Court D'Assises de Paris - 2eme Sectión,* case 1893/89, of 16 March 1990.
33. Juzgado Nacional en lo Criminal Y Correccional Federal [National Court for Federal Criminal and Correctional Matters] No. 4, Case No. 8686/2000, Judgement of March 6, 2001.

Judge Gabriel Cavallo based himself on the sentences mentioned and on the rules of international law in declaring the invalidity of these laws of impunity. These laws, although they lost their force in 1998, had fulfilled the objective of preventing the prosecution and punishment of those responsible for crimes against humanity committed during the dictatorship of Videla in Argentina. The importance of this decision lies, on the one hand, in the internal recognition of the existence of crimes against humanity in customary law at the time of their commission, without such crimes being classified as such in the Argentinian legal system, and on the other that these belong to the peremptory norms of general international law or *jus cogens*, which does not permit the implementation of forms of transitional justice which violate the rights of victims and/or their next of kin to achieve justice.

The decision applies the customary conception of this category of crimes which originates from the statutes and case law of international criminal courts, among other international instruments that have defined it over its course of evolution, many of them coming from America. In addition it took as a basis the case law of the IACtHR, that of other states, and Argentinian criminal law, which it interpreted in line with the sources mentioned *supra*.

Judge Cavallo, very wisely and with a broad and contemporary perspective, recognises the existence of international criminal law whose function is to ensure respect for the rights inherent to the human being, being made up of a series of principles and legal rules, most of which are mandatory, not only for the international community as a whole but also for each of its constituent states. He further asserts that the peremptory nature of the prohibition of international crimes and the legal consequences of the breach of this prohibition have been fully recognised by customary international law, concluding that, on the one hand, the international norms that classify this kind of criminal behaviour, including crimes against humanity, prevail over domestic norms, and on the other, that universal jurisdiction and the impossibility of excluding criminal responsibility, prevail over the application of a statute of limitations or due obedience.

The sentences in this direction appeared repeatedly within the Argentinian jurisdiction[34] until the adoption on 21 August 2003 of the Law No. 25,779 which definitively declared them invalid. The constitutionality of this law was upheld by the Second Division of the National Appeals Chamber of Federal Criminal and Correctional Matters of Buenos Aires on 16 December 2004.[35]

However the crystallization of all this came when the Supreme Court ruled, in its decision of 14 June 2005:

> "2. To declare the validity of Law 25,779.
>
> 3. To declare void, for all purposes, laws 23,492 and 23,521 as well as any action based on them which might stand against the advance of the cases under investigation, or the prosecution and conviction of those responsible, or in any way hinder the investigations carried out through the appropriate channels and from within their respective jurisdictions, for crimes against humanity committed in the territory of Argentina."[36]

Notwithstanding the previous sentence, the legal model of impunity that had prevailed during the first years of the Argentinian transition would break when the Criminal Cassation Chamber of the Supreme Court of Justice declared for the first time on 13 July 2007, the revocation, as unconstitutional, of the pardon – Decree 1002/89– that had

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34. See, for example: Juzgado Nacional en lo Criminal y Correccional Federal [National Court for Federal Criminal and Correctional Matters] No. 11, Case No. 7694/99, sentence of October 1, 2001; decisions of Division II of the Cámara Nacional de Apelaciones en lo Criminal y Correccional de Buenos Aires [Federal National Appeals Chamber of Federal Criminal and Correctional Matters of Buenos Aires] in Cases No. 17,844 and No. 17,889, of November 9, 2001; Juzgado Nacional en lo Criminal y Correccional Federal [National Court for Federal Criminal and Correctional Matters] No. 11, Case No. 6.859/98, Judgement of September 12, 2002.
35. Division II of the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires [National Appeals Chamber of Federal Criminal and Correctional Matters of Buenos Aires], Case 8686/00, Judgement of December 16, 2004.
36. Judgement of the Corte Suprema de Justicia de la Nación Argentina [Supreme Court of the Argentinian Nation], S. 1767. XXXVIII, Case N °. 17768, 14 June 2005, Decision Paragraphs 2-3.

granted amnesty to retired Gen. Santiago Omar Riveros,[37] one of the principal suspects in the case which investigated the crimes committed by the Argentinian dictatorship in the Campos de Mayo and its responsibility in the murder of the youth Floreal Avellaneda. One of the central arguments of the sentence was the haste with which the former general Riveros had been pardoned, before the judicial system had been able to determine his guilt or innocence, thereby violating the rights of victims and/or their next of kin, as well as of society as a whole, to know the truth of the facts and to be able to assign responsibility to the perpetrators, given that the pardon had been an impediment to their investigation.

In the ruling, the judges held that the pardons that had been granted by Menem, far from creating the conditions and the setting for reconciliation, mutual forgiveness and national unity, transgressed the international treaties on human rights ratified by Argentina. They mentioned the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, among others.

It is worth mentioning that the ruling highlights a quote from the IACtHR in the case of *Barrios Altos*, in which the use of the pardon is questioned:

> "Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity (...) This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation."

This was the judicial step that was required so that the Supreme Court of Argentina could rule definitively on the other pardons with which Carlos Menem had in 1989 and 1990 amnestied several sol-

37. *Ibid.*, M. 2333. XLII, *"Julio Lilo y otros s/ rec. de casación e inconstitucionalidad"*, Sentence of 17 July 2007.

diers involved in human rights violations. This sentence helped in turn to accelerate investigations into the largest clandestine detention centre that operated in Argentina, through which an estimated four thousand disappeared persons passed, of whom virtually none survived.

This permitted the sentence of life imprisonment against former general Santiago Riveros and five co-defendants[38] whose effects have spread to the rest of those pardoned, among them Rafael Videla and Massera. The Supreme Court based its judgment on its previous decisions which had already declared the non-applicability of statutory limitations and of amnesties to crimes against humanity and human rights violations.

The recognition by the Argentinian domestic jurisdiction of the existence in customary law of crimes against humanity and of the non-applicability to them of statutory limitations by virtue of their belonging to *jus cogens* reflects the contribution of the case law emanating from the IACtHR which, together with the judicial will of a country, managed to achieve the defeat of the old models of impunity which had been in place in Argentina for years. The recognition of the mandatory nature of the sentences decreed by the IACtHR, the declaring null and void of said laws of impunity, as well as that country's ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity represent a very important step in vindicating the rights to truth, justice and reparation for victims and/or their next of kin at the expense of impunity.

B. URUGUAY AND THE AMNESTY LAW (LEY DE CADUCIDAD)

Uruguay, now regarded as one of the most democratic countries in Latin America, earning it the description of the "Switzerland of Amer-

38. Tribunal Oral en lo Criminal Federal de San Martín [Federal Oral Criminal Court of San Martín] No. 1, Case No. Case No. No. 2005 and related cases, No. 2044, Judgement of August 12, 2009.

ica," was on 27 June 1973 the scene of a military coup, in which the Armed Forces, as an institution, took power in the country. Thus for a little over a decade, their deeply rooted democratic and constitutional ideas were forced to make way for a military dictatorship which emerged from a deep economic and social crisis and which would exercise total control over the Uruguayan population. This population would be repressed and classified, according to the danger they represented, into three categories: A, B and C. Only one of these groups could obtain employment, others would lose it, and still others could neither enter nor leave the country.

The de facto military regime would leave thousands of victims of arbitrary arrests and torture, and a lower figure of about one hundred murders and thirty-four forced disappearances, which were carried out with impunity in the face of a civilian and military justice system under its control. It is worth mentioning that Uruguay is a country with very small population,[39] thus while the numbers of disappeared, murdered, arbitrarily arrested and tortured are small, they represent a high percentage of the population.

The IACoHR documented twenty-five cases of death, and according to the information received, detected between three thousand and eight thousand arbitrary arrests. According to the Commission this information was provided by the Washington Office on Latin America. According to the calculations of this association, the number of people illegally detained in Uruguay was about six thousand. This agency also estimated that between 1972 and 1977, some sixty thousand people were deprived of their liberty for political or ideological reasons. Moreover, the Uruguayan government, in its comments on the Report of the Commission of 24 May 1977, acknowledged that as at 15 August 1977 a total of 2,366 persons were under arrest due to their being, in the Government's view, "subversive and seditious." Numerous complaints and other communications were also received by the Commis-

39. According to official data of the National Statistics Institute of the Oriental Republic of Uruguay, this country had in 1975 a population of 2,788,429 inhabitants rising, according to the latest census, to 3,241,003 inhabitants in 2004.

sion concerning acts of torture committed against detainees.[40] It is noteworthy that these acts were carried out with total impunity.

As early as 1978 the Inter-American Commission on Human Rights stated the following:

> "The numerous denunciations received from Uruguay and from many other sources which the Commission considers to be reliable, and the Uruguayan Government's responses to the Commission's request for information and recommendations, enable the Commission to affirm that there have been serious violations of the following human rights in Uruguay: the right to life, to liberty, and to personal security; the right to freedom of opinion, expression and dissemination of ideas; the right to a fair trial; the right to due process of law; the right of assembly and association; and the right to vote and to participate in government."[41]

In relation to the forced disappearance of persons, it is necessary to emphasise that this practice was not as extended in Uruguay as in other neighbouring countries, however, most of these crimes were committed in this first period, with the cooperation and under the coordination of other Southern Cone dictatorships, especially in Argentinian territory from 1976 onwards.

Between 1979 and 1983, after the weakening of the regime as a result of electoral defeats – in a referendum on the constitution and in primary elections – an increase in social mobilisation, confusing negotiations and diverse legislative measures, on 3 August 1984 the leaders of some political parties agreed the unwritten Naval Club Pact which would again permit the calling of democratic elections in November of that year and in which they agreed the non-prosecution of those responsible for the crimes committed in the past.

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40. See in this regard: Inter-American Commission on Human Rights, "Report on the Situation of Human Rights in Uruguay", OEA/Ser.L/V/II.43, doc. 19 corr. 1, 31 January, 1978, Cap. II, para 4, Cap. III, para. 1 and Chap. IV, para. 3.
41. See: Inter-American Commission on Human Rights: Report on the Situation of Human Rights in Uruguay", OEA/Ser.L/V/II.43, doc. 19 corr. 1, 31 January 1978, Conclusions, para. 2.

Later, in 1985, the Uruguayan political prisoners were released thanks to the passing of the Law of Amnesty of political and related crimes,[42] excluding those imprisoned for offenses involving cruel, inhuman or degrading treatment or for detentions of disappeared persons committed by police or military officials. As for the measures for reparation, the groups which had been deprived of their right to work for political reasons would be compensated and reinstated in their jobs. A Parliamentary Inquiry Commission would also be established on the *Status of Persons who Disappeared and the Events Which Caused it between 1973 and 1982*, which would act under many constraints and would turn out to be a dismal failure in its task of achieving the right to the truth for the victims and for Uruguayan society as a whole, since it left aside the cases of torture and arbitrary arrests and it declared the State's responsibility in the events, but did not go into the existence of a state policy with that aim.

Various actions would be attempted by the victims and/or their next of kin to achieve the prosecution of these crimes, but due to the opposition of the armed forces, which refused to cooperate and forbad its members from appearing before civil courts, the bringing to justice of those responsible was impeded.

This posed a serious dilemma to the civil authorities, which did not know whether to directly confront the military and force their members to appear in court, or to issue an amnesty that would put a decisive end to the conflict. Thus, opting for the latter option, in 1986 Congress approved the "Law of expiry of the punitive intentions of the state" (known as the "Ley de caducidad")[43], which was very similar to Argentina's "Full Stop Law", but considered by the government as an appropriate measure to avoid a coup by the armed forces. This law was challenged before the Supreme Court of Uruguay which, despite noting that it was really an amnesty law, declared in a majority decision of 2 May 1988 that the law was constitutional.[44] On this basis the Uru-

42. Law 15,737 of 8 May 1985.
43. Law No. 15,848, passed on 22 December 1986.
44. Corte Suprema fe Uruguay [Supreme Court of Uruguay], No. 148, Sentence of 12 May 1988.

guayan people, opting for democracy at the expense of justice, approved the law by majority vote in a referendum on 16 April 1989.

Given that the victims of the crimes committed during the military dictatorship could no longer use the domestic judicial system to achieve the punishment of those responsible for these acts, they had to resort to the international inter-American system of human rights protection. In this area the Inter-American Commission on Human Rights would play a crucial role, as some of its decisions had a major social impact, which, together with the changes occurred in Argentina and Chile, and the inactivity of the Uruguayan authorities, would bring a wave of joint protests in support of the victims of disappearances.

In relation to criminal prosecution for crimes committed during the military dictatorship, Juan Carlos Blanco, former Foreign Minister, was arrested in 2001 and charged with joint responsibility for the imprisonment, torture and murder of the teacher Elena Quinteros, who disappeared in 1976 in the gardens of the Embassy of Venezuela. In the request for the trying of Blanco, the prosecutor said:

> "The violations of human rights which occurred in that dark period were serious enough so as to persist in the collective memory and to justify their punishment. To maintain otherwise would set our country against the international currents, and would be against the agreements ratified. The very creation of the Commission for Peace is a clear indication that the memory of these crimes has not been extinguished."[45]

However, in this application for trial, the prosecution did not qualify the events as crimes against humanity, let alone argue that statutory limitations could not apply. This occurred in 2008 when a conviction was demanded for the crime of "forced disappearance", with the application of a sentence of 20 years imprisonment. However, Blanco was freed on bail for this accusation, and the case is still open.

45. See the "Request for the trial of Juan Carlos Blanco Estrada, as co-author of a crime of especially aggravated homicide. " In: http://www.derechos.org/nizkor/uruguay/doc/charg7.html [consulted: 11 November 2009].

Understandably, a major boost in this case came in 2005 with the arrival in the presidency of Tabaré Vásquez, who has made some efforts to carry out the investigation of other cases which he considers are not covered by the amnesty law, thus we have the case of the disappearance of Maria Claudia Garcia de Gelman and that of the murders of Michelle and Gutierrez, attributed to Blanco and to the former dictator Bordaberry. Blanco has been in preventive custody for the latter case since late 2006, and at the time of writing the judge has not yet been able to pass sentence.

However, one of the greatest advances in the fight against impunity during the government of Tabaré Vasquez was not only the trying of Blanco and Bordaberry but the conviction to 25 years imprisonment of former President Gregorio Álvarez (1980-1984) for especially aggravated murder and crimes against humanity. This undoubtedly represents a new step forward in the process of memory, truth and justice for crimes committed under the military dictatorship, not only in Uruguay but throughout the Southern Cone. All this without neglecting the declaration of the unconstitutionality of the amnesty law by the Supreme Court of Uruguay on 19 October 2009, with effect limited to the case of SABALSAGARAY,[46] but which is an important precedent in the context of the struggle against impunity being carried out in that country. However, this advance was tarnished a few days later by the Uruguayan people's refusal in a referendum to definitively repeal the Full Stop Law, thus keeping the country still divided.[47]

In the case of Uruguay's transition to democracy, we can see how the amnesty law has become a real obstacle to the investigation, prosecution and punishment of those responsible for the past crimes under the dictatorship, with the victims' right to truth, justice and reparation not being satisfied. This model of impunity clearly constitutes a

46. See in this connection the decision of the Supreme Court of Uruguay, No. 365, 19 October 2009, Case of "Sabalsagaray Curutchet, Blanca Stela. Complaint. Exception of Inconstitutionality Arts. 1, 3 and 4 of Law Nº 15,848, File 97-397/2004.

47. According to the official referendum results, 47% of voters were in favour of annulling the law, but nearly 53% voted for it to be retained. The percentage of those who voted against impunity coincided with that of the persons who voted for José Mujica as president.

breach of the obligations which Uruguay took on at an international level, as well as a judicial ignorance of the mandatory nature of the rulings on the subject which have already emerged, with sufficient firmness, from the IACtHR. Thus we are witnessing a situation in which a democratic peace has been built dangerously, by sacrificing justice, thus undermining its sustainability over time. It only remains to be seen what progress in the direction of justice can be made during the period of office of the recently elected President José Mujica, on whom we assume that that many hopes have been placed[48].

C. CHILE AND DECREE LAW NO. 2191

On 11 September 1973, President Salvador Allende was overthrown by a military junta headed by General Augusto Pinochet, which would prohibit all political activity and maintain a de facto military government in Chile for almost two decades.

During the Chilean military dictatorship a wide variety of international crimes and serious human rights violations were committed. The victims were those persons considered to be dangerous to the new regime which, through a policy of terror, tried to eliminate all those elements which threatened their doctrines and actions. With this aim the de facto government, through the National Intelligence Directorate (DINA) and with the cooperation of some civilians, carried out, massively and systematically – though with varying degrees of intensity and levels of selectivity when choosing victims – thousands of extrajudicial killings, torture (including rape, especially of women), arbitrary deprivation of liberty in centres beyond the reach of the law, forced disappearances and other human rights violations. This repression was applied in almost all regions of the country without the Chilean authorities taking any action in this regard.

As from 1974, these violations were reported to international bodies and, despite the refusal of the regime to recognise the facts, they began

48. According to official data from the Electoral Court, the percentage of those who voted against maintaining the amnesty law coincided with that of the persons who voted for José Mujica as president.

to draw the attention of the international community, both within the framework of the Organization of American States and at the United Nations.[49]

The IACoHR stated in its Annual report for 1977:

> "On repeated occasions, the Government of Chile has expressed its intention to respect the independence of the judiciary and to abide by its resolutions. In practice, this commitment has not caused it any great problem. Most of the time, the courts, arguing that their function is to implement the existing legislation, have maintained the same criteria as the Government, thus avoiding a conflict. Even in the few cases where a Court of Appeal upheld a petition for constitutional protection and ordered the immediate release of a detainee, as happened in the case of Carlos H. Contreras Maluje – extensively documented in the section concerning the right to life – when the Ministry of Interior denied that the person was under arrest, the corresponding Court of Appeal, after carrying out an investigation, restricted itself to closing the case". [50]

The model of impunity established in Chile was reinforced in 1978 with the introduction of an Amnesty Law[51] which was very far from being an attempt to leave the past behind and to build a future of peace on the basis of unity and the strengthening of the bonds which unite the Chilean nation. Under this law amnesty was granted to all those responsible for crimes committed in the period from 11 September 1973 to 10 March 1978, with the exception of those who were already being tried or had been already sentenced. However, the benefits of

49. See, for example, the UN General Assembly resolution of November 1974, asking the Government of Chile to fully respect the Declaration of Human Rights; the UN General Assembly resolution of December 1975, approving the report of the Working Group and condemning the government of Chile for human rights violations, as well as asking it to adopt the measures required to safeguard basic human rights and fundamental freedoms; and the UN Commission on Human Rights Resolution of March 1977, which condemns the government of Chile for proven human rights violations.
50. See Inter-American Commission on Human Rights: "Annual Report, 1977", OEA/Ser.L/V/II.43, doc. 21 corr. 1, 20 April 1978, Fourth Section, VI.C., para. 4.
51. Decree Law N°. 2191, 19 April 1978.

this law would extend to those convicted by military courts, excluding a series of crimes, and would not apply to those who were in exile.

The mandate from this decree gave an appearance of symmetry which was not maintained in the rest of its articles. Thus, the fact that the amnesty also applied to those convicted by military courts meant that any investigation into the whereabouts of individuals was closed without having even started, something which caused much controversy.

Notwithstanding, a year later the Supreme Court declared that investigations should be initiated or continued in all cases of enforced disappearances, but very little or nothing would come of this.

As early as 1985 the Supreme Court took a step backwards, and went about ratifying the rulings of the lower courts, applying Decree No. 2,191 to cases of enforced disappearances even before the full verification of the facts, going so far as to punish those judges who challenged the dismissal of cases. It is therefore not surprising that later, in 1989, the Amnesty Decree was invoked to close nearly a hundred cases which were being heard in military courts.

In conclusion, in comparison with the immediate and direct benefit it gave to members of the Armed Forces and Security services, as the Inter-American Court warned, *"this amnesty did not change the situation of dissidents under the military regime and only meant the release of those who were in jail, some of whom were forced to leave the country. The situation of exiles did not change and numerous requests to return were rejected"*.[52]

Between the different pressures from the international community and from Chilean civil society, Augusto Pinochet's regime began to lose strength; on 5 October 1988, the "no" vote on their continuation in office was victorious, and the military authorities accepted the results. It was from this time on that several provisions came into effect which would allow him to continue just one more year in power, which would be crucial in planning and deciding the transition process.

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52. Inter-American Commission on Human Rights: "Annual Report 1978", OEA/Ser.L/V/II.47, doc. 13 rev.1, June 29, 1979, Section Four, sect. b), para. 5.

On 11 March 1990, President Aylwin was democratically elected and took power after almost two decades of dictatorship; however, Pinochet remained as Commander in Chief of the Army until 1998.

The final count of victims of the military regime between 11 September 1973 and 10 March 1990 was more than three thousand executed and/or missing[53] and more than twenty-eight thousand cases of arbitrary arrests for political reasons and torture,[54] almost all of these crimes remaining in absolute impunity.

In this regard, already in 1985, the Inter-American Commission on Human Rights, explaining the reasons for the scale of the violations committed by the Chilean government, attributed them to the use of almost all *"the known methods for the physical elimination of dissidents, including disappearances, summary executions of individuals and even of groups of defenceless persons, executions decreed in trials without any legal guarantees, torture, and indiscriminate and excessive violence against public demonstrations*. (...) [55].

And recognising the massive and systematic nature of these violations, added that:

> *"The scale of the confirmed violations, the diversity of the methods employed in their execution, the lengthy period during which they were carried out and the impunity of the public officials who committed them, permit the Commission to conclude that it is not a question of individual excesses, explicable in the context of an armed struggle against an internal enemy, but on the contrary, they follow from the deliberate intention of the Government of Chile to eliminate any form of dissent, even at the cost of such serious violations of the right to life as those that have been documented..."* [56]

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53. National Commission on Truth and Reconciliation "Report of the National Commission on Truth and Reconciliation", Part One, Chapter I, Part III, Chapter I-III.
54. National Commission on Political Imprisonment and Torture: "Report of 10 November 2004 "and "Supplementary Report of 1 June 2005" in http://www.comisiontortura.cl/inicio/index.php . [Accessed: 15 November, 2009]
55. Inter-American Commission on Human Rights: "Report on the Situation of Human Rights in Uruguay", OEA/Ser.L/V/II.77. rev.1 doc. 18, 8 May 1985, Chapter III, para. 182.
56. *Ibid,* Para. 184.

The complete validity of Amnesty Decree No. 2,191 with respect to both domestic and international law was still accepted by the Supreme Court of Chile, even at the beginning of the 1990s.[57] However, the court rejected the possibility of extending it to the area of civil liability, without identifying ways of gaining access to this area with the phase of investigation having been removed.

The Chilean judiciary was of the opinion that neither the Pact of San José, Costa Rica, ratified on 21 August 1990, nor the International Covenant on Civil and Political Rights, incorporated into Chilean law on 29 April 1989, had sufficient authority to make the Amnesty Decree ineffective.[58] Thus by considering the Decree as the most favourable *lex praevia*, the retroactive application of said instruments clearly contravened the principle of non-retroactivity of criminal law, and would be tantamount to holding that the criminal liability which had been decisively eliminated under the amnesty had been able to be reborn afterwards. The application of a retroactive criterion meant, in their view, undermining the essence of the amnesty which, with no doubt at all, is always the most benign criminal law for those who are favoured by it.

However, President Aylwin expressed a clear intention from the moment he took power to govern in a "regime of truth", in which the Amnesty Decree could not be an obstacle to the prosecution and punishment of the crimes committed during the military dictatorship. Thus, on 4 March 1991 he declared: *"I hope these they* [the Chilean courts] *play their role properly and accept the investigations, to which –in my opinion–, the amnesty law in force can not be an obstacle".*[59] This would not be more than a simple intention, since there was no success in completing any criminal proceedings and the Supreme Court, at the same time as it showed itself increasingly will-

57. Corte Suprema de Chile [Supreme Court of Chile], *Case of Insunza Bascunan, Ivan Sergio (motion of inapplicability)*, August 24, 1990, paras. 25-29.
58. See for example the decision of the Court Martial of 25 March 1998, paragraph 9 (file of annexes to the complaint, Annex 3, pages 43 and 44).
59. See the article of Amnesty International: "Chile: Transition at the Crossroads: Human rights violations during the Pinochet government are still the basic problem", p. 17.

ing to transfer the open cases from the jurisdiction of ordinary courts to military courts, continued to abide by the Amnesty Decree, confirming the dismissal of cases. This situation would significantly and definitively affect the popularity of the Aylwin administration.

However, in 1993, this permanent impunity was breached somewhat, with the conviction in the first instance of General Contreras and Brigadier Espinoza as the persons responsible for planning the murders of Letelier and Moffitt, a ruling that would be ratified by the Supreme Court in 1995, on the basis that the case was not covered by the Amnesty Decree.

It is worth mentioning that while at that time the Chilean justice system had been a complete failure in the prosecution of the past crimes committed by the military regime, important initiatives were taken in the area of reparations, such as the creation of the National Return Office (1990), the Reparation and Integral Health and Human Rights Program (1991), the National Corporation for Reparation and Reconciliation (1992) which would give continuity to the work of the National Commission on Truth and Reconciliation.

The following years, and in the period of office of Eduardo Frei, there was no significant step forward in the prosecution of the perpetrators and other participants for the crimes committed during the regime, a situation that lasted until late 1998 and early 1999.

The criteria of the Supreme Court on this question remained intact. However, exceptionally, there were variations in a few cases. One of these changes of approach was evident in 1995 in the judgement of the Criminal Division in the case of Cheuquepán and Llaulen, which confirmed the conviction declared in the court of first instance in a case of the forced disappearance of persons, because it was considered that it was not covered by the Amnesty Decree. Furthermore, arguing that it could not be considered that the crimes had been committed in act of service, it confirmed that the ordinary courts were competent to hear the case. The Court made other novel sentences in this direction, on 13 August 1995 in the case of Mario Fernandez, and on 26 October 1998 in the famous case of Contreras Maluje. In the latter, the application of the Amnesty or any other time limitation was rejected on the basis of

the continued or permanent nature of the crime of the forced disappearance of persons. This criterion gradually came to be repeated in the Supreme Court of Chile.[60]

These sentences, which represented little or nothing in comparison with the high degree of impunity, were followed by other criminal prosecutions at the international level, such as in Italy, Argentina and the United States. However, none of them would receive as much worldwide attention as the failed attempt to prosecute General Augusto Pinochet –on which we have already commented– made by the Spanish jurisdiction and which led to his arrest in October 1998, on the basis of the principle of universal jurisdiction.[61] Switzerland and Belgium would also initiate proceedings against him.

So, in short, we can see that very few cases have been punished. The most well-known cases and those which did not enjoy the protection of the Amnesty Decree, either because they were committed outside of its time period or because they constituted continuing or permanent crimes, have gradually been resolved. However, most of the crimes, which clearly constitute crimes against humanity, still go unpunished and their prosecution has come up against major obstacles as a result of this Decree.

Subsequently, several bills have been proposed with the aim of putting an end to the prosecution of the crimes of the dictatorship or of further limiting the time during which they can be prosecuted. Already in 2006 there were six draft laws aimed at amending Decree No. 2,191, of which five were not passed. It is worth mentioning that two of them[62] attempted to have said decree interpreted by a law which

60. See in this regard, and by way of example, Judgement of the Fifth Chamber of the Court of Appeals of Santiago, Case of Miguel Angel Sandoval Rodríguez, Docket 11,821-2003, 5 January 2004, para. 76.

61. For more information about this case see: Aran, M. and Lopez Garrido, D. *International crime and international jurisdiction. The Pinochet Case [Crimen internacional y jurisdicción internacional. El caso Pinochet]*, Valencia, Tirant lo Blanch, 2000; Brody, R. and ratner, M. (eds.): *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, La Hague, Kluwer, 2000.

62. See Bulletin No. 654-07, submitted on 7 April 1992 by Senators Rolando Calderon Aránguiz, Jaime Gazmuri Mujica, Ricardo Núñez Muñoz and Hernan Vodanovic Schnake (file of annexes to the final written arguments of the State, Annex 10, pages 4269 to

would establish that it was not applicable to crimes against humanity, given that these were not covered by statutory limitations, nor were they susceptible to amnesty. Another bill[63] had the aim of regulating the application of the Decree and establishing that, in cases of persons arrested and disappeared, the judge would continue the investigations *"with the sole purpose of clarifying the location of the victim or their remains."* And finally a sixth bill, No. 82.25, was presented recently with the objective of declaring null and void Decree Law No. 2,191.[64]

In short, the actions of the Chilean civil and judicial authorities have violated the Vienna Convention on the Law of Treaties, international human rights treaties and the obligations deriving from the principles of *jus cogens*, which dictate that crimes against humanity are not covered by statutory limitations, and cannot be the subject of and amnesty or pardon, by their maintaining and inciting during the transition process the validity of the Amnesty Decree to favour those responsible for such unlawful acts. This clearly meant that Chile had international liabilities, as the IACtHR ruled in 2006 in the above mentioned case of *Almonacid Arellano*.

Already by the end of the first decade of the 21st century it is inconceivable that those who control the system of justice do not assume their responsibility and comply with the mandatory legal obligations laid down in international human rights law, which have been sufficiently reaffirmed both at national level, such as in Argentina, and internationally. Nor is it acceptable that between the almost total complete ineffectiveness and the disregard for the rights of victims by the state authorities responsible for providing justice, victims and/or

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4274); Bulletin No. 1718-07, submitted on 11 October 1995 by Senators Ruiz de Giorgio and Mariano Ruiz Esquide (file of annexes to the final written arguments of the State, Annex 11, pages 4276 to 4285).

63. See Bulletin No. 1657-07, submitted on 19 July 1995 by Senators Diez, Larraín, Otero and Pinera (file of annexes to the final written arguments of the State, Annex 14, pages 4379 to 4389).

64. See Bulletin No. 4162-07, submitted on 21 April 2006 by Senators Girardi, Letelier, Navarro and Ruiz-Esquide (Annex 9 final written arguments of the State, pages 4249 to 4267).

their next of kin are obliged to resort to the regional system of international human rights protection. This action or omission is in itself a human rights violation which deviates from the constitutional and international duty to ensure, to promote and to guarantee human rights and the fulfilment of the victims' right to truth, justice and reparation, essential to the building of a peace which is sustainable over time.

D. PERU AND THE AMNESTY LAWS NO. 26,479 AND 26,492

From 1980 onwards, Peru was the arena for an internal conflict which lasted for nearly a decade, resulting in multiple acts of violence by armed groups, including Sendero Luminoso and the Tupac Amaru Revolutionary Movement, the armed forces, the police, and paramilitary organizations such as the Grupo Colina.

Thus on 17 May 1980, one day before the presidential elections, the terrorist group Sendero Luminoso stormed the Peruvian town of Chuschi, where they stole and burned voting lists and ballot boxes which were to be used in that electoral contest. With this act, the terrorist group triggered an armed conflict and a wave of violence which gradually increased in intensity. Thus began a long period of political armed violence in Peru, which would leave thousands of victims of serious human rights violations, constituting crimes against humanity and breaches of international humanitarian law.

In 1984, another terrorist group came onto the scene, which also confronted the Peruvian government, the MRTA. But in contrast to Sendero Luminoso, this group was formed more like a classic leftist urban guerrilla group, and its main target were members of the Police, Armed Forces and the dominant groups, not the civilian population.

The extreme social inequality in Peru in 1985 – the moment in which Alan Garcia (1985-1990) took on the presidency of this country – is considered to be one of the main causes that made the internal armed conflict possible and which nourished it. But despite some measures taken by the government to minimise the social divide and to fight these insurgent movements, these efforts were in vain.

The combat groups made up of members of the armed forces and the police, at the same time as taking measures against subversion, committed serious human rights violations, such as torture during interrogations, cruel and inhumane mistreatment, among others. The state and the population drew further and further apart as a result of the abuses of power committed by the police and the military authorities.

Alberto Fujimori assumed the presidency of Peru (1990-2000) in the midst of an economic crisis caused by galloping inflation. However the counter-insurgency measures continued to be applied in contravention of the Constitution and with human rights violations on the part of the paramilitary extermination groups. Fujimori sought to institute norms which in his view would bring about the pacification of Peru, but he was stopped by Congress, which rejected his measures as unconstitutional. In view of this, on 5 April 1992 Fujimori carried out a self-coup to establish what was in his opinion a "Government of Emergency and National Reconstruction" on the basis of Decree Law No. 25,418.

The progressive defeats of the terrorist movements did not take long in arriving, thereby ensuring the popular approval of a new constitution in 1993 which strengthened the pacification of the country. In this way an authoritarian government was constituted whose policies made possible the abuses of power by the police and the military forces in the course of the internal struggle against subversion. Thus, as we see, with the pretext of defending the population, numerous human rights abuses were committed, such as arbitrary arrests, genocide, forced disappearances, torture, killings, abductions and extrajudicial executions, all of them under the auspices of the State.

Regarding the prosecution of this type of crimes, it should be underlined that one of the fundamental characteristics of international criminal law is that of combating impunity by ensuring the obligation to prosecute and punish those responsible for serious human rights violations, which in most cases are directly promoted by the States involved in these crimes through the implementation of measures to impede their penalisation.

Thus when the Peruvian internal conflict ended, amnesty law No. 26,479 was passed on 14 June 1995, with the intention of granting a general amnesty to military, police and civilian personnel in different cases. A week later, on 21 June, Law No. 26,492 was issued in order to interpret and determine the scope of the amnesty granted by Law N º 26,479. In this way the Peruvian government avoided the prosecution of those responsible for serious human rights violations. These legislative measures sought to install a model of impunity and significantly influenced the popularity of the Fujimori government.

However, in 1998 Peru decided to bring its domestic legislation concerning crimes against humanity into line with international law, by accepting their prosecution through their incorporation into the country's Penal Code, under Law No. 26,926, of 21 February 1998.

Although the amnesty laws were contrary to the Constitution,[65] they were sponsored and defended by the Peruvian state itself, thus making necessary the intervention of the international system of human rights protection, through the decisions of the IACtHR in the symbolic cases of the *Barrios Altos massacre* (Judgement of 14 March 2001) and *La Cantuta* (Judgement of 29 November 2006), which gave the decisive impulse to these laws being declared null and void – since they also contravened the provisions of the American Convention on Human Rights – thus initiating a series of judgments in this regard within the domestic jurisdiction of Peru.

So in response to the IACtHR ruling, the national courts recognised in several judgments the inadmissibility of the provisions of statutory limitations or of other obstacles imposed by domestic law which sought to avoid the investigation, prosecution and punishment of human rights violations, thus allowing victims and/or their next of kin access to the judicial system in order to resolve cases. It is worth underlining that thanks to this, it was recently possible for the

65. Judge Saquicuray expressed herself in this sense when, while investigating the massacre of *Barrios Altos*, she declared the amnesty laws inapplicable, because they were not supported by the Constitution and contravened the American Convention on Human Rights. However, this decision of the judge was contravened by Law No. 26492, entitled "Concerning the interpretation and scope of the amnesty granted by Law 26,479."

first time in history to convict a former President – Alberto Fujimori – for having committed crimes against humanity during his term of office.[66]

CONCLUSIONS

From the above we can conclude that the application of the judicial decisions of the IACtHR to domestic law represents a clear support for the system of human rights protection throughout the whole inter-American region, which not only fulfils its task of vindicating the rights of victims of gross human rights violations, but also gives a clear answer to those states –such as Uruguay, El Salvador and Spain among others– which, despite the advances achieved by international law, have been unable or unwilling, for different reasons to apply such criteria to their domestic judicial system.

The Inter-American Court and the Inter-American Commission on Human Rights have contributed, through their work of putting emphasis on the obligations under which State Parties find themselves when taking judicial decisions of any type, in the light of the general obligations enshrined in Articles 1.1 and 2 of the ACHR, to the objective that no one be deprived of judicial protection and of the exercise of the right to a simple and effective resource, in terms of Articles 8 and 25 of the Convention. For this reason the State Parties to the ACHR that enact laws whose aim is to prevent the investigation, prosecution and punishment of those responsible for serious human rights violations which constitute crimes against humanity, such as is the case of the amnesty laws, violate these provisions of the Convention. Amnesty laws violate the right to the protection of victims and contribute to the perpetuation of impunity, making it impossible to properly overcome a past of conflict and to meet the demands for truth and justice made by transitional justice.

66. See the Judgement of the Sala Penal Especial de la Corte Suprema de Justicia de la República [Special Criminal Chamber of the Supreme Court of the Republic], of 7 April 2009, Exp Nº A.V. 19 – 2001.

The judgments issued by the IACtHR in this area represent a major achievement in the difficult and vital task of reconciling case law and the doctrine of international law so as to allow these standards to be unfailingly applied to ordinary jurisdiction. This greatly increases the effectiveness of the fight against the existing models of impunity, and at the same time has a preventive effect as a deterrent which increases the probabilities that terrible acts, such as those carried out in Latin America over several decades, are not repeated.

Furthermore, the judgments issued by national courts have set an important precedent in terms of relating and applying international criminal jurisdiction to internal national jurisdictions, and are also an effective tool in the fight against impunity, since they have contributed to vindicating the right of access to justice for the victims of terrible crimes which harm the interests of the international community as a whole.

Unfortunately, despite all this background of the defence of rights and of breakthroughs in the fight against impunity for such acts, the putting into effect of these decisions will depend on the domestic and international will which exists to do so. Political interests may arise and end up prevailing over legal arguments. Both *realpolitik* and diplomacy have on repeated occasions done nothing but limit the principles and concepts which are basic to safeguarding humanity and maintaining peaceful international coexistence. We can not ignore the importance for the judicial bodies of their decisions receiving sufficient internal support and not being subjected to internal and/or international pressure, so as for them to be able to perform their duties properly and effectively. This dual support, at national and international level, is indispensable in creating a perception of a considerable risk of prosecution, on the part of individuals in general, if they engage in such conduct.

When the real and effective safeguard of the collective interests which are protected by international human rights law does not match these wishes or interests, we can see what can occur in a recent example from Spain, where the legislature, despite the judicial decisions coming from Constitutional Court, the norms of customary and con-

ventional international law – such as the Rome Statute of the ICC[67]– accepted by the Spanish government and the fact that this principle is applicable without restrictions in third party states[68] has decided to considerably restrict the principle of universal jurisdiction. Furthermore, they have done so without taking into account the fact that for the international community this is one of the fundamental mechanisms which enables justice to combat impunity in cases of crimes under international law, when the countries in which they occur are unable or unwilling to investigate and prosecute those responsible, and the ICC can not exercise its jurisdiction.

With the amendment of Article 23.4 of the Organic Law of the Judiciary, finally approved on 7 October 2009, this principle became subject to it being shown that there are victims of Spanish nationality, it being proven that the alleged perpetrators are in Spanish territory or the confirmation of a significant connection with Spain. These requirements undermine, among other things, the reason for the existence of this principle, which is the fight against impunity, and its conception, which follows from the specific nature of the crimes being prosecuted, some of which have already been identified as belonging to *jus cogens* and as referring to *erga omnes* rights. Additionally, the right to the effective judicial protection of victims and the right to

67. The Rome Statute of the ICC refers in its preamble to three fundamental principles. Firstly to the principle of *aut dedere aut judicare*, when it affirms that *"... the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"* (Para. 4). Secondly, to the principle of universal jurisdiction, when it states: *"Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes "* (Para. 6), and thirdly and finally to the principle of complementarity, when it states that *"...the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"* (Para. 10).

68. See, for example the German Constitutional Court Judgement of 12 December 2000, which upheld the conviction for the crime of genocide handed down by German courts to Serb citizens for crimes committed in Bosnia-Herzegovina against Bosnian victims. See also the Judgement of the Court of Cassation, Belgium, 12 February 2003, which explicitly recognises that universal jurisdiction is provided for in Belgian law. It is worth mentioning that the legal provisions which contain the principle of universal jurisdiction in Belgian, German, Italian, Danish and Swedish legislation, among others, do not include such limitations.

equality as a procedural guarantee, enshrined in the Spanish Constitution and in international treaty law, are seriously damaged.

This amendment does not correspond to the interests of the international community to fight against the impunity of acts which are prejudicial to human dignity. It constitutes an obstacle to the prosecution and punishment of crimes against humanity, among others, which are covered by rules and principles – such as the principle of universal jurisdiction – that are part of *jus cogens* and therefore are peremptory rules of general international law which can not be modified by treaties or by the internal laws of a state. It would therefore be highly recommendable and correct to declare said amendment as null and void, not only because it is unconstitutional but also because it undermines norms at a higher level.

Having seen in this article some "legal" obstacles that may appear or may be created to prevent the prosecution of crimes which are so serious as to threaten the entire international community, it is worth emphasizing that the recognition of the customary existence and the nature of crimes against humanity and of the rules governing their application has played a crucial role, particularly in Latin America in allowing the prosecution of crimes committed in the past, during dictatorial regimes or internal armed conflict and where, despite the introduction of measures of impunity it has been possible to make progress in the defence of the rights of victims to achieve justice, as the only guarantee that the crimes are not repeated and thus of social peace.

The recognition at international, inter-American and internal level of the specific characteristics of crimes against humanity and of the status of the norms and principles which govern their application, coupled with the political will to combat impunity for such acts, is what ultimately has helped to vindicate the rights of victims of crimes committed during periods of dictatorship or internal conflict in some South American countries, who have historically been deprived of their right of access to the mechanisms of justice.

The promotion of the implementation and enforcement of this peremptory rule of general international law will make it possible to re-

move all obstacles that have limited or which have tried to limit the prosecution of such acts by reason of place, time and personality criteria, allowing the victims and/or their next of kin to freely exercise their judicial actions, to know the truth, to punish those responsible and to obtain fair reparations. Only then will victims be able to overcome a past filled with memory, some individuals will repent and others will think twice before violating human dignity, and justice will have created the essential foundations for building a sustainable peace.

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08010 BARCELONA (SPAIN)
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