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# ***91** LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS EN MATERIA DE REPARACIONES Y LOS CRITERIOS DEL PROYECTO DE ARTÍCULOS SOBRE RESPONSABILIDAD DEL ESTADO POR HECHOS INTERNACIONALMENTE ILÍCITOS

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***92** INTRODUCCIÓN

La reparación constituye, tal vez, el aspecto que ha alcanzado el mayor grado de desarrollo dentro del Derecho Internacional de los Derechos Humanos. La reparación tiene por finalidad colocar a la víctima de una violación en una posición más o menos similar a la que se encontraba antes de la ocurrencia del hecho ilícito internacional. En este sentido, así como la reparación es la consecuencia directa de la responsabilidad, también puede existir de varias formas y maneras.

Para que haya lugar a la reparación bajo el Derecho Internacional de los Derechos Humanos se requiere que previamente se establezca la responsabilidad internacional del Estado de que se trate. Tanto la jurisprudencia como la doctrina han identificado los elementos constitutivos de la responsabilidad internacional del Estado. Una vez establecida la responsabilidad, surge una nueva vinculación u obligación jurídica de reparar, la cual, a su vez, también puede existir de varias formas y maneras.

En el ámbito de la Organización de las Naciones Unidas ("O.N.U."), la Comisión de Derecho Internacional produjo en **2001** el "Proyecto de Artículos sobre Responsabilidad Internacional del Estado por Hechos Internacionalmente Ilícitos" ("Proyecto" o "Proyecto de Artículos"). [FN1] El estudio de este tema tomó a la ***93** Comisión de Derecho Internacional más de 45 años. [FN2] Aun cuando su discusión no ha concluido todavía, una vez finalizado, el Proyecto está llamado a constituir la codificación del derecho de la responsabilidad internacional. [FN3] El Proyecto de Artículos no tiene, todavía, un efecto vinculante entre los miembros de la comunidad internacional, aunque poco a poco va constituyendo un importante punto de referencia en la materia.

En el Sistema Interamericano, el órgano facultado para determinar la responsabilidad internacional del Estado es la Corte Interamericana de Derechos Humanos ("Corte Interamericana," "Corte," o "Corte I.D.H."). Establecida la responsabilidad del Estado por la Corte Interamericana, esta hace aplicación de la provisión legal que la faculta para ordenar reparaciones. Evidentemente, la decisión de la Corte, que establece la responsabilidad del Estado, pone a cargo de dicho Estado una nueva obligación: la obligación de reparar el daño causado por su ilícito. [FN4]

El presente artículo tiene por finalidad presentar, comparar y reseñar los criterios jurisprudenciales de la Corte Interamericana vis-á-vis el Proyecto de Artículos. A lo largo de este artículo, se verá, en primer lugar, el marco legal de las reparaciones en el Sistema Interamericano de Promoción y Protección de Derechos Humanos. A continuación, se mostrarán los medios de reparación previstos por el Proyecto de Artículos como consecuencia de la responsabilidad internacional del Estado. Por otro lado, se pasará revista a los ***94** principales precedentes sentados por la Corte Interamericana en materia de reparaciones, haciendo una equivalencia con el Proyecto de Artículos. Para cada forma de reparación, se exhibirá y hará comparación entre los criterios de la Corte, si ha habido variación. Al final se plantearan algunas conclusiones puntuales.

## I. MARCO LEGAL DE LAS REPARACIONES EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS

En el Sistema Interamericano de Promoción y Protección de Derechos Humanos ("Sistema Interamericano" o "SIDH") las reparaciones tienen un marco esencialmente convencional. El SIDH está conformado por dos órganos o cuerpos de supervisión. En

primer lugar está la Comisión Interamericana de Derechos Humanos ("Comisión Interamericana," "Comisión," o "Comisión I.D.H.") y en segundo lugar la Corte Interamericana. [FN5] El principal instrumento convencional dentro del Sistema Interamericano lo es la Convención Americana sobre Derechos Humanos ("Convención Americana," "Convención," o "CADH").

En virtud del Artículo 63(1) de la Convención Americana, "[c]uando decida que hubo violación de un derecho o libertad protegidos en esta Convención, la Corte dispondrá que se garantice al lesionado en el goce de su derecho o libertad conculcados. Dispondrá asimismo, si ello fuera procedente, que se reparen las consecuencias de la medida o situación que ha configurado la vulneración de esos derechos y el pago de una justa indemnización a la parte lesionada." [FN6] Ciertamente, esta provisión legal tiene un carácter mucho más amplio que su contraparte europea, el Artículo 41 del Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales. En virtud de esta última disposición, la Corte Europea de Derechos Humanos debe remitirse primero al derecho interno del Estado, y luego de ello ***95** puede, si lo considera procedente, ordenar "una satisfacción equitativa." [FN7]

Como puede verse, la Corte Interamericana tiene un mayor margen para otorgar reparaciones que la Corte Europea de Derechos Humanos. [FN8] Evidentemente, esto tiene que ver, no sólo con el marco convencional en virtud del cual se ordenan las reparaciones, sino también el tipo de casos con los que tiene que lidiar cada uno de estos tribunales. Solamente un tribunal como la Corte Interamericana, que en pleno Siglo XXI debe lidiar con casos de masacres, tortura, ejecuciones extrajudiciales, y desapariciones forzadas, se ve en la necesidad de concluir que "dictar una sentencia en la cual se determine la verdad de los hechos y todos los elementos del fondo del asunto, así como las correspondientes consecuencias, constituye una forma de reparación para las presuntas víctimas y sus familiares y, a la vez, una manera de contribuir a evitar que se repitan hechos similares." [FN9]

La reparación es, en palabras de la Corte Permanente de Justicia Internacional ("CPJI"), un principio de derecho internacional, y hasta una concepción general del derecho, en virtud de la cual la violación de un compromiso entraña la obligación de reparar. [FN10] "Al producirse un hecho ilícito, imputable a un Estado surge de inmediato la responsabilidad internacional de éste por la violación de una norma internacional, con el consecuente deber de reparación y de hacer ***96** cesar las consecuencias de la violación." [FN11] La reparación, además de imponerse en el Sistema Interamericano como norma convencional, es también un principio general y además una de las normas consuetudinarias más arraigadas. [FN12] Pero en una visión más humana, el juez Cançado Trindade consideró que "las reparaciones por violaciones de los derechos humanos proporcionan a los victimados tan sólo los medios para atenuar su sufrimiento, tornándolo menos insoportable, quizás soportable." [FN13]

Si bien no existe en el derecho internacional la vinculación del precedente jurisprudencial, o stare decisis, la Corte Interamericana ha producido una verdadera doctrina jurisprudencial en materia de reparaciones. El criterio de la Corte se ha expandido, a través de los años y de diferentes composiciones de dicho tribunal, a niveles muy elevados y detallados. Queda por ver si la Corte dará pasos adicionales.

## II. LAS REPARACIONES EN EL PROYECTO DE ARTÍCULOS

El Proyecto de Artículos es, sin lugar a dudas, el trabajo más controversial y que ha permanecido más tiempo en la agenda de la Comisión de Derecho Internacional. [FN14] Este importante documento está llamado a constituirse, si los Estados así lo quieren, en un texto codificado sobre el derecho de la responsabilidad internacional del Estado. Esto ha sido reconocido incluso por la Asamblea General de la O.N.U., la cual, por un lado "[a]cog[ió] con beneplácito" y "[e]xpres[ó] su agradecimiento a la Comisión de Derecho Internacional por su contribución continua a la codificación y el ***97** desarrollo progresivo del derecho internacional" [FN15] y por otro lado llamó la atención de los gobiernos sobre el Proyecto de Artículos "sin perjuicio de la cuestión de su aprobación o de la adopción de otro tipo de medida en el futuro, según corresponda[.]" [FN16]

El Proyecto de Artículos destina su Segunda Parte al contenido de la responsabilidad internacional del Estado. [FN17] Con este fin, en el primer capítulo se consagran los principios generales, para en los capítulos siguientes referirse concretamente a la reparación del daño y por último al caso en que la violación ocurre al violarse una norma de jus cogens, respectivamente. [FN18]

Cuando se ha establecido y declarado la responsabilidad internacional del Estado, de conformidad con el Proyecto de Artículos, las consecuencias jurídicas quedan establecidas por el mismo instrumento. [FN19] Para que exista responsabilidad internacional se requiere, en primer lugar, la existencia de una norma de carácter vinculante. Esta norma debe obligar al Estado de que se trate con anterioridad a la ocurrencia del hecho que la desconozca. Cabe destacar, además, que lo que realmente importa es el contenido de la norma, y no su forma. Es decir, no importa que se trate de una norma convencional, consuetudinaria, jurisprudencial, o de otro carácter. En este sentido, la existencia de la norma y la vinculación con el Estado deben ser innegables.

Adicionalmente, para que haya responsabilidad internacional del Estado debe haber un hecho ilícito. Este hecho puede ser una acción, como también puede ser una omisión. Pero tal vez el más importante de los elementos constitutivos de la responsabilidad internacional es ***98** la atribución o imputabilidad del hecho ilícito al Estado. Según estableció la Corte, "[e]s un principio básico del derecho de la responsabilidad internacional del Estado, recogido por el Derecho Internacional de los Derechos Humanos, que tal responsabilidad puede generarse por actos u omisiones de cualquier poder, órgano o agente estatal, independientemente de su jerarquía, que violen los derechos internacionalmente consagrados." [FN20] Ciertamente, "un hecho ilícito violatorio de los derechos humanos que inicialmente no resulte imputable directamente a un Estado, por ejemplo, por ser obra de un particular o por no haberse identificado al autor de la transgresión, puede acarrear la responsabilidad internacional del Estado, no por ese hecho en sí mismo, si no por falta de la debida diligencia para prevenir la violación o para tratarla en los términos requeridos por la Convención." [FN21]

Como se ha visto, cuando se declara la responsabilidad internacional de un Estado, se generan también dos obligaciones sustanciales. La primera de estas obligaciones es la de cesación y no repetición del ilícito. [FN22] En este sentido, el Estado debe detener por completo el ilícito, si es que continúa ocurriendo, y no repetirlo. Por otro lado, el Estado queda obligado a reparar íntegramente los daños y perjuicios causados. Como lo ha notado

la Corte Interamericana, la reparación "es el término genérico que comprende las diferentes formas como un Estado puede hacer frente a la responsabilidad internacional en que ha incurrido." [FN23] Consecuentemente, la O.N.U. ha proclamado que "[l]a reparación íntegra del perjuicio causado por ***99** el hecho internacionalmente ilícito adoptará la forma de restitución, de indemnización y de satisfacción, ya sea de manera única o combinada." [FN24] Cabe destacar que "[l]a obligación de reparar, regulada por el Derecho internacional, no puede ser modificada o incumplida por el Estado obligado invocando disposiciones de su derecho interno." [FN25] A continuación se veran las distintas formas de reparación, su contenido, y alcance.

## III. INTERACCIÓN DE LOS CRITERIOS DE LA CORTE Y EL PROYECTO DE ARTÍCULOS SOBRE REPARACIONES

### A. La Restitución o Restauración del Bien Jurídico Afectado

La figura de la restitución o restauración tiene su origen en la restitutio in integrum del antiguo derecho romano. Hoy en día se entiende como el restablecimiento del individuo a la misma situación en que se encontraba antes del acto ilícito. [FN26] Es preciso señalar que aun cuando la restitución o rehabilitación es el principio en el derecho internacional, este es posible únicamente en el caso que sea material y físicamente posible. En caso contrario, deben buscarse otras formas de reparación. [FN27]

Sin embargo, en los Comentarios al Proyecto de Artículos se abre la posibilidad de que la restitutio in integrum sea más amplia que la ***100** restitución o restauración propiamente. [FN28] En virtud de la concepción más amplia, se implica también la adopción de medidas que sean conducentes a establecer la situación que, probablemente, habría existido si la violación no hubiese sido cometida. [FN29]

La diferencia existiría en que, en el caso de la restitución o restauración se toman en consideración la situación objetiva existente al momento de la comisión del hecho. Por otro lado, en el caso de la restitutio in integrum, se utiliza un parámetro hipotético para determinar el posible desenvolvimiento de la víctima, de no haber ocurrido el ilícito. Esto ha sido planteado por la Corte Interamericana en repetidas ocasiones. [FN30]

El Proyecto de Artículos parece inclinarse por la fórmula de la restitución, pues se inclina por "restablecer la situación que existía antes de la comisión del hecho ilícito." [FN31] La restitución, entonces, debe ser efectuada siempre que no sea materialmente imposible o cuando, según el Proyecto de Artículos, "[n]o entrañe una carga totalmente desproporcionada con relación al beneficio que derivaría de la restitución en vez de la indemnización." [FN32] En efecto, la restitución es considerada como el medio más deseable de reparación, aun cuando no sea el más comúnmente empleado por la Corte Interamericana.

En principio, según el criterio de la Corte Interamericana, la más efectiva forma de restitución viene en medidas de revisión judicial. En Loayza Tamayo v. Perú, la Corte ordenó que la víctima fuese ***101** liberada [FN33] al tiempo de establecer como nulo e inválido el proceso penal al que había sido sometida la víctima. [FN34] Por otro lado, en Castillo Petruzzi v. Perú la Corte añadió que la legitimidad de una sentencia descansa en la legitimidad del proceso en su totalidad y que, por lo tanto, si el proceso tiene serios

defectos, entonces la sentencia debe ser anulada. [FN35]

Por otro lado, la restitución puede tomar la forma de rehabilitación legal. Esto comprende especialmente medidas para eliminar registros criminales indebidamente creados en virtud de procesos defectuosos e irregulares. En Herrera Ulloa v. Costa Rica, la Corte, al tiempo de considerar nulos los procedimientos contra la víctima, ordenó a Costa Rica que ninguno de ellos tuviese efecto legal alguno. [FN36] Eso incluía su inscripción en los registros criminales, judiciales, y penitenciarios. [FN37]

En otros casos, la Corte se refirió más bien a la afectación del buen nombre o el honor de la víctima como consecuencia de los procesos llevados a cabo en el ámbito interno. En este sentido, en Garrido y Baigorria v. Argentina, se determinó que la restauración del buen nombre u honor afectados era un medio de reparación. [FN38] Sin embargo, en Cesti Hurtado v. Perú, donde la víctima solicitaba que la Corte ordenara publicar avisos en los periódicos indicando que no había sido encontrada culpable de las imputaciones debido a la naturaleza irregular de los procesos en su contra, la Corte no consideró necesario ordenar tales medidas. [FN39] Ciertamente, se trata de una cuestión apreciada por la Corte en cada caso particular.

***102** Resulta interesante también el que la Corte, dentro del ámbito de la restitución, ordene aspectos que caen dentro del ámbito laboral de la víctima antes de la comisión del hecho ilícito. En Loayza Tamayo, por ejemplo, la víctima se desempeñaba profesora universitaria al momento de ocurrir las violaciones. [FN40] La Corte Interamericana ordenó al Perú en su sentencia que la víctima fuera reincorporada a sus actividades docentes y su reinscripción en los registros de seguridad social y planes de retiro con efectos retroactivos. [FN41] Además, considerando que los efectos de las violaciones contra la víctima dificultarían su reinserción en sus ocupaciones previas, la Corte ordenó la creación de un mecanismo de desempleo por incapacidad. [FN42] En un caso posterior contra Panamá, la Corte ordenó al Estado que volviera a colocar a las víctimas en sus puestos de trabajo, después de considerar que habían sido despedidos a través de una ley cuyos efectos eran retroactivos. [FN43] Y en el caso de que resultare materialmente imposible la reinstalación de las víctimas, la Corte ordenó que se ofreciese oportunidades alternativas de empleo, de conformidad con las condiciones, salarios, y otros pagos que tenían al momento de su despido. [FN44] Aplicando un criterio similar, en De la Cruz Flores v. Perú la Corte ordenó al Perú que reincorporara a la víctima a su actividad dentro de la profesión médica, y que le otorgase la posibilidad de capacitarse y actualizarse profesionalmente mediante el otorgamiento de una beca. [FN45]

Resulta interesante el criterio de la Corte Interamericana en Durand y Ugarte v. Perú, donde el Estado se comprometió a proveer a la víctima y su cónyuge servicios de salud gratuitamente por el resto de sus vidas. [FN46] Aun cuando en este caso inicialmente fue el ***103** propio Estado el que ofreció este rubro, dicho compromiso podría resultar en lo que el Proyecto de Artículos denomina "una carga totalmente desproporcionada con relación al beneficio que derivaría de la restitución en vez de la indemnización." [FN47] El Proyecto de Artículos incluye entonces un test de balance y una mera relación de costos y beneficios, lo cual resulta inconcebible en la jurisprudencia de la Corte Interamericana, que conoce día tras día de "la cuestión recurrente de la vulnerabilidad e inseguridad propias de la condición humana." [FN48] Aquí radica principalmente la distinción entre el Derecho Internacional Público General y el Derecho Internacional de los Derechos Humanos.

B. La Compensación o Indemnización Compensatoria

Cuando la restitución del bien jurídico que se ha visto afectado por el ilícito internacional es prácticamente imposible, se hace necesario aplicar o determinar otras formas de reparación. En efecto, "[o]bligar al autor de un hecho ilícito a borrar todas las consecuencias que su acto causó es enteramente imposible porque su acción tuvo efectos que se multiplicaron de modo inconmensurable." [FN49] En el caso de la compensación, su base se encuentra en la misma Convención Americana, que faculta a la Corte a fijar "una justa indemnización a la parte lesionada." [FN50] Consecuentemente, la compensación pecuniaria es la forma de reparación mas comúnmente otorgada en casos de violaciones de derechos humanos. [FN51]

En lo que respecta al Proyecto de Artículos, se establece que "[e]l Estado responsable de un hecho internacionalmente ilícito está obligado a indemnizar el daño causado por ese hecho en la medida en que dicho daño no sea reparado por la restitución. La indemnización cubrirá todo daño susceptible de evaluación ***104** financiera, incluido el lucro cesante en la medida en que éste sea comprobado." [FN52] Ciertamente, "[e]l artículo 36 versa sobre la indemnización del daño causado por un hecho internacionalmente ilícito, en la medida en que ese daño no haya sido reparado mediante restitución." [FN53]

A través de su jurisprudencia constante, la Corte Interamericana ha fijado límites a la compensación, aunque esto siempre viene determinado por cada caso en particular. Por ejemplo, en Garrido y Baigorria, los familiares solicitaron que la Corte dictase una "indemnización ejemplar," más parecida a punitive damages que a compensación propiamente. [FN54] Ante este pedimento, la Corte, respondió que "[l]a reparación, como la palabra lo indica, está dada por las medidas que tienden a hacer desaparecer los efectos de la violación cometida. Su calidad y su monto dependen del daño ocasionado tanto en el plano material como moral. La reparación no puede implicar ni un enriquecimiento ni un empobrecimiento para la víctima o sus sucesores." [FN55] Sin embargo, cabe destacar que desde sus primeras sentencias, la Corte Interamericana ha ordenado el pago de indemnización, lo que continúa presentemente en cada una de sus decisiones. [FN56]

La Corte Interamericana determina el monto de la indemnización compensatoria generalmente sobre aspectos y rubros claramente establecidos. Sin embargo, ni en Gangaram Panday v. Suriname, [FN57] ni en Genie Lacayo v. Nicaragua, [FN58] la Corte aportó consideraciones especificas sobre los aspectos ponderados para determinar el monto ***105** concedido por indemnización compensatoria. Cabe destacar que en las demás decisiones dictadas por la Corte Interamericana, este tribunal analiza meticulosamente y exhaustivamente todos los rubros y aspectos sobre los cuales determina los montos puestos a cargo de los Estados en cuestión por concepto de indemnización. Habitualmente, estos rubros se clasifican en daño físico, daño material y daño inmaterial o moral. Vale decir que aparentemente la Corte ha ido combinando el concepto de daño físico propiamente, con el de daño material.

1. El Daño Físico

El daño físico se refiere al conjunto de afectaciones físicas y daños severos, e irreversibles en muchos casos, que sufren las víctimas de violaciones de derechos humanos.

En Loayza Tamayo, por ejemplo, la Corte escuchó testimonio del tormento físico a que fue sometida la víctima, mientras se encontraba bajo el control del Estado. Este tormento, según lo presentado a la Corte, incluyó golpes, abuso sexual, violación, y otras manifestaciones de tortura que llevaron a la víctima a una menopausia prematura. [FN59] Cabe destacar que la Corte Interamericana, en este caso, no consideró como un hecho probado la alegada violación sexual a que habría sido sometida la víctima. [FN60]

Por su parte, en Suárez Rosero v. Ecuador, la víctima sufrió ruptura de un disco y la mandíbula como resultado de haber sido golpeado por agentes policiales en repetidas ocasiones [FN61] y desarrolló neumonía, alergias permanentes, y una úlcera como resultado de las pésimas condiciones de su detención. [FN62] En cambio en Tibi v. Ecuador, caso en donde al igual que Suárez Rosero el Estado responsable es el Ecuador, pese a considerar como probados los ***106** alegatos sobre tortura [FN63] y las lesiones permanentes consecuencias de aquella, [FN64] la Corte no otorgó reparaciones por concepto de daño físico. En igual sentido la Corte decidió Gutiérrez Soler v. Colombia. [FN65] Sin embargo, si las lesiones impiden que la víctima pueda trabajar, entonces la Corte lo considera como daño material. [FN66]

2. El Daño Material

Se entiende, de manera general, que el daño material incluye "la pérdida de ingresos, gastos médicos, los gastos incurridos en la búsqueda de la víctima ante el encubrimiento de las autoridades o la falta de investigación, y otros gastos de carácter pecuniario que son causados por la violación." [FN67] Según la Corte, "[e]l daño material supone la pérdida o detrimento de los ingresos de la víctima, los gastos efectuados con motivo de los hechos y las consecuencias de carácter pecuniario que tengan un nexo causal con los hechos[.]" [FN68] Siempre que sea posible aportar la prueba, [FN69] la Corte la tendrá en cuenta, conjuntamente con la jurisprudencia del propio Tribunal y los ***107** argumentos de las partes para resolver las pretensiones sobre el daño material. [FN70]

El daño material comprende, por un lado el lucro cesante o lucro cessans, el cual se refiere a la pérdida de ingresos de la víctima, [FN71] así como también el daño emergente o damnum emergens, que enmarca los pagos y gastos en que han incurrido la víctima o sus familiares durante la investigación de la violación [FN72] y el destino final de víctimas desaparecidas o ejecutadas. [FN73]

En cuanto al lucro cesante, la Corte ha mantenido que la compensación debe ser acordada por el daño sufrido por la víctima o sus familiares por el tiempo en el que se han visto impedidos de trabajar debido a la violación. [FN74] Sobre este particular, la Corte ha tomado como puntos de referencia para determinar el monto, la expectativa de vida en el país al momento de los hechos, [FN75] las circunstancias del caso, [FN76] el salario mínimo legal, [FN77] y la pérdida de una chance cierta. [FN78]

El lucro cesante se refiere mayormente a la interrupción de ingresos, salarios, honorarios, y retribuciones. En este sentido, refleja ***108** el perjuicio sobre condiciones concretas de las que realmente disfrutaba la víctima, así como la probabilidad de que tales condiciones continuasen y progresasen [FN79] si la violación no hubiera tenido lugar. El lucro cesante tiene referente automático en el nivel de educación de la víctima, sus calificaciones profesionales, [FN80] salarios y beneficios laborales. En un criterio bastante

favorable para las víctimas y sus familiares, la Corte considera que un "adulto que percibe[] ingresos y tiene familia, destina[] la mayor parte de dichos ingresos a atender las necesidades . . . de ésta." [FN81]

Respecto del daño emergente, la Corte ha establecido que este debe englobar gastos que incurrieron las víctimas o sus familiares con el fin de dar con la verdad. La Corte es de criterio que dentro de estos gastos se incluyen visitas a instituciones, gastos por concepto de transporte, hospedaje, y por la búsqueda de la víctima. [FN82] En caso de que se esté ante un caso de ejecución extrajudicial o desaparición forzada de personas, se podrán incluir ingresos dejados de percibir por alguno de los familiares durante la búsqueda a nivel interno o por asistir a las audiencias ante sede internacional. Igualmente, se incluyen gastos por tratamientos médicos recibidos por la víctima o por sus familiares por los diversos padecimientos en su salud como resultado de los hechos del caso, [FN83] gastos por el desplazamiento de familiares a otras comunidades como consecuencia del hostigamiento que sufrieron por los hechos del caso, y gastos por sepultura. [FN84] Es decir, la Corte ha establecido que debe existir un nexo causal entre los daños y los gastos. [FN85]

***109** En Castillo Páez v. Perú, por ejemplo, los familiares de la víctima argumentaron ante la Corte que las violaciones desembocaron en una serie de efectos dañinos en el patrimonio familiar, como la bancarrota del negocio del padre y la venta de la residencia familiar a un precio reducido para poder abandonar el país. [FN86] La Corte consideró que existía un vínculo de causalidad entre la violación y el daño patrimonial, y ordenó el pago de una suma global (establecida con base en la equidad) como indemnización de ese daño. [FN87]

3. El Daño Inmaterial o Moral

La Corte Interamericana entiende que el daño moral o inmaterial "puede comprender tanto los sufrimientos y las aflicciones causados a las víctimas directas y a sus allegados, y el menoscabo de valores muy significativos para las personas, como las alteraciones, de carácter no pecuniario, en las condiciones de existencia de la víctima o su familia." [FN88] En primer lugar, la Corte ha asociado el daño moral con el padecimiento de miedo, sufrimiento, ansiedad, [FN89] humillación, degradación, y la inculcación de sentimientos de inferioridad, [FN90] inseguridad, frustración, e impotencia. [FN91]

En Mack Chang v. Guatemala, por ejemplo, la Corte ponderó las graves circunstancias del caso, así como el agudo sufrimiento de la víctima y sus familiares. [FN92] La Corte encendió además que "resulta evidente que [la víctima] experimentó dolores corporales y sufrimiento antes de su muerte, lo que se vio agravado por el ***110** ambiente de hostigamiento que vivía en esa época." [FN93] Igualmente, en Hermanas Serrano Cruz v. El Salvador, la Corte Interamericana consideró que "es propio de la naturaleza humana que toda persona experimente dolor ante el desconocimiento de lo sucedido a un hijo o hermano, máxime cuando se ve agravado por la impotencia ante la falta de las autoridades estatales de emprender una investigación diligente sobre lo sucedido." [FN94]

Por otro lado, el daño moral o inmaterial también ha sido coligado con la obstaculización de valores culturales que sean particularmente característicos para la víctima o sus condiciones de existencia [FN95] y ha sido visto como equivalente con la violación de la integridad personal. [FN96] Cabe destacar, en este sentido, que en Masacre

de Plan de Sánchez v. Guatemala, la Corte consideró acreditada la pérdida de tradiciones y valores culturales, derivada de la muerte de los transmisores orales de ellas [FN97] y calificó la existencia de daño moral también a través de estos hechos.

Finalmente, debe destacarse que la Corte usualmente considera que la sentencia per se constituye una forma de reparación del daño moral o inmaterial. [FN98] Sin embargo, en casos graves, en donde ha habido un considerable daño y afectaciones a la existencia de las víctimas o sus familiares, la Corte ha considerado procedente ***111** "ordenar el pago de una compensación por concepto de daño inmaterial, conforme a la equidad." [FN99]

C. Las Medidas de Satisfacción

La satisfacción puede referirse a medidas que proveen reparación a la víctima de forma simbólica o representativa, pero que también tienen un impacto en la comunidad y el entorno social a lo interno del Estado, y repercusión pública. [FN100] El tema de la satisfacción es bastante distinto en el Proyecto de Artículos y en la jurisprudencia de la Corte Interamericana. Básicamente, según el Proyecto de Artículos, la satisfacción tiene un carácter subsidiario vis-á-vis la reparación. En cambio, para la Corte, más bien se trata de medidas que pueden coexistir.

Para el Proyecto de Artículos, "[e]l Estado responsable de un hecho internacionalmente ilícito está obligado a dar satisfacción por el perjuicio causado por ese hecho en la medida en que ese perjuicio no pueda ser reparado mediante restitución o indemnización. La satisfacción puede consistir en un reconocimiento de la violación, una expresión de pesar, una disculpa formal o cualquier otra modalidad adecuada. La satisfacción no será desproporcionada con relación al perjuicio y no podrá adoptar una forma humillante para el Estado responsable." [FN101] En las palabras del primer comentario al artículo, "[e]l carácter bastante excepcional del recurso a la satisfacción y su relación con el principio de la reparación íntegra se ponen de relieve en la frase 'en la medida en que ese perjuicio no pueda ser reparado mediante restitución o indemnización.' Sólo en los casos en que esas dos formas no hayan proporcionado la reparación íntegra puede ser necesaria la satisfacción." [FN102]

La Corte Interamericana concuerda con el Proyecto de Artículos en el hecho de que la satisfacción comprende medidas de reparación ***112** que no son pecuniarias y que son más bien de tipo simbólico, [FN103] de alcance o repercusión pública, [FN104] y buscan que se investiguen los hechos y se sancionen los responsables, [FN105] el reconocimiento de la dignidad de las víctimas o transmitir un mensaje de reprobación oficial de las violaciones de los derechos humanos de que se trata, [FN106] brindar la oportunidad de obtener una decisión conforme a derecho, [FN107] así como evitar que se repitan violaciones como las del caso. [FN108] Cabe destacar, sin embargo, que en el ámbito de las relaciones interestatales, que se rigen más bien por el Proyecto de Artículos, normalmente se trata de perjuicios no materiales, lo cual no es el caso de los asuntos sometidos a la consideración de la Corte Interamericana.

Las distintas formas en que se lleva a cabo la satisfacción en el SIDH no son rígidas, y dependen de las circunstancias propias de cada caso en concreto. En la práctica de la Corte, las medidas de satisfacción que han sido propuestas y ordenadas son susceptibles de ser enmarcadas bajo cuatro categorías: determinación y reconocimiento de responsabilidad,

disculpa, publicidad, y conmemoración.

1. El Reconocimiento y la Determinación de Responsabilidad del Estado

La Corte Interamericana se ha pronunciado en repetidas ocasiones en el sentido de que su sentencia sobre el fondo constituye, por sí ***113** sola, una medida significativa de satisfacción por los daños morales sufridos. [FN109] A través de la jurisprudencia de la Corte, pueden identificarse dos situaciones distintas.

En primer lugar, puede tratarse de un reconocimiento de responsabilidad por parte del Estado. De conformidad con el Reglamento de la Corte, "[s]i el demandado comunicare a la Corte su allanamiento a las pretensiones de la parte demandante y a las de los representantes de las presuntas víctimas, sus familiares o representantes, la Corte, oído el parecer de las partes en el caso, resolverá sobre la procedencia del allanamiento y sus efectos jurídicos. En este supuesto, la Corte procederá a determinar, cuando fuere el caso, las reparaciones y costas correspondientes." [FN110] En la jurisprudencia de la Corte, el Estado se ha allanado en varios casos. [FN111]

Cabe destacar que aun en presencia de un allanamiento por parte del Estado, la Corte puede ordenar, debido a las circunstancias particulares de tal caso, que ello se haga mediante un acto público. Esto ha ocurrido, entre otros casos, en Masacre de Plan de Sánchez, [FN112] Molina Theissen v. Guatemala, [FN113] Carpio Nicolle v. Guatemala. [FN114]

***114** En segundo lugar, puede suceder que el Estado no reconozca su responsabilidad internacional a través del procedimiento ante la Corte Interamericana. Sin embargo, si la Corte establece que el Estado ha incurrido responsabilidad, dicha decisión debe ser cumplida por el Estado [FN115] y, en virtud de la Convención Americana, esta decisión es definitiva e inapelable. [FN116] En este caso, se trata de que el Estado cumpla inmediatamente con medidas de cesación del hecho ilícito y, adicionalmente, que el Estado manifieste voluntad de alcanzar un acuerdo sobre reparaciones, o que durante el procedimiento de reparaciones actúe con la deferencia propia de su condición de responsable frente a las víctimas.

La Corte Interamericana ha requerido en varios casos la realización de actos públicos de reconocimiento de responsabilidad, luego de que por sentencia se haya establecido alguna violación a la Convención Americana. En este sentido, se puede citar Bámaca Velásquez v. Guatemala, [FN117] Sánchez v. Honduras, [FN118] 19 Comerciantes v. Colombia, [FN119] Gómez Paquiyauri v. Perú, [FN120] Hermanas Serrano Cruz, [FN121] Huilca Tecse v. Perú, [FN122] Moiwana v. Suriname, [FN123]***115** Comunidad Indígena Yakye Axa v. Paraguay, [FN124] y Yean y Bosico v. República Dominicana. [FN125] Un precedente interesante es Tibi, donde la Corte, además de ordenar que el reconocimiento fuese hecho por escrito, requirió del Estado que también lo hiciera a nivel internacional y mediante un texto traducido. [FN126]

2. La Disculpa Pública

En lo que respecta a la disculpa pública, la jurisprudencia de la Corte Interamericana ha ido variando a través del tiempo. En un primer momento, la Corte no incluía este aspecto

en sus decisiones, pese a que le era solicitado por los peticionarios. [FN127] Inclusive, en ***116** Suárez Rosero, los peticionarios alegaron y presentaron prueba de que dicha disculpa era necesaria para la recuperación de la víctima. [FN128]

Con sus decisiones más recientes, la Corte ha variado su postura jurisprudencial anterior. En Yean y Bosico, por ejemplo, la Corte ha ordenado que el Estado manifieste públicamente sus disculpas a las víctimas y a sus familiares. [FN129] En igual sentido se ha pronunciado la Corte en Bulacio, [FN130] Goiburú v. Paraguay, [FN131] y Vargas Areco v. Paraguay. [FN132] En Caso del Penal Miguel Castro Castro la Corte se refirió a un "desagravio." [FN133]

Por otro lado, la práctica reciente de los Estados ha incluido la realización espontánea de expresiones de disculpa pública. Esto ha ocurrido, particularmente cuando existe un reconocimiento o acquiesencia estatales de responsabilidad expresados en audiencia pública ante la Corte Interamericana. En este sentido, ha sido el caso en Masacre de Mapiripán [FN134] y Moiwana. [FN135]

***117** 3. La Publicidad de la Decisión de la Corte

En el estado actual del criterio jurisprudencial de la Corte Interamericana, la publicación de la sentencia o las partes pertinentes de la misma constituyen una medida de satisfacción. Sin embargo, el criterio jurisprudencial anterior a Cantoral Benavides [FN136] no contenía este importante aspecto. Ciertamente, al igual que con la disculpa pública, la Corte ha avanzado significativamente en su función jurisdiccional con la inclusión de la publicación de la sentencia en el paquete de reparaciones. Este es, sin duda, un punto muy importante en el caso de violaciones a los derechos reconocidos y protegidos por la Convención Americana, debido a que las víctimas necesitan que se de publicidad a los hechos considerados como probados por la Corte que tienen que ver mayormente con la falta de investigación estatal.

La Corte Interamericana ha ordenado también la publicación de la sentencia o las partes pertinentes de la misma en casos tales como Durand y Ugarte, [FN137] Bámaca Velásquez v. Guatemala, [FN138] El Caracazo v. Venezuela, [FN139] Instituto de Reeducación del Menor v. Paraguray [FN140] y Acosta Calderón v. Ecuador [FN141] entre otros. En Masacre de Plan de Sánchez, las medidas de difusión ordenadas por la Corte tienen la modalidad de haberse ordenado tanto en español como en idioma maya achí. [FN142] En igual sentido, en Yatama v. ***118** Nicaragua se ordenó la difusión en cinco idiomas: español, miskito, sumo, rama, e inglés. [FN143] También se ha ordenado la publicación de la sentencia en el boletín de las fuerzas armadas [FN144] y, en otro caso, por medios electrónicos de difusión. [FN145]

Sin embargo, debido a las características especiales del caso, la Corte no sólo ha ordenado la publicación. Otra medida de publicidad que ha sido ordenada por la Corte es la divulgación pública del resultado de investigaciones sobre los autores de las violaciones, así como su acusación y sanción. Esto ha tenido lugar en Barrios Altos v. Perú, [FN146] pero no en Almonacid Arellano v. Chile, [FN147] pese a ser, al igual que el anterior, un caso que tiene que ver con leyes de autoamnistía.

4. La Conmemoración como Medida de Satisfacción

La jurisprudencia reciente de la Corte Interamericana en materia de reparaciones contiene rubros relacionados con la conmemoración de los hechos elevados a su consideración. Al igual que ciertos aspectos presentados precedentemente en este artículo, la Corte se negaba pertinazmente a ordenar este tipo de medidas. [FN148] Cabe destacar que, por ejemplo, en Benavides Cevallos v. Ecuador, el Ecuador se comprometió a conmemorar el nombre de la víctima en ***119** calles, plazas o escuelas, como lo habían solicitado sus padres. [FN149] Mientras que en Trujillo Oroza v. Bolivia, el Estado boliviano consideró justo nombrar un centro educativo de la ciudad de Santa Cruz con el nombre de la víctima. [FN150] Es decir, en principio, las medidas de conmemoración se lograban debido a la voluntad del Estado y no a lo ordenado por la Corte.

A medida que ha avanzado el criterio de la Corte, también se han incluido medidas de satisfacción que se refieren a la conmemoración de las víctimas. En Bámaca Velásquez, por ejemplo, la Corte consideró que la realización de actos u obras de repercusión pública que tengan efectos como la recuperación de la memoria de las víctimas es una forma de compensación del daño inmaterial. [FN151] Por otro lado, en Mack Chang, la Corte ordenó la creación de una beca de estudios con el nombre de la víctima y el nombramiento de una calle en su honor. [FN152] En Molina Thiessen [FN153] y Gómez Paquiyauri, [FN154] la Corte ordenó al Estado conmemorar el nombre de las víctimas en un Centro Educativo.

Otras medidas tendentes a la conmemoración que han sido ordenadas por la Corte incluyen la erección de monumentos. Entre otros casos, esto se ha ordenado en 19 Comerciantes, [FN155] Huilca Tecse, [FN156] y Moiwana. [FN157] En Hermanas Serrano Cruz la Corte dispuso ***120** la designación de un día dedicado a los niños y niñas desaparecidos durante conflictos armados internos. [FN158] Además, en Huilca Tecse, la Corte ordenó el establecimiento de una cátedra o curso universitario de derechos humanos y la conmemoración de la memoria y labor vital de una víctima durante las celebraciones del día del trabajo, el 1 de mayo. [FN159]

D. Las Garantías de Cesación y No Repetición

Una de las condiciones intrínsecas de la responsabilidad internacional del Estado es que el ilícito cese y no vuelva a repetirse. En virtud del Proyecto de Artículos, "[e]l Estado responsable del hecho internacionalmente ilícito está obligado: a) A ponerle fin si ese hecho continúa; [y] b) A ofrecer seguridades y garantías adecuadas de no repetición, si las circunstancias lo exigen." [FN160] Necesariamente, una vez que se ha declarado la responsabilidad del Estado, es fundamental que se asegure que si la violación continúa se detenga permanentemente, y que, además, se prevengan futuras conductas violatorias semejantes. Entonces, puede afirmarse con seguridad que las garantías de cesación y no repetición tienen un carácter preventivo. [FN161]

Las medidas de cesación y no repetición generan efectos sobre amplias situaciones de violaciones de derechos humanos. Por este motivo, se trata de garantías por excelencia, ya que tienen por finalidad corregir la falla que genera el ilícito a nivel interno. En su jurisprudencia constante, la Corte ha ordenado medidas que pueden clasificarse en tres renglones: acción y revisión legislativa, investigación y acción judicial, y acción ejecutiva.

***121** La acción y revisión legislativa se desprende de la obligación convencional de

adoptar disposiciones de derecho interno. En este sentido, la Convención Americana dispone que "[s]i en el ejercicio de los derechos y libertades mencionados en el artículo 1 no estuviere ya garantizado por disposiciones legislativas o de otro carácter, los Estados partes se comprometen a adoptar, con arreglo a sus procedimientos constitucionales y a las disposiciones de esta Convención, las medidas legislativas o de otro carácter que fueren necesarias para hacer efectivos tales derechos y libertades." [FN162] Sobre esta disposición, la Corte ha apuntado que "[e]l deber general del artículo 2 de la Convención Americana implica la adopción de medidas en dos vertientes. Por una parte, la supresión de las normas y prácticas de cualquier naturaleza que entrañen violación a las garantías previstas en la Convención. Por la otra, la expedición de normas y el desarrollo de prácticas conducentes a la efectiva observancia de dichas garantías." [FN163]

En Barrios Altos, la Corte Interamericana concluyó con pertinencia que la adopción de leyes de autoamnistía, consideradas por la Corte como contrarias per se a la Convención Americana, eran una violación a la misma y entrañaban la responsabilidad del Estado. [FN164] Por otro lado, en Claude Reyes, la Corte estableció que el Chile había restringido el derecho de acceso a la información de las víctimas mediante mecanismos no previstos por las leyes [FN165] y que, si bien el Estado había introducido modificaciones legislativas, las mismas habían tenido lugar con posterioridad a las violaciones. [FN166] En otro caso contra Chile, la Corte también ordenó que se modificara el derecho interno a fin de erradicar la posibilidad de censura previa. [FN167]

***122** En lo que respecta a la investigación y acción judicial, la Corte siempre ha recordado a los Estados que tienen el deber de investigar y sancionar siempre que los autores de la violación no hayan sido determinados. Aún cuando la obligación de investigar fue originalmente tratada en casos de desaparición forzada, [FN168] luego fue aplicada a otro tipo de violaciones al tratarse de estados generalizados de impunidad. [FN169]

En este sentido, es importante destacar que la Corte ha apuntado: (1) que en esta materia los Estados no pueden excusar la falta de avance en las investigaciones en la falta de actividad procesal de los interesados; [FN170] y (2) que la operación de cualquier tipo de prescripción se suspende mientas un caso está pendiente ante una instancia del sistema interamericano. [FN171] Además, en Mack Chang, por ejemplo, la Corte estableció que el Estado tiene la obligación de no recurrir o aplicar figuras como la amnistía y la prescripción, o el establecimiento de excluyentes de responsabilidad. [FN172]

La Corte ha fijado criterios muy claros e importantes en el caso de procesos judiciales celebrados en el marco de violaciones bajo la Convención Americana. Tal es el criterio de la Corte en Castillo Petruzzi, donde la Corte consideró la nulidad de una sentencia condenatoria dictada al final de un proceso sin las debidas garantías. [FN173] En experiencias más recientes, en Hilaire v. Trinidad y ***123** Tobago, la Corte ordenó al Estado la realización de 30 nuevos juicios. [FN174] Además, en Fermín Ramírez v. Guatemala, la Corte ordenó a Guatemala la realización de un nuevo juicio contra la víctima, donde se respeten las garantías de audiencia y defensa. [FN175] En estos casos, también está presente la obligación de devolver cualesquiera bienes incautados en infracción de la Convención. [FN176]

En cuanto a la acción ejecutiva, la Corte ha considerado que pueden existir violaciones debido a ellas. En un claro ejemplo, en Ivcher Bronstein v. Perú, la Corte consideró que la

víctima había sido privada arbitrariamente de su nacionalidad adquirida, [FN177] y que una medida apropiada para remediar esta situación era el restablecimiento de aquella. [FN178] En otro orden, en Berenson Mejía v. Perú, la Corte ordenó al Perú adecuar las condiciones del penal de Yanamayo a los estándares internacionales y trasladar a otros centros de detención a quienes, por sus condiciones especiales, no pueden estar recluidos en dicho establecimiento penal. [FN179]

E. Los Intereses como Medio de Reparación

El Proyecto de Artículos prevé el pago de intereses en materia de reparaciones. Según este texto, "[s]e debe pagar intereses sobre toda suma principal adeudada en virtud del [capítulo relativo a las reparaciones], en la medida necesaria para asegurar la reparación íntegra. La tasa de interés y el modo de cálculo se fijarán de manera que se alcance ese resultado. Los intereses se devengarán desde la ***124** fecha en que debería haberse pagado la suma principal hasta la fecha en que se haya cumplido la obligación de pago." [FN180]

La Corte es tenaz en lo que se refiere a la etapa de supervisión y cumplimiento de la sentencia, una facultad considerada por aquella como inherente a sus funciones jurisdiccionales. [FN181] Pero la Corte, aun cuando lo ha hecho, no tiene como práctica usual, hasta la fecha, la imposición de intereses en el pago de las sumas ordenadas en sus decisiones.

Ciertamente, como se vio anteriormente, los Estados están obligados convencionalmente a acatar las decisiones de la Corte y de implementarlas de conformidad con el principio de buena fe. Además, los Estados no pueden, por razones de orden interno, dejar de asumir la responsabilidad internacional ya establecida. [FN182] En efecto, las decisiones de la Corte vinculan al Estado y a todos los poderes públicos del mismo. [FN183]

Sin embargo, puede verse también que el mecanismo de supervisión y cumplimiento de sentencias, aun cuando ha dado resultados en casos específicos, dista de ser efectivo. De la información brindada por la misma Corte se desprende que menos de 70 casos tienen una resolución de cumplimiento, desde que el mecanismo se emplea con regularidad. [FN184] Se hace necesario un mecanismo que rompa la tozudez y la negativa del Estado a cumplir con la decisión de la Corte dentro del plazo fijado.

Por poner un ejemplo, en Yean y Bosico, la Corte concedió al Estado plazos para el pago de las sumas de dinero ordenadas en la sentencia. [FN185] En este sentido, y a pesar de que la Corte impuso un ***125** interés moratorio, [FN186] ha transcurrido casi un año y medio desde la fecha de la sentencia, y el Estado no ha cumplido con nada de lo ordenado por la Corte. En cambio, el Estado ha invertido el tiempo en recurrir la sentencia de fondo a fin de que se reexaminara, lo cual fue rechazado de plano por la Corte, citando su criterio constante e invariable. [FN187]

Los intereses no constituyen una forma autónoma de reparación. [FN188] Cabe destacar además que el artículo 38 del Proyecto de Artículos no trata de los intereses posteriores a la decisión o los intereses de demora. Sólo versa sobre los intereses que se incluyen en la suma que una corte o tribunal debe otorgar, es decir, los intereses compensatorios. [FN189] En este sentido, ya que el interés moratorio sería facultativo para la Corte, su uso debe regularizarse.

## CONCLUSIONES

Es evidente que la jurisprudencia de la Corte establece criterios más amplios y adecuados en materia de reparaciones de violaciones de derechos humanos, que los que establece el Proyecto de Artículos. Ciertamente, el Proyecto de Artículos es un documento que se refiere más bien a la responsabilidad internacional del Estado en el ámbito de las relaciones interestatales. Tales relaciones se encuentran regidas por el Derecho Internacional Público General.

Aun cuando el Proyecto de Artículos, ni los comentarios al mismo, se refiere especialmente a las violaciones de derechos humanos, este es un instrumento interesante que puede servir de referencia, aun en su estado actual. Quedará por verse qué tipo de apoyo brindarán los Estados a este instrumento que debe su creación a décadas de trabajo.

Si es que los Estados que están bajo la jurisdicción contenciosa de la Corte Interamericana deciden suscribir un eventual tratado sobre ***126** responsabilidad internacional, resulta evidente que dicho tribunal contará con una herramienta más para considerar e interpretar la Convención Americana. Mientras ello ocurre, la Corte Interamericana tiene la responsabilidad, ahora con nueva composición desde el 1 de enero de **2007**, de continuar su avance progresista en su misión de supervisar a los Estados Partes en la Convención Americana. El proceso no puede detenerse, ni mucho menos retroceder.

Se hace necesario que la Corte Interamericana sea firme en su supervisión y cumplimiento de sentencia. La razón de ser de las largas sentencias de la Corte es precisamente, entre otras, la creación de una doctrina en materia de derechos humanos que sirva a los Estados del Hemisferio trazar políticas públicas efectivas para garantizar la plena vigencia de la Convención Americana en cada una de sus jurisdicciones. Los Estados tienen estos criterios a su disposición, y deberían acudir a ellos sin necesidad de que esto ocurra en un caso contencioso.

Pero como puede verse, todavía en esta etapa de globalización, el Hemisferio esta lejos de contar con verdaderos estados de derecho. En este aspecto, la labor de la Corte es fundamental para brindar una decisión conforme al derecho a los individuos que no lo obtuvieron en el plano domestico, que es donde deberían obtenerlo. Y aun en este caso, teniendo la obligación de acatar las decisiones, los Estados no lo hacen.

La imposición de intereses por moratoria bien podría ser una solución a la negligencia de los Estados en cumplir con las decisiones. En este sentido, la Corte tiene el deber de ser creativa y tomar ventaja de las múltiples avenidas procesales que le ofrece la Convención Americana para supervisar su cumplimiento. Es muy importante que la Corte Interamericana asuma en su doctrina que las reparaciones, más allá de ser una consecuencia directa de la responsabilidad internacional del Estado, son una realidad que ayuda a las v íctimas a transitar por el verdaderamente irreparable camino puesto en frente de ellas por el Estado.

[FNa1]. Licenciado en Derecho Cum Laude por la Universidad Autónoma de Santo Domingo (Santo Domingo, República Dominicana) con LL.M. en Estudios Legales Internacionales de la

American University Washington College of Law (Washington, D.C., E.E.U.U.). Ex becario "Rómulo Gallegos" en la Comisión Interamericana de Derechos Humanos. El autor es actualmente Abogado Especializado en la Firma Pellerano & Herrera, y profesor de Derecho Internacional Público en la Universidad Iberoamericana en Santo Domingo, República Dominicana.

[FN1]. Ver Proyecto de Artículos Sobre Responsabilidad Internacional del Estado por Hechos Internacionalmente Ilícitos, en Informe de la Comisión de Derecho Internacional sobre el Trabajo de 53° Período de Sesiones, La Organización de las Naciones Unidas [O.N.U.] Documento Oficial de la Asamblea General [Doc. GAOR], 56° Sesion, Suplemento N° 10, Doc. O.N.U. A/56/10 (**2001**) [en adelante Proyecto de Artículos].

[FN2]. Ver generalmente Comisión de Derecho Internacional, State Responsibility [Responsabilidad del Estado], http:// untreaty.un.org/ilc/summaries/9_6.htm (visitado por última vez el 20 de octubre de **2007**) [en adelante Responsabilidad del Estado].

[FN3]. Ver id. (notando que aun cuando la Comisión ya ha adoptado los Artículos sobre la Responsabilidad del Estado por Hechos Internacionalmente Ilícitos, la Asamblea General, a través de las resoluciones A/RES/56/83 (12 de diciembre de **2001**) y A/RES/59/35 (2 de diciembre de **2004**) sigue solicitando comentarios de los gobiernos de estados sobre estos).

[FN4]. Ver Organización de los Estados Americanos, Convención Americana sobre Derechos Humanos, art. 63.1, 22 de noviembre 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [en adelante Convención Americana] (definiendo el rol de la Corte después de identificar una violación de un derecho o libertad protegido por la Convención).

[FN5]. Ver id. art. 33 (destacando que ambos órganos tienen competencia para conocer de los asuntos relacionados al cumplimiento de los compromisos contraídos por los Estados Partes de la Convención).

[FN6]. Id. art. 63(1).

[FN7]. Ver Consejo de Europa, Convenio Europeo para la Protección de los Derechos Humanos y Libertades Fundamentales, art. 41, 4 de noviembre de 1950 [en adelante Convenio Europeo] (otorgando poder a la Corte Europea para reparar una violación del Convenio cuando el derecho interno resultaría en una reparación imperfecta).

[FN8]. Comparar Convención Americana, supra nota 4, art. 63(1) (demostrando que la Corte Interamericana de Derechos Humanos tiene la facultad de ordenar del Estado responsable de la violación la reparación sin remitirse primero al derecho interno) con Convenio Europeo, supra nota 7, art. 41 (remitiendo primero al derecho interno del Estado y ordenando una satisfación equitativa sólo en ciertas situaciones donde se considere procediente).

[FN9]. Masacres de Ituango v. Colombia, **2006** Corte Interamericana de Derechos Humanos [Corte I.D.H.] (ser. C) No. 148, ¶ 80 (1 de julio de **2006**).

[FN10]. Ver Factory at Chorzów (Alemania v. Polonia), 1927 C.P.J.I. (ser. A) No. 9, en 21 (26 de julio) (añadiendo que la reparación es un elemento esencial de derecho internacional

en virtud del cual, al producirse un hecho ilícito imputable a un Estado surge la responsabilidad y la consecuente obligación de reparar de una manera adecuada).

[FN11]. La "Panel Blanca" v. Guatemala, **2001** Corte I.D.H. (ser. C) No. 76, ¶ 78 (25 de mayo de **2001**).

[FN12]. Ver Blake v. Guatemala, 1999 Corte I.D.H. (ser. C) No. 48, ¶¶ 32-33 (22 de enero de 1999) (incluyendo la reparación entre los principios fundamentales del derecho internacional sobre la responsabilidad de los Estados).

[FN13]. Bulacio v. Argentina, **2003** Corte I.D.H. (ser. C) No. 100, ¶ 25 (18 de septiembre de **2003**) (voto razonado del Juez A.A. Cançado Trindade) (apuntando que aunque las reparaciones tienen su relevancia, es prácticamente imposible considerar la reparación de daños ante la masacre de una familia y, como corolario, sostener que las reparaciones a las víctimas de violaciones de los derechos humanos logren poner fin a su sufrimiento).

[FN14]. Ver generalmente Daniel Bodansky y John R. Crook, Symposium: The ILC's State Responsibility Articles, 96 Am. J. Int'l L. 773 (**2002**).

[FN15]. Responsabilidad del Estado por Hechos Internacionalmente Ilícitos, Resolución de la Asamblea General [Res. A.G.] 56/83, ¶¶ 1-2, Doc. O.N.U. A/RES/56/83 (28 de enero de **2002**) [en adelante Responsabilidad del Estado 56° Período de Sesiones].

[FN16]. Responsabilidad del Estado por Hechos Internacionalmente Ilícitos, Res. A.G. 59/35, ¶ 1, Doc. O.N.U. A/RES/59/35 (16 de diciembre de **2004**) [en adelante Responsabilidad del Estado 59° Período de Sesiones].

[FN17]. Ver generalmente Proyecto de Artículos, supra nota 1, en 220-315 (incluyendo las consecuencias por la falta de cumplimiento).

[FN18]. Ver id. en 223 (consagrando, en su artículo 28, las obligaciones creadas en la primera parte del Proyecto de Artículos, con las consecuencias jurídicas de la segunda parte).

[FN19]. Ver Responsabilidad del Estado 56° Período de Sesiones, supra nota 15, art. 28.

[FN20]. Ver Los 19 Comerciantes v. Colombia, **2004** Corte I.D.H. (ser. C) No. 109, ¶ 140 (5 de julio de **2004**). Ver tambien Sánchez v. Honduras, **2003** Corte I.D.H. (ser. C) No. 99, ¶ 142 (7 de junio de **2003**); "Cinco Pensionistas" v. Perú, **2003** Corte I.D.H. (ser. C.) No. 98, ¶ 163 (28 de febrero de **2003**); Los "Niños de la Calle" v. Guatemala, 1999 Corte I.D.H. (ser. C) No. 63, ¶ 220 (19 de noviembre de 1999).

[FN21]. Los 19 Comerciantes, **2004** Corte I.D.H. (ser. C) No. 109, ¶ 140 (explicando que para establecer la responsabilidad por la violación, no es preciso identificar individualmente a los agentes a los cuales se atribuyeron los hechos violatorios, sino que es suficiente demostrar que hubo apoyo o tolerancia de parte del poder público) (citando Velásquez Rodríguez v. Honduras, 1988 Corte I.D.H. (ser. C) No. 4, ¶ 172 (29 de julio de 1988)).

[FN22]. Ver Responsabilidad del Estado 56° Período de Sesiones, supra nota 15, art. 30.

[FN23]. Blake v. Guatemala, 1999 Corte I.D.H. (ser. C) No. 48, ¶ 31 (22 de enero de 1999).

[FN24]. Responsabilidad del Estado 56° Período de Sesiones, supra nota 15, art. 34.

[FN25]. Raxcacó Reyes v. Guatemala, **2005** Corte I.D.H. (ser. C) No. 133, ¶ 115 (15 de septiembre de **2005**).

[FN26]. Ver Declaración sobre los Principios Fundamentales de Justicia para las Víctimas de Delítos y de Abuso de Poder, Res. A.G. 40/34, ¶ 8, Anexo, Doc. O.N.U. A/RES/40/34/Anexo (29 de noviembre de 1985) (estableciendo que el resarcimiento requiere 'la devolución de los bienes o el pago por los daños o pérdidas sufriedas'). Ver tambien Velásquez Rodríguez v. Honduras, 1989 Corte I.D.H. (ser. C) No. 7, ¶ 26 (21 de julio de 1989) (enfatizando que la doctrina de restitutio in integrum incluye la compensación de daños morales).

[FN27]. Ver Dinah Shelton, Remedies in International Human Rights Law 271-272 (2d ed. **2005**) (argumentando que aun en casos donde la restitución no puede restablecer al individuo, como en casos resultando en muerte, la reparación puede comportar de cambios preventivos dirijidos a asegurar la no repetición de tales violaciones).

[FN28]. Ver Proyecto de Artículos, supra nota 1, en 252-53 (reconociendo, en los comentarios 1, 2, 3, y 4 del Artículo 35, que a pesar de que el artículo adopta una definición estricta de la reparación, la obligación de borrar las consequencias del acto ilícto deja abierta la posibilidad que la reparación sea mas expansiva).

[FN29]. Ver James Crawford, The International Law Commission's Articles on State Responsibility 213 (**2002**).

[FN30]. Ver Loayza Tamayo v. Perú, 1998 Corte I.D.H. (ser. C) No. 42, ¶¶ 123-124 (27 de noviembre de 1998) (explicando que en casos de violaciones de derechos humanos tales como la libertad y integridad personal, es preciso buscar formas sustitutivas de reparación como la indemnización pecuniaria); Suárez Rosero v. Ecuador, 1997 Corte I.D.H. (ser. C) No. 35, ¶ 108 (12 de noviembre de 1997) (resaltando que como no era posible restablecer a la víctima a la situación en la que se encontraba antes del hecho ilícito, la indemnización era esencial para la reparación).

[FN31]. Responsabilidad del Estado 56° Período de Sesiones, supra nota 15, art. 35.

[FN32]. Id. art. 35(b).

[FN33]. Ver Loayza Tamayo v. Perú, 1997 Corte I.D.H. (ser. C) No. 33, ¶ 84 (17 de septiembre de 1997) (concluyendo que el Estado debería ordenar la libertad de la víctima como consecuencia de las violaciones de derechos humanos, particularmente de la prohibición de doble enjuiciamiento).

[FN34]. Loayza Tamayo, 1998 Corte I.D.H. (ser. C) No. 42, ¶ 122.

[FN35]. Ver Castillo Petruzzi v. Perú, 1999 Corte I.D.H. (ser. C) No. 52, ¶ 219 (30 de mayo

de 1999).

[FN36]. Herrera Ulloa v. Costa Rica, **2004** Corte I.D.H. (ser. C) No. 107, ¶ 207(4) (2 de julio de **2004**).

[FN37]. Ver id. ¶ 195.

[FN38]. Ver Garrido y Baigorria v. Argentina,1998 Corte I.D.H. (ser. C) No. 39, ¶41 (27 de agosto de 1998).

[FN39]. Ver Cesti Hurtado v. Perú, **2001** Corte I.D.H. (ser. C) No. 78, ¶¶ 57-59 (31 de mayo de **2001**) (declarando que el haber encontrado al Perú responsable constituía per se un reparación adecuada ante el daño a la reputación).

[FN40]. Ver Loayza Tamayo v. Perú, 1998 Corte I.D.H. (ser. C) No. 42, ¶106(A)(d) (27 de noviembre de 1998).

[FN41]. Id. ¶ 113.

[FN42]. Ver id. ¶¶ 114-116 (adjudicando a la víctima, con efecto retroactivo, reinscripción a su registro de jubilación más salarios y garantías sociales y laborales).

[FN43]. Ver Baena Ricardo v. Panamá, **2001** Corte I.D.H. (ser. C) No. 72, ¶ 214(7) (2 de febrero de **2001**).

[FN44]. Ver id.

[FN45]. Ver De La Cruz Flores v. Perú, **2004** Corte I.D.H. (ser. C) No. 115, ¶¶ 161, 169-170 (18 de noviembre de **2004**).

[FN46]. Ver Durand y Ugarte v. Perú, **2001** Corte I.D.H. (ser. C) No. 89, ¶ 36 (3 de diciembre de **2001**).

[FN47]. Responsabilidad del Estado 56° Período de Sesiones, supra nota 15, art. 35(b).

[FN48]. Los Hermanos Gómez Paquiyauri v. Perú, **2004** Corte I.D.H. (ser. C) No. 110, ¶ 2 (8 de julio de **2004**) (voto razonado del Juez A.A. Cançado Trindade).

[FN49]. Caso Aloeboetoe v. Suriname, 1993 Corte I.D.H. (ser. C) No. 15, ¶ 48 (10 de septiembre de 1993).

[FN50]. Convención Americana, supra nota 4, art. 63(1).

[FN51]. Jo M. Pasqualucci, Victim **Reparations** in the Interamerican Human Rights System: A Critical Assessment of Current Practice and Procedure, 18 Mich. J. Int'l L. 26 (1996-1997).

[FN52]. Responsabilidad del Estado 56° Período de Sesiones, supra nota 16, art. 36.

[FN53]. Proyecto de Artículos, supra nota 1, en 259 (citando artículo 36 comentario 1).

[FN54]. Garrido y Baigorria v. Argentina, 1998 Corte I.D.H. (ser. C) No. 39, ¶ 43 (27 de agosto de 1998).

[FN55]. Id.

[FN56]. Ver, por ejemplo, Velásquez Rodríguez v. Honduras, 1989 Corte I.D.H. (ser. C) No. 7, ¶ 52 (21 de julio de 1989) (cubriendo daño moral); Godinez Cruz v. Honduras, 1989 Corte I.D.H. (ser. C) No. 8, ¶ 50 (21 de julio de 1989) (requiriendo el pago por daño moral).

[FN57]. Ver Gangaram Panday v. Suriname, 1994 Corte I.D.H. (ser. C) No. 16, ¶ 70 (21 de enero de 1994) (fijando indemnización de carácter nominal).

[FN58]. Ver Genie Lacayo v. Nicaragua, 1997 Corte I.D.H. (ser. C) No. 30, ¶ 95 (29 de enero de 1997) (ordenando una compensación pecuniaria que deberá ser pagada, sin deducción de impuestos).

[FN59]. Ver Loayza Tamayo v. Perú, 1998 Corte I.D.H. (ser. C) No. 42, ¶ 75 (27 de noviembre de 1998); Loayza Tamayo v. Perú, 1997 Corte I.D.H. (ser. C) No. 33, ¶45(e) (17 de septiembre de 1997).

[FN60]. Ver Loayza Tamayo, 1998 Corte I.D.H. (ser. C) No. 42, ¶ 106(A)(i) (aceptando como comprobado daños físicos sólo después de examinar una larga lista de testimonio y evidencia).

[FN61]. Ver Suárez Rosero v. Ecuador, 1999 Corte I.D.H. (ser. C) No. 44, ¶¶ 34(a), 54(A)(b) (20 de enero de 1999).

[FN62]. Ver Suárez Rosero v. Ecuador, 1997 Corte I.D.H. (ser. C) No. 35, ¶ 23(d) (12 de noviembre de 1997); Suárez Rosero, 1999 Corte I.D.H. (ser. C) No. 44, ¶¶34(a), 54(A)(b).

[FN63]. Ver Tibi v. Ecuador, **2004** Corte I.D.H. (ser. C) No. 114, ¶ 90.50 (7 de septiembre de **2004**) (describiendo la violencia física y amenazas que la víctima sufrió a mano de los guardias incluyendo quemaduras de cigarrillos, golpes, descargas eléctricas, y quebrados de dientes).

[FN64]. Ver id. ¶ 90.53 (incluyendo trastornos de salud física y psíquica).

[FN65]. Ver Gutiérrez Soler v. Colombia, **2005** Corte I.D.H (ser. C) No. 132, ¶¶ 76, 78, 85, 117 (12 de septiembre de **2005**) (disponiendo pago por daño material, inmaterial, y por concepto de costas y gastos).

[FN66]. Ver "Instituto de Reeducación del Menor" v. Paraguay, **2004** Corte I.D.H (ser. C) No. 112, ¶¶ 290-292 (2 de septiembre de **2004**) (considerando que la imposibilidad temporal de trabajar causada por las heridas constituyó un daño material).

[FN67]. Ver Jo M. Pasqualucci, The Practice and Procedure of the **Inter-AmericanCourt** of

**HumanRights** 255 (**2003**) [traducción del autor] (revisando la práctica de la Corte Interamericana en cuanto al dado de compensación de daños materiales, conocidos como perjuicios pecuniarios); ver también Trujillo Oroza v. Bolivia, **2002** Corte I.D.H. (ser. C) No. 92, ¶ 74(a) (27 de febrero de **2002**) (incluyendo entre los gastos que incurrieron los familiares de la víctima visitas a cárceles e instituciones públicas, viajes, boletos aéreos, hospedaje, alimentación, y llamadas telefónicas).

[FN68]. Acosta Calderón v. Ecuador, **2005** Corte I.D.H. (ser. C) No. 129, ¶ 157 (24 de junio de **2005**).

[FN69]. Ver El Amparo v. Venezuela, 1996 Corte I.D.H. (ser. C) No. 28, ¶¶ 17, 19 (14 de septiembre de 1996) (refiriendo al escrito de la Comisión del 29 de mayo de 1996 donde incluyó bajo el rúbro 'daño emergente," gastos incurridos por los familiares para obtener información y los realizados para buscar sus cadáveres).

[FN70]. Ver Las Hermanas Serrano Cruz v. El Salvador, **2005** Corte I.D.H. (ser. C) No. 120, ¶ 150 (1 de marzo de **2005**).

[FN71]. Ver Pasqualucci, supra nota 67, en 256.

[FN72]. Ver Castillo Páez v. Perú, 1998 Corte I.D.H. (ser. C) No. 43, ¶ 77 (27 de noviembre de 1998) (listando traslados, comunicaciones, investigaciones adminstrativas, visitas a la cárcel, hospitales, e instituciones públicas al igual que gastos médicos incurridos).

[FN73]. Ver El Amparo, 1996 Corte I.D.H. (ser. C) No. 28, ¶ 17.

[FN74]. Ver Bámaca Velásquez v. Guatemala, **2002** Corte I.D.H. (ser. C) No. 91, ¶54(a) (22 de febrero de **2002**) (ortorgando compensación a la esposa de la víctima en la cantidad de dinero correspondientes a los ingresos perdidos mientras buscaba a su esposo lo cual le causó la perdida de tiempo laboral).

[FN75]. Ver Carpio Nicolle v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 117, ¶¶108-109 (22 de noviembre de **2004**) (fijando la cantidad de US $110,000 a la víctima de treinta y un años en compración a la suma de US $50,000 a la víctima de cuarenta y cinco años en base a la expectativa de vida en Guatemala).

[FN76]. Ver "Instituto de Reeducación del Menor" v. Paraguay, **2004** Corte I.D.H (ser. C) No. 112, ¶ 289 (reafirmando la necesidad de tratar cada caso a la luz de las circunstancias del mismo).

[FN77]. Ver Los "Niños de la Calle" v. Guatemala, **2001** Corte I.D.H. (ser. C) No. 77, ¶ 79 (26 de mayo de **2001**) (aplicando el salario mínimo del Estado a falta de información específica sobre los ingresos reales de las víctimas).

[FN78]. Ver Bulacio v. Argentina, **2003** Corte I.D.H. (ser. C) No. 100, ¶ 84 (18 de septiembre de **2003**).

[FN79]. Ver Cantoral Benavides v. Perú, **2001** Corte I.D.H. (ser. C) No. 88, ¶ 49 (3 de diciembre de **2001**) (razonando que la víctima debería recibir remuneración

correspondiente al salario que hubiera recibido un biólogo, materia que estudiaba y hubiera terminado si no hubiera sido detenido).

[FN80]. Ver Blake v. Guatemala, 1999 Corte I.D.H.(ser. C) No. 48, ¶ 16 (22 de enero de 1999) (solicitando entre otros documentos una copia certificada de título profesional o de acreditación de grado académico para asesorar los daños).

[FN81]. Ver El Caracazo v. Venezuela, **2002** Corte I.D.H. (ser. C) No. 95, ¶ 50(b) (29 de agosto de **2002**).

[FN82]. Ver, por ejemplo, Sánchez v. Honduras, **2003** Corte I.D.H. (ser. C) No. 99, ¶ 166(a)-(b) (7 de junio de **2003**).

[FN83]. Ver id. ¶ 166(c).

[FN84]. Ver Bulacio v. Argentina, **2003** Corte I.D.H. (ser. C) No. 100, ¶ 89 (18 de septiembre de **2003**).

[FN85]. Ver Sánchez, **2003** Corte I.D.H. (ser. C) No. 99, ¶ 166(d).

[FN86]. Ver Castillo Páez v. Perú, 1998 Corte I.D.H. (ser. C) No. 43, ¶ 71(c) (27 de noviembre de 1998).

[FN87]. Ver id. ¶¶ 68(B)(d), 71(c), 76.

[FN88]. Bulacio, **2003** Corte I.D.H. (ser. C) No. 100, ¶ 90; Acosta Calderón, **2005** Corte I.D.H. (ser. C) No. 129, ¶ 158 (24 de julio de **2005**).

[FN89]. Ver Blake v. Guatemala, 1999Corte I.D.H. (ser. C) No. 48, ¶ 20(e) (22 de enero de 1999) (considerando el impacto que la desaparición de la víctima tuvo sobre su familia al no saber de su paradero).

[FN90]. Ver Loayza Tamayo v. Perú, 1997 Corte I.D.H. (ser. C) No. 33, ¶ 57 (17 de septiembre de 1997) (adoptando el razonamiento de Corte Europea de Derechos Humanos en cuanto a los daños sufridos durante los interrogatorios).

[FN91]. Ver Blake, 1999 Corte I.D.H. (ser. C) No. 48, ¶ 20(e) (concluyendo que la abstención de las autoridades de investigar los hechos de la desaparición de la víctima generó en su familia sentimientos de frustración e impotencia).

[FN92]. Mack Chang v. Guatemala, **2003** Corte I.D.H. (ser. C) No. 101 (25 de noviembre de **2003**).

[FN93]. Ver id. ¶ 261.

[FN94]. Las Hermanas Serrano Cruz v. El Salvador, **2005** Corte I.D.H. (ser. C) C No. 120, ¶ 159 (1 de marzo de **2005**) (manifestando que la Corte presume que los sufrimientos o muerte de la víctima(s) acarrean en los familiares resultando en un daño inmaterial).

[FN95]. Ver Fermín Ramírez v. Guatemala, **2005** Corte I.D.H. (ser. C) No. 126, ¶¶47(a), 129 (20 de junio de **2005**) (dando testimonio sobre las condiciones en las cuales se encontraba la víctima durante su encarcelamiento). El Sr. Ramírez, vivía en una celda de dos por tres metros donde tenía sola una ventana por la cual recibía su comida. Durante un tiempo compartía esta celda con dos personas adicionales aun cuando sólo habían dos camas. Se le permitía salir sólo diez minutos cada semana de manera que hacer ejercicio era casi una imposibilidad.

[FN96]. Ver Cantoral Benavides v. Perú, **2001** Corte I.D.H. (ser. C) No. 88, ¶ 53 (3 de diciembre de **2001**) (reconociendo perturbaciones que no son susceptibles de medición pecuniaria).

[FN97]. Ver Masacre Plan de Sánchez v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 116, ¶¶ 49.12-49, 15 (19 de noviembre de **2004**) (detallando la pérdida de conocimientos de la cultura maya achí producida por la muerte de las mujeres y los ancianos que funcionaban como transmisores orales de la cultura).

[FN98]. Ver La Cantuta v. Perú, **2006** Corte I.D.H. (ser. C) No. 162, ¶ 219 (29 de noviembre de **2006**).

[FN99]. Ver Las Masacres de Ituango v. Colombia, **2006** Corte I.D.H. (ser. C) No. 148, ¶ 387 (1 de julio de **2006**).

[FN100]. Ver Acosta Calderón v. Ecuador, **2005** Corte I.D.H. (ser. C) No. 129, ¶¶163-165 (24 de junio de **2005**) (ordenando la publicación en el diario oficial del Ecuador y en otro diario con alcance nacional los hechos probados de la Corte y la eliminación de los antecedentes penales de la víctima de los registros públicos).

[FN101]. Proyecto de Artículos, supra nota 1, en 282 (citando Artículo 37).

[FN102]. Id. en 282-83 (citando el Comentario 1).

[FN103]. Id. en 285 (citando el Comentario 5).

[FN104]. Ver Caesar v. Trinidad y Tobago, **2005** Corte I.D.H. (ser. C) No. 123, ¶¶120-121 (11 de marzo de **2005**).

[FN105]. Ver Penal Miguel Castro Castro v. Perú, **2006** Corte I.D.H. (ser. C) No. 160, ¶ 436 (25 de noviembre de **2006**) (analizando los procedimientos internos abiertos y concluyendo que no resultaron ser efectivos para garantizar un verdadero acceso a la justicia).

[FN106]. Ver Huilca Tecse v. Perú, **2005** Corte I.D.H. (ser. C) No. 121, ¶ 102 (3 de marzo de **2005**).

[FN107]. Ver Trabajadores Cesados del Congreso v. Perú, **2006** Corte I.D.H. (ser. C) No. 158, ¶ 148 (24 de noviembre de **2006**) (disponiendo que el Estado garantice efectivo acceso que es sencillo, rápido, y eficaz con un órgano independiente e imparcial).

[FN108]. Ver Urrutia v. Guatemala, **2003** Corte I.D.H. (ser. C) No. 103, ¶ 171 (27 de

noviembre de **2003**) (considerando entre las formas de reparación la investigación y sanción de los hechos).

[FN109]. Ver Claude Reyes v. Chile, **2006** Corte I.D.H. (ser. C) No. 151, ¶ 156 (19 de septiembre de **2006**) (estimando que la sentencia constituye, per se, una forma de reparación y satisfacción moral de significación e importancia para las víctimas).

[FN110]. Corte Interamericana de Derechos Humanos, Reglamento de la Corte Interamericana de Derechos Humanos, art. 53(2), 25 de noviembre de **2003**, disponible en http://www.corteidh.or.cr/reglamento.cfm.

[FN111]. Ver La Cantuta v. Perú, **2006** Corte I.D.H. (ser. C) No. 162, ¶¶ 35-57 (29 de noviembre de **2006**); Penal Miguel Castro Castro v. Perú, **2006** Corte I.D.H. (ser. C) No. 160, ¶¶ 129-159 (25 de noviembre de **2006**); Las Masacres de Ituango v. Colombia, **2006** Corte I.D.H. (ser. C) No. 148, ¶¶ 55-98 (1 de julio de **2006**); Barrios Alto v. Perú, **2001** Corte I.D.H. (ser. C) No. 75, ¶¶ 34-40 (14 de marzo de **2001**); El Caracazo v. Venezuela, 1999 Corte I.D.H. (ser. C) No. 58, ¶¶ 37-44 (11 de noviembre de 1999).

[FN112]. Ver Masacre Plan de Sánchez v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 116, ¶ 100 (19 de noviembre de **2004**) (agregando un acto público con la presencia de altas autoridades frente a las víctimas maya achí aun cuando el Estado ya había expresado su profundo sentimiento durante la audiencia pública celebrada el 24 de abril de **2004**).

[FN113]. Ver Molina Theissen v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 108, ¶87 (3 de julio de **2004**) (ordenando la realización de un acto público en adición a la disculpa durante la audiencia pública del 26 de abril de **2004** con el propósito de asegurar la garantía de no repetición).

[FN114]. Ver Carpio Nicolle v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 117, ¶ 136 (22 de noviembre de **2004**) (requiriendo un acto público a la vez del reconocimiento de responsabilidad por parte del Estado para asegurar los plenos efectos de la reparación y garantizar la no repetición).

[FN115]. Convención Americana, supra nota 4, art. 68(1).

[FN116]. Id. art. 67.

[FN117]. Ver Bámaca Velásquez v. Guatemala, **2002** Corte I.D.H. (ser. C) No. 91, ¶84 (22 de febrero de **2002**) (ordenando la publicación en el Diario oficial y otro diario de circulación nacional, por una sola vez, de la parte resolutiva de la sentencia y el capítulo relativo a los hechos probados).

[FN118]. Ver Sánchez v. Honduras, **2003** Corte I.D.H. (ser. C) No. 99, ¶ 188 (7 de junio de **2003**) (ordenando la publicación en el Diario oficial y otro diario de circulación nacional, por una sola vez, de la parte resolutiva de la sentencia y el capítulo relativo a los hechos probados).

[FN119]. Ver 19 Comerciantes v. Colombia, **2004** Corte I.D.H. (ser. C) No. 109, ¶274 (5 de julio de **2004**) (ordenando la celebración de un acto público en presencia de las víctimas y

con la participación de altas autoridades del Estado). La Corte sugerió que este tomase acabo en la misma ceremonia donde aplicarían la placa al monumento erigido en honor a las víctimas.

[FN120]. Ver Los Hermanos Gómez Paquiyauri v. Perú, **2004** Corte I.D.H. (ser. C) No. 110, ¶ 234 (8 de julio de **2004**) (ordenando la celebración de un acto público en reconocimiento de la responsabilidad en presencia de familiares de las víctimas y con participación de altas autoridades del Estado).

[FN121]. Ver Las Hermanas Serrano Cruz v. El Salvador, **2005** Corte I.D.H. (ser. C) No. 120, ¶ 194 (1 de marzo de **2005**) (ordenando la celebración de un acto público en presencia de familiares de las víctimas con participacion de altas autoridades del Estado y con transmición a medios de comunicación incluyendo el Internet).

[FN122]. Ver Huilca Tecse v. Perú, **2005** Corte I.D.H. (ser. C) No. 121, ¶ 111 (3 de marzo de **2005**) (ordenando la celebración de un acto público de reconocimiento de la responsabilidad por la ejecución extrajudicial de la víctima con disculpa pública a los involucrados en presencia de familiares de las víctimas, altas autoridades del Estado, organizaciones sindicales, y organizaciones de derechos humanos).

[FN123]. Ver La Comunidad Moiwana v. Suriname, **2005** Corte I.D.H. (ser. C) No. 124, ¶ 216 (15 de junio de **2005**) (ordenando la presentación de una disculpa pública conjunto con actos en honor a la víctima de homicidio con participación de altas autoridades del Estado, el líder de la aldea afectada, y miembros de la comunidad).

[FN124]. Ver Comunidad Indígena Yakye Axa v. Paraguay, **2005** Corte I.D.H. (ser. C) No. 125, ¶ 226 (17 de junio de **2005**) (ordenando la celebración de un acto público tomando en cuenta las tradiciones, costumbres, y lenguajes de los Yakye Axa en el asiento de la comunidad con participación de altas autoridades del Estado y con difusión por los medios de comunicación).

[FN125]. Ver Las Niñas Yean y Bosico v. República Dominicana, **2005** Corte I.D.H. (ser. C) No. 130, ¶ 235 (8 de septiembre de **2005**) (ordenando la presentación de una disculpa pública con la participación de altas autoridades del Estado y en presencia de las víctimas y sus familiares y trasmitida por medios de comunicación incluyendo radio, prensa, y televisión).

[FN126]. Ver Tibi v. Ecuador, **2004** Corte I.D.H. (ser. C) No. 114, ¶ 261 (7 de septiembre de **2004**) (ordenando la publicación de declaración de responsabilidad en un diario de circulación nacional en el Ecuador y después de ser traducido al francés, y la publicación de este en un diario de amplia circulación en Francia donde vivía la víctima).

[FN127]. Ver Suárez Rosero v. Ecuador, 1999 Corte I.D.H. (ser. C) No. 44, ¶ 72 (20 de enero de 1999) (denominando la sentencia lo equivalente a la reparación); Loayza Tamayo v. Perú, 1998 Corte I.D.H. (ser. C) No. 42, ¶¶ 155 y 158 (27 de noviembre de 1998) (considerando que la sentencia de fondo constituyó per se una adecuada reparación); Caballero Delgado y Santana v. Colombia, 1997 Corte I.D.H. (ser. C) No. 31, ¶ 58 (29 de enero de 1997) (aceptando la sentencia como suficiente reparación).

[FN128]. Ver Suárez Rosero, 1999 Corte I.D.H. (ser. C) No. 44, ¶ 69 (presentando prueba de parte del terapeuta).

[FN129]. Ver Las Niñas Yean y Bosico, **2005** Corte I.D.H. (ser. C) No. 130, ¶ 235.

[FN130]. Ver Bulacio v. Argentina, **2003** Corte I.D.H. (ser. C) No. 100, ¶ 145 (18 de septiembre de **2003**) (señalando que el Estado debe publicar en el Diario Oficial la parte resolutiva de la Sentencia del caso).

[FN131]. Ver Goiburú v. Paraguay, **2006** Corte I.D.H. (ser. C) No. 153, ¶ 173 (22 de septiembre de **2006**) (estableciendo que el Estado debe realizar un acto público reconociendo su responsabilidad por la desaparición de las víctimas).

[FN132]. Ver Vargas Areco v. Paraguay, **2006** Corte I.D.H. (ser. C) No. 155, ¶ 158 (26 de septiembre de **2006**) (ordenando un acto público en la comunidad de los familiares de la víctima dado que estos no estuvieron presentes en la audiencia pública del caso).

[FN133]. Ver Penal Miguel Castro Castro v. Perú, **2006** Corte I.D.H. (ser. C) No. 160, ¶ 445 (25 de noviembre de **2006**) (señalando que el Estado debe manifestar públicamente su responsabilidad en relación a las violaciones declaradas en la sentencia).

[FN134]. Ver La "Masacre de Mapiripán" v. Colombia, **2005** Corte I.D.H. (ser. C) No. 134, ¶ 314 (15 de septiembre de **2005**) (ejemplificando como el Estado reconoció su responsabilidad internacional y a la vez reafirmó como su política la promoción y protección de los derechos humanos).

[FN135]. Ver La Comunidad Moiwana v. Suriname, **2005** Corte I.D.H. (ser. C) No. 124, ¶ 216 (15 de junio de **2005**) (apreciando la declaración que Suriname "no tiene objeciones a emitir una disculpa pública a toda la nación, y a los sobrevivientes y familiares en particular, en relación con los hechos que ocurrieron en la aldea de Moiwana").

[FN136]. Ver Cantoral Benavides v. Perú, **2001** Corte I.D.H. (ser. C) No. 88, ¶ 79 (3 de diciembre de **2001**).

[FN137]. Ver Durand y Ugarte v. Perú, **2001** Corte I.D.H. (ser. C) No. 89, ¶ 39 (3 de diciembre de **2001**) (sentencia de la corte).

[FN138]. Ver Bámaca Velásquez v. Guatemala, **2002** Corte I.D.H. (ser. C) No. 91, ¶84 (22 de febrero de **2002**) (parte resolutiva de la sentencia y el capítulo relativo a los hechos probados).

[FN139]. Ver El Caracazo v. Venezuela, **2002** Corte I.D.H. (ser. C) No. 95, ¶ 128 (29 de agosto de **2002**) (puntos resolutivos de la sentencia y parte de los hechos probados).

[FN140]. Ver "Instituto de Reeducación del Menor" v. Paraguay, **2004** Corte I.D.H. (ser. C) No. 112, ¶ 315 (2 de septiembre de **2004**) (puntos resolutivos de la sentencia y los hechos probados).

[FN141]. Ver Acosta Calderón v. Ecuador, **2005** Corte I.D.H. (ser. C) No. 129, ¶ 164 (24 de

junio de **2005**) (puntos resolutivos de la sentencia y los hechos probados).

[FN142]. Ver Masacre Plan de Sánchez v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 116, ¶ 102 (19 de noviembre de **2004**) (señalando que el Estado debe traducir la Convención Americana sobre Derechos Humanos al idioma maya achí y que Guatemala debe disponer de los recursos necesarios para facilitar la divulgación de dichos textos).

[FN143]. Ver Yatama v. Nicaragua, **2005** Corte I.D.H. (ser. C) No. 127, ¶ 253 (23 de junio de **2005**) (ordenando la transmisión por la radio comunitaria de los puntos resolutivos de la sentencia en español, miskito, sumo, rama, e ingles).

[FN144]. Ver Carpio Nicolle v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 117, ¶ 138 (22 de noviembre de **2004**).

[FN145]. Ver Las Hermanas Serrano Cruz v. El Salvador, **2005** Corte I.D.H. (ser. C) No. 120, ¶ 195 (1 de marzo de **2005**) (ordenando el establecimiento de un enlace al texto completo de la sentencia en una página web de personas desaparecidas).

[FN146]. Ver Barrios Altos v. Perú, **2001** Corte I.D.H. (ser. C) No. 75, ¶ 51(5) (14 de marzo de **2001**).

[FN147]. Ver Almonacid Arellano v. Chile, **2006** Corte I.D.H. (ser. C) No. 154, ¶171(4) (26 de septiembre de **2006**).

[FN148]. Ver, por ejemplo, Castillo Páez v. Perú, 1998 Corte I.D.H. (ser. C) No. 43, ¶ 94 (27 de noviembre de 1998) (describiendo la petición de parte de los familiares de las víctimas que el Estado publicara los hechos probados y la parte resolutiva de sentencia); Velásquez Rodríguez v. Honduras, 1989 Corte I.D.H. (ser. C) No. 7, ¶7 (21 de julio de 1989) (enumerando demandas de parte de la esposa de la víctima con respecto a los desaparecidos); Godinez Cruz v. Honduras, 1989 Corte I.D.H. (ser. C) No. 8, ¶ 6 (21 de julio de 1989) (notando que la familia solicitó el cumplimiento de ciertas medidas para resolver violaciones de derechos humanos).

[FN149]. Ver Benavides Cevallos v. Ecuador, 1998 Corte I.D.H. (ser. C) No. 38, ¶ 48 (19 de junio de 1998).

[FN150]. Ver Trujillo Oroza v. Boliva, **2002** Corte I.D.H. (ser. C) No. 92, ¶ 122 (manteniendo que la escritura del nombre de la víctima en el centro educativo serviría para recordar los hechos lesivios y evitar la repetición de estos).

[FN151]. Ver Bámaca Velásquez v. Guatemala, **2002** Corte I.D.H. (ser. C) No. 91, ¶56 (22 de febrero de **2002**) (considerando la dificultad en denominar la reparación a efectos que no tienen carácter economico).

[FN152]. Ver Mack Chang v. Guatemala, **2003** Corte I.D.H. (ser. C) No. 101, ¶¶ 285-286 (25 de noviembre de **2003**).

[FN153]. Ver Molina Theissen v. Guatemala, **2004** Corte I.D.H. (ser. C) No. 108, ¶88 (3 de julio de **2004**) (conmemorando a los niños desaparecidos durante el conflicto armado con

una placa en tributo a la víctima de este caso).

[FN154]. Ver Los Hermanos Gómez Paquiyauri v. Perú, **2004** Corte I.D.H. (ser. C) No. 110, ¶ 236 (8 de julio de **2004**) (estableciendo que tal acto despertará la conciencia pública sobre la necesidad de evitar la repetición de los hechos).

[FN155]. Ver 19 Comerciantes v. Colombia, **2004** Corte I.D.H. (ser. C) No. 109, ¶273 (5 de julio de **2004**) (ordenando un monumento en un lugar elijido por el Estado y los familiaries de las víctimas con los nombres de estos sobre la placa).

[FN156]. Ver Huilca Tecse v. Perú, **2005** Corte I.D.H. (ser. C) No. 121, ¶ 115 (3 de marzo de **2005**) (requiriendo al Estado peruano erigir un busto en memoria de la víctima en un lugar público de la ciudad de Lima).

[FN157]. Ver La Comunidad Moiwana v. Suriname, **2005** Corte I.D.H. (ser. C) No. 124, ¶ 218 (15 de junio de **2005**) (dirigiendo la construcción de un monumento cuyo diseño y ubicación fueran designados en consulta con los representativos de las víctimas).

[FN158]. Ver Las Hermanas Serrano Cruz v. El Salvador, **2005** Corte I.D.H. (ser. C) No. 120, ¶ 196 (1 de marzo de **2005**) (reforzando en la sociedad salvadoreña la necesidad de encontrar mejores soluciones para identificar la verdad sobre el paradero de sus niños).

[FN159]. Ver Huilca Tesce, **2005** Corte I.D.H. (ser. C) No. 121, ¶¶ 113-114.

[FN160]. Proyecto de Artículos, supra nota 1, en 226 (citando el Artículo 30).

[FN161]. Ver Crawford, supra nota 29, en 199 (enfatizando que el Estado debe concentrar en el refuerzo de una relación legal continua y en el futuro).

[FN162]. Convención Americana, supra nota 4, art. 2.

[FN163]. Castillo Petruzzi v. Perú, 1999 Corte I.D.H. (ser. C) No. 52, ¶ 207 (30 de mayo de 1999).

[FN164]. Ver Barrios Altos v. Perú, **2001** Corte I.D.H. (ser. C) No. 83, ¶ 18 (3 de septiembre de **2001**).

[FN165]. Ver Claude Reyes v. Chile, **2006** Corte I.D.H. (ser. C) No. 151, ¶ 94 (19 de septiembre de **2006**).

[FN166]. Ver id. ¶ 102 (concluyendo que el Estado no cumplió con las obligaciones de la Convención Americana porque las violaciones del caso ocurrieron antes que el Estado realizara las reformas necesarias).

[FN167]. Ver "La Última Tentación de Cristo" v. Chile, **2001** Corte I.D.H. (ser. C) No. 73, ¶ 103(1), (4) (5 de febrero de **2001**) (ordenando al Estado que modificara su ordenamiento júridico interno de acuerdo con las protecciones del artículo 13 de la Convención Americana).

[FN168]. Ver Velásquez Rodríguez v. Honduras, 1988 Corte I.D.H. (ser. C) No. 4, ¶172 (29 de julio de 1988) (destacando que falta de diligencia por parte del Estado podría acarrear responsabilidad internacional).

[FN169]. Ver, por ejemplo, Ximenes Lopes v. Brasil, **2006** Corte I.D.H. (ser. C) No. 149, ¶ 248 (4 de julio de **2006**) (acusaciones del mal trato resultando en muerte de un paciente de descapacidad mental); Garrido y Baigorria v. Argentina, 1998 Corte I.D.H. (ser. C) No. 39, ¶ 73 (27 de agosto de 1998) (desaparción de víctimas); La "Panel Blanca" v. Guatemala, 1998 (ser. C) No. 37, ¶ 173 (8 de marzo de 1998) (secuestros acompañados de maltratos y torturas).

[FN170]. Ver Las Palmeras v. Colombia, **2002** Corte I.D.H. (ser. C) No. 96, ¶ 68 (26 de noviembre de **2002**) (enfatizando que la obligación de investigar y sancionar violaciones de derechos humanos se debe realizar ex oficio e independiente de solicitaciones de las víctimas).

[FN171]. Ver id. ¶ 69 (planteando que hacer lo contrário resultaría en traer impunidad a los responsables).

[FN172]. Ver Myrna Mack Chang v. Guatemala, **2003** Corte I.D.H. (ser. C) No. 101, ¶ 276 (25 de noviembre de **2003**).

[FN173]. Ver Castillo Petruzzi v. Perú, 1999 Corte I.D.H. (ser. C) No. 52, ¶ 132 (30 de mayo de 1999) (reconciendo que tribunales militares no satisfacen los requerimientos inherentes a las garantías de imparcialidad e independencia establecidas en la Convención Americana).

[FN174]. Ver Hilaire, Constantine y Benjamin v. Trinidad y Tobago, **2002** Corte I.D.H. (ser. C) No. 94, ¶ 214 (21 de junio de **2002**).

[FN175]. Ver Fermín Ramírez v. Guatemala, **2005** Corte I.D.H. (ser. C) No. 126, ¶130 (20 de junio de **2005**) (declarando la necesidad de otras medidas de reparación, incluyendo reformas legales y medidas legislativas y administrativas).

[FN176]. Ver Tibi v. Ecuador, **2004** Corte I.D.H. (ser. C) No. 114, ¶ 237 (7 de septiembre de **2004**) (incluyendo gastos de viajes y estancia de los familiares durante visitas a la víctima, sesiones de psicoterapia de víctima, alimentación especial, tratamiento físico, reparación de dentadura, y devolución de bienes y valores que fueron incautados por la policía).

[FN177]. Ver Ivcher Bronstein v. Perú, **2001** Corte I.D.H. (ser. C) No. 74, ¶ 95 (6 de febrero de **2001**) (explicando que la anulación no fue conforme a la ley Peruana).

[FN178]. Ver id. ¶¶ 179-180.

[FN179]. Ver Lori Berenson Mejía v. Perú, **2004** Corte I.D.H. (ser. C) No. 119, ¶ 241 (25 de noviembre de **2004**) (aludiendo al impacto que tiene la altura de la prisión sobre sus habitantes).

[FN180]. Proyecto de Artículos, supra nota 1, en 289 (citando el Artículo 38).

[FN181]. Ver, por ejemplo, Yatama v. Nicaragua, **2006** Corte I.D.H. Resolución de la Corte I.D.H., ¶ 1 (29 de noviembre de **2006**) (indicando que la Corte tiene como facultad la supervisión del cumplimiento de sus decisiones).

[FN182]. Ver Ricardo Canese v. Paraguay, **2006** Resolución de la Corte I.D.H., ¶ 6 (22 de septiembre de **2006**).

[FN183]. Id.

[FN184]. Ver Jurisprudencia de la Corte Interamericana de Derechos Humanos, disponible en http://www.corteidh.or.cr/supervision.cfm (visitada por última vez el 27 de octubre de **2007**).

[FN185]. Ver Las Niñas Yean y Bosico v. República Domincana, **2005** Corte I.D.H. (ser. C) No. 130, ¶ 251 (8 de septiembre de **2005**) (delimitando el plazo de pago a un año a partir de su notificación).

[FN186]. Ver id. ¶ 258.

[FN187]. Ver Caso de las Niñas Yean y Bosico v. República Dominicana, **2006** Corte I.D.H. (ser. C) No. 156, ¶ 23 (23 de noviembre de **2006**) (enfatizando que el Estado continúa presentando el caso ante la Corte).

[FN188]. Ver Proyecto de Artículos, supra nota 1, en 289 (explicando en el comentario 1 del Artículo 38, que los intereses no son necesaros ni suficientes para compensación en todos los casos).

[FN189]. Ver id. (estableciendo que los intereses viene del procedimiento de la Corte y varía en caso).

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Article

# *49 TRANSITIONAL JUSTICE IN TIMES OF CONFLICT: COLOMBIA'S LEY DE JUSTICIA Y PAZ

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***50** I. Introduction

Transitional justice has become a mainstay in post-conflict recovery and reconstruction. Since the 1970s, numerous countries have opted for alternative justice mechanisms to respond to periods of massive violence and human rights violations. The political openings that have made peace processes possible have varied--peace accords (El Salvador and Guatemala), moral weakening of militaries (Argentina), corruption charges (Peru), and international pressure (South Africa). [FN1] Each of these experiences presents its own nuances, demonstrating that no fixed transitional justice model exists. [FN2] However, to date these various transitions have shared a common trait: they occurred after episodes of internal armed conflict, political violence, and authoritarian regimes. In each of these settings, once political violence subsided, the governing power implemented transitional justice approaches to confront the past in the hope of establishing the foundations for a different sort of future. Indeed, as Ruti Teitel has argued, transitional justice is a leading rite of modern political passage and draws upon both legal innovations and ritual acts that enable the passage between two orders--the predecessor and successor regimes. [FN3]

By definition, transitional justice involves alternative approaches to conventional justice, thus provoking lively and at times contentious debate. In each context, political leaders, intellectuals, perpetrators, victim-survivors, [FN4] and other national and international actors struggle over the balance between truth and justice, accountability and impunity, retribution and forgiveness, and material and symbolic **reparations**, ***51** among other issues. As a result, new transitional justice experiences do not evolve in a vacuum but rather are greatly shaped and influenced by the experiences that came before them. Through this growing "popular jurisprudence," new standards of acceptability and legal limits have evolved to shape future transitional justice models. [FN5] Indeed, this evolving body of legal principles is increasingly normative, as various social actors--particularly victim-survivors and their advocates, as well as domestic and international human rights organizations--present absolute human rights standards to limit political expediency. Thus, the exceptional nature of transitional justice and the flexible equations that have been used to balance truth, justice, and **reparations** are becoming more formulaic as justice increasingly trumps the use of amnesties and pardons in the name of "stability and order" during periods of volatile political change.

Colombia is a case in point, and one that reflects this transitional justice genealogy. In

July **2005** the country embarked on its own transitional justice project when the Colombian Congress promulgated Ley 975/05 (Law 975/05), the Ley de Justicia y Paz (Justice and Peace Law). Unlike its predecessors, Colombia chose transitional justice mechanisms pre-post-conflict: the country's internal armed conflict continues after years of failed peace negotiations and demobilization efforts with various illegal armed groups. However, these latest negotiations occur within a different international context and legal climate, which in turn shape the parameters of the legally and the socially possible. Indeed, prior to the Justice and Peace Law, Colombia began a comprehensive Disarmament, Demobilization and Reinsertion (DDR) program, reforming previous legal frameworks in an effort to collectively demobilize the paramilitaries. Previous attempts at demobilization in Colombia were informed by military and security objectives, and were generally evaluated in terms of technocratic concerns regarding the numbers of combatants enrolled and arms surrendered. [FN6] Embarking on a transitional justice process in the midst of war changes the nature of DDR, as well as the objectives of transitional justice. Rather than operating in a sequential ***52** fashion, Law 975/05 shifted the DDR program onto the terrain of transitional justice and its concerns with issues of memory, truth, justice, redress, and reconciliation. Simultaneously, by explicitly merging DDR and transitional justice, Colombia draws upon the increasingly normative field of transitional justice while contributing an innovative case study: brokering peace through transitional justice mechanisms and staging a transition in the absence of peace accords-- indeed, in the midst of war.

This proposed approach has provoked intense domestic and international debate on the grounds that it requires compromising the increasingly absolute human rights standards of truth, justice, and **reparations** with the desire to bring a warring faction to the negotiating table. How much is the Colombian state willing and able to cede to the paramilitaries while still remaining faithful to international jurisprudence and norms, as well as responding to the demands of a growing victim-survivors' movement that is well-versed in the transitional justice thinking that has emerged over the last twenty-five years? The Colombian victim-survivors' movement and the human rights organizations that serve as their advocates have begun a contentious battle to revoke the Justice and Peace Law through multiple judicial challenges, insisting on victim-survivors' rights to truth, justice, and **reparations**--rights increasingly viewed as central to the broader goal of “national reconciliation.” The authors examine these legal challenges in order to explore how absolute human rights standards have come to influence the transitional justice approach, which began as an alternative to these “rigid” principles. The authors propose that the legitimacy of transitional justice lies precisely in the space in which local actors seek to balance legality with politics, the demands of peace with the clamor for justice.

The authors of this Article were committed to researching the impact of the paramilitary demobilization process “on the ground”--that is, conducting qualitative research that would allow us to test the validity of different debates with the goal of generating recommendations on how future conflict and post-conflict countries might benefit from the merging of DDR and transitional justice. [FN7] In this text we draw upon the preliminary results of our research on the individual and collective demobilization programs. The first stage of the project included 112 in-depth interviews with demobilized combatants from the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP) (Revolutionary Armed Forces of Colombia-People's Army), the Ejército ***53** de Liberación Nacional (ELN), [FN8] and the Autodefensas Unidas de Colombia (AUC) (United Self-Defense Forces of Colombia).

We begin with a concise history of the current conflict in Colombia, as well as previous demobilization efforts with various illegal armed groups. We then turn to an analysis of the Justice and Peace Law, which established the legal framework in which the DDR program is being implemented. Following a discussion of the debates this process has generated, we present the findings from our qualitative research with demobilized combatants. We conclude by examining the benefits and challenges of moving DDR onto the terrain of transitional justice.

## II. The Origins of War

Colombia's civil war is the lengthiest armed conflict in the Western hemisphere, beginning during the period known as La Violencia (1948-1953), when violent confrontation between two established political parties exploded. [FN9] The Conservative Party launched a violent offensive against supporters of the Liberal and Communist parties, who were demanding socioeconomic and political change; these violent attacks prompted the rural population to begin organizing "self-defense groups." By the time La Violencia ended, 200,000 people were dead, and more than a billion dollars in property damage had occurred. Ultimately, in 1958, "democracy" was restored in Colombia when the Liberals and Conservatives issued the Declaration of Sitges, in which they proposed a "National Front" of joint governance. [FN10]

Soon thereafter, in the 1960s, a proliferation of guerrilla movements occurred in Colombia and throughout Latin America. In many cases, the guerrilla movements were the armed wings of existing communist parties, composed of those who felt traditional parties had failed to deliver on the promise of social change and political reform. [FN11] The FARC, Colombia's ***54** oldest and largest guerrilla group, established itself in 1966. [FN12] Today the FARC has an estimated 18,000 members, including many women and children.

The escalating insurgent violence prompted the formation of the alternately legal and illegal armed groups known collectively as paramilitaries. [FN13] State sponsorship of these groups traces back to Emergency Decree 3398, issued in 1965 and subsequently transformed into Law 48 and approved by the Colombian Congress in 1968. [FN14] This law allowed the government to "mobilize the population in activities and tasks" to restore public order and contain the insurgent threat. [FN15] Specifically, the military formed armed civilian groups to assist in joint counterinsurgency operations. Although promoted as "self-defense committees" organized to protect local communities against the guerrillas, these groups came to assume greater responsibility in state-organized "search and destroy" operations seeking to quash the guerrillas. [FN16] This initiative arose out of the logic of the Cold War and a counterinsurgency strategy that lay the groundwork for the paramilitaries to become the preferred means of protecting the interests of the powerful elite, suppressing social protest viewed through the prism of anti-communism, and ultimately assisting in the expansion of drug trafficking throughout Colombia. [FN17]

Indeed, the growth of the paramilitaries occurred in the absence of a state presence in war zones. [FN18] Paramilitaries were often converted into private security forces for rich landowners and economic elites who wanted to remove peasants forcibly from land they later expropriated or ***55** developed. [FN19] Multinational companies also played a role in contracting paramilitary groups to protect their interests. [FN20] Increasingly, the

paramilitaries became a means for resolving labor disputes, eliminating political opponents, and controlling social protests by targeting activists and peasant leaders--all actions that were brokered by the security forces and framed as part of the counterinsurgency strategy. [FN21] The collaboration between illegal armed groups and drug traffickers only further complicated the war. [FN22] Into this already volatile situation, the U.S.-backed Plan Colombia resulted in significant military support finding its way into the hands of the AUC. [FN23]

Indeed, it was the fusion of paramilitary organizations and drug trafficking that ultimately gave rise to the phenomenon known as paramilitarismo. By the late 1980s, the paramilitaries formed part of a powerful parallel military structure "capable of coordinated action throughout the country." [FN24] Yet, in light of growing outrage over the ties between the military, paramilitaries, and drug traffickers--and the human rights violations attributed to these groups--then President Virgilio Barco outlawed the use of armed civilians in army operations in a decree, noting that "these provisions . . . may be taken as legal authorization to organized armed civilian groups that end up acting outside the Constitution and the laws . . . which stands in the way of pooling efforts to achieve reconciliation . . . ." [FN25] He also criminalized the promotion, financing, and membership in paramilitary groups and penalized ***56** the act of training or equipping "persons in military tactics, techniques, or procedures for undertaking criminal activities," making it an aggravated offense if done by active or retired members of the military forces or National Police. [FN26] However, in 1997, Carlos Castaño brought together eighteen paramilitary blocs to form the AUC as a national umbrella group of paramilitaries. [FN27] The organization developed a highly regimented military command structure, seeking to translate its military power and economic might into political capital.

Thus, legal reforms aside, paramilitarismo continued. Domestic and international human rights organizations have documented the continued collusion between the military and paramilitary, resulting in massacres, assassinations, torture, forced displacement, forced disappearances, and kidnappings. [FN28] Moreover, human rights organizations routinely attributed seventy to eighty percent of the human rights violations to the paramilitaries, making Colombia's armed conflict "a war against civil society." [FN29] What began forty-two years ago as a war waged by Marxist revolutionaries against an exclusive political system has devolved into a bloody struggle over resources: the military, the paramilitaries, guerillas, domestic elites, and multinational actors vie for control of this resource-rich country. [FN30] In the struggle, all groups have committed serious human rights violations, and according to Amnesty International, 70,000 people have been killed in the past twenty years alone. [FN31] Thousands more have disappeared or been kidnapped, tortured, and forcefully recruited by illegal armed groups, among other grave violations of fundamental rights. [FN32] The vast majority of the war casualties are unarmed civilians, and the escalating violence and fear have prompted massive internal and cross-border displacement. [FN33] The UN High Commissioner for Refugees estimates***57** that almost three million people have been internally displaced. [FN34] Often, the most vulnerable sectors of society have been targeted, including disproportionate numbers of indigenous people and members of Afro-Colombian communities. [FN35] In sum, the war in Colombia has resulted in a humanitarian crisis provoking international concern, as various armed groups commit serious human rights violations and demonstrate total disregard for international humanitarian law. [FN36]

## III. Disarmament, Demobilization, and Reintegration: Colombia's Serial Search for Peace

During Colombia's forty-two-year internal armed conflict, each successive president has attempted some sort of military victory or, in the face of that impossibility, peace negotiations. While it is beyond the scope of this text to present an exhaustive review of these previous efforts, we note certain key features that serve to contextualize current peace negotiations and explain the tensions between traditional models of demobilization and a changing political and legal context.

Within the glossary of post-conflict reconstruction and peace building, three terms loom large: disarmament, demobilization, and reintegration. As the United Nations Department of Peacekeeping Operations (UNDPKO) defines it, in the context of peace processes, "disarmament" consists of the collection, control, and elimination of small arms, ammunition, explosives, and light and heavy weapons from the combatants and, depending upon the circumstances, the civilian population. [FN37] "Demobilization" is the process in which armed organizations (which may consist of government or opposition forces, or simply armed factions) decrease in size or are dismantled as one component of a broad transformation from a state of war to a state of peace that may involve the concentration, quartering, disarming, management, and licensing of former combatants with the incentive of compensation or ***58** other assistance to reenter civilian life. Finally, "reinsertion" or "reintegration" directs ex-combatants to strengthen their capacity, and that of their families, to achieve social and economic self-sufficiency. [FN38] Reinsertion programs may include economic assistance, technical or professional training, or instruction in other productive activities. In sum, "DDR is concerned with dismantling the machinery of war." [FN39]

In its traditional formulation and implementation, DDR was squarely located within a military or security framework. [FN40] This focus failed to give sufficient consideration to the host communities and the need to incorporate local, cultural, or gendered conceptions of what constitutes the rehabilitation and resocialization of ex-combatants. Yet, an evaluation of DDR programs in sub-Saharan Africa noted that "[l]ong-term integration is ultimately the yardstick by which the success of the DDR programme is measured." [FN41] Reintegration therefore appears to be the weakest phase of the DDR process. The newly released United Nations Integrated DDR Standards underscores the deficiency of reintegration efforts and insists on "the need for measures to be conducted in consultation and collaboration with all members of the community and stakeholders engaged in the community, and [DDR programs] make use of locally-appropriate development incentives." [FN42]

Even if DDR has tended to be defined as a military strategy, its importance in human rights contexts has not gone unnoticed. For instance, the UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (the Joinet Principles) establish that "[g]uarantees of non-recurrence" include "measures to disband parastatal armed groups." [FN43] In the report to which the principles are annexed, the Special Rapporteur states, "[d]isbandment of parastatal armed groups: this is one of the hardest measures to enforce . . . [because], if not accompanied by action to reintegrate group members into society, the cure may be worse than the disease." [FN44] To that end, Joinet Principle 38 addresses the "Disbandment of unofficial armed groups directly or ***59** indirectly linked to the State and of private groups benefiting from its passivity." [FN45] This directive reflects the principle of prevention and non-repetition, the underlying justification for the international human rights protection system. [FN46] In this vein, the

Inter-American Commission on Human Rights (IACHR) advised that "[t]he efforts at peacemaking and demobilization of armed groups should be strengthened on the basis of legitimacy and participation, so as to offer the beneficiaries a genuine opportunity for reintegration into society and guarantees of protection in the face of possible violent reprisals." [FN47] Indeed, as will be explored, Colombia's experience suggests that the traditionally slighted issue of reintegration may serve as the bridge to the goals of transitional justice, in particular reconciliation.

A. The Start of DDR in Colombia: Negotiating Peace with Guerrillas

An overview of past DDR efforts in Colombia highlights the weaknesses in the traditional DDR framework in terms of the reintegration phase, ultimately resulting in backslides to violence. Most approaches adopted the logic of olvido y perdón en pro de la paz (forgetting and pardon in favor of peace). For instance, in 1953, Army Chief of Staff General Gustavo Rojas Pinilla staged a coup to end La Violencia, initiating Colombia's first demobilization effort through general amnesty and government aid to belligerents who lay down their arms. [FN48] Thousands complied with the offer, and relative calm ensued for several months following the coup. The government failed to provide adequate security, however, and many of the demobilized men were subsequently killed in an escalating cycle of revenge. [FN49]

Since then, numerous administrations have attempted to implement DDR with various guerrilla groups. Early demobilization efforts illustrate the extent to which absolute amnesty was considered a legitimate means of securing "peace." The Betancour administration (1982-1986) applied Law 35, Ley de Amnistía no condicionada y en pro de la Paz (Law of Unconditional Amnesty in Favor of Peace) to recognize the guerrilla organizations as political actors, thereby ***60** establishing a framework for demobilization efforts not connected to a peace treaty. [FN50] Nearly 700 guerrilla members from the FARC, ELN, and the Movimiento 19 de Abril (M-19) participated in this demobilization program. [FN51] Law 35 also formed the basis for the Uribe Contract of 1984, in which the FARC agreed to a ceasefire and announced the establishment of a political party, the Unión Patriótica. [FN52] Following their demobilization and reconstitution as a legitimate political party, some 3,000 members of the Unión Patriótica were assassinated by paramilitaries who had not been included in peace talks. The failure to guarantee security for the ex-combatants--and their subsequent slaughter--hovers over any negotiations with the guerrilla groups today.

The Barco government (1986-1990) also attempted to demobilize the guerrillas via the Iniciativa para la Paz (Initiative for Peace), requiring the guerrillas to dismantle their military apparatus, surrender their weapons, and reintegrate into society. [FN53] This effort emphasized a national reconciliation process, yet still excluded the paramilitaries. The continued paramilitary violence, often carried out with the tacit support of the military, undermined the peace process. Moreover, the initiative did not contemplate concerted reintegration programs, although the first National Reintegration Office finally opened in April 1991. Among the problems plaguing the process were insufficient funding, scant monitoring of the demobilized combatants, and lack of consultation with or benefits to the host communities. [FN54] In sum, the government's main goal was ending the armed conflict, and little thought was directed toward how to move beyond winning the war to securing peace.

The succession of failed attempts continued, with Cesar Gaviría (1990-1994) attempting to control drug trafficking through plea-bargaining and reduced sentences for drug kingpins who turned themselves in to authorities. With attention focused on the key drug traffickers, other armed groups grew virtually unchecked. The paramilitaries expanded as allies in the struggle to provide "security" in those areas of the country where the state was historically absent, and as their ***61** power grew, so did the lethality of their methods. Thus, by the time President Ernesto Samper (1994-1998) was elected, the paramilitaries were increasingly viewed as a threat to the state; in consolidating their territorial and political power, they increasingly turned their violence on members of the elite who had been their allies and benefactors. [FN55]

Additionally, ongoing definitional debates revolved around which groups would be considered political and which would be labeled terrorist. Law 418 in 1997 opened the possibility that the government could bestow carácter político (political status) on guerrilla groups and popular militias, thus making negotiations possible. [FN56] The law also established an exploratory commission charged with determining the possibility of entering into dialogue with the guerrillas and presenting "recommendations regarding the treatment that . . . would need to be given to the self-defense groups as parties to the armed conflict." [FN57] For the first time, the issue of paramilitary groups was included in the government's efforts to develop peace policies.

These initial steps toward full inclusion did not last long. Andrés Pastrana (1998-**2002**) was elected president on a platform that promised renewed peace talks and a commitment to achieving a negotiated settlement to the war. In an effort to demonstrate to the guerrillas that he was a man of his word, he ceded to the FARC a large portion of southernColombia to which military access would be denied, thereby ensuring the guerrillas a "safe zone" during the peace process. [FN58] However, this controversial move did not succeed in securing meaningful negotiations, and once again, the paramilitaries remained strikingly absent from the negotiating table.

B. Negotiating Peace with Paramilitaries: Contemporary DDR Efforts

In the wake of so many failed peace processes, President Álvaro Uribe (**2002**-**2006**; **2006**-present) was elected on the promise of restoring security and the rule of law. With the failure of Pastrana still fresh, Uribe refused to negotiate with the FARC, whom he considered a "terrorist ***62** threat." [FN59] Rather, he cautiously explored the possibility of negotiating with the paramilitaries, while simultaneously promising to rein in the guerrillas.

There is a certain irony to these negotiations: in part the paramilitary demobilization is an attempt to "de-paramilitarize" the Colombian state, distancing it from these "self-defense committees," that went beyond governmental control. In its report on Colombia's demobilization, Amnesty International notes that "[t]he notion of a peace or demobilization process between the government and paramilitaries is a seemingly contradictory concept given the long-standing and close links between the security forces and paramilitaries, and the fact that the raison d'être of paramilitarism is the defense of the Colombian state and the status quo against real or perceived threats." [FN60] Yet certain sectors of the Colombian military also felt that the paramilitaries damaged the legitimacy of the institution itself and were thus eager to distance themselves from a group that had become a liability. [FN61] Furthermore, increasing domestic and international pressure called for a more

permanent solution.

The paramilitary leaders had their own motivations for engaging in dialogue. Alfredo Rangel has persuasively argued that paramilitary leaders entered into negotiations with Uribe for four key reasons. [FN62] First, many paramilitary leaders were tired of combat. Many of these men are accustomed to urban life and its comforts, and life in the rural war zones is not only harsh but keeps them away from their families. Second, many paramilitary leaders expected the Uribe administration to weaken and beat back the guerrillas, which would deprive them of the discourse that justified their existence. Third, they assumed that the legal and political conditions for their demobilization and reinsertion would resemble those that previous administrations had extended to the guerrillas during the 1980s and 1990s. Finally, national and international sentiment was strongly behind Uribe's efforts to negotiate a demobilization process with the paramilitaries.

However, as we argue throughout this text, the paramilitary leaders were mistaken in several of their assumptions. Principally, they did not consider the substantial changes that have occurred in international human rights law and norms, and the increasing demand for truth, justice, and **reparations** following armed conflicts. Thus, rather than the well-worn path of pardon and forgetting, these paramilitary leaders entered ***63** into negotiations that were strongly influenced by demands for nunca más (never again).

Within this shifting context, Uribe became the first Colombian president to enter into a peace process with the AUC. This innovation set Uribe's peace policy apart from that of every other administration since 1989, when President Barco declared the paramilitary groups illegal. As Garcia Peña observes, "[w]ith this, the analytical frame changes radically: it was always thought that the paramilitary demobilization would be the result of peace with the insurgency--either simultaneously or subsequently--because the paramilitaries themselves claim to be a consequence of the guerrilla." [FN63]

In August **2002**, the government began negotiations with the paramilitaries, facilitating this process through Law 782 of December **2002**, which regulated individual and collective demobilization efforts by both extending and amending Law 418 of 1997. [FN64] The government named Luis Carlos Restrepo as the High Commissioner for Peace responsible for promoting the signing of the Santa Fe de Ralito I agreement on July 15, **2003**. The agreement marked the beginning of formal talks between the AUC-linked paramilitary groups and the government, and it included terms for the demobilization of all paramilitary combatants by the end of **2005**. [FN65] The AUC was obliged to suspend its lethal activities and maintain the unilateral ceasefire, as well as aid the government in its anti-drug-trafficking efforts. [FN66] As talks began, the AUC announced a unilateral ceasefire on December 1, **2002**, while insisting that none of its members would face prison time or extradition to the United States. [FN67] The Santa Fe de Ralito II agreement, signed on May 13, **2004**, set up a 368-square-kilometer zona de ubicación (concentration zone) in Tierralta, Córdoba, ***64** to facilitate and consolidate the negotiation process between the government and the AUC, improve verification of the ceasefire, and establish a timetable for demobilization. [FN68] However, while the military and national police are responsible for guarding the perimeter of the zone, they have no presence within it, leaving civilians inside the zone in a state of insecurity. [FN69]

Decree 128, promulgated on January 22, **2003**, regulates Law 782 and thus governs

both the individual and collective demobilization processes. [FN70] The Decree established the Comité Operativo para la Dejación de Armas (Committee for Laying Down Arms) to verify membership in illegal armed groups and to evaluate whether individuals and groups have a genuine desire to demobilize and provide identification papers to certify their status. Decree 128 provides economic and legal benefits--including "pardons, conditional suspension of the execution of a sentence, a cessation of procedure, a resolution of preclusion of the investigation or a resolution of dismissal"--to armed groups that committed "political and related crimes." [FN71] These groups also enjoy immunity from future prosecution for the same crimes underlying the benefits granted. Finally, Decree 128 regulates social benefits, such as the provision of food, shelter, safety, and even economic opportunities.

The complete process takes a maximum of forty-eight days, beginning with the paramilitary leaders giving the government a list of their members and the weapons they will surrender. Following this stage, the members are moved to a "concentration zone" where their identities are verified through fingerprints, photographs, and dental records for the Registraduría Nacional del Estado Civil (National Registrar of Civil Status). [FN72] These individuals also hand over their weapons and are checked for outstanding arrest warrants for crimes not covered by Decree 128, based on ***65** the Office of the Attorney General's database, as well as those of the state intelligence services.

When an individual is transferred to the zone, the government determines whether he or she is responsible for a human rights violation. While this determination should be based on information provided by the Attorney General's office along with information from the state intelligence branch, [FN73] the Attorney General's office apparently conducts only a cursory check of its files to see if the individual is already the subject of an ongoing prosecution or has been previously convicted. [FN74] Thus, no new prosecutions arise during the demobilization process unless and until crimes are discovered at a later time. Finally, if an individual is suspected of being a human rights violator-- irrespective of whether the acts in question were political--he is not eligible for Decree 128 and remains in the concentration zone after the remainder of the group is returned to the place of origin. [FN75] Those who return begin to receive economic benefits and other support, and any criminal charge or investigation terminates. None of those subject to this process is required to identify illegally obtained assets or provide **reparations** to victims.

In practice, flaws in this system have resulted in pardons for paramilitary members under investigation for non-pardonable offenses such as human rights violations. In December **2004**, the Office of the General Prosecutor, the government entity responsible for disciplinary investigations of public officials and security force members charged with misconduct and human rights violations, revealed that 160 members of the paramilitary group Bloque Cacique Nutibara (BCN) were pardoned under Decree 128 but were later found to be under investigation for human rights violations. [FN76] While a handful of members and many paramilitary leaders have been sent to the concentration zone, many other demobilized paramilitaries who benefited from Decree 128 have therefore gone free, often returning to their communities of origin. [FN77] The Colombian Procuraduria (Inspector General's Office) found that 163 individuals charged with atrocities such as kidnapping and forced disappearances had received judicial benefits. [FN78]

***66** C. Problems with Colombia's DDR: The Question of Accountability

Since **2003**, Colombians have watched orchestrated ceremonies of paramilitaries laying down their arms before television audiences and dignitaries in efforts to demobilize. The process commenced on November 25, **2003**, when 874 members of the BCN laid down their arms, setting off a series of large-scale demobilizations. [FN79] To date, a total of 30,151 AUC combatants have demobilized, and 16,983 weapons have been turned in and registered. [FN80] Despite the media-friendly performance of demobilization, the reality reveals the difficulties and superficialities of such efforts.

While the Ministry of Defense claimed significant reductions in the violence beginning in **2003**, [FN81] other sources showed that sociopolitical violence remained high, with almost 5,000 extrajudicial killings in **2003**, the majority executed by paramilitaries. [FN82] The Centro de Investigación y Educación Popular (Research and Public Education Center) has also identified increases in displacement due to the violence. [FN83] The Colombian Defensoría del Pueblo (Ombudsman's office) reported in September **2004** that it had received 342 complaints against paramilitaries, including massacres, assassinations, and kidnappings. [FN84] That same ***67** year, the Colombian Commission of Jurists reported 1,899 disappearances from the date of the ceasefire. [FN85] Similarly, while the Ministry of Defense has reported that twenty percent of the paramilitary combatants have demobilized, others claim that the number of paramilitaries has grown by ten percent annually. [FN86] In **2004**, the IACHR observed that the process had neither resulted in a significant reduction of violence nor altered the threatening and abusive behavior of local paramilitaries. [FN87] In other words, despite televised collective demobilizations, the general population continued to live in a climate of fear and violence. Critics blame the mechanisms used for the physical demobilization of paramilitary troops and the lack of oversight of the process. [FN88]

In particular, Decree 128 affects individual demobilization but does not adequately address collective demobilization. Thus, the structure of paramilitarism is not dismantled, even though individual combatants disarm and demobilize. Importantly, collective demobilization is "identified with the development of peace negotiations with the leadership of illegal organizations," whereas "individual demobilizations seek to dismantle these organizations from their base, offering their members the opportunity to avail themselves of procedural, social, and economic benefits in exchange for their surrender and cooperation with the authorities." [FN89]

Since the passage of Law 418 of 1997, the tenor of demobilization efforts has been to encourage individuals to desert illegal armed groups. Yet, Decree 128 does not require individuals to provide information about the group to which they belong, leaving some information about crimes uncovered. [FN90] The demobilization procedures follow what Human Rights Watch terms "an assembly line approach," which adheres to mechanical procedures in accordance with an expedited schedule mandated by the High Commissioner for Peace. [FN91] Investigators lose valuable information about the group's structures, crimes, financing, illegal assets, and other critical information. The differences in the means may therefore reflect ***68** differences in the desired ends. Andres Peñate, the Colombian Deputy Secretary of Defense, has affirmed that the "demobilization of individuals is regarded as a 'war tactic' by the government, as its emphasis is on the retrieval of information and the weakening of the insurgent groups, [while] 'collective demobilization' is conceived as a peace instrument." [FN92]

Moreover, with so many ex-paramilitaries free without consequences and paramilitarismo intact, new problems complicate the peace process. One arises when paramilitaries undergo a "legitimization" process, which entails the purchase of legal businesses and other productive projects, as well as integration into local, regional, and national politics. [FN93] Paramilitaries often gain control of these assets or positions through cooptation or threats, and thus they have maintained a widespread societal presence, occupying "a significant number of local mayors' offices, governorships, the judicial apparatus, the health and education system, public contracts, business cooperatives and other economic concerns, private security firms, and the criminal economy, including drug-trafficking, extortion, the illegal trade in gasoline, prostitution, and gambling rackets, thus part of a complex criminal organization." [FN94] Meanwhile, those living in the community, labeled comunas, continue to live under "the reign of silence." [FN95] As Human Rights Watch cautions, "unless the law takes into account the complexity, power, and regenerative capacity of paramilitary mafias, there is a serious risk that the demobilization process will simply give paramilitary leaders the benefits they seek without resulting in any real advances in terms of accountability or peace." [FN96] Any reengagement of demobilized combatants in the conflict therefore contributes to the failure to "break the cycle of violence in Colombia." [FN97]

Without a breakdown of paramilitarismo, both demobilized paramilitaries and guerrillas are being "recycled" into the conflict, often as paid military informants, and thus "legalized" to become "more palatable to domestic and international public opinion." [FN98] Moreover, they gain economic and legal benefits while continuing with their illegal activities. ***69** In this way, paramilitarismo becomes "reengineered" rather than dismantled. As the IACHR recognizes, fostering conditions for the successful reincorporation to society of those who have formalized their intent to put down their arms is valid and desirable. At the same time, the use of civilians in tasks to support the military forces and National Police must be evaluated with caution since it could reproduce the circumstances that originally led to the creation of the groups that are now the object of demobilization efforts. [FN99]

Programs that benefit the demobilized by giving them access to job training, income and employment generation, and psychosocial accompaniment are equally divisive and may cause resentment in the poor communities in which the demobilized reside. [FN100] These former "criminals" are perceived as having easy access to privileges that are beyond the reach of many of the poor, who struggle on a daily basis. Above all else, the IACHR concludes that "[t]he demobilization mechanisms have not been accompanied by comprehensive measures to provide relief to the victims of the violence nor to clarify the many criminal acts that remain unpunished, and therefore the factors generating the conflict in large measure persist." [FN101]

Thus, neither the number of demobilized combatants compiled in the aggregate statistics nor televised collective demobilization ceremonies are sufficient to satisfy a need for substantive compliance and justice. Even if sincere, these events do not reflect careful consideration of the social processes that must accompany them. The result is collective demobilizations that run the risk of remaining mere rituals of statecraft, lacking social resonance. They confirm what many of these community members and former combatants fear: that it is all a façade--the state in its theatrical register, orchestrating a transition that does not reach beyond the flat, shiny surface of the television screen.

D. Reintegration: Towards a Concept of Reconciliation?

Frequently, peace processes, democratic transitions, and "national reconciliation" efforts are little more than the restructuring of elite pacts of governability and domination. In these superficial forms of reconciliation, the dialogue involves the same interlocutors, the same silences, and the same exclusionary logics that existed previously. Maximizing the commitment of demobilized combatants to reintegrating themselves into ***70** "legal life" requires public rituals that construct a new way of coexisting, as well as a redistribution of resources and power.

For example, in South Africa, the discourse of national reconciliation was, to a great extent, dominated by political and religious leaders. Wilson criticizes the South African Truth and Reconciliation Commission (TRC) for having deployed the concept of reconciliation in a top-down manner, leaving little space to express the sentiments of retribution and revenge that operated in the local sphere. [FN102] The failure to translate the grand vision of national reconciliation to the local level was striking, and religious and political elites appropriated the term "reconciliation" as a meta-narrative to reconstruct the nation-state and their hegemony, post-apartheid. Wilson argues that part of the gap between national and local processes resulted from the lack of "any dispute-resolution mechanisms within the TRC framework to negotiate the return of former 'pariahs' to the community." [FN103] His conclusions support the need to reincorporate demobilized combatants into the communities in which they live, and the need to work with the victims, the victimizers, and the beneficiaries in reconstructing social life.

This challenge underscores the fact that the least studied and least successful phase of DDR is reintegration, which should in fact be a central focus in Colombia. [FN104] If ex-combatants are not provided with viable paths leading to their reincorporation into society, then they may choose to "return to the hills" and the fighting that has convulsed Colombia for more than four decades. Moving DDR onto the terrain of transitional justice may work to the benefit of both former combatants and broader society. The Colombian experiment may be the first to implement the recommendations in the newly released Stockholm Initiative on DDR, which advocates reformulating traditional DDR to include links to transitional justice and reconciliation measures. [FN105]

E. The Demobilized as Transitional Subjects?

The interviews conducted for this study enabled critical insights into the reintegration process. Of the 112 individuals interviewed, ninety percent were combatientes rasos (foot soldiers) or squadron leaders in charge of a maximum of ten to fifteen men. These individuals were chosen for interviews because they represent the "castaways" of the war--the cannon fodder that are often expendable and woefully replaceable. ***71** We emphasize the need to differentiate according to rank and to recognize that while many of these ex-combatants do blur the line between victim and perpetrator, they are not among those who are the true beneficiaries of the war. Obviously, differences in rank translate into differences in earnings and responsibilities; they also influence combatants' intellectual authorship, the severity of their crimes, and their sense of guilt and the guilt others attribute to them.

Our research demonstrates that key factors motivating the combatant's desire to participate in the DDR program include missing one's hometown, friends, and family, as well

as the “war weariness” so many of these men and women expressed. One factor contributing to this fatigue is the lack of any meaningful ideology that these combatants might use to justify their actions. It was common to hear that “this war is just a business,” and that these men were tired of “killing innocent people--people I didn't even know.” [FN106]

Another phrase that echoes throughout our conversations with ex-combatants is volver al monte (return to the hills), a symbolically rich idea that invokes far more than a geographical location. The former combatants described life in “the hills” (the battle front) as marked by gnawing hunger, days and weeks without sleep, sickness without access to medical care or medications, lives of fear and clandestinity, and incessant killing or watching others being killed. The harsh reality of life in the hills has played a key role in motivating demobilization. Moreover, family proved essential, acting as a bridge between life in the hills and memories of civilian existence--a tie that enabled many of these former combatants to remember that they were still human beings, even out in the hills. Indeed, our findings indicate that the majority of these former combatants are looking for some way to leave the war behind, and yet they are living in the midst of an ongoing armed conflict. The irony is that these demobilized combatants are, in many cases, “transitional subjects.” Unfortunately, the social context is not.

Our research also indicates that paramilitary demobilization must extend beyond the former combatants to include their social environment, requiring that national processes and policies be combined with local and regional initiatives. While local processes should not be romanticized as intrinsically harmonious or democratic, neither should they be overlooked. Reconciliation needs to include certain performative aspects. For instance, collectives engage in “ritual purification” and the reestablishment of ***72** group unity via the secular rituals embodied in transitional legal practices. From this perspective, law is not only a set of procedures, but also a series of secular rituals that break with the past and mark the beginning of a new moral community. Although the literature on transitional justice has focused almost exclusively on the international and national spheres, transitional justice is not the exclusive preserve of either international tribunals or states: communities also mobilize the ritual and symbolic elements of these transitional processes to deal with the deep cleavages left, or accentuated, by civil conflicts. [FN107]

To assume that a change in legal status--combatant to ex-combatant--will translate into the social sphere in the absence of any preliminary process of consultation with the host community is short-sighted. Interviews with people in the surrounding neighborhoods reveal the deep mutual fear that exists between the ex-combatants and the host community. The failure to involve this broader community leads to a vicious cycle of suspicion and fear, both on the part of the “re-integrated” ex-combatants and members of the communities who suddenly find themselves living with former killers. One person assured us that everyone looks at these demobilized combatants as though they were “people from a new race.” Ex-combatants also worry enormously about their own security. One of the administrators of the Bogotá DDR program expressed this mutual fear:

> Really, I think it's a fairly complex process. First of all, the beneficiaries of the program are running a huge risk if they leave the program early because nobody has any idea what they will do if they have to manage their own homes. In addition to this, there's the question of what they will do whenever the state's aid runs out--how will

> they make a living when it's over? And then there's the problem of what might happen if the community does not know how to receive them. There hasn't been any work with the community so that they become used to all the demobilized. There has not been much concern for facing the question of how they could and would ultimately have to live together. [FN108]***73** The question of how to live together resonated among the former combatants as well as their social circles and the host communities. DDR must extend beyond the mere collection of weapons to seriously address the reincorporation of ex-combatants into society, and that reincorporation will involve issues of justice, reparation, and reconciliation. Author Theidon, in her work with the Peruvian Truth and Reconciliation Commission in Ayacucho, studied how people attempt to reconstruct social relationships and sociability after years of living as "intimate enemies." [FN109] It is clear that local initiatives and local processes play a key role in post-conflict reconciliation. [FN110] Reconciliation is forged and lived locally, among families, neighbors, and communities. Without implementing mechanisms for the return and reintegration of former "pariahs"--mechanisms that would provide security for all concerned as well as ensure forms of justice and reparation--the DDR process will continue to be hampered by the high level of impunity that has characterized the program to date.

F. The Transformation of DDR: The Introduction of Transitional Justice Concepts

The concerns generated by the reintegration process ultimately give rise to issues intimately connected to transitional justice and ultimately international law: the victims and their rights. Colombia provides a salient example of how international pressure affects traditional DDR processes, in particular through the involvement of international monitoring bodies. In early **2004**, the Member States of the Organization of American States (OAS) unanimously expressed their "unequivocal support for the efforts of the Government of President Uribe to find a firm and lasting peace," along with their interest in supporting the peace process. [FN111] In what some perceive as a promotional strategy, the Colombian government signed an agreement with the General Secretariat of the OAS on January 23, **2004**, to set up the Misión de Apoyo al Proceso de Paz en Colombia (MAPP/OEA) (Mission to Support the Peace Process in Colombia). [FN112] MAPP/OEA's mandate includes overseeing and verifying initiatives undertaken to secure a ceasefire and an end to hostilities ***74** through DDR strategies. [FN113] It has assumed the responsibility for oversight of the demobilization effort, which includes monitoring the concentration zone; keeping an inventory of weapons, war material, and munitions; and assuring respect for the ceasefire at the national level. It has also assisted in the reinsertion of paramilitaries into civilian life. [FN114]

Despite this front-line role, the mission may not publicly comment on the demobilization efforts unless requested to do so by the Colombian government. [FN115] It also has no power to sanction paramilitaries who fail to meet the terms of their demobilization agreements. [FN116] The process has therefore been criticized as lacking transparency and effective oversight. [FN117] These shortcomings have led some countries to demand the establishment of a legal framework that would ensure respect for international norms of truth, justice, and reparation. [FN118] Specifically, the OAS Permanent Council highlighted the need to "ensure that the role of the OAS is fully consistent with the obligations of its Member States with respect to the effective exercise of human rights and international humanitarian law," and invited the IACHR to provide

advisory services to the MAPP/OAS Mission. [FN119]

In July **2004**, the IACHR delegation visited Colombia to evaluate the demobilization process and the legal regime under which it operated. [FN120] In its concluding report, the IACHR mission observed, "[t]he demobilization mechanisms have not been accompanied by comprehensive measures to provide relief to the victims of the violence nor to clarify the many criminal acts that remain unpunished, and therefore the factors generating the conflict in large measure persist." [FN121] As a result, the IACHR offered "background information in the form of case-law and doctrinal writings on peace processes and administration of justice to be taken into account in the demobilization process." [FN122] This decisive move prompted a vigorous political campaign that helped insert transitional justice guidelines into the DDR process.

Diverse monitoring bodies and human rights organizations began to demand that Colombia's demobilization process be coupled "with guarantees***75** that the State's international obligations will be respected." [FN123] Other observers criticized the lack of an adequate legal framework for setting forth the benefits and conditions of demobilization and the process of dialogue between the "negotiating high command" of the AUC and government. [FN124]

In particular, concern arose over Decree 128, which excludes benefits for combatants who are "being processed or have been condemned for crimes which according to the Constitution, the law or international treaties signed and ratified by Colombia cannot receive such benefits." [FN125] This decree applies only to ex-combatants who decide to participate in individual or collective demobilization but who are being investigated or serving sentences for "lesser" crimes, such as illegal possession of arms, membership in illegal armed groups, and petty crimes. But Law 782 defines the crimes referenced in Decree 128 as "atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, and murder committed outside combat," among others. [FN126] The gap created by Law 782 attracted international scrutiny and required the government to create an alternative framework for the DDR process to deal with members alleged to have committed human rights abuses.

The international community took advantage of the opportunity to modify the DDR process by drawing attention to the missing link in the standard DDR process--concern for the victims and the host communities. Thus, the IACHR endorsed "genuine mechanisms of participation . . . in secure conditions, for the victims of the conflict, so as to ensure access to truth, justice, and reparation." [FN127] It found the negotiations and ceasefire to be at a crucial stage that "should be guided by the principles and standards set forth in international law for resolving armed conflicts" while also respecting the "state's obligation to ensure justice, truth, and **reparations** for all persons under their [sic] jurisdiction." [FN128] Accordingly, the IACHR included a section in its **2004** report on Colombia, Principles and Standards for Overcoming Armed Conflicts and their Consequences for the Civilian Population, noting that:

> The successful development of a process of demobilization . . . calls for the clarification of the violence and reparation of its consequences. Realistic expectations of peaceful coexistence under the rule of law should be based on measures that address ***76** the challenges posed by the construction of a culture of tolerance and the rejection of impunity. The international community has identified a series of guidelines

> with respect to truth, justice, and **reparations** that draw on the experiences of different societies and the principles of law reflected in the obligation of states to administer justice in keeping with international law. [FN129]

Similarly, Amnesty International noted the need to balance individual rights within the demobilization process as a means of combating impunity:

> The right of victims to truth, justice and reparation must form the backbone of efforts to resolve the conflict. Truth, justice and reparation play a key role in ensuring against repetition of human rights abuses. They are essential components of a just and lasting peace and of a future in which human rights are respected and protected. [FN130]

International critics thus invoked what have become classic debates in the transitional justice literature regarding impunity through amnesty, the difficulty of balancing the desire for peace with the demands for justice, and the need for domestic legal principles to respect changes in international jurisprudence.

G. Legislating Peace and Justice

International pressure greatly shaped the legislative history of the legal framework eventually adopted to deal with the "gap" created by Law 782. The resulting Justice and Peace Law helped merge DDR and transitional justice into one legal framework. The merger signifies a momentous break from all previous conventional demobilization frameworks applied in Colombia. [FN131] Above all else, it also creates a novel legal model that mirrors the growing consensus that DDR can no longer operate independently of those considerations normally associated with transitional justice--the rights of victim-survivors to truth, justice, and **reparations**.

Yet, as will be discussed in this next section, the resulting law did not emerge without substantial debate. For those accustomed to an unbridled freedom to broker peace through the most expedient means available, this new direction presented formidable alterations in thinking and practice. Resistance to this new model slowly subsided in the face of consistent lobbying by national and international intermediaries committed***77** to the task of establishing new limits to acceptable peacemaking practices.

Indeed, the "give and take" between these two positions was apparent from the very start of Colombia's most recent attempt to create a legal framework for demobilization. To encourage demobilization and reincorporation into civilian life, the government's first proposed initiative in **2003** contemplated the elimination of criminal sentences altogether for persons who had committed serious violations of human rights or international humanitarian law. [FN132] In defense of the initiative, President Uribe commented that he understood "the concern raised by offering alternative sentences for grave crimes, . . . [b]ut in a context of 30,000 terrorists, it must be understood that a definitive peace is the best justice for a nation in which several generations have never lived a single day without the occurrence of a terrorist act." [FN133]

After a considerable national and international outcry ensued--magnified by a heated debate in the Colombian Congress--the bill was withdrawn for modification. [FN134] The IACHR referred to its court's "clear and firm jurisprudence" denouncing "enactment of laws that limit the scope of judicial proceedings intended to clarify and redress basic human

rights violations committed during a domestic armed conflict . . . ." [FN135] Yet, the lack of balance between the demands of peacemaking and the rights of victim-survivors reflected a tension that would come to color the state's position not only for the remainder of negotiations over the law but also in the aftermath of its eventual promulgation.

In the wake of President Uribe's failed initiative, a series of new proposals appeared, each attempting to respond to the new internationally imposed limits yet representing the range of possibilities along the DDR and transitional justice spectrum. Indeed, the legislative agenda of the Colombian House of Representatives indicates that nine such bills were presented between July **2004** and June **2005**, and significantly, all ***78** were categorized as relating to the "[r]einsertion of armed groups operating outside of the law." [FN136]

The proposed legislation coincided with the Coordination and International Cooperation Roundtable for Colombia, held in London in July **2003** and Cartagena in February **2005** and involving the Colombian government and potential donors, such as the G24 countries, the Inter-American Development Bank, and the United Nations. [FN137] While the purpose of the international meetings was to discuss recommendations issued by the UN High Commissioner for Human Rights Office in Colombia, they inevitably involved discussion of the DDR process. [FN138] These meetings may have been a turning point in the negotiations in that they communicated clearly to the Colombian government that it would have to bring DDR into compliance with international standards on truth, justice, and reparation. Moreover, they ignited the lobbying efforts of local and international human rights groups.

Transitional justice principles and rules, grounded in international law, became the "parameters to be taken into account at the moment of judging whether the demobilization process of armed illegal groups satisfies the requirements of truth, justice and reparation for the victims of the armed conflict in Colombia." [FN139] Yet, at the same time, the challenges of integrating transitional justice principles into a pre-post-conflict situation were not overlooked, as evidenced by a letter issued by the UN High Commissioner for Human Rights stating that "mechanisms of transitional justice should only be applied within processes of negotiation, dialogue and agreements with illegal armed groups that have previously agreed with the government to demobilize and dismantle." [FN140] These pronouncements, combined with the stream of legislation being presented, pressured the Minister of the Interior to present the international community with a revised bill during the Cartagena meeting. The revisions incorporated provisions on truth, justice, and **reparations**, [FN141] but when the ***79** bill was presented to the Colombian Congress the next day, these provisions had already been weakened. [FN142] The Minister's comments reflected the continued resistance to altering traditional DDR approaches that were predicated upon leniency for armed actors. Indeed, a series of further modifications weakened the proposal that eventually constituted the final bill approved by the Colombian Congress. [FN143]

## IV. Tensions in Balancing the Political with the Legal: DDR and Transitional Justice

The debate surrounding the creation of a legal framework for Colombia's peace process has revealed the tension between the state's political need to promote DDR and its legal obligations under human rights and international humanitarian law. Law 975/05, signed by President Uribe July 22, **2005**, embodies the strain between these two competing principles

and the difficulties inherent in balancing the need to broker peace between warring factions with the obligation to respect the rights of those who suffered harm during the armed conflict. [FN144] Attempting to integrate principles of international law into a DDR process can seem futile if done only superficially or for political expediency--victim-survivors may reject these cosmetic alterations and at times the entire transitional justice package.

As discussed above, the Justice and Peace Law was originally designed to fill the gap left by Law 782/02 and Decree 128/03, which pertain to Colombia's "foot soldiers" who elected to participate in the demobilization, benefiting from a process that de facto amounts to a pardon or amnesty. Left over are those who do not qualify for this amnesty because they are under investigation for grave human rights violations. In this way, the Justice and Peace Law does not supersede, but rather complements, the demobilization law. The UN Permanent Mission to Colombia clearly explains that the Justice and Peace Law "is exceptional in nature, inasmuch as it is not a law intended for normal times but rather to encourage an end to violence by organized groups outside the law." [FN145]

***80** Interestingly, the title of the law reads "for the . . . reincorporation of members of armed groups operating outside the law who contribute in an effective manner to the achievement of national peace." [FN146] While the law thus places emphasis on the "R" of DDR, it also integrates transitional justice concepts in its "Definition and Principles," which includes as the law's primary objective "to facilitate the peace process and the individual and collective reincorporation of members of extra-legal armed groups into civil life, guaranteeing the rights to truth, justice and reparation of victims." [FN147]

In fact, the Justice and Peace Law emphasizes criminal proceedings to accomplish this goal, with Article 2 clarifying that the law "regulates the judicial investigation, procedures, sanction and benefits of people linked to armed groups operating outside the law, as authors or participants in criminal acts committed during and as part of their membership to these groups, who have decided to demobilize and contribute decisively to national reconciliation." [FN148] In particular, it regulates the conditions for providing an "alternative sentence," instead of a standard punishment in exchange for "contributions to the achievement of national peace, collaboration with justice, reparation to the victims and an adequate re-socialization." [FN149] The law contemplates both collective and individual demobilization, but first requires that individuals who choose to participate in the process must appear on the Attorney General's list provided by the national government as part of its peace talks, while also adhering to the requirement that illegal activity cease. [FN150]

While the thrust of the law and the mechanisms it puts in place emphasize the DDR process, the influence of international actors can be seen through the explicit protection of victims' rights. Specifically, Article 4 establishes that the process of national reconciliation "should always promote the right of victims to truth, justice and reparation" as well as "respect the right to due process and judicial guarantees of the prosecuted." [FN151] The law also explicitly protects the right to effective investigations and sanctions, the right to truth, and the right to reparation. [FN152] Finally, the law creates the Comisión Nacional de Reparaciones y Reconciliación (CNRR) (National **Reparations** and Reconciliation Commission)***81** to assist in guaranteeing these rights. [FN153] Despite these textual provisions, internal contradictions in the law were quickly criticized for undermining the goals of victim protection.

A. Challenges to the Law

Contradictions in Law 975/05 prompted vociferous national and international criticism, including general objections and pronouncements from the United Nations, the IACHR, Human Rights Watch, Amnesty International, and the Colombian Commission of Jurists, among others. [FN154] Sectors of Colombia's civil society also organized to protest the law. For instance, the Movimiento de Víctimas de Crímenes de Estado (Movement of Victims of State Crimes, or Victims' Movement) was formed on June 25, **2005**. [FN155] The movement, composed of numerous grassroots organizations and growing rapidly from 300 to approximately 800 delegates from around the country, protested the approval of Law 975/05. [FN156] It also brought one of the ten national lawsuits presented before the Colombia Constitutional Court. [FN157]

Another lawsuit, brought by a consortium of 105 human rights and victim-survivors' organizations, challenged the form or content of thirty-three of the seventy-two articles in Law 975/05. [FN158] On May 18, **2006**, the Constitutional Court ruled on the merits of this challenge, issuing its opinion in Gustavo Gallón Giraldo v. Colombia. [FN159] The consortium's claims were supported by amicus curiae from national and international actors such as the International Center for Transitional Justice (ICTJ). [FN160] The decision prompted significant controversy in Colombia, especially from paramilitary leaders, but it set important parameters for the balance between peace and justice. [FN161] Although the Colombian Constitutional ***82** Court upheld the law in general terms, it declared other articles partially or wholly unconstitutional, tilting the balance in favor of victim-survivors. [FN162]

In the following sections, we offer an overview of the various criticisms of Law 975/05, including arguments made in Gustavo Gallón Giraldo, couched within an overview of the transitional justice paradigm presented in the academic literature. The amalgam of civil society responses to the law reflects current national and international expectations of transitional justice that limit the scope of the state's prerogatives in peace negotiations and political transitions. Indeed, the legal challenges center around the absence of perfect protection of the three central components of transitional justice: truth, justice, and **reparations**. [FN163] We examine how the Constitutional Court sought to resolve these tensions, in particular by elevating peace to a right in an effort to legitimize a proportionality test that often provokes disagreement among international law purists. [FN164] While it is beyond the scope of this Article to present a comprehensive analysis of the law and the Constitutional Court ruling, we offer this preliminary examination in anticipation of further analysis once implementation of Colombia's Law 975/05 begins.

1. The Right to Justice

In the course of its development, the field of transitional justice has helped establish justice as a key principle of international law. [FN165] Historically, absolute amnesties have been used as bargaining tools to end repressive regimes or war, preserve peace, prevent further hostilities, or promote transitions to civilian governments. [FN166] Yet, in many transitional justice settings, amnesties are not intended to facilitate the surrender of weapons or an end to hostilities, but rather, later in the peace process, to facilitate investigation of human rights. [FN167] For instance, in South Africa, ***83** amnesties were a tool for gathering a “fuller truth” about the past to satisfy a national need for reconciliation.

[FN168] Even then, amnesties met with great opposition. [FN169] Advocates of justice--defined to include investigation, prosecution, and sanction of wrongdoers-- challenge the use of amnesties [FN170] and the claim that the right to an effective remedy before a competent national court "is one of the fundamental pillars" of the rule of law and the state's duty to guarantee human rights protection. [FN171] Consensus has propelled the rights of victim-survivors into the peace formula. [FN172]

a. Reduced Sentence as Veiled Amnesty

Issues related to the appropriate dose of criminal justice cut to the heart of the debates regarding Law 975/05. As Kerr observes, "[p]unishment has been the sticking point in the 'peace talks' between the Government of Colombia (GOC) and the paramilitaries." [FN173] The ability to determine "optimal levels" of punishment constitutes the bargaining chip in Colombia's transitional justice process, with Law 975/05 embracing a middle path: the law does not offer a South Africa-style amnesty, but it also does not promise full criminal trials as in Peru. ***84** The law offers a reduced and qualified punishment via an "alternative" sentence--suspension of existing sentences and proceedings, to be replaced with imprisonment of no less than five years and no more than eight years for beneficiaries who comply with the basic demobilizing requirements. [FN174] The Colombian Superior Court determines punishment depending on the gravity of the crime and the defendant's level of collaboration, while aggregating all other proceedings and punishments. [FN175] Time spent in "concentration zones" counts towards reducing the alternative sentence by up to eighteen months. [FN176] The government then decides where the prisoners will serve their sentences, potentially obviating incarceration in regular prisons. [FN177] A probationary period equal to half of the sentence begins upon completing the alternative sentence, and if all illegal activities cease, the original sentence will extinguish. [FN178] Failure to refrain from all illegal activity, however, results in reversion back to the original suspended sentence. Revelation of new crimes not previously included in the defendant's confession will result in a twenty percent increase of the alternative sentence if omission is found to be intentional. [FN179]

In the Gallón Giraldo case, the claimants argued that these provisions disproportionately favor the perpetrators, and that the alternative sentence and absence of direct investigation and prosecution act as an indulto velado (veiled pardon). [FN180] The perpetrator gains leniency without absolute guarantees to the truth, **reparations**, or the cessation of hostilities. [FN181] The claimants portrayed Law 975/05 as part of a larger scheme that creates both "an instrument and system" of impunity." [FN182] The claimants also asserted that Law 975/05 is "a very sophisticated mechanism for impunity since it presents definitions and announcements apparently very generous with regard to the rights of victims, but designs a system that in an undercover way permits impunity." [FN183] Commenting on the effect of the law, the Victims' Movement claimed the law was "wrongly called Justice and Peace," and instead asserted that it completes the circle***85** of impunity initiated by Law 782/02 and Decree 128/03, [FN184] which do not require criminal investigations. Thus, the Justice and Peace Law only applies to demobilized persons already under investigation, meaning many perpetrators may go free. The plaintiffs in Gallón Giraldo claimed that the failure to investigate and sanction crimes promotes repetition and thus undermines prevention. [FN185] The amicus brief presented by the International Commission of Jurists argued that the alternative sentence clause contradicts the principle of proportionality, since existing criminal penalties in Colombia range from ten to forty years

for human rights crimes, and if combined, could result in a life sentence. [FN186] Alternatively, the UN High Commissioner for Human Rights noted that the reduced sentence would be fair only if the law guaranteed effective collaboration that revealed identities, circumstances, motivations, and harms caused to victims. [FN187]

b. Constraints on an Effective Investigation

The claimants in Gallón Giraldo argued that Law 975/05 lacks an effective promise of criminal investigation, and thus punishment, despite creating special prosecutors, judges, judiciary police, and support staff for each of these actors. [FN188] Claimants also questioned the drastic time constraints in the law, as charges must be brought thirty-six hours after a prosecutor presents the "spontaneous confession" to the sitting magistrate. [FN189] The special prosecutor then has sixty days to investigate and verify the confession, after which a criminal trial must be initiated within ten days. [FN190] The Gallón Giraldo claimants contended that these limits do not guarantee full, effective, and impartial investigation and prosecution of the individuals responsible for the thousands of serious human rights violations that occurred during the conflict. [FN191] The IACHR pointed out that "the seriousness and complexity of the crimes perpetrated," along ***86** with institutional limits to investigation and prosecution, will make it difficult to offer "a realistic alternative to establish individual responsibility in full measure." [FN192]

c. Involvement of Victim-Survivors

The apparent exclusion of victim-survivors from the criminal process also raised concern. The Gallón Giraldo claimants criticized the lack of adequate and explicit guarantees to protect their participation, particularly in terms of access to evidence and participation in all stages of the process. [FN193] They argued that Law 975/05 prevents them from contributing to the litigation strategy and limits their ability to protect their interests and rights. [FN194] The IACHR affirmed that victims' involvement in the legal process helps "re-establish the conditions of equality that make it possible for the victims of the conflict to recognize their status as citizens and regain trust in the institutions," making such involvement of "fundamental importance for attaining peace." [FN195]

Colombia's current "pre-post-conflict" context poses challenges to the participation of victim-survivors, who still live in great fear and are reluctant to divulge information or come forward on an individual basis. The criminal proceedings and largely adversarial posture of Law 975/05 do not necessarily provide the "victim-friendly" forum usually associated with transitional justice measures such as truth commissions. [FN196] Indeed, Colombia's transitional justice project does not include a truth commission per se, although the CNRR will assume many tasks associated with such a body, without a truth-seeking component that includes victims' testimonies.

***87** 2. The Right to Truth

The "truth v. justice" debate is central to the field of transitional justice and has helped raise the profile of the right to truth. [FN197] South Africa's experience raised questions about whether compromising justice results in fuller truth, as protected by international law. [FN198] In addition, the Joinet Principles establish that "[s]tates must take appropriate action to give effect to the right to know." [FN199] The **Inter-AmericanCourt** of

**HumanRights** has held that victim-survivors or their next-of-kin have the right to have human rights violations identified and enumerated by competent organs of the state. [FN200] Similarly, the United Nations Human Rights Committee has established a right to judicial determination of the circumstances of a human rights violation and those responsible for it. [FN201] In its discussion of Colombia's DDR process, the IACHR explains that individuals and societies have the right "to know the truth of what happened as well as the reasons why and circumstances in which the aberrant crimes were committed, so as to prevent such acts from recurring." [FN202] Here, truth relates to more than just knowing about the conduct of perpetrators; it also means understanding "the objective and subjective elements that helped create the conditions and circumstances in which atrocious conduct was perpetrated, and to identify the legal and factual factors that gave rise to the appearance and persistence of impunity." [FN203]

In this way, by understanding the full context, causes, and responsibilities of human rights violations, truth and historical memory form part of **reparations**. [FN204] Substantive and procedural protections ensure this process: the former relates to revealing what happened, why the crime occurred, and who committed it; the latter relates to the mechanism most ***88** suited to answering these questions. [FN205] Raquel Aldana-Pindell notes that truth commissions often are substituted for criminal trials, circumscribing the full truth. [FN206] Yet in Colombia, the absence of a truth commission and the undue restrictions placed on criminal proceedings account for limitations on the pursuit of truth.

a. No Incentive to Give a Full Confession

The truth-gathering capacity of Law 975/05 rests on "spontaneous confessions," [FN207] in which a demobilized individual offers a free and full version of the facts, which is subsequently verified in the presence of a defense lawyer, followed by interrogation by a prosecutor. [FN208] The individual is expected to "manifest the circumstances of time, mode and place" of the crimes he or she committed as a member of an illegally armed group, as well as indicate all illegally gained property and goods to be delivered to the Reparation Fund. [FN209] The Gallón Giraldo claimants have complained that an individual may receive full benefits of the law without ever having to give a full confession, thus failing to make "a genuine contribution to the clarification of the truth." [FN210] Indeed, the Justice and Peace Law lacks compelling and effective incentives for former combatants not only to come forward to tell the truth but to reveal it in full. For instance, if it is later discovered that a demobilized combatant benefited from the law but did not disclose all of the truth, he or she will be penalized only if the state proves this omission was intentional. [FN211] Amnesty International contended that this burden would "prove practically impossible" to overcome. [FN212] Moreover, even where proven to be an intentional omission, the subject's sentence increases by only twenty percent of the alternative sentence that was imposed.

The weak investigatory apparatus established by the law could help participants conceal crimes. [FN213] Without full confessions, many facts will remain obscured, resulting in uninvestigated crimes and unpunished perpetrators, [FN214] and frustrating the reparatory goals of transitional justice ***89** processes. [FN215] The UN Working Group on Enforced or Involuntary Disappearances points out that neither the collective nor individualized demobilization efforts in Law 975/05 call for disclosure of the location of disappeared persons, contrary to treaty law. [FN216] As the Gallón Giraldo claimants point

out, the law requires only “an infinitesimal minority” of demobilized individuals to reveal the truth. [FN217] Using statistics from the Attorney General's office, they estimate that only .48% of all paramilitaries will be subject to Law 975/05, while the remaining 99.52% will benefit from Law 782/02. [FN218] Of this small pool of duty-bound ex-combatants, only those who admit the full truth will be subject to prosecution. [FN219]

The claimants further question how Law 975/05 can be effective given that most human rights violations have never come under investigation. [FN220] Amnesty International observes that the “endemic nature of impunity in Colombia” means that most paramilitary members and guerrillas have never come under formal judicial investigation for violations of human rights or international humanitarian law. [FN221] They “are even less likely to have been tried or convicted for such offences.” [FN222] Human Rights Watch posits that

> [b]ecause most paramilitary crimes do not yet have a known author, it is very likely that many individuals who have committed massacres, kidnappings, or other crimes will be able to avoid detection and prosecution. In effect, historically endemic failures to properly investigate and prosecute paramilitary abuses would become guarantees of impunity today. [FN223]

If unaccompanied by rigorous parallel criminal investigations, Law 975/05 does not create an explicit state burden to investigate. Decree 4760, the preliminary regulation for Law 975/05, indicates that the ***90** CNRR will request investigations with necessary supporting information. [FN224] Likewise, the regulation calls for the design of “an appropriate, transparent and swift mechanism to receive the requests, petitions and complaints of victims.” [FN225] The Inter-American Court clarified that initiating criminal investigations is the state's legal duty and not the responsibility of victims and their next-of-kin. [FN226] Given the diminished probability of an investigation, paramilitaries will feel less compulsion to confess the truth and resort to the alternative presented by Law 975/05. Moreover, Law 975/05 made paramilitary activity a seditious crime, eliminating the threat of extradition or transfer to the International Criminal Court and further decreasing the incentive to participate. [FN227]

b. Focus on Individual Culpability

The Justice and Peace law mandates a “duty of memory” [FN228] and requires the preservation of archives [FN229] yet constructs this memory by using judicial proceedings to establish the facts of individual cases and individual criminal responsibility. [FN230] Individualizing the process weakens efforts to dismantle the paramilitary infrastructure and undermines the overall goal of DDR. [FN231] The larger context of the war and the history of the various armed actors will remain under-explored and poorly understood. The need for historical truth means determining “the degree of involvement of different participants in the perpetration of crimes against the civilian population by action, omission, collaboration or acquiescence.” [FN232] Amnesty International calls for the exposure of all economic, political, and institutional links to the paramilitary, including state institutions and security forces, individuals, companies, politicians, and other sectors of civil society. [FN233]

The individualized focus of the Justice and Peace Law also undermines any effort to determine state responsibility for acts and omissions in protecting citizens. [FN234] As the Victims' Movement points out, Law ***91** 975/05 does not “recognize the existence of victims

of the State, and seeks to cover up state responsibility in the creation, encouragement, development, and consolidation of the paramilitary strategy." [FN235] The Gallón Giraldo claimants likewise argue that it will not be possible to identify the systematic and generalized nature of the violations. [FN236] The Inter-American Court has also established that even if the state does not officially encourage the formation of paramilitary groups, it remains responsible for tolerating a legal framework that permitted such activity by not taking the measures "necessary to prohibit, prevent, and duly punish their criminal activities." [FN237]

This type of comprehensive investigation usually occurs through truth commissions. [FN238] Truth commissions emphasize that exploring the broader context of a conflict permits better strategies for addressing its root causes, especially through institutional reform. Truth commissions also provide a "collective memory" that permits a country to confront the past, official denials, and imposed silences. [FN239] This process provides victim-survivors with public validation of their suffering [FN240] and advances an understanding of "state-sponsored terrorism" not just as a reckless or aberrant undertaking but rather as "a political project." [FN241] Finally, this approach makes the state's obligation to provide integral **reparations** increasingly irrefutable. [FN242]

Above all else, truth commissions place emphasis on the voices of victims, their families, and other social and political actors. [FN243] Confessions, in contrast, focus on perpetrators, omitting the personal ***92** experiences of victims. [FN244] As Borneman explains, "listening, witnessing, and retribution cannot be delinked in a project of reconciliation over time; they are conceptually part of the same complex." [FN245] Researching and reconstructing the truth of violent periods is not a private process but rather one implicating a whole society, a process more closely associated with truth commissions. In this way, historical memory projects serve as an opportunity for those who have been "excluded, persecuted, [and] stigmatized" to participate in public life. [FN246]

Thus, while transitional justice projects often attract criticism for trading justice for truth, Colombia's experience may not even include the truth--or at least not enough of it. In fact, to some extent Colombia seems to be doing it backwards, beginning with a commission that attempts to repair and seek peace, followed by a somewhat limited chance at justice.

c. "Sort of a Truth Commission": The National **Reparations** and Reconciliation Commission

The state responded to the purported shortcomings of the Justice and Peace Law in its report to the Committee on Juridical and Political Affairs of the OAS Permanent Council in April **2006**, [FN247] wherein Colombia claimed that the CNRR vindicates the right to truth. [FN248] Indeed, Article 51 of Law 975/05 assigns the CNRR a wide array of responsibilities, some pertaining to the clarification of truth. The CNRR must "guarantee that victims participate in judicial investigation procedures as well as recognition of their rights"; [FN249] "present a public report on the reasons for the emergence and development of illegal armed groups"; [FN250] and "monitor and verify the reinsertion process and the work of local officials so as to insure full demobilization of illegal armed groups' members and the full ***93** operation of institutions in those territories." [FN251] Given this array of responsibilities, Dr. Eduardo Pizzaro, [FN252] the president of the CNRR, stated:

> The CNRR holds the dear conviction that without the truth, neither justice nor **reparations** nor reconciliation are possible. Consequently, reconstruction of the truth, both factual and historical, will be one of the main tasks of our Commission. To that end, and in line with the text of the law, it is essential to distinguish judicial from historical truth. The former is an essential task of the judiciary, even though the Commission will need to insure active participation by victims in the judicial investigations. The latter, on the other hand, will be fundamentally the task of the CNRR. One and the other, however, are not mutually exclusive and must accordingly nurture each other. [FN253]

In this way, the CNRR assumes the function of a truth commission without technically being one. Dr. Pizzarro clarified the distinction: "[t]he CNRR is not itself a truth commission even though many of its functions . . . will be those that create conditions that promote the creation of a truth commission in the future." [FN254] Article 7(3) of Law 975/05 provides that "judicial proceedings advanced after this law enters into force will not rule out the application in the future of other nonjudicial mechanisms to reconstruct the truth." [FN255]

Despite this distinction, Dr. Pizzaro recognized that the CNRR was assigned certain responsibilities normally given to truth commissions. He explicitly acknowledged that while other truth commissions were created after the conclusion of a dictatorship, civil war, or apartheid, the CNRR "was created in a time when conditions are only now ripening to overcome the country's armed conflict." [FN256] He added that "promoting policies on truth, justice and reparation in the middle of conflict will be undoubtedly one of the greatest challenges to confront the CNRR." [FN257]

***94** Dr. Pizarro's clarification takes on greater significance in light of the government's consistent rejection of proposals for the creation of a truth commission, in the apparent belief that to do so would be inappropriate before the end of the armed conflict. Even then, some still maintain that it is "not advisable to publicly disclose what has really happened during decades of violence because it would worsen the wounds." [FN258] Despite this reluctance to form a national truth commission, the CNRR appears to be a mutation of such an entity.

Still, a large sector of the Victims' Movement has publicly condemned the CNRR, which they view as sacrificing their rights. In response, the Victims' Movement has proposed "an authentic Commission of Historical Clarification when in Colombia there exist real guarantees for such a body." [FN259] The lack of victim support for the work of the CNRR is worrisome, given that the success of such bodies hinges entirely on victims' participation. On this last point, Stover explains that, based on his studies in Iraq, Rwanda, and the former Yugoslavia, "all sectors of a war-ravaged society--the individual, community, society, and state--should become engaged participants in--and not merely auxiliaries to--the processes of transitional justice and social reconstruction." [FN260] In Colombia, a significant number of victim-survivors strongly object to the CNRR, making the CNRR's greatest challenge finding ways to win the support of these dissenting voices. [FN261]

3. The Right to **Reparations**

The last decade has seen increasing recognition that the violation of a human right triggers the subsequent duty to repair the damage caused by the offense. [FN262] Indeed, recent truth commissions have put greater emphasis on **reparations**. [FN263] The

ascendance of the right to reparation became clear through the UN General Assembly's approval of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious***95** Violations of International Humanitarian Law, developed by UN Special Rapporteur Theo Van Boven (the Van Boven Principles). [FN264] In view of the importance of **reparations**, critics have drawn attention to further inadequacies in the Justice and Peace Law.

a. Illicit Goods to Fund Individual **Reparations**

Law 975/05 presents a comprehensive definition of **reparations** that includes restitution, indemnification, rehabilitation, satisfaction, and guarantees against repetition. [FN265] Furthermore, it refers to both individual and collective **reparations**. [FN266] Yet it includes conditions that circumscribe guarantees that **reparations** will be fully implemented for all of the conflict's victims. For instance, Law 975/05 stipulates that the Victims Reparation Fund will consist of all illegal goods and properties from the demobilized individuals subjected to the law, augmented by international and public funds "within the limits authorized by the national budget." [FN267]

The exclusion of some paramilitary property has generated a range of criticism. Amnesty International points out the risk that perpetrators will launder or otherwise conceal illicit funds, making their identification more difficult, or that paramilitaries will have no such assets. [FN268] The Van Boven Principles reiterate that when the person responsible for the illicit conduct cannot pay **reparations**, the state should endeavor to do so. [FN269] Claimants in the Gallón Giraldo case questioned the validity of the law's limits on the state's financial contribution based on budget constraints, arguing that "the state cannot excuse itself from paying compensation" by arguing it has no available funds. [FN270] The claimants also complained that those responsible for crimes should be required to use all of their property, illegally obtained or not, to meet their obligations to pay **reparations** to victims of the conflict. [FN271] In its amicus brief, the ICTJ labeled the **reparations** deceitful because of the significant risk that victims will not be adequately compensated. [FN272] Transfer of all illicitly gained property to the Victims Reparation Fund ***96** could also undermine restitution to specific victims, since stolen land would not necessarily be returned to the rightful owner. [FN273]

b. Judicial Determination at the Request of Victim-Survivors

In contrast to other transitional justice settings that rely on truth commissions to present reparation plans, Colombia's plan relies on judicial determinations. Specifically, Article 8 of Law 975/05 holds that "competent judicial authorities will determine individual, collective, or symbolic **reparations**, whichever may be the case, in accordance with the terms of this law." [FN274] At this hearing, the victim-survivor or his or her legal advisers must express in a "concrete manner" the **reparations** they are soliciting and must present evidence necessary to prove damages. [FN275] The court will encourage a friendly settlement or otherwise will make a ruling for inclusion in the final sentencing conviction. [FN276] Even if the victim-survivor does not exercise his or her right to reparation, the law can be read to establish that the demobilized person will still be eligible for the alternative sentence. [FN277] Victims who do not invoke their right during the special criminal proceedings do not enjoy explicit provisions for individual **reparations** under Law 975/05. Instead, Article 8 states that "collective reparation should be oriented towards the

psychosocial reconstruction of populations affected by the violence." [FN278] Yet the law implies that only victims and their parents are eligible, excluding siblings and other related family members. [FN279]

The right to reparation should not hinge in this way on victim-survivors' involvement in judicial proceedings. Instead, as the Gallón Giraldo claimants contend, "the right to reparation should be guaranteed in all circumstances . . . taking into consideration that his or her participation may be limited by causes outside of his or her control." [FN280] Amnesty International also questioned placing the burden of seeking **reparations** on victims rather than the state, noting that if the "victim fails to present a claim, for example, because they [sic] are unaware of the case, then there will be no reparation." [FN281] Furthermore, if the victim-survivor is unable to establish the responsibility for and circumstances ***97** surrounding a human rights abuse, perhaps in the absence of a full confession, he or she will not be able to direct the claim toward a specific individual. [FN282] Colombia's framework minimizes the state's responsibility, and thus its obligation to pay **reparations**. The IACHR notes that, for collective **reparations**, the Justice and Peace Law "places greater emphasis on restitution of unlawfully acquired property than on the kind of mechanisms that will make full **reparations** for victims possible" and omits mention of damage to "the social worlds and relationships of indigenous peoples, Afro-descendant communities, or displaced women, who are frequently heads of household under conditions of poverty and extreme duress. Each of these groups rank [sic] among those most vulnerable to the violence perpetrated by participants in the armed conflict." [FN283]

In theory, the CNRR has responsibility for overseeing the reparation process, monitoring and periodically evaluating remedies, and making recommendations regarding their proper implementation. [FN284] Within two years following the law's entry into force, the CNRR will present the government and the Peace Commissions of the Senate and the House of Representatives with a report on progress made in paying **reparations** and guidelines for future **reparations**. [FN285] Nonetheless, it remains unclear to what extent the CNRR will be able to fill the gaps in the reparation scheme.

B. Putting the Law to the Test

A new addendum in the genealogy of transitional justice sees courts testing the limits and setting stricter parameters for measures permitted in political peace processes. In the case of Colombia both national and international courts have set important precedents.

1. Judgment of the **Inter-AmericanCourt** of **HumanRights** on Law 975/05

This trend toward judicial review has greater salience in Latin America due to the availability of contentious jurisdiction in the Inter-American Court, which has helped build a human rights framework with noticeable influence on transitional justice projects. [FN286] In fact, the first ***98** test of the limits of Law 975/05 arose through an unprecedented decision by the Inter-American Court. Usually, a challenge to a national law cannot be brought directly to the Inter-American Court, but rather must arise after testing its application in a domestic case, such as in the challenges against Peru's anti-terrorist laws. [FN287] But the Inter-American Court granted a motion of "supervening event" to issue its opinion on Law 975/05 in Mapiripán v. Colombia. [FN288]

The case, filed with the court in September **2003**, involved the kidnap, torture, and murder of at least forty-nine civilians in July 1997 by state and paramilitary agents who then threw their victims' bodies in the Guaviare River in Mapiripán. In August **2005**, soon after President Uribe signed the Justice and Peace Law, victims' representatives in Mapiripán v. Colombia asked the Inter-American Court to consider whether Law 975/05 interferes with the victim's right to a remedy. In accordance with Article 44.3 of the court's procedures, petitioners requested that the court "examine the normative framework of the internal legislation and the demobilization program using international standards related to rights of victims." [FN289] The court found that Law 975/05 did not provide sufficient incentive for exhaustive confessions, and that the multiple perpetrators who were part of demobilized paramilitary blocks could deny the full truth. [FN290] It declared that the state must remove all actual and juridical obstacles to an exhaustive judicial examination of the violations, prosecution of those responsible, and **reparations** for the victims. [FN291]

The state responded by arguing that Law 975/05 had not been applied in this particular case and therefore was not a "supervening event," making the law immaterial to the court's decision. [FN292] In an unprecedented move, the court referred to its own jurisprudence in holding that no internal law or provision--particularly amnesties, statutes of limitations, and mitigating factors--can impede a state from complying with the obligation to investigate and sanction those responsible for human rights ***99** violations. [FN293] The court's decision to make a pronouncement on Law 975/05 demonstrates the Inter-American Court's growing influence over domestic matters that interfere with the most fundamental human rights embodied in the Convention, an influence felt by Colombia's highest court.

2. Challenging the Law: Balance Between Peaceand Justice in Gallón Giraldo

Notably, the Colombian Constitutional Court acknowledged in Gallón Giraldo "the difficult circumstances in which Colombia, its population and its institutions are struggling to achieve peace," while not releasing Colombia from its obligations as a party to the American Convention on Human Rights. [FN294] Specifically, the Court noted the tension between "finding peace by establishing juridical mechanisms to disarticulate armed groups" and "the interests of justice" under human rights and international humanitarian law. [FN295] The Court, however, did not view this as "an insoluble dilemma," but rather framed its analysis in terms of the "complementarity between the right to justice and the right to peace." [FN296]

In adopting a balancing approach, the Constitutional Court chose a flexible standard in what is fast becoming a seemingly absolute terrain. While outright amnesties are no longer accepted, some important academic and legal authorities still concede there is merit in balancing these interests. Diane Orentlicher warns against adopting "stark dichotomies" such as "punish or pardon" or "amnesty or accountability." [FN297] Similarly, Gwen Young confirms that the balancing test requires looking not only at "international law obligations, but also at political realities, and individual and societal needs for justice and reconciliation . . . . Resolution will require balancing the legal, political, and social objectives and realities surrounding the grant of amnesty." [FN298] This task, however, requires a careful examination of all relevant factors to be balanced, their relative importance, and their absoluteness as a right.

a. The Right to Peace

The Colombian Constitutional Court approached the balancing test by first examining peace, with Law 975/05 serving as "one of the most ***100** important pieces in the juridical framework in Colombia's peace process." [FN299] Significantly, in Gallón Giraldo, the Court adopted the position that "peace" is not just a political aspiration but also a right, taking the discussion far beyond the arguments presented by the claimants. [FN300] The Court recognized that the definition of peace may range from the absence of conflict and confrontation ("basic nucleus") to full compliance with human rights ("maximum development"). [FN301] Furthermore, it discussed the "multifaceted character" of peace as a "collective right within the third generation of rights" [FN302] and viewed the right as a "juridical duty" of all individuals. [FN303] This perspective reflects what Carl Wellman describes as the "notion of solidarity" inherent to collective rights, as they are realized only with the "concerted efforts of all the actors on the social scene: the individual, the State, the public and private groups, and the entire international community." [FN304] With this broadly shared objective, all become "joint and severally responsible." [FN305] The court mentioned that even though the UN Charter does not explicitly include the right to peace, the UN Educational, Scientific and Cultural Organization (UNESCO) lent support to the existence of the right in 1997. [FN306]

This treatment of the right to peace presents an interesting new angle to transitional justice paradigms. The detailed presentation of the legal doctrine underlying the right to peace suggests an intention to elevate it beyond a mere political prerogative. If given equal standing with other fundamental rights such as justice, the right to peace could trigger the application of a proportionality test. If left as only a political aspiration, the right to peace would lose out to more commonly recognized human rights.

b. Relieving the Tension Between Peace and Justice

Colombia's Constitutional Court established that "justice does not necessarily oppose peace," but rather the "administration of justice contributes***101** to peace because it resolves controversy and conflict through institutional routes." [FN307] Even in viewing justice and peace as complementary principles, the court acknowledged that "in some occasions they are in apparent tension in contexts of democratic transition and overcoming armed conflict. In such contexts, it is necessary to provide penal benefits to those who have committed grave human rights violations and humanitarian law infractions to overcome the conflict." [FN308] The court recognized that the express objective of Law 975/05 is to facilitate peace and the reincorporation of combatants into civil life while also guaranteeing the rights of victim-survivors, thus searching "for equilibrium between peace and justice." [FN309] Thus the rights to peace and justice are not contradictory but rather interdependent. [FN310] Likewise, the Court also referred to the preamble of the Joinet Principles, which recognizes that "there can be no just and lasting reconciliation unless the need for justice is effectively satisfied." [FN311]

The Court even made reference to the UN Secretary-General's **2004** report that characterized transitional justice as an extraordinary mechanism for administering justice when "normal" conditions do not exist due to violent conflict. [FN312] Still, the Court noted that "the social objectives of peace" do not mean the state's international obligations to ensure minimum standards of justice, truth, and **reparations** should be relaxed." [FN313]

Here, the Court reinforced the adaptation of transitional justice concepts to a situation of ongoing conflict, in effect making it a part of the peace negotiations.

The Court also made explicit reference to human rights norms. It outlined all the international human rights treaties to which Colombia is a party and then dedicated an entire section to reviewing landmark cases decided by the Inter-American Court. [FN314] It explained that international norms and jurisprudence are "relevant to the interpretation of rights and duties in the internal order" and serve as "hermeneutic criteria" for making sense of local constitutional norms. [FN315] The Court sought a balance between the instruments used to promote reconciliation and the ***102** guarantee of the victims' rights in order to make "peace compatible with human rights." [FN316] In this way, the merging of DDR with transitional justice comes into focus.

c. Finding Balance: The Proportionality Test

In effect, the Constitutional Court's opinion established that neither peace nor justice is an absolute right. The Court considered whether Law 975/05 is the most appropriate means for achieving the constitutionally valid right to peace, or alternatively whether it institutionalizes a system of impunity. Specifically, the Court applied a "method of deliberation" to the tension between the claimants' rights and the legislative instruments chosen by the state to transition towards peace and democracy. [FN317] The goal was to harmonize the two values or determine which should have prevalence. [FN318] The Court emphasized that the legislative branch must operate within constitutional limits. In fact, Colombia's 1991 Constitution itself was conceived as a "peace treaty," thus demonstrating that peace carries great constitutional weight in Colombia. [FN319] The Court explained that the "novel problem presented by Law 975 of **2005** is how to deliberate on peace," [FN320] but it clarified that "peace does not justify everything." [FN321] Indeed, "peace could be used to justify any type of measure, including nugatory constitutional rights." [FN322] The Court therefore applied a proportionality test, ruling that the means chosen to effect peace must not create a manifestly disproportionate effect on other constitutional rights. [FN323]

d. Principal Holdings in Gallón Giraldo

In Gallón Giraldo the Constitutional Court refrained on procedural grounds from considering some of the claims brought against Law 975/05. [FN324] For instance, the Court declared itself unable to address the petitioner's global criticism of a "system of veiled pardon and covered-up impunity," since this claim related to the general demobilization process, including Law 782/02 and Decree 128/03, on which the court did ***103** not have jurisdiction to rule on the merits. [FN325] The Court also refused to hear the petitioner's claim that if a victim does not invoke his right to reparation during the proceedings, the right ceases to exist. The Court felt that any opinion on the matter would amount to an interpretative guideline, although it did offer such interpretation in other parts of the opinion. The rulings relevant to our examination include the following holdings:

The Alternative Sentence. While the Court acknowledged that limits on acceptable punishment can lead to impunity, it explained that tools for restoring peaceful coexistence may require flexibility when the goal is disarmament. [FN326] The Court rejected the notion that the alternative sentence is a "hidden pardon," since the original sentence does not expire until all conditions are met: demobilization, **reparations**, time served, and restraint

from other criminal acts. [FN327] The Court also rejected the allowance for accumulation of previous punishments in calculating the alternative sentence, which amounted to a "disguised pardon." [FN328] The Court modified the prohibition on recidivism for the same crime that led to conviction, making it apply to all illegal activity in the future and requiring complete resocialization and reinsertion. [FN329] Failure to comply leads to revocation of the benefits and reinstatement of the original conviction or criminal proceedings. In addition, the Court ruled that the voluntary nature of participation in the concentration zones means that time spent there cannot count toward a sentence, nor can the state effectively pardon participants by relaxing prison conditions. [FN330] The Court conceded, however, that the law would not apply retroactively to the thousands of combatants demobilized under Law 782/02 and Decree 128/03.

Effective Investigation. While the Court did not find the time frame for investigation unconstitutional, it eliminated the qualification that a free confession immediately initiates the thirty-six-hour requirement for holding an indictment hearing. Instead, it embraced a "reasonable timeframe" standard, during which the prosecutor can build a case. [FN331] The sixty-day limit for investigation comes into effect upon the indictment hearing, rather than at the time of the confession itself.

Victim-Survivor Participation. The Court recognized the importance of victim-survivor participation and set forth expectations for ***104** participation at the following stages: free confession, indictment, and acceptance of the charges. [FN332] The Court explained that victims have an implicit power to intervene in all phases of the proceedings. [FN333] On the question of standing, the Court adopted an inclusive view of "victims" but noted that the "state is not obligated to assume all the damage of all the family of direct victims." It also held that although not all family members have the same rights, the law cannot impede their right to an effective remedy. [FN334]

The Right to Truth. The Court held that the law does not "design an effective incentive system that promotes the full and accurate revelation of truth." [FN335] While accepting the alternative sentence, the court found the requirements for "collaborating with justice" too general to vindicate the victim's right to truth. [FN336] In addition, the Court required simply that information provided by the demobilized combatants be complete and reliable, rejecting the requirement that a beneficiary's intent be determined whether or not a beneficiary denied, covered up, or was silent about information. The Court found that because the law provided no true incentive to tell the full truth, a more serious sanction for withholding information should apply. [FN337] The more serious sanction would assist in dismantling illegal armed groups by facilitating fuller inquiry into the "macrocriminal phenomena" in Colombia. [FN338] Failure to provide the full truth--or omitting truth--must trigger the state's legal responsibility to investigate and sanction, resulting in subjection to the normal criminal justice system and making the "free confession" alternative a "one-shot deal." [FN339]

The Court conceived of the right to truth as expansive, including knowledge of the causes and circumstances of rights violations. The Court also required that the location of the disappeared be part of the information proffered. [FN340] Additionally, any limitation on access to archives would only be permissible to protect witnesses and victim-survivors. [FN341] The Court also annulled the sedition article based on procedural***105** deficiencies in its enactment, essentially lifting any shield from extradition. [FN342]

**Reparations**. The Court maintained the individual liability standard for paying **reparations**, rejecting the notion that civil responsibility should be passed on to the state, and thus to taxpayers "who have not caused any damage but instead are victims of the macrocriminal process." [FN343] The Court, however, required that all goods--not just those considered illicit--be eligible for consideration in **reparations** payments, although nonillicit goods would require a court order. [FN344] Moreover, the Court removed the phrase "if he or she has it" in reference to payment into the Victims' Fund, eliminating financial hardship as a valid reason for nonpayment. [FN345]

The Court also concluded that although penal responsibility remains individualized, a form of vicarious liability, or "solidarity," extended to the whole demobilized group. [FN346] Still, the Court established a clear hierarchy of responsibility, beginning with the demobilized. The state enters "in this sequence only in a residual role to cover the rights of victims, especially those who do not have a final judicial decision to fix the amount of indemnification." [FN347] The Court rejected limits in the budget as a reason for failure to pay **reparations**, which "cannot be absolutely submitted to the political will of those who define the budget, since the rights of victims must be satisfied, especially in the pursuit of peace and reconciliation." [FN348] This ruling is significant in that states often claim that limited resources circumscribe their obligation to pay **reparations**. [FN349] Even if the CNRR must temporarily allocate scarce resources, budget constraints do not altogether extinguish the state's obligation to provide some **reparations**. [FN350]

With regard to collective **reparations**, the Court warned that the rights of individuals cannot be ignored, and again noted that the entire group was liable under the notion of solidarity. The Court eliminated any ambiguity about the need to identify the perpetrator to receive ***106reparations**, since such a literal reading would amount to a disproportionate burden on the victim. [FN351] The Court left open the issues of how payment will be made in individual cases, as well as the criteria for limiting these distributions. It also declined to interpret Article 55, which makes the Social Solidarity Network responsible for distributing **reparations** without further elaboration. The Court left the subject for future decisions, clarifying only that Article 54 places the burden for **reparations** on combatants. [FN352]

Definition of Victims. The Court adopted an inclusive view of victims, with the qualification that the "state is not obligated to assume all the damage of all the family of direct victims." The Court also held that not all the family members have "exactly the same rights," but that the law cannot impede their right to an effective remedy. [FN353]

## V. Conclusion

The Constitutional Court's decision in Gallón Giraldo clearly indicates that DDR and transitional justice can no longer be separated conceptually or practically. DDR programs must transcend the military and security frameworks in which they have traditionally been conceived and must be located squarely within transitional justice debates on truth, justice, **reparations**, and reconciliation. [FN354] Rigorous respect for human rights norms can change the legal and political climate in which peace negotiations occur, meaning truth, justice, and redress should not be ignored or indefinitely postponed. [FN355] DDR programs therefore must emphasize the "R" of DDR--reintegration, precisely the component that has traditionally been the weakest link in the chain. This approach would move beyond

measures focused on how to give warring parties an incentive to disarm and include the rights and demands of victim-survivors and host communities. [FN356]

A reading of the Constitutional Court's opinion provides important benchmarks for negotiating this "balancing act" between the desire for peace--too frequently reduced to public order and issues of governability--and the observance of human rights. Proportionality means a minimum baseline of respect for the fundamental rights of truth, justice,***107** and **reparations**--the three basic pillars of transitional justice--while upholding the "right to peace." Indeed, the Court clarified that all these rights are interdependent, working synergistically; modifying one right directly affects the others. Colombia is left searching for a "fit" between two paradigms that are no longer legally or practically separable.

Undoubtedly, the challenges of this task contributed to the Court's delay in publishing the ruling, which generated significant confusion and tension. In the interim, the Court felt compelled to release a press statement clarifying its key rulings in order to address the concerns of both victim-survivors and paramilitaries. It reassured the paramilitaries that previous convictions would accumulate under the maximum alternative sentence, and in turn assured the victim-survivors that an original conviction would expire only once the beneficiary fulfilled all conditions. In a sense, the judiciary entered into the peace negotiations, brokering a compromise while maintaining its legal duty to champion the rights and interests of the aggrieved. [FN357] Victim-survivors are now a third party to the peace negotiations.

While public debate continued on Law 975/05, President Uribe ordered the arrest of seventeen leaders of illegal armed groups. He also ordered more than 30,000 of the individuals who were demobilized in the last three years not to delay in invoking the special benefits of Law 975/05. [FN358] Perhaps the potent combination of intense national and international protest forced the state to bring retributive justice into the DDR mix.

Colombia's experience demonstrates that transitional justice is not merely a legal phenomenon; rather, the mechanisms of transitional justice are also social phenomena, and an evaluation of their success will depend in part upon the perceptions of members of the society undergoing transition from periods of violent conflict. As Teitel asserts, a "genealogy of transitional justice demonstrates, over time, a close relationship between the type of justice pursued and the relevant limiting political conditions. Currently, the discourse centers on preserving a minimalist rule of law identified chiefly with maintaining peace." [FN359] She opines that this trend presages an "increased pragmatism in the politicization of the law." [FN360] Yet the case of Colombia presents almost the ***108** opposite: the legalization of the political. These social and political forces will play a direct role in the subsequent phases of both the transitional justice and DDR processes in Colombia. The constantly evolving field of transitional justice requires more than a study of legal debates and norms: it requires an analysis of the cultural and political contexts that shape what is legally and socially possible. With Colombia's transitional justice process scheduled to proceed over the next eight years, this examination has only just begun.

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[FN1]. See generally Herding Cats: Multiparty Mediation in a Complex World (Chester A. Crocker et al. eds., 1999) (discussing peacemaking efforts in the cases of El Salvador, Peru, and the South African region, among others); COMPARATIVE PEACE PROCESSES IN LATIN AMERICA (Cynthia J. Arnson ed., 1999) (examining the politics of peace negotiations relating to guerrilla conflicts in Latin America).

[FN2]. See Priscilla B. Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (**2001**).

[FN3]. See Ruti G. Teitel, Transitional Justice 11-26 (**2000**).

[FN4]. The term "victim" and the elaboration of categories of victimization figure prominently in the work of truth commissions. In light of our work in Peru, we are more comfortable with the hyphenation "victim-survivor" for several reasons. First, not all people with whom we have spoken identify themselves as victims in their daily lives. Indeed, they may reject the term for the helplessness it implies, choosing to distance themselves from such an image. In Peru, for instance, those who suffered human rights violations use the term "afectados" (affected). Second, part of our ongoing research focuses on the ways in which people organize to demand **reparations** and how this political activism leads to new perceptions of citizenship and agency. Finally, we are influenced by the work of Mahmood Mamdani and his assertion that people must move beyond dichotomized identities as one way of searching for new forms of justice and coexistence following atrocity. See Mahmood Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda (**2001**).

[FN5]. Orit Kamir, Honor and Dignity in the Film Unforgiven: Implications for Sociolegal Theory, 40 LAW & SOC'Y REV. 193, 211 (**2006**). Although the concept of "popular jurisprudence" is associated with mass consumption and the entertainment industry, we adopt the term here in reference to the formation of popular notions of justice that develop in reaction to legal and political processes occurring with relation to disarmament, demobilization, and reintegration and its related laws and negotiations.

[FN6]. See Mark Knight & A. Özerdem, Guns, Camps and Cash: Disarmament, Demobilization and Reinsertion of Former Combatants in Transitions from War to Peace, 41 J. Peace Res. 499 (**2004**); Sami Faltas, DDR Without Camps: The Need for Decentralized Approaches, in Bonn Int'l Ctr. for Conversion (BICC), Conversion Survey **2005**: Global Disarmament, Demilitarization, and Demobilization 112 (**2005**).

[FN7]. For a fuller discussion of this research, see Kimberly Theidon & Paola Andrea

Betancourt, Transiciones Conflictivas: Combatientes Desmobilizados en Colombia, 58 Análisis Político 92 (**2006**), and Kimberly Theidon, Transitional Subjects: The Disarmament, Demobilization and Reintegration of Combatants in Colombia, Int'l J. Transitional Just. (forthcoming Spring **2007**).

[FN8]. The ELN, formed in 1964, has its roots in the previous liberal peasant struggles, and is thus an outgrowth of university unrest, with an estimated 3,500-4,000 combatants. Amnesty Int'l (AI), Colombia, The Paramilitaries in Medellín: Demobilization or Legalization? 2 (**2005**). For more information on the various armed actors, see information provided by the Center for International Policy, Colombia Program, available at http:// www.ciponline.org/colombia/infocombat.htm.

[FN9]. For a more detailed account of Colombia's history, see VIOLENCE IN COLOMBIA: THE CONTEMPORARY CRISIS IN HISTORICAL PERSPECTIVE 81-84 (Charles Bergquist, Ricardo Peñaranda & Gonzalo Sánchez eds., 1992) (offering a political history of violence in Colombia from 1810 to 1990).

[FN10]. See Timothy P. Wickham-Crowley, Guerrillas and Revolution in Latin America: A Comparative Study of Insurgents and Regimes Since 1956 17-18 (1992).

[FN11]. See Timothy P. Wickham-Crowley, Winners, Losers, and Also-Rans: Toward a Comparative Sociology of Latin American Guerrilla Movements, in Power and Popular Protest: Latin American Social Movements 132, 133 (Susan Eckstein ed., **2001**); Wickham-Crowley, supra note 10, at 30-33.

[FN12]. Inter-Am. Comm'n on Human Rights (IACHR), Org. of Am. States (OAS), Third Report on the Human Rights Situation in Colombia, P28, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (1999) [hereinafter IACHR I], available at http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm; Wickham-Crowley, supra note 10, at 181.

[FN13]. Winifred Tate, Paramilitaries in Colombia, 8 Brown J. World Aff. 163, 164 (**2001**-**2002**); see Fernando Cubides, Narcotráfico y paramilitarismo: ? Matrimonio indisoluble?, in El Poder Paramilitar 215 (Alfredo Rangel ed., **2005**).

[FN14]. IACHR I, supra note 12, P17; Law No. 48 of Dec. 16, 1968, O.G. No. 32.679, Dec. 26, 1968 (Colom.), available at http:// www.dafp.gov.co/leyes/L0048_68.HTM [hereinafter Law No. 48].

[FN15]. IACHR I, supra note 12, PP36-37; Law No. 48, supra note 14.

[FN16]. AI, supra note 8, at 3.

[FN17]. Daniel Jaramillo García-Peña, La relación del Estado colombiano con el fenómeno paramillitar: Por el esclarecimiento histórico, 52 Análisis Político 58 (**2005**) (author's translation).

[FN18]. Alfredo Rangel, ?A Dónde Van Los Paramilitares?, in El Poder Paramilitar, supra note 13, at 8, available at

www.seguridadydemocracia.org/docs/pdf/ensayos/prologoParamilitares.pdf.

[FN19]. See Nazih Richani, Systems of Violence: The Political Economy of War and Peace in Colombia 118 (**2002**).

[FN20]. Nazih Richani, Multinational Corporations, Rentier Capitalism, and the War System in Colombia, 47.3 Latin Am. Pol. & Soc'y 113 (**2005**).

[FN21]. AI, supra note 8, at 4.

[FN22]. See generally Robin Kirk, More Terrible Than Death: Massacres, Drugs And America's War in Colombia (**2003**) (discussing the political relationship between the United States and Colombia including the drug war and the increasing U.S. military presence in Colombia); Paul Collier, Rebellion as a Quasi-Criminal Activity, 44 J. Conflict Resol. 839, 851-52 (**2000**); Mark Peceny & Michael Durnan, The FARC's Best Friend: U.S. Antidrug Policies and the Deepening of Colombia's Civil War in the 1990s, 48.2 Latin Am. Pol. & Soc'y 95 (**2006**) (providing examples of the connection between the conflict and the drug war).

[FN23]. Kimberly Theidon, Practicing Peace, Living With War: Going Upriver in Colombia (**2001**), http://www.ciponline.org/colombia/01103001.htm. For an excellent overview of Plan Colombia, see generally Ingrid Vaicius & Adam Isacson, The "War on Drugs" Meets the "War on Terror" (**2003**), http:// www.ciponline.org/colombia/0302ipr.htm (highlighting the implications in Colombia from crossover between two U.S. political campaigns).

[FN24]. AI, supra note 8, at 6.

[FN25]. Decree No. 0815 of Apr. 19, 1989, O.G. No. 39116, Dec. 22, 1989 (Colom.) and Decree No. 3398 of Dec. 24, 1965, O.G. No. 39116, Dec. 22, 1989 (Colom.), discussed in IACHR, OAS, Report on The Demobilization Process in Colombia, P39, n.60, OEA/Ser.L/V/II.120 Doc. 60 (Dec. 13, **2004**) [hereinafter IACHR II], available at http://www.cidh.org/countryrep/Colombia04eng/toc.htm.

[FN26]. Decree No. 1194 of July 15, 1992, O.G. No. 40.506, July 17, 1992 (Colom.), available at http:// www.presidencia.gov.co/decretoslinea/1992/julio/15/dec1194151992.doc.

[FN27]. Kirk, supra note 22, at 173.

[FN28]. See, e.g., Human Rights Watch (HRW), The "Sixth Division": Military-Paramilitary Ties and U.S. Policy in Colombia (**2001**), available at http:// www.hrw.org/reports/**2001**/colombia/6theng.pdf; Human Rights Watch, The Ties That Bind: Colombia and Military-Paramilitary Links (**2000**), available at http:// www.hrw.org/reports/**2000**/colombia; Camilo Echandía Castilla, El Conflicto Armado y Las Manifestaciones de Violencia en las Regiones de Colombia 65 (1999).

[FN29]. Daniel Pécaut, Guerra Contra la Sociedad 12 (**2001**).

[FN30]. See the Washington Office on Latin America, http:// www.wola.org/publications/publications.htm and the Center for International Policy,

http://ciponline.org/publications.htm, http://www.cipcol.org for their ongoing position papers and blogs on US policy in the region; Kirk, supra note 22, at xix; Hans R. Blumenthal, Uniendo Esfuerzos por Colombia, Papeles De Cuestiones Internacionales 79, 80 (Winter **2000**).

[FN31]. AI, supra note 8, at 2.

[FN32]. Id. at 3.

[FN33]. Gonzalo Sánchez G., Introduction: Problems of Violence, Prospects for Peace, in Violence in Colombia, 1990-**2001**: Waging War and Negotiating Peace 23 (Charles Bergquist, Ricardo Peñaranda & Gonzalo Sánchez G. eds., **2001**); for a discussion of internal forced displacement, see Alfredo Molano, The Dispossessed: Chronicles of the Desterrados of Colombia 203 (**2005**).

[FN34]. U.N. High Comm'r for Refugees (UNHCR), Colombia Situation Map (Jan. **2006**), available at http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=44103c150.

[FN35]. IACHR II, supra note 25, P45; see also HUMAN RIGHTS WATCH, YOU'LL LEARN NOT TO CRY: CHILD COMBATANTS IN COLOMBIA (**2003**) (discussing the vulnerability of children in Colombia's conflict).

[FN36]. IACHR II, supra note 25, P2.

[FN37]. U.N. Dep't of Peacekeeping Operations, Disarmament, Demobilization and Reintegration of Ex-Combatants in a Peacekeeping Environment: Principles and Guidelines 15 (1999), available at http:// www.un.org/Depts/dpko/lessons/DD&R.pdf.

[FN38]. Id.

[FN39]. Faltas, supra note 6, at 2.

[FN40]. Id. at 5; see also Knight & Özerdem, supra note 6, at 499.

[FN41]. Nat J. Colletta et al., The Transition From War to Peace in Sub-Saharan Africa 18 (1996).

[FN42]. Quaker United Nations Office, Taking a Step Forward at the UN Review Conference: Supporting the Paragraphs Related to Demand in the Draft Outcome Document (May 18, **2006**), http:// www.quno.org/disarmament/salw/SmallArms2006/DemandSB2.pdf.

[FN43]. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (civil and political), annex II, princ. 37, U.N. Doc. E/CN.4/Sub.2/1997/20 Rev. 1 (Oct. 2, 1997) (prepared by Louis Joinet, U.N. Special Rapporteur on Impunity) [hereinafter Joinet Principles].

[FN44]. Id. P43.

[FN45]. Id. annex II, princ. 38.

[FN46]. See Lisa J. Laplante, Bringing Effective Remedies Home: The Inter-American Human Rights System, **Reparations** and the Duty of Prevention, 22 Neth. Q. Hum. Rts. 347, 347-61 (**2004**).

[FN47]. IACHR II, supra note 25, P100.

[FN48]. See Gonzalo Sánchez, The Violence: An Interpretive Synthesis, in Violence in Colombia: The Contemporary Crisis in Historical Perspective, supra note 9, at 102-04.

[FN49]. For an interesting history of guerrilla politics in Colombia, see Steven Dudley, Walking Ghosts: Murder and Guerrilla Politics in Colombia 19, 28 (**2006**).

[FN50]. Law No. 35 of Nov. 19, 1982, O.G. No. 36133, Nov. 20, 1982 (Colom.).

[FN51]. M-19 formed after the allegedly fraudulent presidential elections of April 19, 1970. An urban group, its ideology was a blend of populism and nationalistic revolutionary socialism. IACHR II, supra note 25, P42; Markus Koth, Bonn Int'l Ctr. for Conversion (BICC), To End a War: Demobilization and Reintegration Of Paramilitaries in Colombia 13 (**2005**), available at http:// www.bicc.de/publications/papers/paper43/paper43.pdf.

[FN52]. For an excellent discussion of the Unión Patriótica, see Dudley, supra note 49, at 77-88.

[FN53]. García-Peña, supra note 17, at 60.

[FN54]. AI, supra note 8, at 43. For the most complete overview of this process and the other DDR programs that ultimately failed during the 1980s and 1990s, see Alvaro Villarraga, La Reinserción en Colombia: Experiencias, Crisis Humanitaria y Political Publica (**2006**).

[FN55]. See Luis Alberto Restrepo M., The Equivocal Dimensions of Human Rights in Colombia, in Violence in Colombia, 1990-**2001**: Waging War and Negotiating Peace, supra note 33, at 100-101.

[FN56]. Law No. 418 of Dec. 26, 1997, O.G. No. 43.201, Dec. 26, 1997 (Colom.).

[FN57]. Alto Comisionado para la Paz [Office of the High Comm'r for Peace of Colom.], Construir La Paz De Mañana: Una Estrategia Para La Reconciliación (1997) (author's translation).

[FN58]. See David Bushnell, Politics and Violence in Nineteenth-Century Colombia, in VIOLENCE IN COLOMBIA: THE CONTEMPORARY CRISIS IN HISTORICAL PERSPECTIVE, supra note 9, at 24-25.

[FN59]. Kirk, supra note 22, at 279-80.

[FN60]. AI, supra note 8, at 11.

[FN61]. Id. at 6.

[FN62]. Rangel, supra note 18, at 4.

[FN63]. García-Peña, supra note 17, at 66.

[FN64]. See Law 782 of Dec. 23, **2002**, O.G. No. 45.043, Dec. 23, **2002**. In January **2003**, the government adopted Decree 128, infra note 71, which regulates Law 418 of 1997, on returning to civilian life.

[FN65]. AI, supra note 8, at 11-12.

[FN66]. Id.

[FN67]. Colombia Law 975 prohibits extradition of members of illegal armed groups accused of "political" offenses such as rebellion and sedition. It does permit extradition for offenses such as drug-trafficking. See infra text accompanying note 227. Some have speculated that the paramilitaries have recently shown more interest in negotiations due to the threat of extradition to the United States on drug charges. HRW, Colombia: Letting Paramilitaries Off The Hook 3 (**2005**), available at http:// hrw.org/backgrounder/americas/colombia0105; Juan Forero, Colombia Proposes 10-Year Terms for Paramilitary Atrocities, N.Y. Times, Nov. 16, **2004**, available at http://www.nytimes.com/**2004**/11/16/international/americas/16colombia.html; see e.g., Press Release, U.S. Attorney, S. Dist. N.Y., US Indicts Leaders of Colombian Terrorist Organization on Narcotic Trafficking Charges (July 22, **2004**) (making reference to the proceedings against Diego Fernando Murillo, alias Adolfo Paz or "Don Berna," and Vicente Castaño Gil, alias "El Profe," both members of the negotiating high command of the AUC).

[FN68]. AI, supra note 8, at 14. This agreement was implemented through Resolution 092 of **2004** (Colom.). IACHR II, supra note 25, exec. summary, P10.

[FN69]. Ceding the concentration zone to the AUC has caused some to question whether President Uribe is headed toward his own "Caguancito" (little Caguán), referring to the zone Pastrana ceded to the FARC during his failed negotiations of 1998-**2002**. Indeed, when Uribe authorized preliminary talks with the AUC leadership, he assured at least one of the Catholic priests accompanying the negotiations that he did not want a repeat of Caguán. Interview with representative of the Catholic Church, in Apartadó, Colom. (Sept. 6, **2005**).

[FN70]. In this text we focus on the collective demobilization of the paramilitaries. However, under the presidency of Álvaro Uribe more than 6,000 members of the FARC, the ELN and the AUC have individually demobilized. For more information, see Office of the High Comm'r for Peace of Colom., Cuadros Resumen, Areas Despejadas **2003**-**2006** 31.671 Desmovilizados, available at www.altocomisionadoparalapaz.gov.co/desmovilizaciones/**2004**/index_resumen.htm (last visited Feb. 19, **2007**).

[FN71]. Decree No. 128 of Jan. 22, **2003**, art. 13, O.G. No. 45.073, Jan. 24, **2003**

(Colom.), available at http://www.dafp.gov.co/leyes/D0128003.HTM.

[FN72]. HRW, supra note 67, at 7, n.20 (citing Office of the High Comm'r for Peace of Colom., Report of the General Rapporteur, section 3.6 D).

[FN73]. Id. at 7.

[FN74]. Id. at 8.

[FN75]. Decree No. 128 of Jan. 22, **2003**, art. 21, O.G. No. 45.073; see also HRW, supra note 67, at 8, n.22.

[FN76]. AI, supra note 8, at 13.

[FN77]. Technically, those who come under later investigation for human rights violations lose the Decree 128 benefits and would then be subject to the Law 975 benefits, including an extraordinary justice route. Id.

[FN78]. Procuraduría General de la Nación (Inspector General's Office), Comisión especial de la Procuraduría vigila proceso de desmovilización de AUC en acción preventiva,Boletín 408, Dec. 10, **2004**, available at http://www.procuraduria.gov.co/html/noticias_**2004**/noticias_408.htm.

[FN79]. AI, supra note 8, at 1; Office of the High Comm'r for Peace of Colom.,Update Report of Collective Demobilization (**2004**), available at http://www.altocomisionadoparalapaz.gov.co/desmovilizaciones/**2004**/balance.htm; HRW, Colombia, Librando a los paramilitares de sus responsabilidades n. 25 (**2005**) (citing Solamente se Desmovilizaron 5 de los 11 Bloques de Autodefensa que Debían Hacerlo, El Tiempo (Colom.), Dec. 13, **2004**, available at http://www.hrw.org/backgrounder/americas/colombia0105-sp/index.htm).

[FN80]. Office of the High Comm'r for Peace of Colombia, supra note 70, figs. 2, 3, available at http://www.altocomisionadoparalapaz.gov.co/desmovilizaciones/**2004**/index_resumen.htm. The UN Commission on Human Rights refers to official information stating that from late **2003** through December **2005**, approximately 14,000 people had been collectively demobilized in twenty-three ceremonies. ECOSOC, U.N. Comm'n on Human Rights, Report of the High Commissioner for Human Rights on the situation of human rights in Colombia, P70, U.N. Doc. E/CN.4/**2006**/009 (Jan. 20, **2006**) [hereinafter UNCHR Report].

[FN81]. Ministry of Def. of the Republic of Colom., Informe Anual de Derechos Humanos y Derecho Internacional Humanitario **2002** y Avances Período Presidencial [**2002** Annual Report on Human Rights and International Humanitarian Law and Periodic Presidential Advances] 167 (**2003**).

[FN82]. Centro de Investigación y Educación Popular (CINEP) & Justicia y Paz, Cifras de la violencia política enero-diciembre de **2003** [Figures on Political Violence, January-December **2003**], 28 Noche y Niebla 31 (**2003**); CINEP & Justicia y Paz, Los Derechos Fundamentales en el **2003** [Fundamental Rights in **2003**], 28 Noche y Niebla 27 (**2003**).

[FN83]. CINEP, Cifras de la violencia política enero-junio de **2005** [Figures on Political Violence January-June **2005**], 31 Noche y Niebla 21, 21 tbls. 1, 2 (**2005**).

[FN84]. Defensoría del Pueblo de Colombia, Seguimiento al Cese de Hostilidades Prometido por las Autodefensas Unidas de Colombia como Signo de su Voluntad de Paz para el País, Sept. 24, **2004**, at 23, available at http://www.defensoria.org.co/pdf/informes/informe_107.pdf.

[FN85]. Comisión Colombiana de Juristas, El deber de la memoria: imprescindible para superar la crisis de derechos humanos y derecho humanitario en Colombia **2004**, at 13 (**2004**), available at http://www.coljuristas.org/documentos/documentos_pag/DEBER%20MEMORIA%20FINAL.pdf.

[FN86]. IACHR II, supra note 25, P78.

[FN87]. Id. PP96-97.

[FN88]. AI, supra note 8, at 43.

[FN89]. IACHR II, supra note 25, P72.

[FN90]. See Decree No. 128 of Jan. 22, **2003**, art. 13, O.G. No. 45.073, Jan. 24, **2003** (Colom.), available at http://www.dafp.gov.co/leyes/D0128003.HTM.

[FN91]. HRW, supra note 67, at 7. See Office of the High Comm'r for Peace of Colom., Schedule of Demobilization (Nov. 3, **2003**), http://www.altocomisionadoparalapaz.gov.co/noticias/**2004**/noviembre/nov_03_04b.htm.

[FN92]. Koth, supra note 51, at 26.

[FN93]. AI, supra note 8, at 10.

[FN94]. Id.

[FN95]. IACHR II, supra note 25, P82.

[FN96]. HRW, supra note 67, at 1.

[FN97]. IACHR II, supra note 25, exec. summary, P3.

[FN98]. AI, supra note 8, at 49. For instance, the Ministry of Defense adopted Decree 2767 on August 31, **2004**, expanding the regime of economic benefits already established in Decree 128 to include persons who collaborate with military forces and the National Police by providing more information on the activities of illegal groups. This arrangement was considered a way "to offer them an opportunity to develop a life plan safely and with dignity." Decree 2767 of Aug. 31, **2004**, pmbl., O.G. No. 45657, Aug. 31, **2004** (Colom.), available at http://www.presidencia.gov.co/prensa_new/decretoslinea/**2004**/agosto/31/dec2767310804.pdf.

[FN99]. IACHR II, supra note 25, P79.

[FN100]. For example, the “Regreso a la Legalidad” [Return to Legality] program provided social benefits for the 868 who demobilized in Medellín as a means of promoting their reincorporation into civilian life. Id. P80.

[FN101]. Id. P60.

[FN102]. Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State 213 (**2001**).

[FN103]. Id. at 175.

[FN104]. See the various works by Dr. Sami Faltas, including Faltas, supra note 6.

[FN105]. Swed. Ministry for Foreign Affairs, Stockholm Initiative on Disarmament, Demobilisation and Reintegration PP55-57 (Feb. **2006**).

[FN106]. Research based on 112 in-depth interviews with demobilized combatants, followed by more focused analysis of three sites: Bogotá, Medellín, and Turbo-Apartado. Sixty-four interviewees were from the guerrilla (ELN or FARC) and forty-eight were from the AUC. Of the 112, fourteen were women, all of whom were ex-guerrillas. For a fuller discussion of this research, see Theidon & Betancourt, supra note 7, at 58.

[FN107]. See generally Peter E. Harrell, Rwanda's Gamble: Gacaca and a New Model of Transitional Justice (**2003**) (discussing the use of popularly elected courts in place of statutory law courts to investigate and try genocide suspects); Martha Minow, Between Vengeance and Forgiveness 11 (1998); John Borneman, Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe 47-50 (1997); Kimberly Theidon, Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru, 50 J. Conflict Resol. 433-57 (**2006**).

[FN108]. Interview with a DDR program administrator, in Bogotá, Colom. (Nov. 17, **2005**).

[FN109]. For a discussion of “intimate enemies,” see Kimberly Theidon, Entre Prójimos: El Conflicto Armado Interno y La Política De La Reconciliación En El Perú (**2004**).

[FN110]. Id. (providing an illustration of different local mechanisms used by rural communities in Peru to reinsert members who had become subversives).

[FN111]. OAS Res. 1397/04, OEA/Ser.G/CP/RES.859 (Feb. 6, **2004**) [hereinafter OAS Resolution].

[FN112]. Agreement for Monitoring of the Peace Process in Colombia, Colom.-OAS, Jan. 23, **2004**, approved Feb. 6, **2004**.

[FN113]. IACHR II, supra note 25, P1.

[FN114]. AI, supra note 8, at 15-16.

[FN115]. Interview with member of the MAPP/OAS Mission, in Barrancabermeja, Colom. (Apr. 17, **2006**).

[FN116]. AI, supra note 8, at 16.

[FN117]. Id. at 48.

[FN118]. Id. at 15.

[FN119]. OAS Resolution, supra note 111.

[FN120]. The delegation was led by the Vice President and Rapporteur for Colombia, Susana Villarán, and the Executive Secretary of the IACHR, Santiago A. Canton, from July 11 to 17, **2004**. IACHR II, supra note 25, exec. summary, P1.

[FN121]. Id. exec. summary, P3.

[FN122]. Id. P7.

[FN123]. IACHR, Annual Report Of The Inter-American Commission On Human Rights **2005**, P12, OEA/Ser.L/V/II.124, Doc. 5 (Feb. 27, **2006**).

[FN124]. IACHR II, supra note 25, exec. summary, P8.

[FN125]. Decree No. 128 of Jan. 22, **2003**, art. 21, O.G. No. 45.073, Jan. 24, **2003** (Colom.).

[FN126]. Law No. 782 of Dec. 23, **2002**, art. 19, O.G. No. 45.043, Dec. 23, **2002** (Colom.).

[FN127]. IACHR II, supra note 25, exec. summary, P14.

[FN128]. Id. P94.

[FN129]. Id. P10.

[FN130]. AI, supra note 8, at 16.

[FN131]. See supra Part III.A.

[FN132]. IACHR II, supra note 25, P63.

[FN133]. Peter Slevin, Colombian President Defends Amnesty for Paramilitary Troops, WASH. POST, Oct. 1, **2003**, at A17.

[FN134]. UNHCR--Colom., Observaciones sobre el Proyecto de Ley por la cual se dictan disposiciones en procura de la reincorporación de miembros de grupos armados que contribuyan de manera efectiva a la paz nacional (Sept. 23, **2003**), available at http://

www.hchr.org.co/publico/pronunciamientos/ponencias/po0329.pdf. See also Letter from U.N. High Comm'r for Human Rights Office--Colom. to Legislators of the First Comm'n of the Senate and House of Representatives, Observaciones sobre el Pliego de Modificaciones al Proyecto de Ley "por la cual se dictan disposiciones para la reincorporación de miembros de grupos armadas organizados al margen de la ley que contribuyan de manera efectiva a la consecución de la paz," DRP/175/05 (Mar. 30, **2005**) [hereinafter Letter to Legislators].

[FN135]. IACHR, Annual Report of the IACHR **2003**, ch. IV, P19, OEA/Ser.L/V/II.118, Doc. 5 rev. 2 (Dec. 29, **2003**).

[FN136]. HRW, supra note 67, n.28 (citing Listo Nuevo Proyecto Que Busca Marco Jurídico Para Grupos Armados Irregulares, El Espectador, Dec. 17, **2004**). For a specific list of proposals, see Secretary-General of Legislation, Camara de Representantes de Colombia, Agenda Legislativa: Julio 20 de **2004** a Junio 20 de **2005**.

[FN137]. Cartagena Declaration, Cartagena de Indias, Feb. 3-4, **2005**, available at http://epp-ed.europarl.eu.int/Press/peve05/docs/050922cartagenadeclaration_en.doc; AI, supra note 8, at 21 n.32. The Cartagena meeting was attended by high-level representatives of the governments of Argentina, Brazil, Canada, Chile, Japan, Mexico, Norway, Switzerland, the United States, the EU and its Member States, the European Commission, the UN system, the CAF, the IDB, the IMF, the World Bank, and the Colombian government. Id. at 22 n.33.

[FN138]. AI, supra note 8, at 16, 21 n.32.

[FN139]. IACHR II, supra note 25, exec. summary, P7.

[FN140]. Letter to Legislators, supra note 134, at 5.

[FN141]. HRW, supra note 67, n.30 (citing Gobierno Presentará Marco Legal Para Desmovilización de Paramilitares el Próximo Mes de Febrero, El Tiempo, Dec. 14, **2004**).

[FN142]. AI, supra note 8, at 22.

[FN143]. Colombian High Commissioner for Peace Luis Carlos Restrepo and Vice President Francisco Santos had lent their support to an even weaker bill that had been presented by Senator Armando Benedetti. The final bill was presented to Congress on March 3, **2005**.

[FN144]. Law No. 975 of July 22, **2005**, O.G. No. 45.980, July 25, **2005** (Colom.), available at http://www.coljuristas.org/justicia/LEY%20975%C20DE%C202005.pdf#search=%C22Ley%C20975%C20%C22diario%C20oficial%C22%C20colombia%.

[FN145]. OAS, Observations and Recommendations of the Permanent Council on the Annual Report of the Inter-American Commission on Human Rights, at 20, OEA/Ser.G, CP/CAJP-2399/06 (May 16, **2006**) [hereinafter OAS Observations and Recommendations].

[FN146]. Law No. 975 of July 22, **2005**, O.G. No. 45.980. Article 1 defines "grupo armado organizado al margen de la ley" as pertaining to both guerrilla and paramilitary groups, or a

significant and integral section of either in blocks, fronts, or other modalities that come under Law 782 of **2002**. Id. art. 1.

[FN147]. Id. art. 1 (author's translation) (emphasis added).

[FN148]. Id. art. 2 (author's translation).

[FN149]. Id. art. 3 (author's translation).

[FN150]. Id. arts. 10-11 (author's translation).

[FN151]. Id. art. 4 (author's translation).

[FN152]. Id. arts. 6-8.

[FN153]. Id. arts. 50-51 (author's translation).

[FN154]. Interview with a lawyer at Instituto Latinoamericano de Servicios Alternativos (ILSA), in Colom. (July 31, **2006**).

[FN155]. Victims' Movement website, http://www.movimientodevictimas.org/?q=/taxonomy/term/67.

[FN156]. See id.

[FN157]. El Movimiento Nacional de Víctimas de Crímenes de Estado y otros, Contra la Totalidad de la Ley 975 de **2005**, (Sept. 9, **2005**) (challenging the constitutionality of Law 975).

[FN158]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032 (May 18, **2006**).

[FN159]. Id.

[FN160]. Brief for ICTJ as Amici Curiae Supporting Appellants, Gustavo Gallón Giraldo y otros v. Colom., available at http:// www.ictj.net/downloads/colombia.amicus.spa.pdf.

[FN161]. Paramilitary leaders asserted the ruling was “a fatal blow to the peace process,” thereby provoking the Interior and Justice Minister, Sabas Pretelt, to express his “concern.” La Corte Constitucional Tuvo Que Emitir Un Comunicado Aclarando La Decisión, El Tiempo, May 20, **2006**, available at http://www.icpcolombia.org/documentos/15al21demayo.doc.

[FN162]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032.

[FN163]. See Hayner, supra note 2 (providing an overview of the features of truth commissions within a transitional justice context).

[FN164]. Mark J. Osiel, Why Prosecute? Critics of Punishment for Mass Atrocity, 22 Hum. Rts. Q. 118 (**2000**) (critiquing absolute legal demands for prosecutions).

[FN165]. Miriam J. Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, 15 Harv. Hum. Rts. J. 39, 40 (**2002**) (explaining that despite debates on prosecutions in transitional justice, there is a basic assumption that criminal trials are the optimal approach).

[FN166]. Naomi Roht-Arriaza & Lauren Gibson, The Developing Jurisprudence on Amnesty, 20 Hum. Rts. Q. 843 (1998) (providing a historical examination of the development of amnesties).

[FN167]. See Gwen K. Young, All the Truth and as Much Justice as Possible, 9 U.C. Davis J. Int'l L. & Pol'y 209 (**2003**); Diane F. Orentlicher, Swapping Amnesty for Peace and The Duty to Prosecute Human Rights Crimes, 3 ILSA J. INT'L & COMP. L. 713 (1997) (concluding that amnesties have implications for peace in countries emerging from conflict).

[FN168]. See Ronald C. Slye, Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process, in TRUTH V. JUSTICE 171 (Robert I. Rotberg & Dennis Thompson eds., **2000**) (concluding that South African amnesty was sophisticated, providing truth, reconciliation, and accountability); Stephen Landsman, Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions, Law & Contemp. Probs., Autumn 1996, at 81 (providing a comparison of the advantages and disadvantages of both prosecutions and truth commissions).

[FN169]. See Paul Lansing & Julie C. King, South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age, 15 Arizona J. Int'l & Comp. L. 753 (1998).

[FN170]. Review of the academic literature shows a growing coalition of academics and practitioners offering legal arguments against the legitimacy of amnesties. In fact, Jo M. Pasqualucci called upon the Inter-American Court to rule on the issue. See generally Jo M. Pasqualucci, The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System, 12 Boston Univ. Int'l L.J. 321 (1994); see also Naomi Roht-Arriaza, Combating Impunity: Some Thoughts on the Way Forward, Law & Contemp. Probs., Autumn 1996, at 93; Juan E. Méndez, Accountability for Past Abuses, 19 Hum. Rts. Q. 255 (1997).

[FN171]. This standard comes from the **Inter-AmericanCourt** of **HumanRights**. See Castillo Páez Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, P82 (Nov. 3, 1997); see also Mayagna (Sumo) Cmty. of Awas Tingni v. Nicaragua, **2001** Inter-Am. Ct. H.R. (ser. C) No. 79, P112 (Aug. 31, **2001**); Velásquez Rodríguez v. Honduras, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, P91 (June 26, 1987).

[FN172]. See Raquel Aldana-Pindell, An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes, 26 Hum. Rts. Q. 605 (**2004**).

[FN173]. Katie Kerr, Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process, 37 U. Miami Inter-Am. L. Rev. 53, 54 (**2005**).

[FN174]. Law No. 975 of July 22, **2005**, arts. 3, 29, O.G. No. 45.980, July 25, **2005** (author's translation). Resocialization entails work and study during detention, as well as assisting in the demobilization of the illegally armed group to which the beneficiary belonged.

[FN175]. Id. arts. 20, 29.

[FN176]. Id. art. 31.

[FN177]. Id.

[FN178]. Id. art. 29.

[FN179]. Id. art. 25.

[FN180]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 23 (May 18, **2006**).

[FN181]. Id. at 75. See text accompanying footnotes for lack of absolute guarantees.

[FN182]. Id. at 21, 257.

[FN183]. Id. at 74.

[FN184]. Declaración Final-III EncuentroNacional de Víctimas de Crímenes de Estado, Ocho propuestas para la verdad, la justicia, la reparación integral, la memoria y la no repetición de los crímenes contra la humanidad (July 11, **2006**) (on file with authors) [hereinafter Victims' Final Declaration].

[FN185]. Id. at 28.

[FN186]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 132, 141 (May 18, **2006**).

[FN187]. Dir. of the Office in Colom. of the U.N. High Comm'r for Human Rights, Patrones internacionales en materia de verdad, justicia y reparación para lograr la superación del conflicto armado interno, Remarks to First Committee of the Senate, (Apr. 2, **2004**), available at http:// www.hchr.org.co/publico/pronunciamientos/ponencias/po0437.txt.

[FN188]. Law No. 975 of July 22, **2005**, arts. 33, 16, O.G. No. 45.980, July 25, **2005** (Colom.). For discussion, see OAS Observations and Recommendations, supra note 145, at 26-27.

[FN189]. Law No. 975 of July 22, **2005**, arts. 17, 18, O.G. No. 45.980.

[FN190]. Id. art. 18. If the subject accepts the charges, then the court verifies that it was free, voluntary, and spontaneous. Id. art. 19.

[FN191]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 46; AI, supra note 8, at 23.

[FN192]. Press Release, OAS, IACHR, Issues Statement Regarding the Adoption of the "Law Of Justice And Peace" in Colombia, para. 6 (July 15, **2005**), available at http://www.cidh.org/Comunicados/English/**2005**/26.05eng.htm [hereinafter OAS Press Release].

[FN193]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 22.

[FN194]. Id. at 21.

[FN195]. IACHR II, supra note 25, P29.The Colombian government amended these limits, making corrections through Decree 4760, promulgated in **2005**, which allows victims to furnish evidence, request information, cooperate with court officials, and be notified of and able to challenge decisions at each stage of the proceedings. Decree 4760 regulates Law 975/05 in an effort to assure victim participation, with Article 11(5) clarifying that victims participating in all stages of the proceedings will receive private legal assistance, or be provided with legal representation by the Public Ministry. Decree No. 4760 of Dec. 30, **2005**, art. 11(5) (Colom.). For discussion, see OAS Observations and Recommendations, supra note 145, at 28.

[FN196]. See generally Minow, supra note 107 (discussing the advantages of a truth commission for providing a forum for victims to tell their stories).

[FN197]. See generally Robert I. Rotberg & Dennis Thompson, Truth v. Justice (**2000**) (presenting chapters by different authoritative authors to analyze this debate); Thomas M. Antkowiak, Note, Truth as Right and Remedy in International Human Rights Experience, 23 MICH. J. INT'L L. 977 (**2002**) (discussing international jurisprudence on the right to truth); see also The Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru), **2001** Inter-Am. Ct. H.R. (ser. C) No. 75, PP45-46 (Mar. 14, **2001**).

[FN198]. See generally Wilson, supra note 102 (providing an in-depth analysis and criticisms of this process).

[FN199]. Joinet Principles, supra note 43, princ. 4.

[FN200]. Bámaca Velásquez Case, **2000** Inter-Am. Ct. H.R. (ser. C) No. 70, P201 (Nov. 25, **2000**).

[FN201]. U.N. Human Rights Comm., Communication No. 107/1981, P16, U.N. Doc. CCPR/C/19/D/107/1981 (July 21, 1983).

[FN202]. IACHR II, supra note 25, P18.

[FN203]. Id.

[FN204]. See Raquel Aldana-Pindell, In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes, 35 Vand. J. Transnat'l L. 1399, 1439-41 (**2002**);

Brandon Hamber, Does the Truth Heal?, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 155, 159 (Nigel Biggar ed., **2003**).

[FN205]. Aldana-Pindell, supra note 204, at 1439-43.

[FN206]. Id. at 1438.

[FN207]. Law No. 975 of July 22, **2005**, art. 17, O.G. No. 45.980, July 25, **2005** (Colom.).

[FN208]. Id. art. 19.

[FN209]. Id. art. 17.

[FN210]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 23 (May 18, **2006**).

[FN211]. Law No. 975 of July 22, **2005**, art. 17, O.G. No. 45.980; supra note 170 and accompanying text.

[FN212]. See AI, supra note 8, at 23.

[FN213]. See IACHR, supra note 135, ch. IV, P16.

[FN214]. See OAS Press Release, supra note 192.

[FN215]. See IACHR II, supra note 25, P32; U.N.C.H.R. Report, supra note 80, P73.

[FN216]. ECOSOC, Comm'n on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, PP71-72, U.N. Doc. E/CN.4/**2006**/56/Add.1 (Jan. 17, **2006**). The Working Group notes that the International Convention for the Protection of All Persons from Enforced Disappearances requires efforts to locate the disappeared and permits national legislation to provide for mitigating circumstances only if this provision assists in obtaining information relevant to locating the disappeared. Id. P70.

[FN217]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 217 (May 18, **2006**).

[FN218]. Id. at 42.

[FN219]. See id.

[FN220]. Id.; see Alan Seagrave, Conflict in Colombia: How Can Rebel Forces, Paramiliatary Groups, Drug Traffickers and Government Forces be Held Liable for Human Rights Violations in a Country Where Impunity Reigns Supreme? 25 Nova L. Rev. 525 (**2001**).

[FN221]. AI, supra note 8, at 20.

[FN222]. Id.

[FN223]. HRW, supra note 67, at 8.

[FN224]. Decree No. 4760 of Dec. 30, **2005**, art. 23 (Colom.).

[FN225]. Id.

[FN226]. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, P177 (July 29, 1988); Villagrán Morales Case (The "Street Children" Case), 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, P226 (Nov. 19, 1999).

[FN227]. Law No. 975 of July 22, **2005**, art. 71., O.G. No. 45.980, July 25, **2005** (Colom.).

[FN228]. Id. art. 56.

[FN229]. Id. arts. 57-58.

[FN230]. Id. art. 56; OAS Press Release, supra note 192.

[FN231]. AI, supra note 8, at 22.

[FN232]. OAS Press Release, supra note 192.

[FN233]. AI, supra note 8, at 15.

[FN234]. See generally Seagrave, supra note 220 (discussing how the Colombian state would be held responsible under international law not only for the acts of its own agents but also for failing to control third parties such as the guerrillas and paramilitary); Roman David & Susanne Choi Yuk-ping, Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic, 27 Hum. Rts. Q. 392 (**2005**) (providing a general account of the reparation programs in truth commission settings).

[FN235]. Victims' Final Declaration, supra note 184.

[FN236]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 172 (May 18, **2006**).

[FN237]. IACHR II, supra note 25, P41.

[FN238]. See generally Audrey R. Chapman & Patrick Ball, The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala, 23 Hum. Rts. Q. 1 (**2001**); IACHR II, supra note 25, P16.

[FN239]. See Todd Cleveland, "We Still Want the Truth": The ANC's Angolan Detention Camps and Post-Apartheid Memory 25 Comp. Stud. S. Asia, Afr. & Middle E. 63, 71 (**2005**).

[FN240]. See Stanley Cohen, States of Denial: Knowing About Atrocities and Suffering of Others (**2001**) (providing an overview of the impact of official denial and the need for acknowledgement).

[FN241]. Graciela Fernandez Meijide et al., The Role of Historical Inquiry in Creating Accountability for Human Rights Abuses, 12 B.C. Third World L.J. 269, 269, 276 (1992).

[FN242]. See generally Dinah Shelton, Remedies in International Human Rights Law (1999).

[FN243]. Patrick Smith, Memory without History: Who Owns Guatemala's Past?, Wash. Q., Spring **2001**, at 59, 64.

[FN244]. See generally Leigh A. Payne, Perpetrators' Confessions: Truth, Reconciliation, and Justice in Argentina, in What Justice? Whose Justice? Fighting for Fairness in Latin America (Susan Eva Eckstein & Timothy P. Wickham-Crowley eds., **2003**).

[FN245]. John Borneman, Reconciliation after Ethnic Cleansing: Listening, Retribution, Affiliation, 14 Pub. Culture 281, 295 (**2002**).

[FN246]. Victims' Final Declaration, supra note 184.

[FN247]. OAS Observations and Recommendations, supra note 145.

[FN248]. OAS Press Release, supra note 192 (responding to the IACHR's July 15, **2005** press release stating that the law does not permit clarification of the "historical truth"); OAS Observations and Recommendations, supra note 145 (referring to id. para.15).

[FN249]. Law No. 975 of July 22, **2005**, arts. 51, 52.1 [sic], O.G. No. 45.980, July 25, **2005** (Colom.).

[FN250]. Id. art. 52.2 [sic].

[FN251]. Id. arts. 51, 52.3 [sic].

[FN252]. The CNRR was sworn in by the President of Colombia on October 4, **2005**, choosing Dr. Eduardo Pizarro Leóngomez as its chair. The CNRR is made up of delegates from the executive, the Ministry of Justice, the Minister of Finance and Public Credit, the National Prosecutor's Office, the Public Defender, five personalities, including women appointed by the president, and two representatives of associations of victims of the conflict, including the director of the Social Solidarity Network, who serves as Technical Secretary. OAS Observations and Recommendations, supra note 145, at 23.

[FN253]. CNRR, Elementos para la Construcción de una Hoja de Ruta 5 (Jan. 17, **2006**), available at http:// www.presidencia.gov.co/sne/**2006**/enero/17/ruta.pdf [hereinafter CNRR Hoja de Ruta] (author's translation).

[FN254]. Id. at 1 (author's translation).

[FN255]. Law No. 975 of July 22, **2005**, art. 7, O.G. No. 45.980, July 25, **2005** (Colom.).

[FN256]. CNRR Hoja de Ruta, supra note 253, at 1 (author's translation).

[FN257]. Id.

[FN258]. Juanita León, Por Fin, se Conoce la Sentencia sobre Ley de Justicia y Paz, Semana, June 13, **2006**, P 6, available at http://www.semana.com/wf_InfoArticulo.aspx?idArt=95848.

[FN259]. Victims' Final Declaration, supra note 184 (author's translation).

[FN260]. Eric Stover et al., Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq, 27 Hum. Rts. Q. 830, 834 (**2005**). For accounts on Rwanda and the former Yugoslavia, see My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (Eric Stover & Harvey M. Weinstein eds., **2005**).

[FN261]. Victims' Final Declaration, supra note 184.

[FN262]. For a general discussion of the development of human rights law and the victim's right to a remedy, see Shelton, supra note 242, at 1-37 (1999); for a fuller discussion on the right to **reparations**, see Laplante, supra note 46, at 347, 351-361.

[FN263]. See Lisa J. Laplante & Kimberly Theidon, Truth with Consequences: Justice and **Reparations** in Post-Truth Commission Peru, Hum. Rts. Q. (forthcoming **2007**).

[FN264]. The United Nations General Assembly approved of the principles without vote on December 16, **2005**. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th sess., 64th plen. mtg., U.N. Doc A/Res/60/147 (Dec. 16, **2005**).

[FN265]. Law No. 975 of July 22, **2005**, art. 8, O.G. No. 45.980, July 25, **2005** (Colom.).

[FN266]. Id.

[FN267]. Id. arts. 10, 11, 45, 55.1, 56.

[FN268]. AI, supra note 8, at 24.

[FN269]. IACHR II, supra note 25, P31 n.52 (referring to princ. IX(16-19)).

[FN270]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 63 (May 18, **2006**).

[FN271]. Id. at 57.

[FN272]. Id. at 127.

[FN273]. Id. at 58-59.

[FN274]. Law No. 975 of July 22, **2005**, art. 8, O.G. No. 45.980, July 25, **2005** (Colom.). Article 23 sets procedures for this determination. Id. art. 23.

[FN275]. Id. art. 23.

[FN276]. Id.

[FN277]. Id.

[FN278]. Id. art. 8.

[FN279]. Id. art. 49.3.

[FN280]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, 62 (May 18, **2006**).

[FN281]. AI, supra note 8, at 24.

[FN282]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 63.

[FN283]. OAS Observations and Recommendations, supra note 145, at 18.

[FN284]. Law No. 975 of July 22, **2005**, art. 52.4, O.G. No. 45.980, July 25, **2005** (Colom.), translated in id. at 24.

[FN285]. Id. art. 52.5.

[FN286]. See generally Lisa J. Laplante, Entwined Paths to Justice: The Inter-American Human Rights System and the Peruvian Truth Commission, in Paths to International Justice: Social and Legal Perspectives (Marie Dembour & Tobias Kelly eds., forthcoming **2007**).

[FN287]. For discussion of Peru's experience, see generally Lisa J. Laplante, Heeding Peru's Lesson: Paying **Reparations** to Detainees of Anti-Terrorism Laws 2 Hum. Rts. L. Comment. 88 (**2006**) (discussing the various judgments issued by the **Inter-AmericanCourt** of **HumanRights** on Peru's anti-terrorism law). For more discussion on the Inter-American Court's procedures, see generally Jo M. Pasqualucci, The Practice and Procedure of the **Inter-AmericanCourt** of **HumanRights** (**2003**).

[FN288]. Case of the Mapiripán Massacre v. Colombia, **2005** Inter-Am. Ct. H.R. (ser. C) No. 134, P301 (Sept. 15, **2005**) (author's translation).

[FN289]. Id.

[FN290]. Id. P279-280.

[FN291]. Id. P303-04.

[FN292]. Id. P303.

[FN293]. Id. P304.

[FN294]. Gustavo Gallón Giraldo y otros v. Colom., Const'l Ct. Jgmt. No. C-370/**2006**,

Expediente D-6032, 215 (May 18, **2006**) (author's translation).

[FN295]. Id. at 26.

[FN296]. Id.

[FN297]. Orentlicher, supra note 167, at 714.

[FN298]. Young, supra note 167, at 209.

[FN299]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 277.

[FN300]. Gustavo Gallón Giraldo, Director y Representante Legal, Comisión Colombiana de Juristas, Demanda de inconstitucionalidad contra la ley 975 de **2005**, at 17 (on file with authors).

[FN301]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 198.

[FN302]. Id. at **200**.

[FN303]. Id. at 199.

[FN304]. Carl Wellman, Solidarity, the Individual and Human Rights, 22 Hum. Rts. Q. 639, 642-43 (**2000**).

[FN305]. Id. at 643.

[FN306]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 199 (citing UNESCO Director-General, Report of the Director-General on the Human Right to Peace, presented to the Secretary-General and the Minister of Foreign Affaris and Ministers of Education of Member States, U.N. Doc. 29 C/59 (Oct. 29, 1997), available at http://unesdoc.unesco.org/images/0011/001100/110027e.pdf).

[FN307]. Id. at 253.

[FN308]. Id.

[FN309]. Id. at 27.

[FN310]. Id. at 26-27.

[FN311]. Id. at 28-29 (citing Joinet Principles, supra note 43, pmbl.).

[FN312]. Id. at 202 (citing Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, 4, U.N. Doc S/**2004**/616 (Aug. 23, **2004**)).

[FN313]. Id. at 202.

[FN314]. Id. at 203-208.

[FN315]. Id. at 208 (citing Godínez Cruz vs. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 5, P224 (Jan. 20, 1989)).

[FN316]. Id. at 241.

[FN317]. Id. at 249.

[FN318]. Id. at 250.

[FN319]. Id. at 250, 252. For discussion of the 1991 Constitution, see Gabriel Murillo-Castaño & Victoria Gómez-Segura, Institutions and Citizens in Colombia: The Changing Nature of a Difficult Relationship, 84 Soc. Forces 1 (**2005**).

[FN320]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 248.

[FN321]. Id. at 250.

[FN322]. Id. at 253.

[FN323]. Id. at 254.

[FN324]. Id. at 255.

[FN325]. Id. at 257-58.

[FN326]. Id. at 201.

[FN327]. Id. at 266.

[FN328]. Id. at 269.

[FN329]. Id. at 270.

[FN330]. Id. at 306 (finding Article 31 to be unconstitutional).

[FN331]. Id. at 299.

[FN332]. Id. at 306.

[FN333]. Id. at 309.

[FN334]. Id. at 328.

[FN335]. Id. at 267.

[FN336]. Id.

[FN337]. Id. at 280.

[FN338]. Id.

[FN339]. Id. at 278.

[FN340]. Id. at 287.

[FN341]. Id. at 290.

[FN342]. See Seagrave, supra note at 220 (citing IACHR, supra note 12, P74, which establishes that the conflict in Colombia is subject to international humanitarian law).

[FN343]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 313.

[FN344]. Id. at 320 (allowing all assets to be frozen pending proceedings, not just illegal assets as provided for in Article 13(4)).

[FN345]. Id. at 316.

[FN346]. Id. at 335.

[FN347]. Id. at 336; Law No. 975 of July 22, **2005**, art. 42.2, O.G. No. 45.980, July 25, **2005** (Colom.).

[FN348]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 314.

[FN349]. See generally Alexander Segovia, Financing **Reparations** Programs: Reflections from International Experience, in The Handbook of **Reparations** (Pablo de Greiff ed., **2006**).

[FN350]. Gallón Giraldo, Const'l Ct. Jgmt. No. C-370/**2006**, Expediente D-6032, at 330.

[FN351]. Id. at 336.

[FN352]. Id. at 333.

[FN353]. Id. at 328.

[FN354]. See generally Theidon & Betancourt, supra note 7 (discussing the military aspects of DDR in Colombia and the need for attention to local reconciliation processes).

[FN355]. Miguel Ceballos & Gerard Martin, Colombia: Between Terror and Reform, Law & Ethics, Geo. J. Int'l Aff., Summer/Fall **2001**, at 87, 93.

[FN356]. Id.

[FN357]. Juanita León, La Corte Constitucional avala y 'mejora' la Ley de Justicia y Paz, Semana, May 19, **2006**, available at http:// www.acnur.org/index.php?id_pag=5108.

[FN358]. Colombia Mandatario Exigio a los Desmobilizados Acogerse sin Dilaciones a La Ley Especial, El Mundo, Aug. 17, **2006**, available at http://www.ultimasnoticias.com.ve/ElMundo/default20060817.asp.

[FN359]. Teitel, supra note 3, at 69.

[FN360]. Id.

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Recent Book on International Law

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Book Review

# ***503** THE PRACTICE AND PROCEDURE OF THE **INTER**-**AMERICANCOURT** OF **HUMANRIGHTS**. BY JO M. PASQUALUCCI. CAMBRIDGE, NEW YORK: CAMBRIDGE UNIVERSITY PRESS, **2003**. PP. XLVII, 388. INDEX. $140, £100, CLOTH; $65, £38, PAPER

Douglass Cassel

Notre Dame Law School



No one publishing in the English language-with the possible exception of Judge Antonio ***504** Cançado-Trindade, the former president of the Court-has a more comprehensive and expert command of the practice and procedure of the **Inter**-**AmericanCourt** of **HumanRights** than does Jo Pasqualucci of the University of South Dakota law school. Her timely treatise on this ever more important judicial institution benefits from two decades of close observation, begun as a Fulbright scholar at the Court in San José, Costa Rica, in 1986.

Pasqualucci's thorough, clearly written, well-organized survey and critique of how contentious cases and advisory opinions proceed before the Court is an indispensable guide for practitioners as well as a valuable contribution to international legal scholarship. She regularly compares the practice of the Court to that of other international courts and bodies, enriching her analysis by an understanding of the global institutional framework of which the Court has become an innovative and transformational part.

A creature of the American Convention on Human Rights, [FN1] which it was designed to enforce, the Inter-American Court was fated to a slow and shaky start. The Convention was adopted at an inter-American conference in San José in 1969. Unfortunately, neither the United States under Richard Nixon and Henry Kissinger, nor the mostly authoritarian Latin American regimes of the time, were open to binding international commitments to human rights.

Not until Jimmy Carter arm-twisted a few military juntas did the requisite number of countries-eleven of the thirty-five members of the Organization of American States-ratify the Convention, enabling it to enter into force in 1978. Even then, the Court was nearly

stillborn. Carter could not persuade the Senate to allow the United States to join the Convention. In submitting the Convention to the Senate for its advice and consent to ratification, he knew better than to propose to make the additional, optional declaration that would have been required to accept the Court's jurisdiction in contentious cases.

When the Court was inaugurated in 1979, OAS members were so unenthused that they neglected to provide it any budget. Only the largesse of Costa Rica, as host country, enabled the Court to open for business.

The budgetary story remains shameful. The OAS-60% of whose budget comes from the United States-has never generously funded the Court. It remains a part-time body, whose seven unsalaried judges meet eleven weeks per year in San José (and, in recent years, occasionally in other countries). Its current budget of $1.4 million is so strapped that there are no funds to translate more than a dozen judgments published since mid-**2005** from the original Spanish into English. In view of the quality of the Court's jurisprudence, this is a real loss to jurists and courts, domestic and international, outside the world of *hispanoparlantes*.

Although the Court opened its doors in 1979, for the next seven years it found no one willing and able to walk in. Victims of human rights violations are not permitted to file cases in the Court. Instead, they (or anyone informed of a violation) may complain to the Inter-American Commission on Human Rights in Washington of a breach of the American Convention or, in OAS member states not party to the Convention, of the American Declaration of Human Rights. [FN2] Once the commission resolves a complaint under the Convention, only states or the commission-not the victim-may refer the case to the Court. No state has ever done so and, for the first seven years, neither did a bureaucratically jealous commission.

If not for a few requests for advisory opinions made by the commission and Costa Rica, the distinguished jurists first elected to the Court (among them Judge Thomas Buergenthal, who now graces the International Court of Justice, and who contributes a laudatory foreword to Pasqualucci's book) might as well have devoted their days to Costa Rican beach walks.

Finally, in 1986, the commission referred to the Court three cases of alleged forced disappearances in Honduras. In 1988, the ruling on the merits of the first case, *Velásquez Rodriguez*, [FN3] won global notice in international law circles. The Court developed a creative, yet defensible, methodology to hold states accountable for forced disappearances-horrendous crimes designed to conceal perpetrators in a fog of plausible deniability. In lifting ***505** the fog, the Court pioneered the now widely accepted doctrine of due diligence, which requires states to act reasonably to prevent and punish human rights violations, even when committed by private actors.

In the eighteen succeeding years, the Court has achieved a remarkable record of jurisprudential and institutional success. Its 145 judgments in contested cases (through February **2006**) advance international law in substantive areas ranging from massacres [FN4] and torture [FN5] to freedom of expression, [FN6] labor, [FN7] and property rights. [FN8] The Court may have saved untold lives by its unmatched judicial productivity in ordering and monitoring provisional measures of protection in cases of urgent and

irreparable harm. Its **reparations** orders in the last decade have become the most sweeping and fully restorative of any international court. And its advisory opinions have moved international human rights law forward on issues such as the right to equality, [FN9] the rights of migrant workers, [FN10] and the right to habeas corpus. [FN11]

While expanding the breadth and depth of its defense of human rights, the Court has also managed to win nearly universal acceptance-even confidence-among Latin American governments. The embrace culminated in 1998, when the two largest Latin American nations, Brazil and Mexico, joined the Court. Today the Court is essentially a court of human rights for Latin America, joined by all Spanish and Portuguese-speaking nations of the Western Hemisphere (except Cuba).

In contrast, the United States, Canada, and most English-speaking Caribbean states have elected not to join either the Convention or the Court. Although the United States actively participated in an advisory opinion proceeding before the Court (on consular rights in death penalty cases), [FN12] the Inter-American human rights regime is now in reality two separate regional systems: a “soft” system in the North, guided by the norms of the American Declaration and monitored by the commission, and a “hard” system in the South, bound by the Convention and enforced by the Court.

The Court's success in attracting Latin American states is also reflected in the striking degree to which they comply with its judgments. Except for an initial resistance by Honduras and a brief bolt by the Fujimori regime in Peru-quickly reversed once Fujimori was ousted-no Latin American government has openly defied a judgment of the Court. Albeit sometimes after delay or only partially, money damages ordered by the Court are generally paid. Prisoners whose release is mandated by the Court are freed. And domestic judgments condemned by the Court are annulled.

Where compliance falls short is in cases where similar difficulties would be encountered even by national courts. Most notably, when the Court orders states to investigate and punish perpetrators of massacres or torture, civilian governments often prove unable to call their militaries or police to account. When the Court orders that legislation be adopted, amended, or repealed, governments cannot always convince independent legislatures to meet their international obligations.

Despite its relative institutional success, the Court is no cause for euphoria. Individual cases before any judicial body cannot begin to remedy, much less prevent, massive human rights violations of the sort that continue to bloody Colombia or that take place daily at the end of police batons in interrogation rooms and prisons throughout most countries of Latin America.

But the Court can and does have a multiplier effect. It has strengthened domestic democratic institutions, for example, by reinstating unlawfully dismissed constitutional court judges [FN13] and ***506** by restoring an owner of a newspaper and television station wrongfully deprived of his media properties after criticizing the government. [FN14] Its jurisprudence reverberates in domestic courts, as when Argentina's Supreme Court relied on the Inter-American Court's ruling against Peruvian amnesty laws [FN15] to strike down Argentinian laws blocking prosecutions of human rights violators. [FN16]

The Court's practice and procedure, then, are well worth knowing. Pasqualucci makes the task accessible by bringing forth the best analysis of the Court's practice available in English. [FN17] She does not address the Court's substantive jurisprudence, although there are brief references to a few topics, notably attribution of state responsibility.

Instead, she examines the Court's practice and procedure, broadly defined. After a brief introduction to the structure and history of the Inter-American system, she offers detailed chapters on the Court's jurisdiction, discretionary limits, and procedures for advisory opinions (pp. 33-80); its jurisdiction, admissibility, and procedure on both preliminary objections and the merits in contentious cases (pp. 88-218); the wide range of **reparations** that it orders for victims and family members (pp. 230-90); and its grounds and procedure in ordering provisional measures of protection (pp. 293-325). In a final chapter on the effectiveness of the Court (pp. 326-50), she touches briefly on domestic implementation and effect, and on the political, legal, and financial constraints limiting the Court's capacity.

Her approach throughout eschews mere formalism. While juridically rigorous, she is both policy oriented and pragmatic. She constantly asks whether a given procedural approach will, in fact, be more protective of human rights, taking into account the reactions realistically to be expected from states.

In taking this approach, Pasqualucci is plainly inspired by Judge Buergenthal. Her concluding chapter begins (p. 326) by quoting his observation two decades ago that state compliance with international obligations “depends less on the formal status of a judgment and its abstract enforceability. Much more important is its impact as a force capable of legitimating governmental conduct and the perception of governments about the political cost of non-compliance.” [FN18]

Her policy-based pragmatism infuses the book. For example, in supporting the Court's practice of holding public hearings on provisional measures, she does not invoke an argument of abstract due process, but instead points out, “The hearing publicizes the urgent situation, making the State more likely to take action to remedy it. It also allows the parties to meet face-to-face, which could serve to promote understanding of the problem and provide the Court with much-needed information” (p. 310).

Pasqualucci's evident support for the Court is neither utopian nor cynical, but grounded in both idealism and realism. A good illustration is her assessment that provisional measures

> will never be a panacea for all human rights problems in the western hemisphere. These measures realistically can protect only a few people in limited situations. The threat of their adoption by the Court, however, and the attention drawn to a situation when such measures are adopted, can have a chilling effect on human rights abuses in the area and are another step towards ending these abuses in the region. (P. 325)

She does not shy from suggesting ways to improve the Court's practice. She recommends, for example, decreasing awards of moral damages when states voluntarily accept responsibility, in order to encourage settlements; greater precision in specifying what part of moral damages are for the suffering of the deceased and what part for the anguish

of family members, also to encourage settlements; and assigning oversight of long-term ***507reparations** measures to a third party "for mediation or arbitration," because multiple problems may arise that would not be of "sufficient international importance" (p. 281) to involve the Court.

Her suggestions on greater resort to advisory opinions are intriguing. Human rights obligations could be clarified if requests for opinions were made (or in some cases if the Convention were amended to allow them) by the OAS legal counsel and by domestic courts in member states, as well as by nongovernmental organizations, albeit on a discretionary basis in order not to "open the flood-gates" (p. 44).

Yet this treatise is not primarily a vehicle for Pasqualucci to propound her own ideas. Her criticisms and recommendations are restrained in number and modest in exposition. The bulk of her work is devoted to explain in detail what the Court actually does, how it compares with other international courts and bodies, and how its practice has evolved over time. In all these matters she is well informed.

Her analysis of standing to request advisory opinions, for instance, canvasses standing before the Permanent Court of International Justice, the International Court of Justice, the European Court of Human Rights, and the African Court on Human and Peoples' Rights, [FN19] while her analysis of authority to indicate provisional measures also takes in the UN Human Rights Committee.

Having followed the Court's development over two decades, Pasqualucci is especially well placed to explain how its practices have evolved. For example, whereas the Court once required independent evidence as a basis to order provisional measures, she explains that the Court has now come to give presumptive weight to requests by the commission. While the Court once held de novo evidentiary hearings on the merits, it now relies on the evidence already presented to the commission, provided that the evidence was received in the presence of both parties and the Court sees no other reason to hear it again. Her explications of such evolutions will sharpen the understanding of both practitioners and scholars.

Pasqualucci's guide to the Court's practice is also timely. Although published three years ago, her book came after, and takes into account, the most important recent developments in the Court's practice. Among others, these include its new rules, effective in **2001**, that allow victims full procedural standing before the Court, once the commission or a state has referred a case. They also include the Court's dramatic expansion of its **reparations** orders, from solely monetary compensation in its early years, to orders-commonplace in recent years-to revise legislation, annul domestic court judgments, free prisoners, develop government programs, revise police training curricula, supply basic infrastructure to villages victimized by massacres, issue public apologies, fund commemorative scholarships, and name streets and plazas for victims.

No book of such expansive coverage is flawless. Occasional imprecisions creep into statements such as "States Parties must take legal measures to make the judgments of the Court self-executing in their domestic courts" (p. 342). Is this an assertion of law (in which event it is dubious), or merely an exhortation?

Yet such nits hardly undermine Pasqualucci's admirable achievement. She has produced the definitive work on a subject not widely known but of growing importance. One hopes that she will find time to keep this valuable contribution to practice and scholarship periodically updated.

[FN1]. Nov. 22, 1969, OAS TS No. 36, 1144 UNTS 123 (entered into force July 18, 1978).

[FN2]. American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/V/II.23, doc. 21 rev. 6.

[FN3]. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988). All judgments and advisory opinions of the Inter-American Court are available on the Court's web site, ‹http://www.corteidh.or.cr›.

[FN4]. *E.g.*; Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (Ser. C) No. 105 (**2004**).

[FN5]. *E.g.*, Gómez-Paquiyauri Bros. v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 110 (**2004**).

[FN6]. *E.g.*, "The Last Temptation of Christ" v. Chile, Inter-Am. Ct. H.R. (Ser. C) No. 73 (**2001**).

[FN7]. *E.g.*, Baena Ricardo v. Panama, Inter-Am. Ct. H.R. (Ser. C) No. 72 (**2001**).

[FN8]. *E.g.*, Cantos v. Argentina, Inter-Am. Ct. H.R. (Ser. C) No. 97 (**2002**).

[FN9]. Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R. (Ser. A) No. 18, paras. 70-110 (**2003**).

[FN10]. *Id.*, paras. 111-73.

[FN11]. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Inter-Am. Ct. H.R. (Ser.A) No. 8 (1987); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).

[FN12]. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999).

[FN13]. Constitutional Court v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 71 (**2001**). This judgment and *Ivcher Bronstein, infra* note 14, are discussed in Karen C. Sokol, Case Report: Ivcher Bronstein & Constitutional Tribunal, 95 AJIL 178 (**2001**).

[FN14]. Ivcher Bronstein v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 74 (**2001**).

[FN15]. Barrios Altos v. Peru, Inter-Am. Ct. H.R. (Ser. A) No. 75 (**2001**).

[FN16]. Corte Suprema de Justicia de la Nación, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.-causa N° 17.768" (June 14, **2005**) (Arg.), *at*

‹http://www.derechos.org/nizkor/arg/doc/nulidad.html›.

[FN17]. Readers fluent in Spanish might also consult the latest edition of the excellent treatise by HéCTOR FAúNDEZ LEDESMA, EL SISTEMA INTERAMERICANO DE PROTECCIóN DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES (3rd ed. **2004**).

[FN18]. Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights, in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439, 470 (Theodor Meron ed., 1984).

[FN19]. The African Union recently decided to merge that Court with the new African Union Court of Justice. Assembly of the African Union, Decision No. Assembly/AU/Dec.83 (V) (**2005**), *at* ‹http://www.africa-union.org/root/au/Documents/Decisions/hog/Decisions_Sirte_July_2005.pdf›.

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# REMEDIES FOR THE WOMEN OF CIUDAD JUÁREZ THROUGH THE **INTER-AMERICANCOURT** OF **HUMANRIGHTS**

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## I. INTRODUCTION

***1** Over 300 women have been brutally murdered in Ciudad Juárez, Mexico over the past ten years. [FN1] More than 100 of these murders can be classified as "sexual homicides," with victims having been raped, tortured, and, in many cases, mutilated. Scores of women have also disappeared without a trace. Though several suspects have been arrested, and various theories have been proposed regarding the crimes, the murders have continued with impunity. Local and international non-governmental organizations (NGOs) have drawn attention to these incidents by organizing protests, conducting petition drives, and raising money for the victims' families. The Inter-American Commission on Human Rights (the Commission) has also increasingly given attention to the murders. The Commission's Special Rapporteur for the Rights of Women visited Juárez in the spring of **2002**. The information gleaned from this visit led to a Special Report that outlined a litany of human rights abuses and made dozens of recommendations to improve the situation in Juárez. However, the effectiveness of the Commission's Special Reports must be questioned as they have rarely led to substantial human rights improvements. Based on this track record, alternative international remedies should be pursued.

***2** The past decade has seen something of a "human rights cascade" with the simultaneous strengthening of a number of international human rights institutions that can provide remedies for the victims of abuses. This paper will explore the range of remedies that can be sought in the **Inter-AmericanCourt** of **HumanRights** ("the Court") including 1) contentious cases, 2) requests for advisory opinions, and 3) petitions for provisional measures. [FN2] For each of these remedies, I will examine previous precedents, both within the Court and within parallel institutions, as well as its potential effectiveness for improving the situation on the ground in Juárez. A major question will be whether the State of Mexico can be held accountable for what are generally seen as crimes by private individuals. I will rely on several recent cases from the European Court of Human Rights (the European Court) where states have been found liable for the failure to prevent human rights abuses and the failure to exercise due diligence in the investigation of human rights abuses. In considering any remedy for such abuses, it is vital that the remedy will allow for a voice for the victims, and provide agency for their families so that they are not re-victimized by the legal process. The potential global impact of the remedies for the Juárez

situation will also be considered. Legal precedents in this case could potentially lead to significant advances regarding human rights worldwide. Since, in most cases, these remedies will be most effective if the "envelope is pushed," that is, if the remedies are used in innovative ways, I will also discuss whether such expansions in institutional power might lead Mexico to withdraw from, or ignore, the Court's jurisdiction. Such a backlash would significantly damage the Court's institutional prestige, thus eroding its effectiveness for providing remedies in the future for these or other victims.

## II. THE SITUATION IN JUáREZ

***3** As one writer put it, the kidnapping, torture, rape, and murder of women in Juárez represents "the most shameful human-rights scandal in Mexico's recent history." [FN3] The number of murders has been disputed, but the Commission's Special Rapporteur concluded that at least 268 women had been killed between January of 1993 and January of **2002**. [FN4] Amnesty International claims the total may be 370 murders and that seventy women are still missing. [FN5] The number of murders peaked in the late 1990s. Between 1985 and 1992, 37 women had been killed, but this number dramatically increased with at least **200** additional murders from 1993 to **2001**. [FN6] The murder rates in Juárez are anomalous in two important respects. While more men than women were killed throughout the 1990s, one study showed that the number of women killed was increasing at twice the rate as for men. [FN7] Further, the homicide rate for women in Juárez greatly exceeded the Mexican national average and the rates in other border cities. For example, one study showed that the homicide rate for women in Juárez was more than three times as great as that in Tijuana, a border city of comparable size. [FN8]

***4** Over 100 of the women killed were also raped, beaten, and, in many instances, strangled, stabbed, mutilated, and/or tortured. Evidence seems to indicate some type of conspiracy targeting a specific group of women. Most of the victims are young (between the ages of fifteen to twenty- five); they are often students or workers at the local *maquiladoras*; and many of them migrated to Juárez for financial purposes. [FN9] Many also have similar physical appearances, consisting of a slender physique with dark skin, shoulder- length dark hair, and "attractive" features. [FN10]

***5** Juárez is a border town and factory city that is the home of dozens of *maquiladoras* (large foreign-owned assembly plants) that employ much of the workforce. Nearly one-half of the 1.5 million residents of the city migrated there from local villages and small towns searching for economic prosperity. [FN11] The city's infrastructure had been largely unprepared for such a huge migration, forcing many citizens to find residence in the local "shantytowns." [FN12] A sprawling city, Juárez also includes many square miles of empty desert, which has sadly become the resting place for many of the murdered women. This combination of underdevelopment and the rapid turnover in population, which are characteristics of a bustling border city, have been major obstacles in solving these murders.

***6** There have been many theories about the causes of these murders, the more mundane involving drug trafficking, prostitution, and domestic violence. [FN13] Others speculate that these women are murdered for their organs, which are in turn sold to wealthy recipients in the United States. Some have even concluded that drug rings, or even groups of young men from wealthy families (*los Juniors*), might be using these girls in

macabre rituals or as part of some sporting contest. [FN14]

***7** Many scholars and NGOs claim that these murders are rooted in a larger national problem in Mexico--the widespread discrimination and abuse of women. Amnesty International's report indicated that until these murders are seen as a direct result of a widespread "pattern of violence against women," the human rights of women would forever be violated. [FN15] Studies "indicate that approximately one-third to one-half of Mexican women living as part of a couple suffered some form of abuse (physical, emotional, psychological, economic or sexual) at the hands of their partner." [FN16] Some scholars have linked the murders to the general "wasting of women" associated with the rapid training and turnover of the (predominantly female) workforce in the *maquiladoras*. [FN17] Discrimination and violence against women was a major focus of the Commission's **2003** report that concluded:

> [I]nsufficient attention has been devoted to the need to address the discrimination that underlies crimes of sexual or domestic violence, and that underlies the lack of effective clarification and prosecution. The resolution of these killings requires attention to the root causes of violence against women -- in all of its principal manifestations. [FN18]

*A. Responses from the Mexican Authorities*

***8** As of **2003**, Mexican authorities claimed that they had resolved 181 of the 268 murders. [FN19] However, the Mexican authorities deem a case to be "resolved" if

> the Office of the Special Prosecutor felt that it had enough information upon which to make a presumption as to the motive and culpability of a presumed perpetrator and that the person had been presented before a judge ("*consignado*"). It did not necessarily signify that a particular individual had been formally charged or tried. [FN20]

Further, of the seventy-six cases classified as serial killings, only three convictions have been handed down, and there is much skepticism about the integrity of these convictions. Omar Latif Sharif, an Egyptian national, was convicted and sentenced for three of the murders in 1996, but his sentence is currently under appeal. The authorities have claimed that Sharif directed various gangs to continue the murders while he was in prison. Authorities have indicted, and very recently convicted, members of a gang called "los Rebeldes" in connection with seven rapes and murders in 1996. They have also indicted members of the gangs, "el Tolteca" and "los Ruteros" (thought to be connected with eight crimes in 1999), and the men "el Cerillo" and "la Foca" (thought to be connected with eight crimes in **2001**). [FN21] In October **2004**, bus driver Victor Garcia Uribe was found guilty and sentenced to fifty years in prison for eight slayings that occurred in **2001**. Though he confessed on videotape, he claimed that he was tortured into giving the confession. He was arrested with another bus driver, Gustavo Gonzalez Mesa, who died under suspicious circumstances while in police custody. [FN22] The Mexican police gunned down Mesa's attorney after he had received several threats about the case. [FN23]

***9** The Mexican government has taken several major steps to investigate the murders in Ciudad Juárez. The *Comisión Nacional de Derechos Humanos* (CNDH), Mexico's National Human Rights Commission, issued important reports in 1998 and **2003** that highlighted

abuses by the local authorities and suggested several recommendations. [FN24] Partly as a response to the first of these reports, a Special Prosecutor's Office was established in Juárez in 1998 that employed specially trained officers and promised access to fingerprint and DNA databases. [FN25] However, by **2003** there had been very little institutional follow- up to the report. [FN26] In fact, in a December **2003** report the CNDH found that "public officials of the Mexican State committed acts and omissions that facilitated the direct violation of innumerable provisions in national and international judicial orders" that "suggests ignorance of or contempt for the duty of the State to act with due diligence." [FN27] In response, the national government established a special prosecutor's office at the federal level to coordinate the investigations in **2004**. [FN28] In September **2004**, the Chihuahuan government announced that they would be giving free houses (235 square feet) to forty-seven mothers of victims in addition to "psychological, medical, and legal support, as well as a monthly stipend of $160." [FN29] Human rights advocates claimed that these gestures were an attempt to silence the mothers to prevent them from pressing their claims, but the director of the state-run Chihuahua Women's Institute claimed that these actions would allow the women to get back on their feet so that they could continue to press for justice for their daughters. [FN30]

***10** Despite this recent flurry of activity, most scholars, journalists, and activists following the cases have questioned whether the arrested individuals were even involved in the murders and whether the institutional reforms in the investigative process would have a significant impact. Despite growing local, national, and international pressure, as well as increased efforts by governmental authorities, the unprecedented string of sexual homicides continues. In fact, the crimes have apparently spread to Chihuahua City, the provincial capital, approximately 100 miles to the south. Amnesty International reported that in **2003**, forty-three women were murdered in Juárez with nine of these murders classified as sexual homicides, and another three sexual homicides occurred in Chihuahua City. [FN31] It is imperative that local, national, and international pressure continue to be exerted to solve and eliminate these murders.

***11** Recently, two other legal scholars have considered human rights remedies for the feminicides in Juárez. Grace C. Spencer explored the possibility of bringing a case in American federal courts under the Alien Tort Claims Act (ATCA) for the abysmal working conditions in the *maquiladoras*. [FN32] She concludes that such a claim would not rise to the level required under the Supreme Court's recent *Sosa* case. [FN33] Spencer, though, does not consider whether a case could be brought under the ATCA for Mexico's failure to investigate and prevent the murders as outlined below. Joan H. Robinson does consider whether Mexico can be held accountable for the actions of non-state actors in the Juárez case through an analysis of the Inter-American Court's *Velasquez Rodriguez* case. [FN34] Robinson's work convincingly argues that holding states accountable for failing to investigate and prevent the violations perpetrated by non-state actors will go a long way toward deconstructing the predominant public/private dichotomy in international law and will make courts more willing to broaden the definition of human rights abuses to include widespread domestic violence. [FN35] The present article expands upon Robinson's work by considering a wider range of remedies through the Court and argues that the Court should borrow from the jurisprudence of the European Court and other institutions to elaborate on the standards it outlined in *Velasquez Rodriguez.*

## III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND INTERNATIONAL HUMAN

RIGHTS LAW

***12** One of the most effective potential international remedies for the women of Juárez could be found in international human rights law by bringing action against Mexico in the Court. The Court came into existence in 1978 and is the final arbiter over violations of the American Convention on Human Rights (the Convention). [FN36] Mexico ratified the Convention in 1981 and agreed to the Court's jurisdiction on December 16, 1998. The Convention is binding on ratifying states and ensures, *inter alia*, the right to life (Article 4), the right to humane treatment (Article 5) (which includes the protection against torture and "cruel, inhuman, or degrading punishment or treatment"), the right to a fair trial (Article 8), the right to equal protection (Article 24), and the right to judicial protection which includes "simple and prompt recourse, to a competent court or tribunal" for violations of the rights guaranteed by the Convention (Article 25). The women of Juárez may also find recourse in the protections offered by the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), which Mexico ratified on December 12, 1998. [FN37] This treaty prohibits any form of violence against women, "physical, sexual, or psychological" that occurs in the public or private sphere. [FN38]

*A. State Responsibility for Private Acts*

***13** At first glance, it might be questioned whether Mexico has violated international law in this case. Though some scholars and activists have claimed that the Mexican authorities have been directly involved in the Juárez murders, most theories suggest that private individuals have committed the murders without direct involvement by the Mexican government. Indeed, in its structure, the Convention is a treaty between states and is intended to protect individuals from acts by their states and not from acts by private individuals. Increasingly, however, international legal institutions, including the Court, have held that states can be held responsible for the actions of non-state actors in specific cases. In the Inter-American system this responsibility stems from Article 1 of the Convention, which creates positive obligations on states: "the states parties to this Convention undertake to respect the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" (emphasis added). From this duty to ensure rights comes the corollary duty to put in place a legal system that will provide effective recourse for human rights abuses. As the Court ruled in an Advisory Opinion: "any state which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention." [FN39] In the context of the Juárez case, the Mexican government could be in violation of the Convention for failing to provide security for the women of Juárez once the government knew that human rights violations were likely and for failing to provide due diligence in investigating, prosecuting, and punishing the perpetrators. The Court ruled in its very first contentious case,

> an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. [FN40]

***14** Such state duties in relation to violence against women are more specifically laid out in Article 7 of the Convention of Belém do Pará which includes state duties "to apply due diligence to prevent, investigate and impose penalties for violence against women." This agreement further requires states to "establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures" and to "ensure that women subjected to violence have effective access to restitution, **reparations**, or other just and effective remedies." [FN41] Article 8 incorporates additional steps that states "agree to undertake progressively" including, *inter alia*, promoting "awareness and observance of the right of women to be free from violence" and modifying

> social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women. [FN42]

However, only those duties listed in Article 7 are actionable against a state in the Commission and, ultimately, the Court in a contentious case.

***15** Both the Convention and the Convention of Belém do Pará provide a basis for finding violations against Mexico in the Court. I argue below that Mexico has failed in its obligations to provide due diligence in the investigation of these murders and failed to take reasonable operational steps to prevent these murders once it knew that the murders fit specific patterns. The next two sections will show how the Court could rely on its first substantive decision and fruitfully borrow from the jurisprudence of the European Court of Human Rights to find Mexico in violation of its international obligations.

### *B. Investigating, Prosecuting, and Punishing Human Rights Abuses by Non-State Actors*

***16** In its first substantive decision, the *Velásquez Rodríguez* case, the Court broke new ground in international law by laying out the responsibility a state incurs when it has not adequately investigated the actions of non-state actors. This case dealt with the countless disappearances in the early 1980s in Honduras. The Court began by clarifying that Article 1 of the Convention requires that "the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." [FN43] Of particular note is the requirement to provide an adequate investigation. The Court argued, "[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane." [FN44] The Court acknowledged that just because a case is not resolved does not mean that the investigation is inadequate. But, even though Honduras' formal procedures for investigating such cases were "theoretically adequate" [FN45] in this case, serious questions existed about the effectiveness of the investigation. For instance, judges failed to issue writs to further the investigation. There was no investigation into the overall practice of disappearances and whether the specific case fit into that larger pattern. Also, the legal system often required the victims' families to provide evidence that should have been gathered by the competent authorities. [FN46]

***17** Many human rights organizations have been critical of the Mexican investigation into the Juárez murders. Several instances of investigative misconduct or oversight have been documented in detail including mishandling of DNA evidence of the remains of eight women found together in **2001** and failure to follow up on commonalities among many of the victims. [FN47] The Inter-American Commission, in its report, also documented missing evidence from case files, case files that only contained a few sheets of paper, as well as very little follow- up on older cases. In some cases, family members have subsequently searched crime scenes two or three months after the victims had been found and recovered clothing and other evidence that the authorities seem to have disregarded. [FN48] Information has been withheld from the victims' families; family members have been denied the means to identify their loved ones; and, in some cases, the remains have not been returned to the families. “Family members in these and other cases reported having received conflicting or confusing information from the authorities, and having been treated dismissively or even disrespectfully or aggressively when they sought information about the investigation.” [FN49] Moreover, there have been systemic delays in processing missing persons cases, as well as a failure to pass on missing persons cases to the homicide prosecutor in a timely manner. In addition, family members, attorneys, and reporters have been harassed and threatened when they have criticized the investigations.

***18** This list of negligent behavior on the part of law enforcement officials is only a sample of the complaints that the victims' families have voiced. The Commission's Special Report concluded “the response of the Mexican State to the killings and other forms of violence against women has been and remains seriously deficient. As such, it is a central aspect of the problem. Overall, the impunity in which most violence based on gender remains serves to fuel its perpetuation.” [FN50] From this list of missteps, Mexico seems to have violated the due diligence to investigate the violence against women as laid out in the Convention of Belém do Pará as well as the standards laid out by the Court in the *Velasquez Rodriguez* case.

### *C. Preventing Human Rights Abuses by Non-State Actors*

***19** Mexico could also be culpable under the Convention and the Convention of Belém do Pará for failing to take reasonable steps to prevent violence against women in Juárez. Very few international cases have examined a state's responsibility for failure to prevent human rights violations by non-state actors, but The European Court has made important rulings in this respect in two recent cases involving Turkey.

***20** In *Kiliç v. Turkey* the European Court concluded that Turkey had not done enough to protect a pro-Kurdish journalist who had been harassed, received death threats, and was ultimately shot to death. [FN51] Although the family had argued that agents acting on behalf of the state perpetrated the killing, it is crucial to note that the Court found there was not enough evidence to implicate the authorities directly. Thus, the case was a question of whether there is a “positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.” [FN52] The European Court took note of the “difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources,” but found the State must take positive operational measures when:

> the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. [FN53]

In this case, the authorities were aware of a particular "real and immediate" risk to Kemal Kiliç because of the number of journalists that had been targeted and because he had individually petitioned the government stating that he and those working at his newspaper had received specific threats. Thus, the European Court found that Turkey had violated the right to life guaranteed by Article 2 of the European Convention. [FN54]

***21** In *Kaya v. Turkey,* the Court went one step further and ruled that the government had some responsibility for the death of a doctor who had given aid to wounded members of the PKK (Worker's Party of Kurdistan) even though they were not aware of specific threats to this particular doctor. [FN55] As in the *Kiliç* case there was insufficient evidence that state agents had perpetrated the killing. Instead, it was generally known that counterinsurgency forces were targeting sympathizers of the PKK and, indeed, a government report had outlined the pattern of killings and ended with a series of recommendations to improve the situation in southeastern Turkey. Based upon this knowledge the Court concluded that Kaya was "at particular risk of falling victim to an unlawful attack," [FN56] the government should have been aware of this risk, and, since the government had failed to implement its own recommendations, it had violated its specific obligations to ensure the rights under Article 2 of the European Convention of Human Rights.

***22** In the Inter-American system, both the Convention and the Convention of Belém do Pará outline broad duties to prevent violence but there has been little case law as to how to apply these guarantees. However, the *Kiliç* and *Kaya* cases from the European system can be directly applied to the Juárez situation. Following the logic of *Kiliç*, in cases where a specific woman receives threats and those threats are made known to the authorities, the government has a duty to take reasonable steps to prevent violence. In *Kaya*, the European Court goes further. When there is a general pattern that is known to the authorities, the state has a duty to take reasonable operational steps to prevent abuses. In the Juárez situation, the Commission has noted many of the responses by the Mexican government to prevent further violence, such as special training programs for law enforcement officers and "measures to install more lights, pave more roads, increase security in high-risk areas and improve the screening and oversight over the bus drivers who transport workers at all hours of the day and night." [FN57] However, the Commission found that the Mexican authorities had failed to adequately follow up on the recommendations of its own human rights commission just as Turkey had failed to take the necessary steps as outlined in its own internal report in the *Kaya* case. The Mexican government, when it has acted, has failed to provide enough attention to the more general problem of violence against women and its roots in gender discrimination and instead has focused on the so-called "serial killings." [FN58] The Commission suggested that further training of law enforcement officials was needed as well as additional accountability through evaluation of new initiatives by the authorities. Finally, the State failed to increase its outreach efforts to civil society groups or to conduct a general educational campaign to prevent violence against women. [FN59] I argue that since Mexico has failed to adequately implement such measures it has violated

its duty to prevent the murders in Juárez and is in violation of the right to life as guaranteed under Article 4 of the Convention.

## IV. REMEDIES THROUGH THE INTER-AMERICAN COURT

***23** The Court offers three possible avenues for seeking remedy for human rights abuses such as the failure to provide a remedy through adequate investigations or the failure to take reasonable measures to prevent violence against women. I argue that all three avenues should be explored in this case. The most well-known procedure is a contentious case, which is similar to a trial in the usual sense whereby a state is "accused" of violating parts of the treaty and can present a defense of its actions. The Court is also empowered to issue advisory opinions which provide interpretations of the Convention [FN60] and to issue provisional measures "in cases of extreme gravity and urgency" to protect individuals or groups "in matters it has under consideration." [FN61] To date, the Court has issued decisions in approximately forty contentious cases, issued eighteen advisory opinions, and issued orders for more than fifty provisional measures.

***24** What is most striking about this jurisprudence are the compliance rates for each of these measures, especially in comparison to the relative non-compliance with orders from the Commission. Christine Cerna writes:

> they [states party to the Convention] have accepted the judgments of the **Inter-AmericanCourt** of **HumanRights** and, this is surprising, because the decisions of the Commission still generally remain unobserved in comparison ... the most remarkable development in the evolution of the Inter-American human rights system, and I cannot emphasize this enough, is that it has become accepted. [FN62]

### *A. Contentious Cases*

***25** The Convention permits only states or the Commission to bring contentious cases to the Court, [FN63] and to date no state has brought a case to the Court. Thus, it would be up to the Commission to bring such a case. Under the Commission's modified Rules of Procedure of **2001**, a case will automatically be sent to the Court if the State has not complied with the previous recommendations of a Commission's rulings "unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary." [FN64] Since four cases related to the Juárez murders have already been filed with the Commission and the Commission's rulings are rarely complied with, it is most likely that the Commission will ultimately send a contentious case to the Court in the Juárez situation. [FN65]

***26** Once a contentious case is brought to the Court, it normally proceeds through three distinct phases. First, the states almost invariably file preliminary objections as to why the case should not be heard by the Court. The most commonly used objection is that the victims have not exhausted all local remedies before submitting a case to the Commission, as required by Article 46 of the Convention. In this case, Mexico might claim that it was providing remedies for the women and that its investigation is ongoing. However, the Court has ruled in several cases that, to clear the hurdle of admissibility, the domestic remedy must be both adequate and effective. [FN66] For example, in *Velasquez Rodriguez*, the Court described situations where the remedy "becomes a senseless formality," specifically

when:

> it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. [FN67]

In this situation, Mexico's failure to act for more than a decade as well as ongoing harassment of lawyers, victims' families, and activists should lead the Court to decline to wait on domestic remedies to become more than a "senseless formality."

***27** Once the case clears preliminary objections, it proceeds to the merits phase, where the claim and relevant laws are considered. It is in this phase that the Court would have to consider state responsibilities for the actions of non-state actors, as discussed above. If the state is found responsible in general under Article 1, it could then consider violations of specific rights contained in the rest of the Convention, such as the right to life (Article 4), the right to humane treatment (Article 5) (which includes the protection against torture and "cruel, inhuman, or degrading punishment or treatment"), and the right to judicial protection, which includes "simple and prompt recourse, to a competent court or tribunal" for violations of the rights guaranteed by the Convention (Article 25) or for violations of Article 7 of the Convention of Belém do Pará.

***28** The Court could, at minimum, consider abuses that occurred after December 1998, the date when Mexico acceded to the jurisdiction of the Court and when it ratified the Convention of Belém do Pará. Mexico ratified the Convention in 1981 and was, therefore, legally bound to offer protection for the women of Juárez since that date. In the European system, the European Commission has ruled that a state could be held responsible for violations that occurred after the treaty had been signed but before the state acceded to the jurisdiction of the legal body. To date, the Inter-American system has not ruled on such jurisdictional questions, [FN68] but conceivably Mexico could be held responsible for violations from 1981 to 1998 as well.

***29** If the country is found to be in violation of the Convention, then the case proceeds to the **reparations** phase. In its first two decades, the Court was criticized for the modest sums it awarded to victims, especially in cases of disappearances and loss of life. [FN69] Recently, the Court has increased the amounts of monetary damage that is has rewarded and it now far exceeds the amount granted by the European Court in similar cases. [FN70] The starkest difference between the two courts has been the creative use of non-monetary remedies by the (Inter-American) Court. Often, these remedies have had the purpose of giving agency to the victimized, or at least recognizing the humanity and dignity of the victim. The Court has ordered the state to restore the integrity or identity of the victim by exhuming remains, investigating disappearances, or even locating the children separated from their parents. Victims' families are often given agency through the ability to oversee the investigations of the states [FN71] as well as the capacity to work with the Court to ensure compliance with **reparations** orders. In the *Myrna Mack Chang* case, the Court found that Guatemala had violated the right to life, right to fair trial, and right to humane treatment in the assassination of Chang, an anthropologist and human rights activist. [FN72] Guatemala accepted unconditional responsibility for the killing. As for **reparations**, the State was ordered to investigate the case, prosecute and punish the perpetrators, and publish the results of any investigation. However, what is striking is the

extent to which the state was also ordered to honor and memorialize the victim, including the establishment of an educational grant in the victim's name. The Court ordered that "the State must also name a well-known street or square in Guatemala City in honor of Myrna Mack Chang, and place a prominent plaque in her memory at the place where she died or nearby, with a reference to the activities she carried out." [FN73] Finally, the state was ordered to pay over $750,000 in damages and expenses to her family. A similar ruling could go a long way to restoring the subjectivity of the women of Juárez and assist with what one scholar describes as "a vital struggle to retrieve the subjectivity of the victimized women from the brutality of their deaths, to establish their value and social meaning in *life.*" [FN74]

***30** The Court's increased attention to memorializing the victim could be attributed to the changes in the Court's procedures in 1997 that allow the victim the right to directly address the Court (*locus standi in judicio*) during the **reparations** stage. The Court's awarding of **reparations** seems to have changed dramatically since, with monetary damages increasing substantially [FN75] and almost all of the cases involving creative uses of non- monetary damages occurring after 1998. The newest changes to the Court's rules of procedures, taking effect on June 1, **2001**, allow the victims or their relatives to address the Court at all stages of contentious cases. The President of the Court noted that this change "marks a major milestone in the evolution of the inter-American system for the protection of human rights" [FN76] and this granting of increased agency to the victims surely will lead to dramatic changes in the Court's jurisprudence in contentious cases.

*B. Request for an Advisory Opinion*

***31** The Convention also gives the Court the power to issue advisory opinions that interpret the Convention and other "treaties concerning the protection of human rights in the American States." [FN77] Advisory opinions would, by their very nature, play important roles in setting important interpretive precedents in international law but would appear to have less potential to change the concrete situation in Juárez. And yet, in many cases, these opinions have affected change in domestic laws and in human rights situations. For instance, in an advisory opinion, the Court suggested that Costa Rica change its compulsory licensing law for journalists and Costa Rica complied with this request. [FN78] Two states, Costa Rica and Argentina, have even directly incorporated the rulings of advisory opinions directly into their domestic law. [FN79] Further, when an advisory opinion was requested on Guatemala's continued use of the death penalty, "Guatemala unexpectedly announced the suspension of the executions, which never resumed. The public exposure generated by the Court's consideration of the issue resulted in this change of policy." [FN80]

***32** Advisory opinions have two important advantages over contentious cases. First, if the Commission is reluctant or slow to send a contentious case to the Court, other institutions in the Organization of American States (OAS) could request an advisory opinion on issues "within their spheres of competence." [FN81] For instance, in this case the Inter-American Commission on Women could request an advisory opinion because its mandate is "to promote and protect women's rights, and to support the member states in their efforts to ensure full exercise of civil, political, economic, social, and cultural rights that will make possible equal participation by women and men in all aspects of society." [FN82] Several scholars, as well as the current President of the Court, have suggested that increasing the involvement of other OAS organizations in the matters of the Court would strengthen the system. [FN83]

***33** Advisory opinions are also attractive because, as the Court ruled in its first advisory opinion, it could issue interpretations of "any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto." [FN84] Thus, non-regional treaties fall under the Court's jurisdiction if the given state has agreed to it. For example, in the case involving the application of the death penalty to foreign nationals in the United States, [FN85] the Court's opinion included interpretations of the Vienna Convention on Consular Relations as well as the International Covenant on Civil and Political Rights (ICCPR). In the Juárez case, the Court might reach outside the American Convention and consider points of law stemming from other treaties that Mexico has ratified such as the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and/or the Convention Against Torture (CAT).

***34** A petition for an advisory opinion should not be a contentious case in disguise. If so, international law would dictate that the Court should either hear this as a contentious case or not hear it at all. In possible contentious cases, the Court has stated that it needs to strike a balance between the protection of human rights in a given case and "the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism." [FN86] Accordingly, the Court has ruled that even though the case appeared to be a disguised contentious case, it would issue an advisory opinion because it was "convinced ... that its pronouncement on the matter will provide guidance, both to the Commission and to the parties that appear before it, on important procedural aspects of the Convention." [FN87] Further, the Court found support in numerous cases in other jurisdictions where a Court issued such an opinion even though it might be a contentious case in disguise. [FN88] The Court has even ruled that if the issue were part of a dispute in an ongoing contentious case, it would issue an advisory opinion. [FN89] Despite the fact that several cases about the Juárez murders have been filed in the Commission and may ultimately make it to the Court, the Inter-American Commission on Women or other OAS bodies could simultaneously petition for an advisory opinion on a range of legal questions.

1. An Advisory Opinion on the Standards for an Effective Investigation

***35** A particularly useful substantive question for an advisory opinion would be a clarification of a state's due diligence standards -- especially what constitutes an effective investigation. Several questions could be answered on this issue. First, are the standards for effective investigations that have been developed by the European Court applicable in the Inter-American context? Second, considering that most of the European cases have involved investigations of incidents that directly implicate governmental authorities, would such standards apply to a case involving private actors and if so, would there be different standards for effective investigations for different types of cases? Third, the Court could even rule on whether the due diligence standards in the American system should incorporate the previously non-binding recommendations issued by the United Nations on effective investigations. Making such standards binding in the American system would move a long way toward making them part of the customary law of nations.

***36** Assuming the Court would find that it could borrow from the European system, it

could then analyze several recent decisions involving Turkey in order to answer the latter two questions. First of all, most previous cases that involved the failure to provide an effective investigation implicated direct involvement by the authorities or violence against individuals who were in police custody. However, the European Court has recently ruled that the obligation to provide due diligence in the investigation of those killed by force "is not confined to cases where it is apparent that the killing was caused by an agent of the State." [FN90] In *Ergi v. Turkey*, the Turkish government claimed that its procedural obligations did not extend to a case in which the authorities were not directly implicated, but the European Court ruled "this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State." [FN91] It could be argued, however, that a state owes a more extensive obligation to investigate when its agents are implicated in a human rights violation or when it occurs in custody. After all, such steps as establishing an independent commission would be more appropriate for state- involved cases. On the other hand, one of the purposes of an effective investigation is to determine the identity of the perpetrators and such a determination would include whether state agents were involved. Such questions about the due diligence to investigate could be clarified by an advisory opinion by the Court.

***37** The Court could also rule as to what specific international standards must be followed to meet minimum standards for an effective investigation in the Inter-American system. Recall that the Court has already ruled that an investigation must be prompt and adequate, and it must be conducted by an independent agency when the authorities are implicated. The European Court cases have found that an investigation is ineffective when it includes, *inter alia*, the failure to follow leads, delays in contacting witnesses for statements, failure to conduct an adequate autopsy, and poor forensic examinations of crime scenes. [FN92] In several cases, the European Court has ruled that in violent deaths an autopsy must result in a "complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death." [FN93] Besides some general guidelines, the rulings of the European Court in this area have been accurately described as "vague, limited, and not integrated." [FN94] A positive step in creating a clear and coherent set of standards in this area has been the European Court's increasing number of references to the "The Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" (The Manual) that was passed by the United Nations in 1991. [FN95] The Manual includes the "Minnesota Protocol" which lays out, *inter alia*, specific procedures for an inquiry into any suspicious death including how a crime scene and evidence should be processed and how to gather personal testimony. It also offers very specific guidelines for how to form a commission of inquiry "in cases where government involvement is suspected." [FN96] Appended to The Manual is the "Model Autopsy Protocol" which goes into great detail on how autopsies should be performed and includes a checklist to be followed in cases of controversial deaths. [FN97] The guidelines contained in the Manual and the Model Autopsy Protocol were not originally meant to be binding on states, but "illustrative" of current best practices. However, the Court could issue an advisory opinion that concludes that these protocols, in part or in whole, are part of the due diligence to investigate, making them, at minimum, part of customary law in the Inter-American system. Not only would such a ruling go a long way toward standardizing international law, it could also put some added pressure on the Mexican government to conform to international standards in the Juárez investigations.

### 2. An Advisory Opinion on Domestic Violence as Torture

***38** The Court could also make a ruling on state culpability for violence against women under the Convention Against Torture (CAT). Several scholars have argued that the CAT should cover violence against women, especially extreme forms of domestic violence, as they are analogous in their intents and effects to official torture. [FN98] Meyersfeld explains, "extreme forms of domestic violence not only inhibit a woman's ability to enjoy rights and freedoms equally with men; they amount to a dehumanization process which shares with torture the characteristic of the methodical breakdown - physically, emotionally, and mentally - of one human being by another." [FN99] Even though extreme forms of domestic violence could be analogized to torture, they still might not be among a state's obligations under the CAT. Article 1 limits the definition of torture to those acts "inflicted by or at the instigation of or with the *consent or acquiescence of a public official* or other person acting in an official capacity." [FN100] However, as Rhonda Copelon argues,

> [I]f the purpose of the "consent or acquiescence" language was to cover situations where the state machinery does not work, then gender-based violence is a case in point .... Where domestic violence is a matter of common knowledge and law enforcement and affirmative prevention measures are inadequate, or where complaints are made and not properly responded to, the state should be held to have "acquiesced" in the continued infliction of violence. [FN101]

***39** The Court may be open to such a ruling, as the Commission has recently handed down a groundbreaking ruling on state culpability for domestic violence in the *Fernandes v. Brazil* case. [FN102] In this case, Mrs. Maria da Penha Maia Fernandes' former husband had beaten her and her daughters repeatedly throughout their marriage, and then shot her while she was sleeping. Two weeks later, while recovering from the gunshot wound, he attempted to electrocute her while she was bathing. Despite "the clear nature of the charges and preponderance of the evidence," [FN103] it took almost eight years for the judicial system to move forward to the point of a guilty jury verdict. In the fifteen years since the attempted murders the case has been mired in a myriad of appeals and the ex-husband has remained free. The Commission ruled in **2003** that Brazil was negligent under Articles 1, 8, and 25 of the Convention for failure to ensure human rights by not providing a judicial remedy for Maria de Penha. Further, Brazil was found to have violated five different parts of Article 7 of the Convention of Belém do Pará for failing to provide due diligence in the investigation, prosecution, and punishment of violence against women. The Commission ruled that inaction by the state served to encourage such violence and thus concluded,

> the failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria de Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband .... Tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women. [FN104]

Such wording is very reminiscent of the "consent or acquiescence" language of CAT and is directly applicable to the situation in Juárez. Indeed, the Commission's report on the Juárez murders cites similar studies evincing a pattern of impunity for domestic violence in Mexico. [FN105]

***40** Torture, as well as "cruel, inhuman, or degrading punishment or treatment," is

already proscribed under Article 5 of the Convention. [FN106] However, if extreme forms of domestic violence can be captured under the CAT, a full range of possible remedies becomes available. Article 2 of the CAT requires that "each State Party shall take effective legislative, administrative, judicial or other measure to prevent acts of torture in any territory under its jurisdiction." [FN107] This obligation is non-derogable, meaning it cannot be eschewed due to war or other exceptional circumstances. To date, 136 countries have ratified the CAT, and the prohibition against torture is now widely considered to be part of customary law, as well as a *jus cogens* norm that is binding on all states. As such, violations could even be actionable in the United States federal court system under the Alien Tort Claims Act and the Torture Victim Protection Act of 1991. [FN108] Such an advisory opinion could also lead countries, including the United States, to strengthen their asylum laws to protect women who would be subject to extreme forms of domestic violence upon their return. [FN109] Such potential judicial actions should increase the pressure on countries around the globe such as Mexico to take domestic violence more seriously by enacting and enforcing domestic legislation.

### *C. Request for Provisional Measures*

***41** Besides contentious cases and advisory opinions, the Inter-American Court can issue provisional measures "in cases of extreme gravity and urgency" ordering a country to protect persons from "irreparable damage." [FN110] The Court originally employed these measures only to protect individuals who would ultimately offer evidence in its proceedings, but now has moved closer to the view of other transnational bodies, namely that provisional measures are a way of ensuring basic human rights as mandated by the Convention. [FN111] The Commission has recourse to a similar mechanism, namely, precautionary measures, but, as with many actions of the Commission, they do not have the same compliance rate as provisional measures issued by the Court. Often the Court will observe that the Commission's orders for precautionary measures are not complied with and follow-up with provisional measures of its own. [FN112] Also, the Commission in several cases has requested that the Court issue provisional measures in a case that is still before the Commission. With the Commission having recently ruled favorably on the admissibility of several cases arising from the Juárez murders, the Court could now be asked by the Commission to issue provisional measures. Even if the Commission is unwilling to make such a request, several scholars have suggested that the Court could issue provisional measures in relation to an advisory opinion that it is considering. [FN113] After all, the Convention's wording on provisional measures does not refer to "cases" but refers to "matters" the Court "has under consideration." [FN114] To date, neither the Court nor any other transnational body has issued such orders. The Court may be reluctant to move in this direction, because it would then be able to order provisional measures over countries that have not acceded to its jurisdiction and this might invite a possible backlash against its authority. [FN115] For instance, the Court has issued three advisory opinions in cases dealing presumably with the United States, but the U.S. has not acceded to the Court's jurisdiction. However, one could envision the Court's order having a binding status at least if the advisory opinion involved a country, such as Mexico, that had acceded to its jurisdiction. Either way, provisional measures have become a very effective tool for preventing human rights in the Inter-American system and beyond.

***42** Recently, the Court issued a strong statement affirming that its orders for provisional measures are based in treaty law and thus are binding on individual states:

> The provision established in Article 63(2) of the Convention makes it mandatory for the State to adopt the provisional measures ordered by this Tribunal, since there stands "a basic principle of the law of international state responsibility, supported by international jurisprudence, according to which States must fulfill their conventional international obligations in good faith (*pacta sunt servanda*)." [FN116]

In most cases, it appears that the state in question has complied with these binding orders as can be seen by the number that are ultimately lifted because the threat has subsided -- "when it has been proven that the lives and safety of the persons protected are not at grave or imminent risk." [FN117] The Court has also rescinded parts of orders but affirmed others when some individuals were no longer threatened. Tragically, the Court lifted the order for protection of the Mexican human rights defender Digna Ochoa because she testified that she and her colleagues no longer felt threatened. [FN118] Two months after the order was lifted, Ochoa was killed in her law office in Mexico City. To monitor compliance, the Court almost always requests follow- up reports on its provisional measures and will often reiterate or strengthen its order to ensure full compliance.

***43** Because the Court only meets intermittently and provisional measures are urgent in nature, the President of the Court will often issue provisional measures that will then be voted on by the entire court once it is back in session. [FN119] When the facts of the case in a request for provisional measures are in dispute, the Court will often order a public hearing at which the Commission and the state will testify. Most importantly, the Court has allowed testimony from experts, victims, and relatives. [FN120]

***44** For the most part, the Court's early orders for provisional measures only included a very generic command to "adopt all necessary measures to protect the right to life and the physical integrity of" the named persons. [FN121] But, the Court has now issued more specific orders including timetables for implementing the measures and reporting back to the Court. In the *Luis Uzcátegui* case, the Court ordered Venezuela to "allow the applicants to participate in planning and implementation of the protection measures and, in general, to inform them of progress regarding the measures ordered by the **Inter-AmericanCourt** of **HumanRights**" as well as "to investigate the facts stated in the complaint that gave rise to the instant measures, with the aim of discovering and punishing those responsible." [FN122] Venezuela was ordered to comply within fifteen days and report back to the Court on its compliance every two months. In the *Peace Community* case, the Court ordered Columbia to guarantee safe passage on roads near the village, provide safety at the public transportation terminal (where violence had occurred), and "to ensure that the members of the Peace Community effectively and permanently can transport and receive products, supplies, and foodstuffs." [FN123] Further, the Court ordered that "the State continue to enable participation of beneficiaries of the provisional measures or their representatives in planning and implementation of those measures and, in general, to keep them informed on progress regarding measures ordered by the **Inter-AmericanCourt** of **HumanRights**." [FN124]

***45** The major legal question the Court has wrestled with in issuing provisional measures is the necessary specificity of the "persons" to be covered by the measures. Almost all of the orders for provisional measures have included a listing of the specific individuals to be covered. In the *Case of Haitians,* the Commission requested provisional measures to cover all Haitians that lived near the border between Haiti and the Dominican

Republic and were at risk of being unlawfully deported back to Haiti. The Court considered whether a provisional order could cover an indeterminate group and decided only to order measures for specifically named individuals; they further requested that the Commission provide more specific information on those individuals especially at risk. The Court reasoned that it would not be feasible for a state to extend special protection to an indeterminate group of people. [FN125] The Court followed very similar logic in the *Urso Branco* case where provisional measures were requested to cover all of the inmates in a notoriously violent Brazilian prison. The Court noted its previous decision in the Haitian case, but nevertheless ordered provisional measures for all of the inmates with the caveat that the Brazilian authorities provide the Court with a list of all prisoners within fifteen days. [FN126]

***46** The Court, however, explicitly changed its criteria for provisional measures in a case involving a Columbian collective of about 1,200 individuals. This "peace" community had forsworn all violence and involvement in the ongoing civil war but had suffered a series of brutal attacks by nearby paramilitary forces. [FN127] The Commission requested provisional measures to cover the entire village without naming all covered individuals. The Court agreed to measures for the entire village, arguing:

> while it is true that, on other occasions, the Court has considered [it] indispensable to individualize the people who are in danger of suffering irreparable harm in order to provide them with protective measures, this case has special characteristics that make it different from the background considered by the Court. Indeed, the Community of Paz de San José de Apartadó, formed according to the Commission by about 1200 people, constitutes an organized community, locate[d] in a determined geographic place, whose members can be identified and individualized and who, due to the fact of belonging to said community, all its members are in a situation of similar risk of suffering acts of aggression against their personal integrity and lives. [FN128]

***47** The need for individuation appears to have evolved into the need to outline "objective criteria" and similar risks that bind the community together. [FN129] Two years after the decision, after the paramilitary forces attacked several "service providers" such as those who brought food to the village, the Court extended its order for provisional measures even further to include "all persons linked as service providers to that 'Peace Community."' [FN130] This led the President of the Court to reflect that in the increasingly interconnected world, "from a truly communitarian perspective, the fate (*la suerte*) of one is ineluctably linked to the luck of the others. The International Law of Human Rights cannot remain indifferent to that." [FN131]

***48** With the Court willing to consider protection for large groups of individuals that are bound by objective criteria and similar risks, provisional measures could be used in several innovative ways to help protect the women of Juárez. The Commission has already issued precautionary measures for Esther Chavez Cano (director of the Casa Amiga women's shelter) and the family members and attorneys of two men indicted for the murders in **2001**. [FN132] The Commission could request provisional measures from the Court for these individuals, as well as for those directly connected to the four individual cases before it, such as employees of specific NGOs, relatives of the victims, or attorneys working on the case. Based upon the*Peace Community* case it is possible that the Court could issue provisional measures to protect a larger group of women, as long as they are of an identifiable group that faces similar risks. The Court could identify specific classes of

women that have been especially targeted, such as those who are employees of specific maquiladoras or those who frequent specific areas of the city. Or, since most of the murdered women have been victims of domestic violence, the Court could issue measures to protect women who report such violence.

***49** In many previous cases, the Commission has requested very specific measures that it would like to have taken, but the Court has most often given a "margin of appreciation" to the state to determine which measures to implement. In the *Peace Community* case, for instance, the Commission originally requested a litany of specific measures, such as installing lights on nearby roads, supplying short wave radios, and repairing the telephone system, but the Court, at least initially, only issued a general order to take "any measures" needed to ensure the security of the members of the Peace Community. [FN133] Unlike other matters before the Court, in the Juárez case, the Commission has already prepared an extensive report documenting the abuses and suggesting thirty specific recommendations to ensure women the right to be free from violence in Juárez.

***50** The Court could also draw from the long list of recommendations from the Commission's *Fernandes v. Brazil* domestic violence case. Specifically, the Court could order Mexico to take, at minimum, the following steps: 1) take due diligence in investigating, prosecuting, and punishing those responsible for the crimes, 2) create an independent commission of inquiry with membership from local NGOs and victims' families to analyze current investigative practices, 3) increase training programs on violence against women for law enforcement personnel and other government employees, 4) establish mediation mechanisms for resolving domestic disputes, 5) create police units that are specifically assigned to investigate violence against women, 6) extend special protection for those women who report domestic violence, 7) take other measures to encourage the reporting of domestic violence, and 8) submit periodic reports on progress made in protecting the women in Juárez who are most vulnerable to violence. It is imperative that victims' families and local groups working closely on this issue work with the Court to develop a more extensive list of protective measures. It is worth reiterating that orders for provisional measures from the Court are legally binding, while orders of the Commission are seen as merely hortatory. Thus, it would be expected that Mexican authorities would be more likely to comply with such orders, especially in comparison to the recommendations that have been previously included in the Commission's report on the Juárez situation.

## V. CONCLUSION

***51** The human rights situation in Juárez is complex and multi-faceted. It is grounded in a myriad of social, cultural, demographic, economic, and political conditions, some of which are idiosyncratic to the Mexican border town while others are endemic to Mexico and beyond. Therefore, a comprehensive set of remedies should be pursued through the Court and other transnational institutions. In the Court, each of the three types of remedies should be pursued as each could address different aspects of the abuses in unique ways. Contentious cases offer the best hope for remedying past human rights abuses, especially in relation to the "serial" killings that have garnered much of the international attention. Such a case could lead to reforms in law enforcement and provide **reparations** to individual families. The Court could order creative **reparations** that would serve to memorialize the victims and encourage agency for the victims' families. Advisory opinions, at least on the

two issues suggested above, would have less impact on the serial killings, but a ruling on the needs for effective investigations could lead to dramatic changes in law enforcement procedures in Juárez, Mexico as well as in the Inter-American system. An advisory opinion on the CAT could have more impact on the domestic violence and the patterns of discrimination against women that have led to impunity in the less notorious cases in Juárez as well as affect changes in domestic laws elsewhere. Finally, a request for provisional measures could lead to dramatic changes in operational policies on the ground, thereby serving to increase the pressure on the Mexican authorities to solve the crimes while also serving to prevent future crimes. A favorable ruling on any of these remedies would establish additional international precedent that a state can be found in violation of human rights treaties for the actions of private actors when the state has failed to prevent or adequately investigate human rights abuses.

***52** It is important to be cognizant of several limitations of transnational legal decisions in affecting changes for human rights abuses. First, recent rulings by the Court led Trinidad and Tobago to withdraw from the Court's jurisdiction and Peru unsuccessfully attempted to withdraw when faced with potentially adverse decisions by the Court. [FN134] After years of work by NGOs and others, Mexico finally acceded to the Court's jurisdiction in 1998. For it to withdraw now would be a major blow to the Court's legitimacy. Equally damaging would be the government's overt refusal to comply with an order from the Court. However, such backlash in this case would be highly unlikely, as the Mexican government has recently made several highly publicized statements on human rights and has taken several concrete steps forward in respecting human rights such as establishing the national human rights commission and making some substantive improvements to the investigation in Juárez. Further, Mexico sought the assistance of the Court through two different advisory opinions in the past six years. Therefore, it is highly unlikely that Mexico would withdraw from the jurisdiction of the Court or refuse to comply with a ruling by the Court. Indeed, the Court's legitimacy has increased recently with an ever-increasing rate of compliance with its decisions.

***53** The rulings of an international court should not be seen in isolation, but require concomitant actions by those closest to the situation. The murders in Juárez would not have drawn such national and international attention if it were not for the heroic and timorous efforts of the victims' families and other women, including social workers such as Ester Chavez Cano, journalists such as Diana Washington Valdez, and international activists such as Lourdes Portillo. If the Court were to make a ruling in this case, it should not be seen as supplanting the efforts of grassroots groups who will be the ones who affect real change through continued and constant pressure on the local and national governments. Moreover, international legal rulings, because of their ties to abstract international norms, cannot encompass all of the concerns associated with concrete local conditions. An international response will not be able to address the range of issues facing the women in Juárez, nor will it be able to address all of the nuances of the underlying causes of the troubles in Juárez such as a culture of male dominance, class bias, political powerlessness, drug trafficking, and corruption.

***54** In rushing to create precedents in international law and debating abstract areas of law, it is imperative that the victims and the families are involved and at the forefront of all aspects of any legal proceeding. While recent changes in the Court's operation would allow the victims' families to play major roles in any contentious case or provisional

measures, efforts should also be made to involve them in a major way in any requests for advisory opinions. As the President of the Court wrote, "no one better than the victims themselves (or their legal representatives) can defend their rights before the Court .... No one better than the victims themselves are well motivated to avoid and overcome procedural 'incidents' which may render them defenseless." [FN135]

***55** The mothers of the victims have played crucial roles in this fight and should continue to do so. Anything less than keeping the victims and their families in the forefront risks re-victimizing the victims. Therefore it seems fitting to end with the voice of the mothers who have banded together to form *Justicia Para Nuestras Hijas*. In an open letter they write:

> We are humble women who live in the colonias of Chihuahua. We use public transportation, we work for less than the minimum wage, and most of us have only received a primary education. We are mothers of young women who have disappeared. Some of us have finally found our daughters: raped, murdered, and disposed of anywhere. Others of us are still looking for our daughters. We are united today in our suffering, suffering loss of a daughter or the terrible anxiety of not knowing where our daughters are. Our daughters, the disappeared, are captive somewhere, and are in grave danger. Our murdered wanted to be happy: they had dreams, plans, all cut short by their killers. Along with our desperation, our pain, and our anxiety at having lost a daughter, or of not knowing what has happened to he r, we have to add the mistreatment we have incurred at the hands of investigating officials. [FN136]

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[FN1]. *See* Inter-Am. C.H.R., *The Situation of the Rights of Women in Ciudad Juárez Mexico: The Right to Be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44 (March 7, **2003**) [hereinafter Inter-American Commission Report] (detailing the Juárez situation); AMNESTY INTERNATIONAL, DEVELOPMENTS AS OF **2003**, AMR 41/026/**2003** [hereinafter AI Report **2003**].

[FN2]. A subsequent paper will examine other innovative transnational remedies for the women of Juárez such as: 1) individual petitions to the Human Rights Committee overseeing the International Covenant on Civil and Political Rights, 2) withholding or issuing loans by the Inter-American Development Bank and the World Bank, 3) filing civil suits in U.S. courts under the Alien Tort Claims Act, and 4) the use of voluntary codes of conduct to put pressure on multinational corporations.

[FN3]. Alma Guillermoprieto, *Letter from Mexico: A Hundred Women,* THE NEW YORKER, Sept. 29, **2003**, at 82, 84.

[FN4]. Inter-American Commission Report, *supra* note 1, ¶ 3.

[FN5]. AI Report **2003**, *supra* note 1, at 7.

[FN6]. Inter-American Commission Report, *supra* note 1, ¶ 42.

[FN7]. *Id*.

[FN8]. *Id*. n.9.

[FN9]. *Id*. ¶ 3.

[FN10]. Guillermoprieto, *supra* note 3, at 85.

[FN11]. AI Report **2003**, *supra* note 1, at 24.

[FN12]. Guillermoprieto, *supra* note 3, at 84.

[FN13]. Inter-American Commission Report, *supra* note 1, ¶ 63.

[FN14]. Guillermoprieto, *supra* note 3, at 86. *See also*, *All Things Considered: Explosive Theory on Killings of Juarez Women* (Broadcast of Interview with Diana Washington Valdez on National Public Radio Dec. 4, **2003**), *available at* http://www.npr.org/templates/story/story.php?storyId=1532607. *See also* AI Report **2003**, *supra* note 1, at 48.

[FN15]. AI Report **2003**, *supra* note 1, at 7.

[FN16]. Inter-American Commission Report, *supra* note 1, ¶ 59.

[FN17]. Melissa W. Wright, *A Manifesto Against Femicide*, 33 ANTIPODE 550, 557-58 (**2001**).

[FN18]. Inter-American Commission Report, *supra* note 1, ¶ 11.

[FN19]. *Id.* ¶ 81.

[FN20]. *Id.* ¶ 82.

[FN21]. *Id.* ¶¶ 49, 83-85.

[FN22]. *Id.* ¶¶ 49-50.

[FN23]. *Id*. ¶ 66. On January 25, **2006**, the attorney for Uribe was shot to death in Ciudad Juarez. *See* Frontera NorteSur,*An Explosive Murder Shakes Ciudad Juárez*, (Jan. 26, **2006**), *available at* http://www.nmsu.edu/~frontera/.

[FN24]. Inter-American Commission Report, *supra* note 1, ¶¶ 72-75; AMNESTY INTERNATIONAL, MEXICO: ENDING THE BRUTAL CYCLE OF VIOLENCE AGAINST WOMEN IN

CIUDAD JUáREZ AND THE CITY OF CHIHUAHUA, AMR 41/011/**2004**, 7 (**2004**) [hereinafter AI Report **2004**].

[FN25]. *Id.* ¶ 76.

[FN26]. AI Report **2004**, *supra* note 24.

[FN27]. *Id.* at 7.

[FN28]. *Id.* at 7-8.

[FN29]. Olga R. Rodriguez, *Government Promises Houses to Slain Women's Families*, ASSOCIATED PRESS, Sept. 16, **2004**, http://www.americas.org/item_16404.

[FN30]. *Id*.

[FN31]. AI Report **2004**, *supra* note 24, at 2.

[FN32]. Grace C. Spencer, *Her Body is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REVV. 503 (**2004 / 2005**). *Cf*. Harry F. Chaveriat III, *Mexican Maquiladoras and Women: Mexico's Continued Willingness to Look the Other Way*, 8 NEW ENG. J. INT'L & COMPP. L. 333 (**2002**).

[FN33]. Spencer, *supra* note 32, at 532. *Cf.* Sosa v. Alvarez-Machain 542 U.S. 692 (**2004**).

[FN34]. Joan H. Robinson, *Another Woman's Body Found Outside Juárez: Applying Velásquez Rodríguez for Women's Human Rights*, 20 WIS. WOMEN'S L.J. 167 (**2005**).

[FN35]. *Id*. at 187-88.

[FN36]. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm [hereinafter American Convention].

[FN37]. Inter-American Commission of Women, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534,*available at* http://www1.umn.edu/humanrts/instree/brazil1994.html [hereinafter Inter-American Convention on Violence Against Women].

[FN38]. *Id*. art. 1.

[FN39]. **Inter-AmericanCourt** of **HumanRights**, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights), Advisory Opinion OC-11/90 (Aug. 10, 1990).

[FN40]. Velásquez Rodriguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 172 (1988).

[FN41]. Inter-American Convention on Violence Against Women, *supra* note 37, art. 7.

[FN42]. *Id.* art. 8.

[FN43]. Velásquez Rodriguez Case, *supra* note 40, ¶ 166.

[FN44]. *Id.* ¶ 177.

[FN45]. *Id.* ¶ 178.

[FN46]. The Court elaborated on the duty to investigate, as well as the duty to prosecute through a fair legal system in the Las Palmeras Case, Inter-Am. Ct. H.R. (Ser. C) No. 90 (**2001**). In this case involving the extra-judicial killings of seven Columbian villagers, the Court found that the victims' families were deprived of their right to a fair trial (Art. 8) and their right to judicial protections (Art. 25) even though legal processes were established and investigations took place. The Court stated the general rule that domestic remedies would be illusory if "for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions; or any other situation in which justice is being denied, such as cases in which there has been an unwarranted delay in rendering a judgment." Las Palmeras Case, Inter-Am. Ct. H.R. (Ser. C) No. 90 ¶ 58 (**2001**). Since the Inter-American Court has had only a few opportunities to examine a state's due diligence to investigate, prosecute, and punish I argue below that it should borrow from the jurisprudence of the European Court of Human Rights, which has addressed this issue in a plethora of cases. Such lesson-drawing from the European Court has been done several times by the Court. For instance, in an analogous situation the Court looked to precedent from the European Court to determine what constitutes a reasonable length of time to complete a judicial proceeding. Genie Lacayo Case, Inter-Am. Ct. H.R. (Ser. C) No. 30 (1997).

[FN47]. Kent Patterson, *Activists See Mixed Signals as Juárez Murder Cases Go to OAS,* October 21, **2002***, available at* www.americaspolicy.org/pdf/articles/0210juarez.pdf.

[FN48]. Inter-American Commission Report, *supra* note 1, ¶ 48. Compare Schmidt Camacho's moving description of a "rastreo" or combing of the ground by activists and family members that combines forensics, political activism, and a search for psychological healing (Alicia Schmidt Camacho, *Body Counts on the Mexico-U.S. Border: Feminicidio, Reification, and the Theft of Mexicana Subjectivity,* 4 CHICANA/LATINA STUDIES 22, 43-48 (**2004**).

[FN49]. Inter-American Commission Report, *supra* note 1, ¶ 48.

[FN50]. *Id*. ¶ 69.

[FN51]. Kilic v. Turkey, App. No. 22492/93, Eur. Ct. H.R. 128 (**2000**).

[FN52]. *Id.* ¶ 62.

[FN53]. *Id*. ¶ 63; *Cf.* Osman v. U.K., App. No. 23452/94, Eur. Ct. H.R. 101 (1998).

[FN54]. *Kilic*, App. No. 22492/93 ¶ 77.

[FN55]. Kaya v. Turkey, App. No. 22535/93, Eur. Ct. H.R. 129 (**2000**).

[FN56]. *Id.* ¶ 89.

[FN57]. Inter-American Commission Report, *supra* note 1, ¶ 157.

[FN58]. *Id*. ¶ 154.

[FN59]. *Id*. ¶ 158.

[FN60]. American Convention, *supra* note 36, art. 64(1).

[FN61]. *Id.* art. 63(2).

[FN62]. Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 203 (**2004**). But this compliance does have its limits, "in most cases, the state is prepared to pay the pecuniary **reparations** ordered by the Inter-American Court, but only in the rarest case is it willing to investigate, try and punish the perpetrators, and in those rare cases where it does punish them, they tend to be released from prison after short periods, or never serve prison terms at all." *Id*. 203-04.

[FN63]. American Convention, *supra* note 36, art. 61(1).

[FN64]. Rules of Procedure of the Inter-American Commission on Human Rights, Article 44 Referral of the Case to the Court (Oct. **2003**), *available at* http://www.cidh.org/Basicos/basic16.htm.

[FN65]. To date, four petitions have been filed with the Commission (104/02, 281/02, 282/02, and 283/02). Inter-American Commission Report, *supra* note 1, ¶ 26. In March **2005**, the Commission was to hear initial arguments on the admissibility of these petitions. Many scholars and court watchers have commented on the inordinate length of time required for a case to make its way through both the Commission and the Court. *See* Michael F. Cosgrove, *Protecting the Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, 32 CASE W. RES. J. INT'LL L. 39 (**2000**). The current President of the Court estimates that after making its way through the Commission, it has taken on average of about 28 months for the Court to reach a decision on the merits and another 16 months for judgment on **reparations**. Antônio A. Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMPP. L. 5, 21-22 (**2000**).

[FN66]. JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 131-133 (**2003**).

[FN67]. *Velásquez Rodriguez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 4 ¶ 68.

[FN68]. PASQUALUCCI, *supra* note 66, at 108.

[FN69]. Ben Saul, *Compensation for Unlawful Death in International Law: A Focus on the **Inter-AmericanCourt** of **HumanRights***, 19 AM. U. INT'L L. REV. 523, 575 (**2004**).

[FN70]. *Id.* at 584.

[FN71]. Juan Humberto Sánchez Case, Inter-Am. Ct. H.R. (Ser. C) No. 99 ¶ 10 (**2003**).

[FN72]. Myrna Mack Chang Case, Inter-Am. Ct. H.R. (Ser. C) No. 101 (**2003**).

[FN73]. *Id.* ¶ 286.

[FN74]. Camacho, *supra* note 48, at 47. In the Guatemala case stemming from the abduction, torture, and murder of several street children by Guatemalan security forces, the Court ordered "the State to designate an educational center with a name allusive to the young victims in this case and to place in this center a plaque with the names of Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraun Aman Villagrán Morales. This will contribute to raising awareness in order to avoid the repetition of harmful acts such as those that occurred in the instant case and will keep the memory of the victims alive." The "Street Children" Case, Inter-Am Ct. H.R. (Ser. C) No. 77 ¶ 103 (**2001**).

[FN75]. Saul, *supra* note 69, at 577-78.

[FN76]. Antônio A. Cançado Trindade, "Presentation of the Annual Report to the Committee on Juridical and Political Affairs," Permanent Council of the Organization of American States. OEA/ser. G., CP/CAJP-1932/02, 12 (April 25, **2002**).

[FN77]. American Convention, *supra* note 36, art. 64.

[FN78]. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 25 (David J. Harris and Stephen Livingstone, eds. 1998).

[FN79]. Jo M. Pasqualucci, *Advisory Practice of the **Inter-AmericanCourt** of **HumanRights**: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J INT'LL L. 241, 285 (**2002**).

[FN80]. *Id.* at 286-87.

[FN81]. American Convention, *supra* note 36, art. 64.

[FN82]. Inter-American Convention on Violence Against Women, *supra* note 37.

[FN83]. Pasqualucci, *supra* note 79, at 243.

[FN84]. "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1 ¶ 52 (1982).

[FN85]. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999).

[FN86]. Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), Advisory Opinion OC-15/97, Inter-Am. C.H.R., (Ser. A) No. 15 ¶ 41 (1997).

[FN87]. *Id*.

[FN88]. Western Sahara, Advisory Opinion, ICJ Reports, 12 (1975).

[FN89]. Restrictions to the Death Penalty (arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R., (Ser. A) No. 3 ¶ 39-41 (1983).

[FN90]. Salman v. Turkey, App. No. 21986/93, Eur. Ct. H.R. 357 ¶ 105 (**2000**).

[FN91]. Ergi v. Turkey, App. No. 23818/94, Eur. Ct. H.R. 59, ¶ 82 (1998).

[FN92]. *Kaya*, App. No. 22535/93. *Cf*. Hugh Jordan v. The United Kingdom, App. No. 24746/94, Eur. Ct. H.R. 327, ¶ 107 (**2001**). The "authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death." *Id*.

[FN93]. *Salman*, App. No. 21986/93 ¶ 105.

[FN94]. Kara E. Irwin, *Prospects for Justice: The Procedural Aspect of the Right to Life under the European Convention on Human Rights and its Applications to Investigations of Northern Ireland's Bloody Sunday,* 22 FORDHAM INT. L. J. 1822 (1999).

[FN95]. United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, *United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, U.N. Doc. ST/CSDHA/12, U.N. Sales No. 91.IV.1 (1991) [hereinafter U.N. Manual].

[FN96]. *Id*. art. IIID.

[FN97]. *Id.* § 4.

[FN98]. *See* Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALBANY L. R. 371 (**2003**); Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U.J. GENDER SOC. POL'Y & L. 309 (**2004**); and Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REVV. 291 (1994).

[FN99]. Meyersfeld, *supra* note 98, at 396.

[FN100]. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, art. 1 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, *available at* http://www1.umn.edu/humanrts/instree/h2catoc.htm [hereinafter Convention Against Torture].

[FN101]. Copelon, *supra* note 98, at 355-56.

[FN102]. Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01 (**2001**).

[FN103]. *Id*. ¶ 13.

[FN104]. *Id*. ¶ 55.

[FN105]. Inter-American Commission Report, *supra* note 1, ¶ 59-60.

[FN106]. American Convention, *supra* note 36, art. 5 §2.

[FN107]. Convention Against Torture, *supra* note 100, art. 2 §1.

[FN108]. *See, e.g.*, Sosa, 542 U.S. 692.

[FN109]. *See* Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*. 15 AM. U. INT'L L. REV. 895 (**2000**).

[FN110]. American Convention, *supra* note 36, art. 63 § 2.

[FN111]. Luis Uzcátegui Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 6 (**2002**).

[FN112]. *See, e.g.*, Álvarez et al. Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 6 (1997) (where the Commission had previously issued two sets of precautionary measures).

[FN113]. PASQUALUCCI, *supra* note 66, at 302.

[FN114]. American Convention, *supra* note 36, art. 63 § 2.

[FN115]. *See* Victor Rodriguez Rescia and Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique,* 16 N.Y.L. SCH. J. HUM. RTSS. 593, 631 (**2000**) (arguing against the general overuse of provisional measures: "Provisional measures may be the most frequently used and efficient mechanism within the inter-American system. In recent years, these measures have been exercised more frequently with satisfactory outcomes. Nevertheless, it is a mechanism that should be used appropriately in order to avoid weakening its effects").

[FN116]. Constitutional Court Case, Order of the Court of Aug. 14, **2000**, Inter-Am. Ct. H.R. (Ser. E) ¶ 14 (**2000**), *accord*LaGrand (Ger. v. U.S.), Int'l Ct. Justice No. 104, 40 ILM 1069, ¶ 110 (**2001**) (Where the ICJ forcefully stated that its previous order of provisional

measures against the United States "was not a mere exhortation" but "had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.").

[FN117]. *See* Carpio Nicolle Case, Inter-Am. Ct. H.R., (Ser. E) ¶ 2 (1998).

[FN118]. Digna Ochoa and Plácido et al., Inter-Am. Ct. H.R. (Ser. E) ¶ 4 (**2001**).

[FN119]. Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 64, art. 25.

[FN120]. Case of Haitians and Haitian Origin in the Dominican Republican Republic, Inter-Am. Ct. H.R. (Ser. E) ¶ 9 (**2000**).

[FN121]. *See*, *e.g.,* Chunimá Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 1 (1991).

[FN122]. Luis Uzcátegui Case, Inter-Am. Cr. H.R. (Ser. E) ¶ 3.

[FN123]. Peace Community of San José de Apartado Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 5 (**2002**).

[FN124]. *Id*. ¶ 6.

[FN125]. Case of Haitians and Haitian Origin in the Dominican Republican Republic, Inter-Am. Ct. H.R. (Ser. E) ¶ 8.

[FN126]. The Urso Branco Prisons Case, Inter-Am. Ct. H.R. (Ser. E) ¶¶ 1, 3 (**2002**).

[FN127]. Peace Community of San José de Apartado Case, Inter-Am. Ct. H.R. (Ser. E) (**2000**) [hereinafter Peace Community Case (**2000**)].

[FN128]. *Id.* ¶ 7.

[FN129]. *Id.* ¶ 8 (Abreu-Burelli, Alirio and García-Ramírez, Sergio, concurring).

[FN130]. *Id.* ¶ 8.

[FN131]. *Id.* ¶ 20 (Trindade, A. A. Cançado, concurring).

[FN132]. Inter-American Commission Report, *supra* note 1, ¶ 26.

[FN133]. Peace Community Case (**2000**), *supra* note 130.

[FN134]. *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (**2002**).

[FN135]. Antônio Augusto Cançado Trindade, *The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of Its Mechanism of*

*Protection, in* THE INTERAMERICAN SYSTEM OF HUMAN RIGHTS 414 (David J. Harris & Stephen Livingstone eds., 1998).

[FN136]. Camacho, *supra* note 48, at 56-57.

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Article

# ***379** CRIMINAL DEFAMATION AND THE EVOLUTION OF THE DOCTRINE OF FREEDOM OF EXPRESSION IN INTERNATIONAL LAW: COMPARATIVE JURISPRUDENCE OF THE **INTER-AMERICANCOURT** OF **HUMANRIGHTS**

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Abstract

Restrictions on freedom of expression may take direct and indirect forms. A state may censor speech, criminalize defamation, harass the media or individual journalists, fail to investigate crimes against the media, require the compulsory licensing of journalists, or fail to enact freedom of information laws or laws that prohibit monopoly ownership of the media. A victim of a restriction on freedom of expression that violates international law may have no recourse in domestic courts, either because state law offers no remedy or because judges are too intimidated to enforce the laws as written. In such instances, victims need recourse to an international forum to protect and enforce their rights. In the Western hemisphere individual allegations of violations of freedom of expression may be brought before the Inter-American Commission on Human Rights and, dependent on jurisdiction, tried by the **Inter-AmericanCourt** of **HumanRights**. These organs have developed a progressive case law on the right of freedom of expression. The Author critiques the contributions made by the **Inter-AmericanCourt** of **HumanRights** to the growing international jurisprudence on freedom of expression. Whenever possible, the Author analyzes the Inter-American Court's case holdings in light of the jurisprudence of the European Court of Human Rights and the U.N. Human Rights Committee. The Article also addresses issues that have not yet been presented to ***380** the Inter-American Court and analyzes potential issues in light of the American Convention.

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***381** "Real democracy exists only when individuals are free to say what they think, and to receive and impart information." [FN1]

## I. Introduction

In a landmark international case on freedom of expression, the **Inter-AmericanCourt** of **HumanRights** held that the Costa Rican government had violated the right to freedom of expression of a Costa Rican journalist as a result of his criminal conviction in national courts for defamation. [FN2] The journalist had written a series of articles for the well-known Costa Rican newspaper, La Nación, concerning Costa Rica's honorary representative to the International Atomic Energy Commission in Europe. The articles quoted or reproduced parts of several articles from Belgian newspapers which alleged that the Costa Rican representative had engaged in illegal activities such as drug trafficking and tax fraud. [FN3] The journalist presented both sides of the story and even printed a letter from the diplomat disputing the allegations. [FN4] Nevertheless, the diplomat brought both criminal and civil suits for defamation in Costa Rican courts. [FN5] Under Costa Rican law the defendant journalist bore the burden of proving the truth of the statements that he had quoted from and attributed to the foreign press. The burden was not, as would be expected, on the plaintiff to prove the falsehood of the statements. The journalist could not meet this burden and, therefore, was convicted of a crime. Both the journalist and the newspaper, who were jointly and severally liable, were ordered to pay large fines, and the name of the journalist was inscribed in the criminal register. [FN6] The journalist subsequently filed a complaint with the Inter-American Commission on Human Rights (Inter-American Commission or Commission) alleging that his freedom of speech was violated by the criminal conviction. [FN7] The Commission found in his favor. [FN8] When Costa Rica did not comply with the Commission's recommendations, the Commission ***382** filed an application with the **Inter-AmericanCourt** of **HumanRights** (Inter-American Court or Court). [FN9]

Laws criminalizing defamation are not uncommon throughout the world. Even some U.S. states still have criminal defamation laws. [FN10] Public officials and other powerful individuals can use these laws as a weapon to intimidate the media from revealing corrupt practices or publicizing incriminating information. Journalists and the media may be pressured not to write or broadcast news because its publication could result in a criminal law suit. This self-censorship of the media negatively affects the public's right to information.

Criminal defamation laws are one manner of repressing freedom of expression. Other forms of repression may be direct, as in the form of censorship, or may be indirect, by a means intended to exert control over the media or to have a chilling effect on one journalist or the profession as a whole. Repression may take the forms of physical harassment, imprisonment, or murder of journalists; failure to diligently investigate or prosecute crimes against the media; compulsory government licensing of journalists; or the requirement that a journalist reveal anonymous sources. Alternately, a State may fail to promulgate or enforce laws that will protect freedom of expression, such as access to information laws or laws prohibiting a monopoly of the media.

Often the person whose freedom of expression is threatened has no recourse in domestic courts, either because the law favors the powerful or because judges are too intimidated to enforce the laws as written. In such instances victims need recourse to an international forum to protect and secure their human rights. In the Western Hemisphere individual allegations of violations of freedom of expression may be brought before the Inter-American Commission on Human Rights and, dependent on jurisdiction, before the **Inter-AmericanCourt** of **HumanRights**. In European States, alleged victims can bring a case before the European Court of Human Rights. For victims throughout the world, the U.N. Human Rights Committee (UNHRC) may be authorized to consider individual complaints. This Article will critique the contributions made by the **Inter-AmericanCourt** of **HumanRights** to the growing international jurisprudence on freedom of expression. Whenever possible, the Inter-American Court's response will be analyzed in light of the jurisprudence of the European Court of Human Rights and the decisions of the UNHRC. The Article also addresses issues that have not yet been presented to ***383** the Inter-American Court and analyzes potential issues in light of the American Convention on Human Rights (American Convention).

The Inter-American Court's jurisprudence on freedom of expression and freedom of the press has been influential in the developing democracies of the Americas. Its decisions and reasoning may also influence other international fora. While the Inter-American Court has addressed many of the pressing issues confronting journalists and the mass media internationally, the Court has not fully utilized every opportunity to influence the development of an international jurisprudence on freedom of expression. An international human rights tribunal such as the Inter-American Court should not limit itself to the most restrictive view of the issues presented in a case. Human rights issues must be decided on the international level so that subsequent victims may receive justice in national courts. The Inter-American Court sits only part-time. [FN11] Even the European Court, which is a full-time court, has a serious backlog of cases. [FN12] These courts do not have the resources to repeatedly decide cases involving the same rights. For this reason, the Court must seize each opportunity to develop an international jurisprudence in areas of controversy.

Part II of this Article briefly describes the Inter-American human rights system so as to lay a foundation for its decisions and opinions. Part III sets forth freedom of expression under the American Convention. Part IV analyzes the American Convention's limits on censorship. Part V interprets permissible restrictions on freedom of expression, including restrictions to protect reputations and national security, as well as the Convention's treatment of propaganda for war and hate speech. This Part also contains an extensive analysis of the Inter-American Court's recent decisions on criminal defamation. Part VI evaluates the juridical contributions of the Inter-American Court to freedom of the press,

focusing on the effective use of interim measures to curtail harassment of journalists and jurisprudence prohibiting the mandatory State licensing of journalists. It also discusses future issues that the Court may have to confront, such as contempt laws for a journalist's refusal to reveal sources, and suggests an analysis of these issues. Part VII discusses areas in which States may inhibit freedom of expression by failing to ***384** promulgate or enforce access to information laws and the monopolization of ownership of the media.

## II. The Inter-American Human Rights System

A brief description of the Inter-American human rights system is necessary for an understanding of the impact of the jurisprudence of the **Inter-AmericanCourt** of **HumanRights** and the decisions of the Inter-American Commission on Human Rights. The Inter-American system was created by the Organization of American States (OAS) to provide for human rights protection in the Americas. [FN13] The principle human rights treaty, the American Convention, [FN14] has been ratified by twenty-four of the thirty-five member States of the OAS. [FN15] State parties to the American Convention contract to observe twenty-six rights and freedoms including freedom of thought and expression, freedom from slavery, freedom of movement and residence, and the rights to life, humane treatment, privacy, property, personal liberty, a fair trial, judicial protection, equal protection, and participation in government. [FN16] The American Convention provides for two organs to ensure State compliance with the rights set forth in the treaty: the Inter-American Commission on Human Rights [FN17] and the **Inter-AmericanCourt** of **HumanRights**. [FN18] Those States that have not ratified the American Convention are still subject to the American Declaration of the Rights and Duties of Man, which provides in part that "[e]very person has the right to freedom of investigation, or opinion, and of the expression and dissemination of ideas, by any medium whatsoever." [FN19]

***385** An individual who claims that a State party to the American Convention has violated his or her rights must first exhaust all domestic remedies in the State where the violation allegedly occurred. [FN20] Only after failing to receive satisfaction in domestic courts may the alleged victim approach the Inter-American human rights system. [FN21] The petitioner initially files a complaint with the Inter-American Commission. [FN22] When the issue in the case involves freedom of expression, the OAS Special Rapporteur for Freedom of Expression will analyze the complaint and advise the Commission. [FN23] If the Commission determines that the complaint is admissible, the Special Rapporteur will participate with the Commission in any hearings and will work with the parties to achieve a friendly settlement. [FN24] The Commission sits only part-time and has a backlog of cases, so the Special Rapporteur's expertise and specialized knowledge is of particular assistance to the Commission. [FN25]

When the Commission's procedures have been completed in a contentious case, the Commission or the State may file an application with the Inter-American Court. [FN26] The individual does not have standing to bring a contentious case before the Court, although once an application has been filed, the alleged victim may proceed independently of the Commission. [FN27] The Court can only exercise its contentious jurisdiction over those States that have accepted the Court's jurisdiction, either ipso facto or for a particular case. [FN28] Twenty-one of the twenty-four State parties to the American Convention have accepted the compulsory jurisdiction of the Inter-American Court. [FN29] In its consideration of a case, the Inter-American Court considers written submissions, including

amicus briefs, and it may hold hearings. After deliberations, it determines whether the State has violated a right protected by the American Convention and, ***386** if so, the Court determines the **reparations** that must be made by the State. The Inter-American Court's decisions are binding on the parties to a contentious case. [FN30]

The Court also can contribute to the conceptual evolution of freedom of expression and other rights by responding to requests for advisory opinions. [FN31] Under its advisory jurisdiction, the Court can interpret the American Convention and other human rights treaties to which American States are parties. [FN32] The Court is also authorized to give States opinions as to whether their domestic laws are compatible with the Convention or other treaties. [FN33] In addition, the Inter-American Court can order States to take provisional measures to protect persons, including journalists. who are in grave and urgent danger of irreparable injury. [FN34]

Various resolutions and principles have been adopted in the Inter-American system to assist the Commission and the Court in evaluating situations in which freedom of expression is in question. Most fundamental is the Inter-American Declaration of Principles on Freedom of Expression, which was approved by the Inter-American Commission. [FN35] Additionally, the OAS General Assembly has adopted resolutions on the "Right to Freedom of Thought and Expression and the Importance of the Media" and "Access to Public Information: Strengthening Democracy." [FN36]

## III. Freedom of Expression Under the American Convention

Article 13 of the American Convention provides in relevant part that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." [FN37] The Inter-American Court interprets the right of freedom of ***387** expression to have two interdependent dimensions: an individual dimension and a social dimension. [FN38] The Court clarified that the individual dimension of freedom of expression is broader than the theoretical right to write and speak. [FN39] The individual dimension "includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible." [FN40] According to the Court, the social dimension of freedom of expression "is a means for the interchange of ideas and information" and includes both the individual's right to communicate views to others as well as the right to receive news and opinions from others. [FN41] In this respect, the Court reasoned that it is equally important for ordinary citizens to have access to others' opinions as to share their own. [FN42]

The individual and social dimensions of freedom of speech must be guaranteed simultaneously. [FN43] The Inter-American Court emphasized that freedom of expression is

> ***388** indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free. [FN44] The Court also adopted the standard

> set by the European Court of Human Rights that freedom of expression must be guaranteed not only for the dissemination of the information and ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population. [FN45] In essence, freedom of expression is nonexistent if only statements that are acceptable to the government or the majority of citizens are allowed to be expressed. All facts and opinions must be permitted, provided that they are not specifically restricted by the governing treaty.

The Court has not held that an individual's freedom of expression is violated when that person is forced to express an untruth. In the Maritza Urrutia case, a woman was abducted by Guatemalan State agents and forced to film a video from a prepared script in which she renounced the opposition force of which she had been a member. [FN46] The video was then aired on Guatemalan television. The applicant argued that the victim's right to freedom of expression had been violated. The Court, however, found that the facts supported only a violation of the victim's right to humane treatment and not a violation of her right to freedom of expression. [FN47]

Despite the Court's determination, the right to freedom of expression should include freedom from forced speech. [FN48] In this vein, the Commission, arguing for the victim, contended that "[t]he individual dimension of the right to freedom of expression may be ***389** violated both when a person's right to express himself freely is restricted and when he is obliged, through unlawful acts, to express himself publicly against his will." [FN49] In this instance, the Court has been unduly limited in its approach to freedom of expression. When individuals, organizations, and the media are illegally forced to make or publish statements, the Court should rule that there has been a violation of the victim's freedom of expression. In an earlier advisory opinion, the Inter-American Court explained that "an extreme violation of the right to freedom of expression occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news." [FN50] The government is equally impeding the circulation of information and ideas when it subverts the information released to the public. A person's individual dimension of freedom of expression is violated when the person is forced to make a statement against her will, whether that statement be true or false; the social dimension of freedom of expression is similarly violated when an untrue statement is presented by force to society as the truth. Consequently, when a person or the media is illegally obligated to speak or publish a statement, the Court should hold that the Convention's provision on freedom of expression has been violated.

## IV. Prior Censorship Barred

The American Convention provides that the exercise of freedom of thought and expression "shall not be subject to prior censorship" [FN51] except in specifically limited circumstances. In this regard, the Inter-American Court has stated that "[a]buse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses." [FN52] Thus, most injuries resulting from the misuse of freedom of expression or the media must be compensated through subsequent lawsuits. The only exceptions to prior censorship authorized by the American Convention are State regulation of access to public entertainment "for the moral protection of childhood and adolescence" [FN53] and State derogation from its obligations during a state of emergency. [FN54] Examples of censorship

that go beyond these ***390** limited exceptions include barring and confiscating publications, prohibiting the release of movies and television programs for reasons other than the protection of youth, blocking the content of websites, and halting the publication of certain newspapers or the broadcasting of particular radio or television stations. [FN55]

In its first decision dealing with media censorship, the Inter-American Court found that Chile had failed to meet its obligations under the American Convention when it refused to permit the movie The Last Temptation of Christ to be shown in Chile. [FN56] The Chilean National Cinematographic Classification Council had initially prohibited the exhibition of the film. [FN57] When the Council eventually approved its showing, the Chilean courts annulled that approval, thereby maintaining the censorship of the film. [FN58] The Chilean Association of Attorneys for Public Freedom [Asociación de Abogados por las Libertades Públicas] then filed a petition in the Inter-American human rights system. [FN59] Both the Commission and then the Inter-American Court held that Chile had violated the American Convention's protection of freedom of expression. [FN60] The Court ordered Chile to allow the exhibition and publicity for The Last Temptation of Christ, [FN61] and to take the appropriate measures to amend its domestic laws to eliminate prior censorship of movies so as to protect freedom of expression in accordance with the American Convention. [FN62]

***391** Following the Court's ruling, the Chilean Congress commenced a reformation of the law so as to eliminate censorship and to remove military influence from the National Cinematographic Classification Council. [FN63] The reformed council consists of film critics, representatives of the film industry, education specialists, and professors. [FN64] In **2002**, the Chilean Senate put an end to film censorship by enacting legislation to comply with the Court's orders. [FN65] The new law establishes a ratings system based on age that is similar to the ratings categories employed in Europe and the United States. [FN66] Thus, the Court's use of **reparations** to order the State to amend its laws to conform to the American Convention resulted in greater freedom of expression.

In a subsequent case also involving Chile, the Inter-American Court held that Chile's censorship of the book Ethics and the Intelligence Services [Ética y Servicios de Inteligencia] violated the author's right to freedom of expression. [FN67] The Chilean government prohibited the distribution of the book [FN68] because the author, Palamara Iribarne, a retired Chilean naval officer, did not request the prior authorization for publication required by the military. [FN69] The government seized all copies of the book, deleted it from the computer of the author, and convicted the author of disobedience and endangering public security and defense. [FN70] The government unsuccessfully argued before the Inter-American Court that because it seized the books after they were published and a small number already had been distributed, it had not exercised prior censorship of the book. [FN71] The Court explained that freedom to express thought and the dissemination of that expression are “indivisible.” [FN72] In other words, a State does not effectively protect freedom of expression if it unduly restricts its dissemination. [FN73] Despite the government's ***392** arguments that its actions did not violate the American Convention, the State informed the Court that a bill then before the Chilean Congress would restrict judges' authority to order the censure and seizure of publications. [FN74]

The State also argued that it actions were justified because Palarama Iribarne had violated a confidentiality agreement under which he had sworn not to reveal any secret or confidential information concerning the armed forces which he had acquired during his

service in the military. [FN75] Two experts designated by the military contradicted the State by opining that the book did not jeopardize the security of the Chilean armed forces. [FN76] The experts explained that the information in the book could be obtained from public sources. [FN77] They acknowledged, however, that it was implicit that Palamara Iribarne had gained the education and training necessary to write the book through his experience as a military intelligence specialist. [FN78] The Inter-American Court did not address the State's argument, stating only that the failure to honor a confidentiality agreement can result in administrative, civil or disciplinary responsibilities but not, in a case such as that of Palamara Iribarne, when the information divulged is already in the public sphere. [FN79]

## V. Restrictions on Freedom of Expression

Freedom of expression is not absolute. It must be balanced against the rights of others and the welfare of society. The American Convention broadly provides that "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society." [FN80] The American Convention also sets forth permissible restrictions on the right to freedom of expression. The Court has warned that laws restricting freedom of expression to protect the rights of others should ***393** in no way serve as a means of prior censorship. [FN81] Generally, the Inter-American Court is asked to determine whether particular governmental acts were undue restrictions on freedom of information. In these cases the Inter-American Court examines the alleged violation, given all the facts in the case and the context and circumstances in which the acts occurred. [FN82]

A permissible restriction on freedom of expression must be prescribed by law, satisfy a legitimate purpose specified in the American Convention, and be necessary in a democratic society. [FN83] A restriction has been prescribed by law when there is a domestic statute in effect that limits freedom of expression. The State must identify the domestic law that authorizes the restriction and show that the law has a legitimate purpose. The legitimate purposes permitted by the American Convention include ensuring "respect for the rights or reputations of others or the protection of national security, public order, or public health or morals." [FN84]

Even though a domestic law has a legitimate purpose, it may not limit freedom of expression more than is strictly necessary in a democratic society. [FN85] The State must choose the least restrictive option available to limit a protected right. [FN86] The Inter-American Court stated in this regard that the necessity and thus the legality of restrictions "depend[s] upon showing that the restrictions are required by a compelling public interest." [FN87] To demonstrate a compelling public interest the State has the burden to specifically show that there is a pressing social need for the restriction. [FN88] The Court clarified that it is not sufficient for the State to demonstrate

> ***394** that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to collective purposes, which, owing to their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees and do not limit the right established in this Article more than is strictly necessary. [FN89] The Inter-American Court employs a proportionality test in determining whether a restriction is necessary. The Court explained that "the restriction must be proportionate to the interest that justifies it and

closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of expression." [FN90]

A. Restriction to Protect Reputation: Defamatory Statements

The American Convention stipulates that freedom of expression is subject to "respect for the rights or reputations of others." [FN91] Although freedom of expression is protected by the American Convention, it may legitimately be restricted if the content of the speech is defamatory. A defamatory statement impugns the honor or reputation of another person. [FN92] Persons who have been defamed may have a cause of action against the person who made the statement. [FN93] Some States allow a defamation suit to be filed in either civil or criminal court or in both. [FN94]

Criminal defamation suits can result in an abuse of freedom of expression. [FN95] Particularly egregious are desacato laws, also referred to as "insult laws" or "contempt laws," which criminalize any ***395** "expression which offends, insults, or threatens a public functionary in the performance of his or her official duties." [FN96] Governments and other officials may employ such criminal defamation laws to "suppress criticism of official wrongdoing, maladministration and corruption, and to avoid public scrutiny." [FN97] Even the threat of a criminal defamation suit may result in self-censorship by journalists or the media and have a chilling effect on freedom of speech. A conviction can result in incarceration and a large fine for the person who made the statement as well as a fine for any media outlet that reports it. [FN98] Although the action may be ultimately unsuccessful, the plaintiff who brought the action has exacted revenge against the party who made the statement. Such suits can cause permanent harm to the professional reputation of a reporter even if the charge is unsubstantiated, in that criminal prosecution may lead the public to believe that reliable evidence existed to support the prosecution.

International bodies and press associations have condemned criminal defamation laws, and some State courts have held that they are unconstitutional. [FN99] The U.N. Commission on Human Rights endorsed a statement by its Special Rapporteurs that "[d]etention, as a negative sanction for the peaceful expression of opinion, is one of the most reprehensible practices employed to silence people and accordingly constitutes a serious violation of human rights." [FN100] The Inter-American Declaration on Principles of Freedom of Expression states "[l]aws that penalize offensive expressions directed at public officials, generally known as 'desacato laws,' restrict freedom of ***396** expression and the right to information." [FN101] In **2005**, the Honduran and Guatemalan Constitutional Courts declared desacato laws to be unconstitutional, [FN102] and the Costa Rican Legislative Assembly removed desacato laws from the Costa Rican criminal code. [FN103]

1. The Inter-American Court's Jurisprudence on Defamation

The Inter-American Court positively influenced international jurisprudence in the area of criminal defamation in **2005**. The Inter-American Court decided three criminal defamation cases in which the applicant had been convicted in domestic courts of defaming a public official or person who was involved in activities of public interest. [FN104] The Court ruled in each case that criminal defamation was not the least restrictive means of limiting freedom of expression so as to protect other rights and, therefore, the State had violated the rights of the person convicted domestically of criminal defamation. In Herrera

Ulloa v. Costa Rica, also known as La Nación Newspaper Case, discussed in the introduction, the Court held that requiring a journalist to prove the truth of statements made by third parties was an excessive restriction on the journalist's right to freedom of expression, [FN105] and that there is a higher standard of protection for statements made about persons whose activities are within the domain of public interest. [FN106]

In Canese v. Paraguay, the Inter-American Court stated that "penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct." [FN107] When combined with the Court's statements that the least restrictive means of interference with freedom of expression must be used, [FN108] and that a ***397** criminal proceeding combined with other factors constitutes "an unnecessary and excessive punishment" for statements made in the context of a campaign for election, [FN109] one can infer that criminal sanctions for defamation are not a proportionate restriction on freedom of expression in political campaigns. Civil defamation suits must suffice to repair damage to reputations in that context. In Canese, a former Paraguayan presidential candidate, Richard Canese, had been convicted of criminal defamation by Paraguayan courts for statements he made about another candidate during the campaign for the presidency of the country. [FN110] During the campaign, Canese accused the rival candidate of having enriched himself with the assistance of the former dictator of Paraguay. [FN111] In one newspaper interview he stated that the opposing candidate, Wasmosy, had "passed from bankruptcy to the most spectacular wealth, thanks to the support from the dictator's family." [FN112] Wasmosy won the election, becoming the President of Paraguay, [FN113] and Canese was subsequently convicted in Paraguayan courts of criminal defamation, sentenced to two months in prison, fined, and permanently prohibited from leaving the country. [FN114] After Canese had lost several domestic appeals, petitioners filed a complaint in his favor with the Commission. [FN115] The Commission found that the Paraguayan criminal conviction violated the American Convention and recommended to the State that it lift the sanctions against Canese. [FN116] When the State failed to do so, the Commission referred ***398** the case to the Inter-American Court. While the case was pending before the Inter-American Court, the Supreme Court of Justice of Paraguay annulled the judgment against Canese and absolved him of guilt. [FN117] The Inter-American Court subsequently issued a decision holding that Canese's right to freedom of expression as protected by the American Convention had been violated. [FN118] The Inter-American Court held that criminal prosecution for defamation was unduly restrictive for statements made in the context of political campaigns. [FN119]

In Palamara Iribarne, a former military intelligence officer who had written a State-censored book on military intelligence, also had been convicted in a Chilean military court of criminal defamation for comments that he made to the press about the department that was prosecuting his case. Following the seizure of Palamara Iribarne's book the defendant told the press that the office of the Naval Prosecutor "had limited [Palamara Iribarne's] freedom of expression and had apparently tried to cover up the repression by accusing him of failure to follow military orders and duties." [FN120] He also stated that "there were reasons to assume that the Office of the Naval Prosecutor had forged legal documents and lied to the Court of Appeals when it was consulted with respect to who made the complaint that initiated the summary proceeding and the case number so as to avoid an unfavorable decision." [FN121] The commander of the naval zone filed a complaint against Palamara Iribarne for the crime of desacato stating that Palamara Iribarne had made his statements "in highly offensive terms with respect to the Naval Prosecutor." [FN122] Although Palamara

Iribarne was initially absolved of the crime of defamation before a military tribunal, [FN123] he was subsequently convicted by another military tribunal and that decision was confirmed by the Chilean Supreme Court. [FN124] The case was then brought to the Commission ***399** which found in favor of Palamara Iribarne, and it was then referred to the Inter-American Court. Chile informed the Court that it had revised its desacato law in civil courts to eliminate the crime of defamation against authorities. [FN125] The State had not, however, eliminated defamation from the Chilean Code of Military Justice. [FN126] The Inter-American Court held that Chile had violated Palamara Iribarne's right to freedom of expression because the crime of desacato was disproportionate and unnecessary in a democratic society. [FN127] The Court stated that the law as applied to Palamara Iribarne "established disproportionate sanctions for criticizing the functioning and members of a State institution," [FN128] in that it "suppressed the essential debate for the functioning of a truly democratic system and unnecessarily restricted the right to freedom of thought and expression." [FN129]

2. Higher Level of Protection for Statements about Persons Engaged in Activities of Public Interest

If governmental impunity and corruption are to be defeated, citizens must be allowed to criticize the actions of public officials without fear of criminal prosecution. The Inter-American Court specifies that domestic laws must provide a higher level of protection from defamation suits for statements made about a person whose activities are within the domain of public interest. [FN130] In this regard, the Court stated that

> [t]hose individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate. [FN131]***400** The Court explained that the differing standard of protection is not based on whether the subject is a public figure or private citizen; instead, it is based on whether a given person's activities are matters that fall within the domain of public interest. [FN132] Persons involved in such activities should have a greater tolerance and openness to criticism. [FN133] To date, the Inter-American Court has specifically acknowledged this protection for statements made about honorary diplomats, [FN134] candidates for office, [FN135] and officers and members of the military, including those serving on tribunals. [FN136]

In light of the essential function of public debate in a democracy, the Inter-American Court held that statements questioning the competence and suitability of a candidate made during an electoral campaign concerned matters of public interest. [FN137] The Court stated that a greater margin of tolerance should be shown towards statements and opinions expressed during political debates. [FN138] The Court reasoned that not only during elections but also in general

> [t]he democratic oversight that society exercises through public opinion encourages transparency in the business of the State and promotes a sense of responsibility in public officials as regards their function, ***401** which is why there should be so little margin for any restriction of political discourse on matters of public interest. [FN139] The public's participation in the interests of society is encouraged by allowing the exercise of democratic control through freedom of expression. [FN140] In

> Canese, the Inter-American Court stated that "[e]veryone must be allowed to question and investigate the competence and suitability of the candidates, and also to disagree with and compare proposals, ideas and opinions, so that the electorate may form its opinion in order to vote." [FN141] Likewise, the European Court of Human Rights has stated that it is "particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely." [FN142]

The Inter-American Court should establish a standard that domestic courts could apply in determining whether a restriction related to a person's public activities violates freedom of expression. ***402** In Canese, the Inter-American Court made only a general statement that a judge should weigh "respect for the rights or reputations of others against the value for a democratic society of an open debate on topics of public interest or concern." [FN143] In Herrera, the Court stated that "a certain latitude" should be allowed under the American Convention for statements made about public officials or other public figures when matters of public interest are involved. [FN144] The Court explained that this does not "signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism." [FN145] The European Court of Human Rights also held that a public official who "lays himself open to close scrutiny of his every word and deed" must show "a greater degree of tolerance." [FN146] The European Court of Human Rights has not established the elements of this threshold of protection.

It would benefit international jurisprudence on freedom of expression and assist domestic courts if the Inter-American Court were to set forth a test to be applied in defamation cases, especially when the complainant is a person engaged in public activities. The Inter-American Declaration of Principles on Freedom of Expression suggests the use of such a test. [FN147] It advocates that "it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news." [FN148] The U.S. Supreme Court and other jurisdictions throughout the world have adopted the "actual malice" test. [FN149] Supporters of a free press argue that "the 'actual malice' standard is necessary because stories of official corruption or wrongdoing should not be suppressed simply because a reporter who has done a sound investigation is insufficiently certain of being able ***403** to prove the facts to risk criminal prosecution." [FN150] Alternatively, the Court could have adopted the standard of lack of good faith that has been adopted by other domestic jurisdictions. Despite some resistance in Latin America to importing a foreign standard, a clearer rule would benefit freedom of expression and democracy.

3. Alternate Remedy for Defamation: Civil Suits

The Inter-American Court has consistently held that criminal defamation suits and the sanctions resulting from a conviction for criminal defamation are unnecessary and disproportionate, and are therefore an illegal restriction on freedom of expression when the statement concerns a person engaged in public activities. [FN151] The Court has not yet addressed the issue of whether criminal defamation suits and sanctions are necessary and proportionate when statements are made about a person whose activities are not in the public sphere.

Criminal suits for defamation to remedy damage to a person's honor and reputation

should be deemed to be unnecessary in all cases. Civil law suits for defamation combined with the right to reply can provide restitutio integrum (full restitution) to victims. Civil defamation suits are adjudicated between the parties in civil courts, whereas criminal defamation suits are prosecuted by the State as criminal offenses. Otherwise, the primary distinction between civil and criminal defamation is in the remedies awarded. The victim's remedy in a civil defamation suit is compensatory damages and perhaps punitive damages. [FN152] The formal remedy in criminal libel is incarceration or the payment of a fine to the government. [FN153] Furthermore, civil defamation suits are not as problematic as criminal defamation suits. In civil suits, there is no potential for prosecutorial misconduct. As criminal prosecutors exercise considerable discretion in determining which complaints to prosecute, criminal defamation laws may be inconsistently enforced, and ***404** enforcement may by politically motivated, especially when the alleged victim of the statement is a public official or influential person.

Another problem arises when criminal defamation proceedings are instituted by private parties rather than by prosecutors, as is legal in some States. For instance, in Costa Rica, crimes against a person's honor were prosecuted by the alleged victim. [FN154] Under these statutes a person who considered himself or herself defamed could institute criminal proceedings and take the case to court without the involvement of a public prosecutor. Consequently, frivolous complaints could result in trial, because no public official reviewed the complaint or the evidence to determine if prosecution was warranted.

The Inter-American Court did not utilize the opportunities in the Canese, Herrera Ulloa, and Palamara Iribarne cases to further advance international jurisprudence on freedom of expression by stating unequivocally that defamation should be a civil offense in all cases, and that criminal defamation laws per se are not a proportionate restriction on freedom of expression under the American Convention. The Court has the authority under the American Convention to order a State to repeal a law that violates rights protected by the Convention. [FN155] Although States are commonly allowed a margin of appreciation in drafting laws, the laws must ultimately comply with the State's international human rights obligations. The Court could have ordered the States to repeal their criminal defamation laws. Alternately, the Court could have held that these laws lack legal effect because they contravene the American Convention, as it did in reference to Peru's amnesty laws. [FN156] Criminal penalties for defamation should be eliminated except in cases involving a “direct and immediate incitement to acts of violence, discrimination or hostility.” [FN157] The result of the Court's failure to declare criminal defamation laws per se in violation of the American Convention is that persons alleging that they have been defamed may continue to bring cases in criminal court even though they will not likely win convictions. [FN158] If the Court were to rule that criminal ***405** defamation statutes per se violate freedom of expression, the Court would, thereby, eliminate the egregious use of such laws.

4. Alternate Remedy: Right to Reply

The reputation of a person who has been libeled can be protected through the right of reply following a victorious civil suit. The right of reply may require the publisher or broadcaster responsible for the defamatory statement to print or broadcast the reply of the victim or the court's judgment in the victim's favor. The American Convention provides that “[a]nyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to

make a correction using the same communication outlet, under such conditions as the law may establish." [FN159]

The Inter-American Court stated that there is an inescapable relationship between the right of reply or correction and the right to freedom of expression; this relationship is evidenced by the placement of the right of reply immediately after the right to freedom of expression in the American Convention. [FN160] The Court further stated that "in regulating the application of the right of reply or correction, the State's Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1)." [FN161] Although the European Convention ***406** does not provide for a right of reply, the European Committee of Ministers is said to have "pioneered the concept of a right of reply in the press and on radio and television." [FN162]

Another remedy for defamation would be a reprimand by a professional body or organization of the journalist or publication that printed the defamatory statement. [FN163] Care must be taken, however, that the professional body not be a tool of the government to silence journalists. The organization should be composed of professionals in the field.

5. Burden of Proof and Defenses in Defamation Actions

In some States a person making a defamatory statement may be punished even if the statement is true. In other States, although truth is a defense to defamation, the defendant has the burden of proving that the statement was true. Moreover, domestic law may require that the defendant prove the truth of statements cited from other printed sources or prove the truth of value judgments made about a person. These allocations of the burden of proof are in contrast to the general rule that the plaintiff in civil proceedings or the State in criminal proceedings has the burden of proving that a wrongful act has been committed. [FN164] In defamation proceedings it should be required that the plaintiff prove the defendant made a statement that was damaging to the plaintiff's reputation, the statement was false, and if it was published, that it was published intentionally or negligently. [FN165] In such cases, if the plaintiff did not prove that the statement was false, the case would fail. The burden of establishing the falsity of an allegedly defamatory statement should be on the party bringing the action for defamation, at least when the statement involves a person engaged in matters of public interest. In ***407** a joint declaration, the U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression stated that "the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern." [FN166]

A problem arises in States that place the burden on the defendant to prove that allegedly defamatory statements are true. For example, the Costa Rican law in question in the Herrera Ulloa case put the burden on the defendant to prove the truth of the statements at issue. [FN167] Likewise in Chile, a person who makes a statement alleged to be defamatory had to prove that the statement was true. [FN168] In a Chilean case that has not come before the Inter-American Court, a former political prisoner claimed in a television interview that she had been sexually abused by a Chilean police officer. [FN169] The woman was subsequently convicted of criminal ***408** defamation [FN170] when the police officer brought a criminal proceeding against her, and she bore the burden of proving that

her allegations were true. There were no witnesses to the assault. The Chilean Court held that she had failed to satisfy the burden of proof and convicted her of libel. She was given a two-month suspended prison sentence, fined $1000, and ordered to pay damages. [FN171] As shown by this case, the allocation of the burden of proof can significantly affect the outcome of a trial.

A defendant should never be required to prove the absolute truth of a statement. Journalists, especially, should not be held to a standard of strict liability for broadcasting or publishing a statement that turns out to be false. The media may make mistakes. If the media were liable for every error, it would undermine the right to freedom of expression and inhibit the publication of news. The NGO, "Article 19, Global Campaign for Free Expression" posits a "reasonableness" defense under which the media would be absolved of liabilitity for defamation upon a showing that under all the circumstances of the case, it was reasonable to have published the false statements. [FN172]

The Inter-American Court did not take the opportunity to hold that the burden of proof must be on the plaintiff when the statement concerns a matter of public interest. The Court did not address the issue in the Canese case, and it limited itself to a narrower holding on the issue in the Herrera Ulloa case. [FN173] In Hererra Ulloa, the Court held that placing the burden on the defendant journalist to prove the truth of third party statements, facts that had initially been reported in the European press, was an excessive limitation on freedom of expression. [FN174] The Court reasoned that the effect of placing the burden of proof on the defendant in that case would have a "deterrent, chilling and inhibiting effect on all those who practice journalism," and would "obstruct public debate on issues of interest to society." [FN175] It was unclear from the Inter-American Court's decision ***409** whether any law that places the burden on the defendant to prove the truth of statements would violate the American Convention, or whether there is a violation only if the journalist must prove the truth of statements that have been quoted. Thus, due to the Court's lack of clarification, other persons must be domestically convicted of criminal defamation and fail to prove the truth of their statements before the Inter-American Court will go a step further to clarify the law in this area.

In some States even the truth of the alleged defamatory statement is not a defense. For example, the Executive Director of Casa Alianza, a home for street children in Guatemala, was convicted of criminal defamation for accusing certain Guatemalan lawyers of involvement in irregular adoptions. [FN176] One of the lawyers he had named brought a private action for criminal defamation against the director. [FN177] In Guatemala it was a criminal offense to make a statement that "dishonors, discredits, or disparages another person," even if the statement is true." [FN178] A person convicted of criminal defamation in Guatemala could receive up to five years in prison. [FN179] The Inter-American Court has to date declined to address the issue of whether truth is a valid defense in such an action. It should clarify that truth is always a defense to a charge of defamation.

The Inter-American Court did not find that requiring the defendant in a criminal case to prove the truth of news articles quoted from the foreign press violated the right to a presumption of innocence. [FN180] The Court did not provide an analysis or reasoning for its decision, finding only a violation of the defendant's right to freedom of expression. [FN181] Other sources argue that requiring the defendant to bear the burden of proof in criminal cases is a violation of the right to a presumption of innocence. [FN182]

***410** 6. No Defamation for Value Judgments

The Inter-American Court has not yet been called upon to determine whether a person has been defamed when the speaker or writer has simply published a negative value judgment or opinion about an individual. Value judgments are expressions of opinions about the subject such as “he is competent” or “she is not trust-worthy.” Whereas a fact is susceptible of proof, a value judgment is not and, therefore, a value judgment should not be judged defamatory. The American Convention, unlike the European Convention, does not expressly protect an individual's right to hold opinions. [FN183] Nonetheless, the right to express opinions should be considered to be subsumed within the right to express ideas, a right that is protected by the American Convention.

The European Court of Human Rights has ruled that Austrian courts violated the European Convention's provision on freedom of expression when they held that value judgments and personal opinions were defamatory under domestic law. In the Lingens case, an Austrian journalist had been convicted in the domestic courts for using the expressions “the basest opportunism,” “immoral,” and “undignified” in reference to the Chancellor of Austria. [FN184] The European Court of Human Rights found that the statements were not defamatory, reasoning that “a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, but the truth of value-judgments is not susceptible of proof.” [FN185] Should the Inter-American Court be confronted by a similar issue, it should follow the jurisprudence of the European Court and hold that value judgments and opinions are protected by the American Convention's right to express ideas of all kinds. To be defamatory, a statement must state or imply assertions of facts which are capable of being proven false.

B. Restrictions for the Protection of National Security

The American Convention allows freedom of expression to be subsequently restricted for “the protection of national security, public order, or public health or morals.” [FN186] It must be noted that even when ***411** publication or speech threatens these grounds the American Convention does not authorize prior censorship. The issue is only whether any of the stated grounds will justify the subsequent liability of the party making the statement. In the Palamara Iribarne case, Chile argued that the publication of the book in question would jeopardize national security. [FN187] However, as State experts affirmed that the information in the book was public knowledge, and the State was arguing to justify prior censorship, the Court did not address the defense. [FN188] The Inter-American Court has not had a further opportunity to develop jurisprudence related to this restriction of freedom of expression.

Other international treaties also include permissible restrictions to freedom of expression on the grounds of national security and related factors, and these restrictions have been interpreted in other international fora. The European Convention allows for restrictions “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals . . . .” [FN189] Similarly, the ICCPR permits restrictions “for the protection of national security, or of public order, or of public health or morals.” [FN190] The European Court of Human Rights and the UNHRC have developed jurisprudence to determine whether interference with freedom of

expression is justified on grounds concerning national security and related factors. [FN191] The jurisprudence of both bodies incorporate the same three elements set forth in the jurisprudence of the Inter-American Court when it considers the legitimacy of any restriction on freedom of expression. These elements are that the restriction be (1) prescribed by a national law, (2) made pursuant to one of the legitimate aims set forth in the applicable treaty, and (3) necessary. [FN192]

***412** Enforcement bodies have focused largely on the third element of the "necessity" of the restriction when holding that the restriction contravened the State's obligations under international law. [FN193] National security laws are often drafted in broad and unspecific terms which could allow for State enforcement for any speech or activity which criticizes or can be viewed as threatening to the government in power. [FN194] These laws, when used to stifle dissent, may serve as effective tools to muffle criticism of governmental policies and to subvert democracy. The international enforcement bodies that oversee State compliance with human rights treaties must carefully scrutinize State arguments that an interference with freedom of expression is justified by such laws. When a State defends its interference with freedom of expression on national security grounds, the State should be required to "specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression." [FN195] The State should also be required to explain specifically why the interference is necessary to protect national security or public order. [FN196] Marks and Clapham accurately posit that the protection of national security "while incontestably significant, is absolutely vague and generally rooted in considerations that are not publicly verifiable." [FN197] State reliance on these grounds must be carefully scrutinized.

When Turkey attempted to justify its interference with journalists' rights to freedom of expression on national security grounds, the European Court of Human Rights resolved the journalists' complaints against the State by applying the above-referenced test. [FN198] In Halis v. Turkey the Turkish government imprisoned a journalist for publishing a book review that expressed positive opinions about aspects of the Kurdish separatist movement. [FN199] The journalist was convicted domestically of violating the Turkish Prevention of Terrorism Act through the dissemination of propaganda about an illegal separatist terrorist organization. [FN200]***413** When the journalist filed a complaint with the European Court of Human Rights, the State defended that its restriction was necessary to protect national security. [FN201] The Court found that the restriction was made pursuant to Turkish law and that in view of the sensitive security situation and the use of violence by a separatist movement in Turkey, the measures taken by the government had the legitimate aim of protecting national security and public safety. [FN202] The Court did not find, however, that the conviction and suspended sentence of the journalist were proportionate to the interference with his freedom of expression. [FN203] Thus, the European Court of Human Rights held that the restriction was not necessary in a democratic society and that it, therefore, violated the journalist's right to freedom of expression. [FN204]

Similarly, in Sener v. Turkey, before the European Court of Human Rights, the owner and editor of a weekly Turkish paper was convicted of "disseminat[ing] propaganda against the State" for publishing an article that referred to the military attacks on the Kurdish population as genocide. [FN205] Turkey again defended its interference with freedom of speech on national security grounds because, in its view, merely by speaking negatively of the violence against the Kurdish population, the applicant had "incited and encouraged violence against the State." [FN206] The European Court of Human Rights held that the

State had violated the applicant's right to freedom of expression. [FN207] Likewise, the UNHRC held that South Korea had contravened the ICCPR's provision on freedom of expression when it convicted and imprisoned a South Korean activist for criticizing the government of South Korea and advocating national reunification. [FN208] The government had convicted the complainant of violating its National Security Law. [FN209]

When determining whether governmental restrictions on freedom of speech for reasons such as national security or public order are legitimate, the Inter-American Court should apply similar principles to those applied in such cases by the European Court of Human Rights and the UNHRC. The Court should first look at the restriction in light of the case as a whole, including the content of the speech that was restricted within the overall context of the country at ***414** that time. [FN210] The Court must also specifically determine whether the interference with freedom of expression was "proportionate to the legitimate aims pursued" and whether the reasons used by the government to restrict freedom of speech were "relevant and sufficient." [FN211] As explained by the Council of Europe, "[t]he right to information takes precedence over the political, legal and economic imperatives which are sometimes given as reasons for restricting it." [FN212]

C. Indirect Restrictions on the Media not Permissible

A State may not substitute indirect means to restrict the freedom of the media to express diverse views. The American Convention states that the

> right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. [FN213] This provision insightfully preempts more subtle means of restricting freedom of expression. Neither the European Convention nor the ICCPR contains a similar explicit provision. The Inter-American Court pointed out that the drafters intentionally located the limitation on indirect restrictions immediately following the provision on permissible restrictions to insure that the Convention's language on permissible restrictions not be misinterpreted to limit, more than strictly necessary, the scope of freedom of expression. [FN214]

Under the American Convention, it is incompatible for the State to use public funds to favor one media competitor, to punish those who do not espouse the governmental position, or to attempt to influence the media to broadcast or print information favorable to the government. Thus, a State would violate the American Convention if it granted government loans on a discriminatory basis or used State funds to advertise only on those stations or in those newspapers that publish or broadcast information favorable to the government. Furthermore, the State could not use its power to grant concessions of radio or television frequencies, custom duties privileges, or any other ***415** privileges that would result in a threat to freedom of expression. [FN215] The State's obligations in this area are not only negative; the State also must ensure that indirect restrictions on freedom of expression are not imposed by "private controls," meaning by private parties, which would "impede the communication and circulation of ideas and opinions." [FN216] The Inter-American Declaration states that "the means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of

expression." [FN217]

D. Propaganda for War and Hate Speech Punishable

A question exists as to whether the censorship of hate speech would violate the American Convention. The American Convention provides that

> any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law. [FN218] The initial draft of this provision was broader, reading "[a]ny propaganda for war shall be prohibited by law, as shall any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, crime or violence." [FN219] The U.S. delegation to the drafting convention objected to this provision, arguing that it should be deleted because it required censorship and could conflict with the U.S. protection of freedom of speech. [FN220] The Brazilian delegate, the renowned international law scholar Carlos Dunshee de Abranches, clarified that the provision even as then drafted did "not say that censorship must be established, but rather that the law shall prohibit a certain type of activity." [FN221] The U.S. delegation could not garner support to drop the provision, so, in consultation with ***416** delegates of other countries, the United States put forward a proposed amendment which was accepted and resulted in the current provision. The report of the U.S. delegation commented that the wording that resulted in the final provision was guided by the U.S. Supreme Court decision, Brandenburg v. Ohio. [FN222] Brandenburg set forth the principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [FN223]

The Inter-American Court has not yet been presented with the opportunity to interpret the American Convention's restriction on hate speech. The American Convention's provision is narrower than the provision in the ICCPR, which resembles the original draft provision of the American Convention. The ICCPR prohibits propaganda for war and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." [FN224] The ICCPR and the European Convention do not, however, include a bar on censorship similar to that of the American Convention. Therefore, the case law of these systems has only limited precedential value. The provision on hate speech in the American Convention bears greater similarity to U.S. case law. Consequently, a review of U.S. case law may be more useful in interpreting this provision than a perusal of the case law of other international systems.

## VI. Freedom of the Press in the Inter-American system

Freedom of expression "includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible." [FN225]***417** Considering the media's essential role in a democratic society, it is vital that it be permitted to gather and disseminate diverse information and opinions. [FN226] Democracy is essential to the defense of human rights, and freedom of the press is essential to the maintenance of a democracy. States have used

various means to inhibit the press from publishing commentaries or facts that the State views as negative or hostile. The Inter-American human rights system has responded to many of these threats to the freedom of the press.

A. Harassment, Imprisonment, and Murder of Journalists

In certain States, anyone who disseminates information that is negative of the government or derogatory of public officials may be at risk of repercussions. [FN227] Some repressive regimes harass, imprison, or murder journalists who critically report on public affairs or governmental activities. In doing so, the government is not only intimidating or eliminating the targeted journalists but also attempting to intimidate anyone who might consider investigating and reporting on governmental corruption, human rights abuses, or other wrongdoing. [FN228] The Inter-American Declaration of Principles on ***418** Freedom of Expression states that "[t]he murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression." [FN229]

Harassment may take the form of interference with a journalist's ability to practice the profession. Domestic journalists may have their licenses revoked, foreign journalists may be denied work permits or entry or exit visas, and journalists who cover wars and other conflicts may be detained or have their movements restricted. [FN230] Harassment may also involve death threats, the infliction of physical injury to either the journalist or to his or her family, [FN231] or the imprisonment of the journalists. [FN232] Generally, journalists are imprisoned for allegedly violating so-called "antistate" laws which may include "acting against the interest of the state." [FN233] Professional journalists and other young people who are disseminating dissident news and opinions on the internet are also subject to arrest and harassment. [FN234]

For some, exercising their freedom of expression can be deadly. Journalists may be murdered for reporting on corruption, human rights abuses, or governmental incompetence. Eleven journalists were assassinated in the Western Hemisphere in **2004** due to their professional activities as social commentators. [FN235] Although no ***419** journalists were killed in Colombia in that period of time, it was reportedly due to self-censorship of the media. Voice of America reported that "[t]he fact that no journalists were killed in Columbia this year, for the first time in at least a decade, is very good news, but the reasons for it are troubling." [FN236] The Inter-American Rapporteur for Freedom of Expression has described the assassinations of journalists as "the most brutal means of restricting freedom of expression." [FN237]

The intimidation can go beyond individual reporters to the owners of the media or the newspapers or television stations. After a Guatemalan newspaper published articles critical of the government, armed men entered the newspaper facilities and opened fire, forcing the president of the paper to leave Guatemala. [FN238] When a Peruvian television station broadcast exposés of the government, the owner's Peruvian citizenship was annulled. [FN239] This had the effect under domestic law of removing him from ownership of the television station, a right which was reserved solely for Peruvian citizens. [FN240] The Inter-American Court found that within the context of the case, the government's actions were an indirect means of restricting the owner's freedom of expression and, thus, a violation of his human rights. [FN241] Moreover, the Court held that

> [b]y separating Mr. Ivcher from the control of Channel 2 and excluding the Contrapunto journalists, the State not only restricted their right to circulate news, ideas and opinions, but also affected the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society. [FN242]***420** In the Carpio Nicolle case against Guatemala, the Inter-American Court held that the right to freedom of expression of a well-known politician and newspaper owner who had reported on human rights violations was violated when he was murdered in an ambush. [FN243]

The essential role of journalists in a democracy may justify their special protection. It is often journalists who expose human rights abuses and spotlight governments engaged in gross human rights violations. It has been argued that "'journalists' solemn duties to the cause of human rights call for reciprocity from the human rights cause in the form of special protection and assistance." [FN244] The Inter-American Court has stated in this regard that

> journalists who work in the media should enjoy the necessary protection and independence to exercise their functions to the fullest, because it is they who keep society informed, [which is] an indispensable requirement to enable society to enjoy full freedom and for public discourse to become stronger. [FN245]

The Inter-American Court and Inter-American Commission have successfully ordered governments to protect the lives and physical integrity of journalists who are in grave danger of irreparable harm. The Convention authorizes the Inter-American Court to adopt provisional measures "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons." [FN246] The Commission also issues requests to States to take precautionary measures to protect journalists or the media in "serious and urgent cases" and "whenever necessary according to the information available." [FN247] Interim measures are termed "precautionary measures" ***421** when adopted by the Commission and "provisional measures" when ordered by the Inter-American Court. [FN248] An order of interim measures, for example, may require that a government provide protection to journalists who have been threatened or may order the release of a journalist from prison. Although a State Party to the American Convention has an obligation, erga omnes, to protect all persons subject to its jurisdiction, [FN249] the Court may use its authority to call upon the State to take special measures to protect persons who are in immediate danger. The overriding importance of provisional measures in human rights cases arises from their potential to terminate abuse rather than primarily to compensate the victim or the victim's family after-the-fact. International proceedings, which typically are not resolved for years, are inadequate in urgent circumstances to protect persons from imminent danger or death.

The Inter-American Court issued provisional measures to protect the lives and safety of journalists who worked for the Venezuelan television station Radio Caracas Televisión after one journalist was murdered and others had been shot, beaten, or threatened. [FN250] The Commission and the Court also issued interim measures when the office of a Venezuelan newspaper was invaded and the staff was threatened. [FN251] The Court stated that those who provide social commentary must have the opportunity to do their work in conditions that are adequate to facilitate their freedom of expression. [FN252]

If a case concerns freedom of expression, the Commission will request precautionary measures on its own initiative or upon the request of the OAS Special Rapporteur for

Freedom of Expression. [FN253] The Special Rapporteur has access to the most current information on abuses and threats to the media in the Americas through an informal network of journalists and news organizations, and he can, therefore, urge the Commission to act immediately, before there is irreparable damage. [FN254] For instance, the Commission ordered the Guatemalan government to take measures to protect Guatemalan journalist María ***422** de los Ángeles Monzón Paredes and her family, who were threatened because of her reporting on crucial human rights issues. [FN255] The Commission likewise granted precautionary measures and ordered the government of Haiti to protect a journalist and a radio correspondent who had been subjected to death threats. [FN256] Freedom of the press is essential to the protection of human rights, and interim measures are invaluable to protect the lives of journalists who put themselves at risk to publish accounts of human rights abuse.

When States have not been successful in protecting journalists, they must investigate human rights violations against journalists and prosecute the perpetrators of the violations. The Inter-American Principles on Freedom of Expression address this issue, stating, "[i]t is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation." [FN257] The Inter-American Court has repeatedly ordered States to thoroughly investigate violations and to identify, prosecute and punish the violators. [FN258] Moreover, a State's obligation to investigate human rights violations must be undertaken "in a serious manner and not as a mere formality preordained to be ineffective." [FN259] The State must punish the "intellectual authors" or "masterminds" of the violation as well as the individuals who carried it out, whether or not the perpetrators of the threats or violence are state agents. Punishment will operate as a force against impunity by acting as both a specific and a general deterrent. The Court has ordered that States must use all legal means to combat impunity, which if unchecked "fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives." [FN260] Impunity for those who violate the rights of journalists and the media encourages others who may commit similar abuses. Recognizing this problem, the Declaration of Chapultepec states that violent acts against journalists ***423** and the media "must be investigated promptly and punished harshly." [FN261]

In serious cases, the OAS Special Rapporteur for Freedom of Expression may personally contact State authorities to express concern or make recommendations on steps to be taken to protect freedom of expression. If necessary, the Rapporteur will issue a press release setting forth the violation, such as press releases in **2005** that condemned death threats against three journalists in Colombia who had received funeral wreaths. [FN262] Adverse international publicity has often proven to be an effective tool in curtailing human rights violations, [FN263] and even the threat of negative publicity may compel the government to take corrective action. The Special Rapporteur is not adverse to using the press to protect journalists and freedom of expression.

B. Mandatory State Licensing of Journalists

Governments may attempt to limit journalistic freedom by imposing restraints on the practice of journalism. The Inter-American Declaration of the Principles on Freedom of Expression provides that "[c]ompulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of

expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State." [FN264] The Inter-American Court has declared that the compulsory licensing of journalists violates the American Convention's right to freedom of expression. [FN265] In its advisory opinion Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, the Court was asked whether a Costa Rican law that required that journalists be members of an association limited to graduates of the ***424** University of Costa Rica's journalism school violated freedom of expression as protected by the American Convention. [FN266] Under the law, it was an offense to be a reporter or otherwise practice journalism in Costa Rica if one was not a member of the Costa Rican Journalism Association. [FN267] The Inter-American Court advised Costa Rica that the law was incompatible with the American Convention, because it denied "any person access to the full use of the news media as a means of expressing opinions or imparting information." [FN268] As a result of the Inter-American Court's advisory opinion, the Costa Rican Supreme Court's Constitutional Chamber nullified the domestic law. [FN269] Subsequently, Chile's Supreme Court also struck down a national requirement that journalists be members of a similar type of organization. [FN270]

Other States, however, continue to license journalists. The Brazilian executive branch recently proposed to create a "federal journalism council to guide and oversee the journalism profession." [FN271] The council would "orient, discipline and monitor" journalists, who would have to register with the government agency to practice journalism. [FN272] The council could impose penalties and could even banish reporters from the profession. [FN273] Brazil's President revealed that the goal of the organization was to regulate the content of the media, stating that the council would encourage media to adopt a "positive agenda" when covering governmental affairs. [FN274] A similar law in Bolivia has been condemned by the Inter-American Commission. [FN275]

***425** C. Contempt Laws for Refusal to Reveal Sources

The Inter-American Court has not yet addressed the issue of whether the use of contempt laws to imprison journalists who refuse to reveal anonymous sources is compatible with the American Convention. Whistle blowers and informants are more likely to come forward when they are assured that their identities will not be revealed. If a person's name may be disclosed despite the person's wish to remain anonymous, it may have a chilling effect on an individual's willingness to reveal irregularities. The Inter-American Declaration of Principles on Freedom of Expression specifies that "[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential." [FN276]

The European human rights system supports journalists' right to refuse to reveal sources except in limited circumstances. The European Court of Human Rights has ruled that a journalist has the right to protect confidential sources except in narrowly-defined circumstances. [FN277] Under Article 10 of the European Convention, a journalist must reveal a confidential source "where vital public or individual interests [are] at stake." [FN278] In Goodwin v. United Kingdom, a journalist refused to reveal the confidential source of damaging business information. [FN279] The company alleged that the information was stolen and that its publication could damage the company. [FN280] The domestic tribunals in the UK sided with the company, barring the publication of the information and ordering the journalist to reveal his source. [FN281] When the journalist

refused he was held in contempt of court and fined. [FN282] The journalist then filed a complaint with the European human rights system, arguing that his right to freedom of expression under the European Convention on Human Rights had been violated. The European Court of Human Rights ruled that the order to reveal the journalistic source and the fine imposed on the journalist for refusing to do so were incompatible with the European Convention on Human Rights. [FN283] The Court reasoned that the "[p]rotection of journalistic sources is one of the basic conditions for ***426** press freedom." [FN284] The Court further clarified that "[w]ithout such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected." [FN285]

Repressive countries look towards U.S. domestic law in support of their treatment of journalists who fail to reveal journalistic sources and who are then held in criminal contempt. [FN286] U.S. federal law provides that a journalist who refuses to reveal his confidential sources in certain circumstances can be punished for criminal contempt. The U.S. Supreme Court does not permit a journalist to maintain source confidentiality at all times. In Branzburg v. Hayes, the Supreme Court held that no First Amendment privilege exists "to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation." [FN287] More recently the Court rejected any notion of a "general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege." [FN288] Although thirty-one U.S. states have passed shield laws to provide journalists with some means of protecting their sources during grand jury investigations, [FN289] the U.S. federal government does not have a shield law. According to the Committee to Protect Journalists, "[U.S. law] makes it easier for governments around the world, repressive governments, to justify ***427** their own repressive policies, which in many cases result in the incarceration of journalist[s]." [FN290]

International law should require that States protect a journalist's right to refuse to reveal confidential sources. International treaties and the courts that interpret them should encourage States to pass legislation that would help to insure freedom of the press by shielding reporters from revealing their confidential sources even when ordered to do so before a grand jury. [FN291] In this way, the Inter-American system could contribute to international jurisprudence which will strengthen support of freedom of expression and freedom of the press in this area.

## VII. Failure to Promulgate Laws to Protect Freedom of Expression

Freedom of expression may be violated not only when a State promulgates laws that violate a right but also when the State fails to promulgate laws or to enforce laws that protect rights. More specifically, many States have failed to pass laws that outlaw monopoly ownership of the media. Others have antitrust laws that bar monopolization of the media, but States may not enforce the laws. Likewise, some States have failed to enact access to information laws or to enforce those laws. The OAS Special Rapporteur on Freedom of Information has a mandate from the OAS General Assembly to assist the American States to draft initiatives to protect freedom of speech, particularly in the area of freedom of information laws. [FN292]

***428** A. Access to Information Laws

Access to information laws, also called "freedom of information" laws, allow individuals or organizations to obtain information contained in public records. The accessibility of information arguably increases public awareness of salient social issues, thereby improving freedom of speech. Freer accessibility of public records also increases the transparency of government operations, making corruption less likely or at least more discernible. A major impetus for the recent legislation of public access laws is the belief that governments are more credible when the public is aware of the government's actions. [FN293] When measures are taken to provide for a more transparent government, corruption may be reduced. [FN294] The culture of secrecy that exists in the public sector of many countries cannot withstand the exposure that comes from freedom of information laws.

Democracy relies upon citizens' rights to seek public information. International experts on freedom of expression have emphasized the importance of this right. The U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression made a joint declaration stating that access to information is a fundamental human right. [FN295] In their declaration, they recognized "the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption." [FN296] The Inter-American Declaration of Principles on Freedom of Expression provides that

> [a]ccess to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies. [FN297]***429** In light of this right, more than fifty countries worldwide have adopted laws increasing the accessibility of government records. [FN298] Throughout Central and South America, Belize, Columbia, the Dominican Republic, Ecuador, Mexico, Panama, and Peru have enacted access to information laws. [FN299] Many other States, including Argentina, are considering similar legislation. [FN300] The harmonization of national access to information laws has come about as a result of States modeling newly-enacted access to information laws after the existing laws of other countries. [FN301]

Most access to information laws allow certain exemptions to the State's duty to provide information. According to the Joint Declaration by the Special Rapporteurs on Freedom of Expression, these exemptions should be carefully limited "to protect overriding public and private interests, including privacy." [FN302] Typically these exemptions protect the internal decision-making activities of the government. Despite claims of security, the threshold question "allows for information to be released even if harm is shown if the public benefit in knowing the information outweighs the harm that may be caused from disclosure." [FN303]

The Inter-American Commission recently held that Chile violated a petitioner's right to freedom of expression under the American Convention due to its failure to guarantee access to public information. [FN304] A Chilean environmental group, the Terram Foundation, had requested general and environmental information about the company managing the Condor River Project, a major logging operation in Chile. The request was ignored by the Government and subsequent appeals to Chilean courts were dismissed. [FN305] The Inter-

American Commission held that the right to freedom of expression guaranteed by the American Convention includes the right to access information held by governmental authorities. [FN306] The Commission recommended that Chile bring its ***430** domestic laws into conformity with the American Convention so as to guarantee that citizens have effective access to public information. [FN307] When Chile did not implement the Commission's recommendations, the Commission referred the case to the Inter-American Court, where it is pending.

B. Monopolization of Ownership of the Media

The concentration of media ownership into the hands of a few individuals or companies threatens the fabric of democracy. Editorial independence, unbiased news reporting or, at least, multiple news sources providing differing views are essential to a democracy. A publication of the Council of Europe warns against concentration of the media stating, "grouping several branches of the mass media under single ownership leads to monopolization." [FN308] Only with pluralism of the media will freedom of expression and, ultimately, democracy be protected. Governments must protect against national broadcasting monopolies and media concentration. Domestic media policy and law must serve to protect a pluralistic media.

The Inter-American Court has interpreted the right to freedom of expression as barring monopolization of the media. [FN309] Although addressing one form of monopolization of the media, that of licensing journalists, the Court held that the Convention's right to freedom of expression prohibits other forms of media monopoly. In this regard, the Court stated "there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form." [FN310] In its advisory opinion on the licensing of journalists, the Court stated that "[i]t is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view." [FN311]

The Inter-American Declaration of Principles of Freedom of Expression provides that

> ***431** [m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals. [FN312] States should pass antitrust legislation and enforce these laws when monopolization of the media is threatened.

VIII. Access to the Media

It is difficult, especially for poorer States to insure that all people within their jurisdictions have fair access to the media. In rural, poverty-stricken areas of many Latin American countries most people have radios. Newspapers are also relatively cheap and available. The internet, however, is not accessible to many people. The Inter-American Court stated that "freedom of expression requires, in principle, that the communication

media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media." [FN313]

A concern of the Council of Europe also has been "to ensure fair access for everyone to new information sources." [FN314] It has stated in this regard that

> [a]ll people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition. [FN315] States should be under a progressive obligation to ensure access to the media to everyone, including marginalized groups such as women, refugees and minorities who do not speak the predominant language. [FN316]

## ***432** IX. Corresponding Duties and Responsibilities

The American Convention does not have a specific provision that specifies that a party exercising rights to freedom of expression also incurs corresponding duties and obligations. The ICCPR stipulates that the exercise of freedom of expression "carries with it special duties and responsibilities." [FN317] Likewise, the European Convention provides that the exercise of freedom of expression "carries with it duties and responsibilities." [FN318] The American Convention does have a general provision balancing the rights enshrined in the American Convention with the duties of the recipients of those rights. [FN319]

Media commentators should practice professionalism and responsible journalism in exercising their right to freedom of expression. The media must self-regulate to avoid the more onerous regulations that States may impose in attempting to control the media. The International Criminal Tribunal for Rwanda observed that "[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for the consequences." [FN320]

## X. Conclusion

The Inter-American human rights system has made valuable contributions to the evolution of the doctrine of freedom of expression in international law, but it can do more. The American Convention provides for broad protection of freedom of expression, allowing few restrictions. Permissible restrictions are specifically enumerated, and prior censorship is permitted only to regulate access to public entertainment for the protection of the morals of children and adolescents and when there is a state of emergency. Indirect methods of interference with freedom of expression, such as abuse of private or governmental controls on broadcasting frequencies or newsprint, are specifically barred.

The Commission and the Inter-American Court have interpreted the Convention's provision on freedom of expression to strengthen protections in the Americas. The OAS Rapporteur on Freedom of ***433** Expression assists the Commission in evaluating complaints alleging the abuse of freedom of expression and works with States to improve their compliance with the American Convention. The Court and the Commission attempt to provide immediate protection to journalists who are in imminent danger of bodily harm or death by ordering States to take interim measures to protect journalists and other social

commentators. The Court has also ruled that government-imposed licensing laws which require that journalists belong to an organization that requires that journalists have particular credentials violates the American Convention. [FN321]

In **2005**, the Court had three opportunities to make great strides in the area of criminal defamation. The Court provided protection of freedom of expression by clarifying that journalists are not required to prove the truth of statements quoted from third parties. [FN322] The Court also determined that criminal suits for defamation and criminal sanctions are undue restrictions on freedom of expression when the allegedly defamatory statements are made about persons whose activities are within the domain of public interest. [FN323] The Court did not further advance international jurisprudence on freedom of expression by stating unequivocally that defamation should be a civil offense in all cases and that criminal defamation laws per se are not a proportionate restriction on freedom of expression under the American Convention. As a lesser measure, the Court could have specified that in defamation cases, in general, truth is always a defense and that the burden of establishing the libelous nature of any statement is on the person claiming to have been defamed. Moreover, the Court could have established a test to be applied in national courts to balance the right to reputation of persons engaged in public activities with freedom of expression.

The contributions to the international protection of freedom of expression by the Commission, the Inter-American Court, and the OAS Special Rapporteur on Freedom of Expression have been impressive. In future cases, the Court will hopefully take additional steps to further protect this basic right.

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[FN1]. Kayhan Karaca, Guarding the Watchdog: The Council of Europe and the Media 11 (**2003**).

[FN2]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 135 (Jul. 2, **2004**).

[FN3]. Id. P 95(d)-(i).

[FN4]. Id. P 95(g).

[FN5]. Id. P 95(p).

[FN6]. Id. P 95(t).

[FN7]. Id. P 6.

[FN8]. Id. P 11.

[FN9]. Id. P 27.

[FN10]. Although they are seldom used, criminal defamation statutes remain on the books in about half of U.S. states. John D. Zelezny, Communications Law: Liberties, Restraints, and the Modern Media 116 (4th ed. **2004**). Occasionally they are used to prosecute malicious internet postings. Id.

[FN11]. Rules of Procedure of the **Inter-AmericanCourt** of **HumanRights** approved on Nov. 25, **2003**, during Sessions 9 and 10 of the Court's LXI Ordinary Period of Sessions, held from November 20 to December 4, **2003**, art. 10-11 [hereinafter Rules of Procedure Inter-Am. Ct. H.R.].

[FN12]. See e.g., Luzius Wildhaber, President of the European Court of Human Rights, Address at the High Level Seminar on the Reform of the European Human Rights System 2 (Oct. 18, **2004**), transcript available at http:// www.echr.coe.int/ [hereinafter Wildhaber, Oslo Speech] (follow "Press" hyperlink; then follow "Speeches of the President of the Court" hyperlink; then follow "Oslo, 18 October **2004**" hyperlink) ("Since 1998 the backlog is growing inexorably.").

[FN13]. American Convention on Human Rights, Nov. 22, 1969, pmbl., 9 I.L.M. 163 [hereinafter American Convention].

[FN14]. Id. The American Convention and other Inter-American human rights documents can be viewed on the OAS website, http://www.oas.org, or on the website of the **Inter-AmericanCourt** of **HumanRights**, http://www.corteidh.or.cr. The annual reports and cases of the Inter-American Commission on Human Rights can be found at its website, http://www.cidh.oas.org.

[FN15]. OAS ratifying parties are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Trinidad and Tobago, which had ratified the American Convention denounced it in 1998. Cuba was excluded from participating in the OAS in 1962 for adopting a Marxist-Leninist form of government. The United States has not ratified the American Convention.

[FN16]. American Convention, supra note 13, arts. 4-25.

[FN17]. Id. art. 33(a).

[FN18]. Id. art. 33(b).

[FN19]. Ninth Int'l Conference of American States, American Declaration of the Rights and Duties of Man, art. IV, O.A.S. Res. XXX, (Bogota, Colombia, 1948), available at http://www.cidh.org/Basicos/basic2.htm.

[FN20]. American Convention, supra note 13, art. 46(1)(a).

[FN21]. Id.

[FN22]. Id. art. 61(2).

[FN23]. Annual Report of the Office of the Special Rapporteur for Freedom of Expression **2004**, at 5-7, http://www.cidh.oas.org/relatoria/showarticle.asp? artID=459&lID=1, follow "See Complete Report in PDF" [hereinafter Annual Report of Special Rapporteur].

[FN24]. Id. The goal of the Special Rapporteur is to "stimulate awareness of the importance of the full observance of freedom of expression and information in the Hemisphere, given the fundamental role it plays in the consolidation and advancement of the democratic system ...." Id. at 6.

[FN25]. See id. at 5-7.

[FN26]. American Convention, supra note 13, art. 61.

[FN27]. Rules of Procedure of the Inter-American Court, supra note 11, art. 23(1).

[FN28]. American Convention, supra note 13, art. 62(1).

[FN29]. States accepting the contentious jurisdiction of the Inter-American Court are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

[FN30]. American Convention, supra note 13, art. 68(1).

[FN31]. Id. art. 64.

[FN32]. Id. art. 64(1).

[FN33]. Id. art. 64(2).

[FN34]. Id. art. 63(2).

[FN35]. Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission, in Basic Documents Pertaining to Human Rights in the Inter-American System 211; see Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, http://www.cidh.oas.org/relatoria/showarticle.asp?artID=26&lID=1 [hereinafter Declaration of Principles on Freedom of Expression].

[FN36]. See Organization of American States General Assembly, Thirty-Fifth Regular Session, http://www.oas.org/juridico/english/ga05/ga05.doc.

[FN37]. American Convention, supra note 13, art. 13. Freedom of expression is protected by all the major human rights treaties. Article 10(1) of the European Convention similarly provides that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Convention for the Protection of

Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, Nov. 4, 1950, art. 106. Article 19(2) of the U.N. International Covenant on Civil and Political Rights (ICCPR), which entered into force on March 23, 1976, provides, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Article 9 of the African Charter on Human and People's Rights, which entered into force on October 21, 1986, reads in relevant part, "1) Every individual shall have the right to receive information. 2) Every individual shall have the right to express and disseminate his opinion within the law."

[FN38]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, PP 31-32 (Nov. 13, 1985). The Court specifically stated that freedom of thought and expression "requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others." Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, P 77 (Aug. 31, **2004**).

[FN39]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, PP 31-32; Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 109 (Jul. 2, **2004**); Canese, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, P 77.

[FN40]. Advisory Opinion OC-5/85, P 31; "The Last Temptation of Christ," **2001** Inter-Am. Ct. H.R. (ser C) No. 73, P 65 (Feb. 5, **2001**) (also known as Last Temptation of Christ case); Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 109.

[FN41]. Advisory Opinion OC-5/85, P 32; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 110; Canese, **2004** Inter-Am. Ct. H.R., P 79.

[FN42]. Advisory Opinion OC-5/85, P 32; Ivcher Bronstein v. Peru, **2001** Inter-Am. Ct. H.R. (ser. C) No. 74, P 178 (Feb. 6, **2001**); "The Last Temptation of Christ," **2001** Inter-Am. Ct. H.R., P 66; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 107; Canese, **2004** Inter-Am. Ct. H.R., P 79.

[FN43]. Advisory Opinion OC-5/85, P 33; Ivcher Bronstein, **2001** Inter-Am. Ct. H.R., P 149; "The Last Temptation of Christ," **2001** Inter-Am. Ct. H.R., P 67; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 111; Canese, **2004** Inter-Am. Ct. H.R., P 80.

[FN44]. Advisory Opinion OC-5/85, P 70; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P112; Canese, **2004** Inter-Am. Ct. H.R., P 82. The Inter-American Court has also stated that

> the same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions, as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.

Advisory Opinion OC-5/85, P 70; Ivcher Bronstein, **2001** Inter-Am. Ct. H.R., P 151.

[FN45]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 113; Canese, **2004** Inter-Am. Ct. H.R., P 83 quoting Scharsach and News Verlagsgesellschaft v. Austria, **2003** Eur. Ct. H.R. 596, P

29; Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, P 65 (1979).

[FN46]. Urrutia v. Guatemala, **2003** Inter-Am. Ct. H.R. (ser. C) No. 103, P 99(b) (Nov. 27, **2003**).

[FN47]. Id. P 103.

[FN48]. Id. P 99(b).

[FN49]. Id. P 99(c).

[FN50]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 54 (Nov. 13, 1985).

[FN51]. American Convention, supra note 13, art. 13(2).

[FN52]. Advisory Opinion OC-5/85, P 39.

[FN53]. American Convention, supra note 13, art. 13(4).

[FN54]. Id. art. 27. Freedom of expression is a right that may be suspended or derogated from "in time of war, public danger, or other emergency that threatens the independence or security of a State Party." Id. art. 27(1). The State may derogate from freedom of speech and other rights "to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." Id. The suspension of rights must be non discriminatory, and the State must inform the OAS of the suspension. Id.

[FN55]. Committee to Protect Journalists, "Attacks on the Press in **2004**" report: Iran, Mar. 15, **2005**, http://www.payvand.com/news/05/mar/1127.html.

[FN56]. "The Last Temptation of Christ," **2001** Inter-Am. Ct. H.R. (ser C) No. 73, P 88 (Feb. 5, **2001**); see Human Rights Watch, Chile: Progress Stalled: Setbacks in Freedom of Expression Reform (**2001**), pt. VI. Film Censorship Reform, http://www.hrw.org/reports/**2001**/chile/Foe05fin-05.htm#P539_145947 [hereinafter Film Censorship Reform].

[FN57]. "The Last Temptation of Christ," **2001** Inter-Am. Ct. H.R., P 60(c); see Film Censorship Reform, supra note 56.

[FN58]. "The Last Temptation of Christ," **2001** Inter-Am. Ct. H.R., P 60(e), (f).

[FN59]. Id. P 5.

[FN60]. Id. PP 96-97.

[FN61]. Id.

[FN62]. Id. P 4. The Court reasoned that,

[i]n international law, customary law stablishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies.

Id. P 96.

[FN63]. Film Censorship Reform, supra note 56.

[FN64]. See Index for Free Expression, Chile: End to Film Censorship, http://www.indexonline.org/en/indexindex/articles/**2002**/1/end-to-film-censorship.shtml (last visited Feb. 18, **2006**).

[FN65]. Id.

[FN66]. Id.

[FN67]. Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, P 78 (Nov. 22, **2005**).

[FN68]. Id.

[FN69]. Id. P 63(6). The book dealt with the need for military intelligence activities to conform to certain ethics. Id.

[FN70]. Id. PP 63(19)-(23), 74.

[FN71]. Id. P 66(a).

[FN72]. Id. P 72.

[FN73]. Id.

[FN74]. Id. P 63(h).

[FN75]. Id. P 66(d), (e).

[FN76]. Id. P 63(23).

[FN77]. Id. P 75.

[FN78]. Id.

[FN79]. Id. P 77.

[FN80]. American Convention, supra note 13, art. 32(2). In general, restrictions on the enjoyment or exercise of any of the rights and freedoms provided for in the Inter-American Convention, including freedom of expression, must be applied "in accordance with laws

enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been enacted." Id. art. 30.

[FN81]. Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, P 95 (Aug. 31, **2004**); Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 32 (Nov. 13, 1985).

[FN82]. Advisory Opinion OC-5/85, P 42.

[FN83]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 120 (July 2, **2004**). Likewise, the European Court and the UNHRC require that restrictions on the exercise of freedom of expression must be prescribed by law, have a legitimate purpose, and be necessary and justified. See Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, P 59 (1979).

[FN84]. American Convention, supra note 13, art. 13(2).

[FN85]. Canese, **2004** Inter-Am. Ct. H.R., P 95.

[FN86]. Id. P 96; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 121; Advisory Opinion OC-5/85, PP 46, 59; see also Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, P 59 (1979).

[FN87]. Canese, **2004** Inter-Am. Ct. H.R., P 96.

[FN88]. The Inter-American Court espoused the European Court of Human Rights' interpretation of "necessary" to require the existence of a "pressing social need." Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 122 (citing Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, P 59 (1979); Advisory Opinion OC-5/85, P 46; Canese, **2004** Inter-Am. Ct. H.R., P 96.)

[FN89]. Canese, **2004** Inter-Am. Ct. H.R., P 96; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 121; Advisory Opinion OC-5/85, P 46; see also Sunday Times, 2 Eur. Ct. H.R. P 59. Note that English translations of the above quote are not uniform in all cases, although the wording in Spanish is identical.

[FN90]. Canese, **2004** Inter-Am. Ct. H.R., P 96; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 123.

[FN91]. American Convention, supra note 13, art. 13(2)(a). In the sense that the right to privacy includes the right of each individual to have his or her "honor respected and dignity recognized" it could be said that the right to freedom of expression must be balanced against that right. See id. art. 11.

[FN92]. See Black's Law Dictionary (7th ed. 1999). "The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, or dislike." Id. "Libel is written or visual defamation; slander is oral or aural defamation." Id.

[FN93]. Id.

[FN94]. See Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 95(p).

[FN95]. Press Release, Human Rights Watch: Human Rights News, Chile: Former Political Prisoner Convicted of Defamation (Apr. 28, **2004**) (stating that "defamation laws must be carefully circumscribed so as not to violate freedom of expression"), http://hrw.org/english/docs/**2004**/04/28/chile8509.htm [hereinafter Chile: Former Political Prisoner Convicted of Defamation].

[FN96]. Press Release, Inter-American Commission on Human Rights, Satisfaction with the Repeal of "Descato" In Costa Rica, No. 19/02 (Apr. 25, **2002**), http://www.cidh.org/Comunicados/English/**2002**/Press19.02.htm [hereinafter Satisfaction with the Repeal of "Descato" In Costa Rica]; see Jairo E. Lanao, Legal Challenges to Freedom of the Press in the Americas, 56 U. Miami L. Rev. 347, 365 (**2002**).

[FN97]. Article XIX, Rights vs. Reputations: Campaign Against the Abuse of Defamation and Insult Laws 1 (**2003**), http:// www.article19.org/pdfs/tools/defamation-campaigns-pack.pdf [hereinafter Rights vs. Reputations].

[FN98]. Id.

[FN99]. The International Press Institute passed the following resolution in reference to criminal defamation laws:

The world's leading journalists represented in the International Press Institute accordingly call on parliaments to abolish such laws, on governments to refrain from using them where they exist and to call for their revocation, and on courts to refuse to invoke them and to rule that they violate the fundamental human rights of free speech and press freedom.

Press Release, International Press Institute [IPI], Resolutions Passed by the 53rd IPI General Assembly, Resolution on Criminal Defamation and "Insult Laws" (May 18, **2004**), http://www.freemedia.at/resolutions2004.htm.

[FN100]. Id.

[FN101]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 11.

[FN102]. Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, The Office of the Special Rapporteur for Freedom of Expression of the IACHR Expresses its Satisfaction with Decisions in Guatemala and Honduras Declaring Descato Laws Unconstitional, No. 126/05 (July 1, **2005**), http://www.cidh.oas.org/relatoria/showarticle.asp?artID=638&1ID=1; Honduran High Court Strikes Down Descato Provision, CPJ **2005** News Alert, May 26, **2005**, http://www.cpj.org/news/**2005**/Honduras26may05na.html.

[FN103]. Satisfaction with the Repeal of "Descato" In Costa Rica, supra note 96.

[FN104]. Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, (Aug. 31, **2004**); Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, (Jul. 2, **2004**); Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, (Nov. 22, **2005**).

[FN105]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., PP 132-35.

[FN106]. Id. PP 127-29.

[FN107]. Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, P 104 (Aug. 31, **2004**).

[FN108]. Id. P 96.

[FN109]. Id. P 106. The Canese case was decided after the Herrera Ulloa case. The Court did not address the issue of the criminalization of crimes against honor in Herrera Ulloa. See Herrera Ulloa, **2004** Inter-Am. Ct. H.R.

[FN110]. Canese, **2004** Inter-Am. Ct. H.R., P 69(7). Canese, an industrial engineer who had researched and written books and articles about the Itaipu hydroelectric power plant, had in earlier years been exiled to Holland for his opposition to the former Paraguayan dictator Alfredo Stroessner. Id. P 69(1)(2). Canese had also filed reports alleging corruption and tax evasion against the company contracted to build the power plant, a company that also had been investigated for corrupt practices by the National Congress of Paraguay. Id. P 69(3).

[FN111]. Id. P 69(7). Canese was a candidate in the 1993 Paraguayan presidential election opposing Juan Carlos Wasmosy, the chairman of the board of the Paraguayan company that had constructed the Itaipu project. Id. P 69(2).

[FN112]. Id. P 69(7). Canese alleged that the Stroessner family had allowed Wasmosy to assume the chairmanship of CONEMPA, the consortium that enjoyed a Paraguayan monopoly of the principal civil works of Itaipu. Id. In another interview Canese alleged that "in practice, Mr. Wasmosy was the Stroessner family's front man in CONEMPA, and the company transferred substantial dividends to the dictator." Id.

[FN113]. Id. P 69(8). Other directors of CONEMPA filed a criminal complaint against Canese for defamation. Id. P 69(10).

[FN114]. Id. P 2. This restriction that could be lifted only under extraordinary circumstances. Id.

[FN115]. Id. P 5.

[FN116]. Id. P 10.

[FN117]. Id. P 69(49). In annulling the sentences against Canese and absolving him of guilt, the Criminal Chamber of the Supreme Court of Justice of Paraguay stated,

> [t]he statements made by Mr. Canese--in the political context of an election campaign for the presidency--were, necessarily, important in a democratic society working towards a participative and pluralist power structure, a matter of public interest. There is nothing more important and public than the popular discussion on and subsequent election of the President of the Republic.

Id. P 99 (quoting the Criminal Chamber of the Supreme Court of Justice of Paraguay).

[FN118]. Id. P 108.

[FN119]. Id. PP 91-92.

[FN120]. Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, P 63(73) (Nov. 22, **2005**).

[FN121]. Id. P 63(73).

[FN122]. Id. P 63(74).

[FN123]. Id. P 63(88).

[FN124]. Id. P 63(91), (93).

[FN125]. Id. P 63(101).

[FN126]. Id.

[FN127]. Id. P 88.

[FN128]. Id.

[FN129]. Id.

[FN130]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 129 (Jul. 2, **2004**). The Inter-American Declaration of Principles on Freedom of Expression states that "[t]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest." Declaration of Principles on Freedom of Expression, supra note 35, Principle 10.

[FN131]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 129; Ivcher Bronstein v. Peru, **2001** Inter-Am. Ct. H.R. (ser. C) No. 74, P 155 (Feb. 6, **2001**) The Inter-American Court stated approvingly that the European Court of Human Rights has emphasized that "freedom of expression leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest." Ivcher Bronstein, **2001** Inter-Am. Ct. H.R., P 155. The European Court stated in this regard that the "acceptable limits to criticism are broader with regard to the Government than in relation to the private citizen or even a politician." Ivcher Bronstein, **2001** Inter-Am. Ct. H.R., P 155 (quoting Sürek & Ozdemir v. Turkey, 1999 Eur. Ct. H.R. 50, P 60 (1999)). In a democratic system, the acts or omissions of the Government would be subject to rigorous examination, not only by the legislative and judicial authorities, but also by public opinion." Id.

[FN132]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 129.

[FN133]. Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, P 83 (Nov.

22, **2005**)(citing Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, P 97 (Aug. 31, **2004**)); Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 127.

[FN134]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 3.

[FN135]. Canese, **2004** Inter-Am. Ct. H.R., P 97.

[FN136]. Palamara Iribarne, **2005** Inter-Am. Ct. H.R., P 83.

[FN137]. Canese, **2004** Inter-Am. Ct. H.R., PP 91-92. The Court specified that, "[t]he effective exercise of representative democracy" underlies the enjoyment of human rights." Advisory Opinion OC 6/86, 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, P 32 (May 9, 1986). The Court, moreover, rejected the view that the form of government does not affect State compliance with human rights standards. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 42 (Nov. 13, 1985). The Court also affirmed that, "[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests." Id.

[FN138]. Canese, **2004** Inter-Am. Ct. H.R., P 97 (citing Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 127); see Ivcher Bronstein, **2001** Inter-Am. Ct. H.R.; Feldek v. Slovakia, **2001** Eur. Ct. H.R. 463; Sürek & Ozdemir v. Turkey, 1999 Eur. Ct. H.R. 50, P 60 (1999).

[FN139]. Palamara Iribarne, **2005** Inter-Am. Ct. H.R., P 83; Canese, **2004** Inter-Am. Ct. H.R., P 97; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 127 (citing Ivcher Bronstein, **2001** Inter-Am. Ct. H.R., P 155) [translation by Author].

[FN140]. Advisory Opinion OC-5/85, P 70, quoted in Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 112 and in Canese, **2004** Inter-Am. Ct. H.R., P 82. The Inter-American Democratic Charter states that, "[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy." Inter-American Democratic Charter art. 4 quoted by the Court in Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 115. Likewise, the Council of Europe stated that, "[f]reedom to inform and to be informed is one of the cornerstones of democracy." Denis Durand de Bousingen, Introduction to Karaca, supra note 1, at 9.

[FN141]. Canese, **2004** Inter-Am. Ct. H.R., P 90. The Inter-American Court stated that it

> considers it important to emphasize that, within the framework of an electoral campaign, the two dimensions of freedom of thought and expression are the cornerstone for the debate during the electoral process, since they become an essential instrument for the formation of public opinion among the electorate, strengthen the political contest between the different candidates and parties taking part in the elections, and are an authentic mechanism for analyzing the political platforms proposed by the different candidates. This leads to greater transparency, and better control over the future authorities and their administration.

Id. P 88. The European Court of Human Rights has also called for latitude for freedom of expression within the context of politics, stating that

> [w]hile precious to all, freedom of expression is particularly important for political parties and their active members .... They represent their electorate, draw attention to

their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court's part.
Incal v. Turkey, 1998 Eur. Ct. H.R. 48, P 46).

[FN142]. Bowman v. The United Kingdon, 1998 Eur. Ct, H.R. 4, P 42.

[FN143]. Canese, **2004** Inter-Am. Ct. H.R., P 105.

[FN144]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 128.

[FN145]. Id.

[FN146]. Dichand et. al. v. Austria, **2002** Eur. Ct. H.R., Application No. 29271/95, 26 February **2002**, P 39. The European Court of Human Rights also applies a different standard to "restrictions applicable when the object of the expression is an individual and when reference is made to a public person." Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407, P 42 (1986). In this regard, the European Court stated that "[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual." Id.

[FN147]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 10.

[FN148]. Id.

[FN149]. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); see Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 66(e) (citing Spanish Penal Code arts. 204, 207.

[FN150]. Brief of Open Society Justice Initiative as Amicus Curiae Supporting The Inter-American Commission on Human Rights in the case Herrera Ulloa (on file with the Court).

[FN151]. Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, P88; Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, PP 91-92.

[FN152]. A problem that may arise in a civil defamation suit is the award of disproportionate damages. See Stokes v. Jamaica, Case 28/04, Inter-Am. C.H.R., Report No. 65/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 396 (**2004**). A civil defamation suit is less stigmatizing, but stigma and punishment are often what the alleged victim is seeking. See Gregory C. Lisby, No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence, 9 Comm. L. & Pol'y 433, 470 (**2004**).

[FN153]. One advantage of criminal libel is that the state pays all the costs and expenses of the litigation, whereas the person who files a civil suit must pay attorney fees and court costs.

[FN154]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 66(e).

[FN155]. American Convention, supra note 13, arts. 2, 63(1); see Jo M. Pasqualucci, The Practice and Procedure of the **Inter-AmericanCourt** of **HumanRights** 245-48 (**2003**).

[FN156]. See Barrios Altos v. Peru, **2001** Inter-Am. Ct. H.R. (ser.C) No. 75, P 44 (Mar. 14, **2001**).

[FN157]. Press Release, Human Rights Watch: Human Rights News, Guatemala: Acquittal of Human Rights Defender a Victory for Free Expression (Feb. 2, **2004**), http://hrw.org/english/docs/**2004**/02/02/guatem7210.htm [hereinafter Guatemala: Acquittal of Human Rights Defender].

[FN158]. For example, in May **2005**, a Brazilian sports commentator was convicted of defamation and ordered to spend 18 months of overnight detention in a prison dormitory far from the television station where he broadcast. See Journalist Gets 18 Months Detention on Defamation Charge, CPJ **2005** News Alert, May 17, **2005**, http://www.cpj.org/news/**2005**/Brazil17may05na.html. The sports commentator had made a veiled allegation of corruption when he alleged that certain stations had won the right to broadcast a soccer tournament because of their relationship to the government. Id. The media groups filed criminal complaints against the sports broadcaster, and he was subsequently convicted. Id.

[FN159]. American Convention, supra note 13, art. 14(1). The Argentine Supreme Court has held that there is a directly enforceable right to reply in Argentina without the need for supporting domestic legislation. See Thomas Buergenthal, International Tribunals and National Courts: The Internationalization of Domestic Adjudication, in Recht Zwischen Umbruch und Bewahrung 687, 695 (1995). The Argentine Supreme Court based the righty to reply in Argentina on Article 14 of the American Convention and the Court's advisory opinion on the Enforceability of the Right to Reply. See id.

[FN160]. Advisory Opinion OC-7/86, 1986 Inter-Am. Ct. H.R. (ser.A) No. 7, P 25 (Aug. 29, 1986).

[FN161]. Id. International treaties and the courts that interpret them generally allow contracting states a margin of appreciation in implementing the right to reply. See id. For instance, international law does not dictate the amount of space required for the reply or the time frame in which the reply must be published. See id. P 27. The State may establish explicit provisions in its domestic laws. See id. When a court holds that the media must publish the entire court decision, the right of reply can be onerous to the media. See Lanao, supra note 96, at 347, 353 (citing the Criminal Code of Costa Rica, art. 155). The court decisions often cover several newspaper pages. Id. at 354. Some commentators argue that the victim's reply should be granted the same degree of prominence provided the original statement and should be published free of charge and within a reasonable amount of time after the right of reply is established. See John Hayes, The Right to Reply: A Conflict of Fundamental Rights, 37 Col. J.L. & Soc. Probs. 551, 551 (**2004**).

[FN162]. Karaca, supra note 1, at 13.

[FN163]. Rights vs. Reputations, supra note 97.

[FN164]. Zelezny, supra note 10, at 117. Under U.S. law, the plaintiff in a libel suit has the burden of proof as to all elements of a law suit including the falsity of the statement. Id.

Traditionally under U.S. common law, truth had been a defense to libel, meaning that the defendant (person accused of making a defamatory statement) had the burden of proving the truth of the statement. Id. The U.S. Supreme Court's decisions have now generally placed the burden on the plaintiff to prove the falsehood of the statement. Id. at 126.

[FN165]. Rights vs. Reputations, supra note 97.

[FN166]. Joint Declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression (**2004**), http:// www.cidh.org/relatoria/showarticle.asp?artID=319&1ID=1. The U.S. Supreme Court also rejected the requirement that the defendant prove the truth of allegations concerning public officials as a violation of free speech. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Supreme Court stated that "[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Id. at 279. U.S. law requires that when an alleged defamatory statement concerns public officials, the plaintiff not only bears the burden of proving the falsity of the statements but also of proving that the statements were published in malice or with reckless disregard for the truth. Id at 279-80.

[FN167]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 132 (Jul. 2, **2004**). The Costa Rican statute in question in Herrera Ulloa provided that "[t]he person who dishonors another or who spreads rumors or news of a kind that will affect his reputation, shall be punished with a fine ...." Penal Code of Costa Rica, Title II, art. 46. The law goes on to state that

> [i]nsult or defamation is not punishable if it consists of a truthful statement and has not been motivated by the pure desire to offend or by a spirit of malice. Notwithstanding, the accused may prove the truthfulness of the allegation only: 1. If the allegation is linked to the defense of a matter of current public interest; and 2. If the plaintiff demands proof of the allegation against him, provided that such proof does not affect the rights or secrets of third persons.

Id. The law goes on to state that "[a] defendant accused of libel or defamation may prove the truthfulness of the imputed fact or deed, unless the injured party has not lodged a complaint, where such action is required in order to prosecute." Article 152 of the Costa Rican Penal Code states, "[a]nyone who publishes or reproduces, by any means, offences against honor by another party shall be punished as having committed those offences. (Unofficial translations from Article 19 brief to the Inter-American Court.).

[FN168]. Chile: Former Political Prisoner Convicted of Defamation, supra note 95.

[FN169]. Id.

[FN170]. Id.

[FN171]. Id.

[FN172]. Article 19, Global Campaign for Free Expression, Amicus brief, Defamation Law as a Restriction on Freedom of Expression PP 8, 144-63 (March **2004**) in the Herrera Ulloa

case.

[FN173]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., PP 132-35.

[FN174]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R., PP 132-35. Most of the statements were actually reproductions of portions of news articles printed in the Belgian press. Id. The European Court likewise has held that "punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest." Thoma v. Luxemburg, **2001** Eur. Ct. H.R. ___, P 62.

[FN175]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P133. The European Court has also held that "freedom of expression requires that care be taken to dissociate the personal views of the writer of the commentary from the ideas that are being discussed or reviewed even though these ideas may be considered offensive to many or even to amount to an apologia for violence." Halis v. Turkey, **2005** Eur. Ct. H.R. 3, P 134.

[FN176]. Guatemala: Acquittal of Human Rights Defender, supra note 157.

[FN177]. Id.

[FN178]. Id. Historically, "[t]ruth was not allowed as a defense in criminal libel cases, because the purpose of the prosecution of the crime was to prevent violence." Lisby, supra note 152, at 456.

[FN179]. Guatemala: Acquittal of Human Rights Defender, supra note 157.

[FN180]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 178 (Jul. 2, **2004**). Article 8(2) of the American Convention provides in relevant part that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law." American Convention, supra note 13, art. 8(2).

[FN181]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R, PP 176-178.

[FN182]. Article 19, Global Campaign for Free Expression, Defamation Law as a Restriction on Freedom of Expression; Amicus Curiae Brief Supporting Applicant in Herrera Ulloa (on file with the Court).

[FN183]. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom specifies that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas." European Convention, supra note 37.

[FN184]. Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407, PP 22, 45 (1986).

[FN185]. Id.

[FN186]. American Convention, supra note 13, art. 13(2)(b).

[FN187]. Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, P66(b) (Nov. 22, **2005**).

[FN188]. Id. P 75.

[FN189]. European Convention, supra note 37, art. 10(2).

[FN190]. ICCPR, supra note 37, art. 19(3)(b). The African Charter on Human and People's Rights does not set forth any explicit restrictions to the freedom of Expression. However, the Declaration of Principles of Freedom of Expression in Africa, which was adopted by the African Commission on Human and People's Rights, provides that "expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression." African Commission on Human and People's Rights, Declaration of Principles of Freedom of Expression in Africa (Oct. **2002**), available at http:// www.kubatana.net/html/archive/resour/40303aufoe.asp?sector=RESOUR&range_ start=1.

[FN191]. Halis v. Turkey, **2005** Eur. Ct. H.R. 3, P 134; Kim v. Republic of Korea, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess. (Jan. 4, 1999).

[FN192]. Sener v. Turkey, **2000** Eur. Ct. H.R. 377, P 28; Kim v. Republic of Korea, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., P 12.2 (Jan. 4, 1999). The European Court requires that the restriction be "necessary in a democratic society." Sener, **2000** Eur. Ct. H.R. 377,P 28. The U.N. Human Rights Commission requires that the restriction be "necessary to achieve a legitimate purpose." Kim, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, P 12.2.

[FN193]. Halis v. Turkey, **2005** Eur. Ct. H.R. 3, PP 9-12.

[FN194]. Susan Marks & Andrew Clapham, International Human Rights Lexicon 243 (**2005**).

[FN195]. Kim v. Republic of Korea, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., P 12.5 (Jan. 4, 1999).

[FN196]. Id.

[FN197]. Marks & Clapham, supra note 194, at 243.

[FN198]. Halis v. Turkey, **2005** Eur. Ct. H.R. 3; Sener v. Turkey, **2000** Eur. Ct. H.R. 377.

[FN199]. Halis v. Turkey, **2005** Eur. Ct. H.R. 3, PP 9-12.

[FN200]. Id. PP 13-15, 17.

[FN201]. Id.

[FN202]. Id. PP 26-27.

[FN203]. Id. PP 33, 37-39.

[FN204]. Id.

[FN205]. Sener, **2000** Eur. Ct. H.R. 377, PP 7-8.

[FN206]. Id. P 37.

[FN207]. Id.

[FN208]. Kim v. Republic of Korea, U.N. Human Rights Commission, CCPR/C/64/D/574/1994, 64th Sess., P 2.1-2.3, 12.5 (Jan. 4, 1999).

[FN209]. Id. P 2.3.

[FN210]. Halis v. Turkey, **2005** Eur. Ct. H.R. 3, P 33.

[FN211]. Id.

[FN212]. Karaca, supra note 1, at 9.

[FN213]. American Convention, supra note 13, art. 13(3).

[FN214]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 47 (Nov. 13, 1985).

[FN215]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 13.

[FN216]. Advisory Opinion OC-5/85, P 48.

[FN217]. Id.

[FN218]. American Convention, supra note 13, art. 13(5).

[FN219]. Thomas Buergenthal & Robert Norris, Legislative History, in 2 Human Rights: The Inter-American System, booklet 12, at 89. The provision on freedom of expression was originally Article 12(5). See id.

[FN220]. Id. at 88. The U.S. delegate also stated, "[i]nsofar as propaganda for war, a series of classical works such as Homer's Iliad, a good part of the works of Shakespeare and of St. Thomas Aquinas, in which there is propaganda for war, would be prohibited by law." Id.

[FN221]. Id. at 89.

[FN222]. Brandenburg vs. Ohio, 395 U.S. 444 (1969).

[FN223]. Id. at 447.

[FN224]. ICCPR, supra note 37, at art. 20. The UNHRC, in its General Comments, has stated that this provision will not be fully effective unless States promulgate laws that

prohibit propaganda for war and hate speech and provide for appropriate sanctions should the law be violated. U.N. Human Rights Committee, General Cmt. 11, art. 20, 19th Sess. (1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI<<backslash>>GEN<<backslash>>1<<backslash>>Rev.1 at 12 (1994), available at http://www1.umn.edu/humanrts/gencomm/hrcom11.htm.

[FN225]. Ivcher Bronstein v. Peru, **2001** Inter-Am. Ct. H.R. (ser. C) No. 74, P 147 (Feb. 6, **2001**); Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 32 (Nov. 13, 1985); Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 109 (Jul. 2, **2004**).

[FN226]. Ivcher Bronstein, **2001** Inter-Am. Ct. H.R, P 149; Herrera Ulloa, **2004** Inter-Am. Ct. H.R., P 117. The Inter-American Court has stated that "[t]he effective exercise of representative democracy" underlies the enjoyment of human rights. Advisory Opinion OC 6/86, 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, P 32 (May 9, 1986). "The media provide information which influences not only opinions and attitudes but also political choices, and this is why media freedom, pluralism and independence are essential preconditions of democracy." Karaca, supra note 1, at 11.

[FN227]. See In Imprisoning Journalists, Four Nations Stand Out, CPJ Special Reports from Around the World, Feb. 3, **2005**, http://www.cpj.org/Briefings/**2005**/imprisoned_04/imprison_release03feb05na.html [hereinafter Imprisoning Journalists]. The four nations labeled as those most repressive of a free press for the imprisonment of journalists are China, Cuba, Eritrea, and Burma. Id.

[FN228]. /Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. P 297 (**2002**), http://www.cidh.oas.org/Terrorism/Eng/toc.htm. The Inter-American Commission has stated in this regard that

> [t]he murder, abduction, intimidation and threatening of journalists, as well as the destruction of press materials, are most often carried out with two concrete aims. The first is to eliminate journalists who are investigating attacks, abuses, irregularities, or illegal acts of any kind committed by public officials, organizations, or non-state actors. This is done to ensure that the investigations are not completed or never receive the public debate they deserve, or simply as a form of reprisal for the investigation itself. Secondly, such acts are used as an instrument of intimidation to send an unmistakable message to all members of civil society engaged in investigating attacks, abuses, irregularities, or illicit acts of any kind. These practices seek to silence the press in its watchdog role, or render it an accomplice to individuals or institutions engaged in abusive or illegal actions. Ultimately, the goal of those who engage in these practices is to keep society from being informed about such occurrences, at any cost.

Id.

[FN229]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 9.

[FN230]. Journalists who cover wars are also at risk. See Karaca, supra note 1, at 7. The Council of Europe has "urged the international community to take steps to protect journalists covering crises and conflicts." Id.

[FN231]. In **2003**, the Inter-American Commission noted an "alarming increase in intimidations against the media" in Guatemala. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/Ser.L/V/II/118, doc. 5 rev. 2 P 41 (**2003**), http:// www.cidh.org/annualrep/2003eng/chap.4b.htm.

[FN232]. One hundred twenty-two journalists were reportedly in prison worldwide at the end of **2003**. See Imprisoning Journalists, supra note 227.

[FN233]. Committee to Protect Journalists, supra note 55.

[FN234]. See id. In Iran, where people have turned to the internet for news because certain newspapers have been banned and broadcasting is controlled by conservatives, the government is cracking down. See id. A spokesperson for the Iranian judiciary stated that "individuals operating unauthorized Web sites would be prosecuted for 'acting against national security, disturbing the public mind, and insulting sanctities."' Id.

[FN235]. Annual Report of Special Rapporteur, supra note 23, ch. II, P 7; see Serena Parker, Threats to Press Freedom Remain in Latin America, Say Analysts, The Epoch Times, Dec. 3, **2004** (discussing the dangers faced by journalists in Latin America)

[FN236]. Parker, supra note 235. The publisher of El Comercio, a Brazilian newspaper stated that the "Committee Against Impunity has investigated 19 cases of murdered journalists in Brazil." Press Release, Inter-American Press Assoc. [IAPA], IAPA Welcomes Law that Places Human Rights Crimes Under Federal Jurisdiction (Dec. 10, **2004**), http://www.ifex.org/en/content/view/full/63224/.

[FN237]. Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, Office of the Special Rapporteur for Freedom of Expression Deplores Assassination of Columbian Journalist, No. 115/05 (Jan. 14, **2005**), http://www.cidh.org/relatoria/showarticle.asp?artID=353&lID=1.

[FN238]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/Ser.L/V/II.118, doc. 5 rev. 2, Ch. III P 42 (**2003**). In addition, several of the newspaper's investigative journalists and staff received death threats. Id. In response to a complaint of human rights abuse filed with the Commission, the Commission ordered the government of Guatemala to take interim measures to protect the director and the technical and administrative staff of the newspaper. Id.

[FN239]. Ivcher Bronstein v. Peru, **2001** Inter-Am. Ct. H.R. (ser. C) No. 74, P 76(a), (d), (g), (i), (j), (q).(Feb. 6, **2001**).

[FN240]. Id. PP 76 (e), (u), 160.

[FN241]. Id. PP 162, 191(5).

[FN242]. Id. P 163.

[FN243]. Carpio Nicolle v. Guatemala, **2004** Inter-Am. Ct. H.R. (ser. C) No. 117, PP76(15),

(21), 155(1)(e) (Nov. 22, **2004**). It was not clear whether Mr. Carpio Nicolle, a member of the governmental opposition, was killed for his political convictions or for printing them in his newspaper. See id.

[FN244]. Amit Mukherjee, International Protection of Journalists: Problem, Practice, and Prospects, 11 Ariz. J. Int'l & Comp. L. 339, 344 (1994).

[FN245]. Herrera Ulloa v. Costa Rica, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, P 150 (Jul. 2, **2004**).

[FN246]. American Convention, supra note 13, art. 63(2). The American Convention authorizes the Commission in "cases of extreme gravity and urgency" to circumvent its time-consuming procedures and immediately request that the Inter-American Court adopt provisional measures. Id.

[FN247]. Rules of Procedure of the Inter-American Commission on Human Rights, art. 25(1)(d), approved by the Commission at its 109th special session held from December 4-8, **2000**, amended at its 116th regular period of sessions, held from October 7-25, **2002** and at its 118th regular period of sessions, held from October 7-24, **2003**. Neither the American Convention nor the Statute of the Commission authorizes the Commission to request that a State adopt precautionary measures. The Court has held that there is a presumption that Court-ordered provisional measures are necessary when the Commission has previously ordered precautionary measures on its own authority that were not effective and another threatening event has subsequently occurred. Digna Ochoa y Plácido Case, 1999 Inter-Am. Ct. H.R., (ser. E), No. 2, P 6 (Nov. 17, 1999).

[FN248]. Rules of Procedure of the Inter-American Commission on Human Rights, supra note 247, arts. 25, 74.

[FN249]. Peace Community of San Jose de Apartadó Case, **2002** Inter-Am. Ct. of H.R., (ser. E), P 7 (June 18, **2002**).

[FN250]. Ríos v. Venezuela, **2002** Inter-Am. Ct. H.R., (ser. E), PP 1, 2 (Nov. 27, **2002**).

[FN251]. El Nacional and Así Es La Noticia Newspapers Case, **2004** Inter-Am. Ct. H.R. (ser. E) (July 6, **2004**).

[FN252]. Id. P 10.

[FN253]. Rules of Procedure of the Inter-Am. Comm. HR, supra note 247, art. 25(1).

[FN254]. See Organization of American States [OAS], Functions & Objectives of the Special Rapporteur for Freedom of Expression, http://www.cidh.org/relatoria/showarticle.asp?artID=36&IID=1.

[FN255]. María de los Ángeles Monzón Paredes v. Guatemala, Inter-Am. Comm. H.R. (Mar. 18, **2003**).

[FN256]. Liliane Pierre-Paul v. Haiti, Inter-Am. Comm. H.R. (May 29, **2003**).

[FN257]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 9.

[FN258]. See Cantoral Benavides Case, **2000** Inter-Am. Ct. H.R. (ser. C) No. 69, P 12 (Aug. 18, **2000**); Villagran Morales Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, P 8 (Nov. 19, 1999); Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R., (ser. C) No. 4, P33 (July 21, 1989).

[FN259]. Villagran Morales Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, P 226 (Nov. 19, 1999).

[FN260]. Paniagua Morales Case, 1998 Inter-Am. Ct. H.R., (ser. C) No. 37, P 173 (Mar. 8, 1998). The Inter-American Court defines "impunity" as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the Inter-American Convention." Constitutional Court Case, **2001** Inter-Am. Ct. H.R. (ser. C) No. 27, P 123 (Jan. 31, **2001**).

[FN261]. Declaration of Chapultepec, Hemisphere Conference on Free Speech, Mar. 11, 1994, Principle 4.

[FN262]. Functions & Objectives of the OAS Special Rapporteur for Freedom of Expression, supra note 254; see Press Release, OAS, Office of the Special Rapporteur for Freedom of Expression of the IACHR, Office of the Special Rapporteur for Freedom of Expression Expresses Serious Concern about Threats to Three Columbian Journalists, No. 123/05 (May 18, **2005**), http:// www.cidh.org/relatoria/showarticle.asp?artID=576&lID=1.

[FN263]. Tom J. Farer, The OAS at the Crossroads: Human Rights, 72 Iowa L. Rev. 401, 403 (1987).

[FN264]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 6. Also, the Declaration of Chapultepec specifies that "[t]he membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary." Declaration of Chapultepec, supra note 261, Principle 8.

[FN265]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, PP 76 (Nov. 13, 1985).

[FN266]. The Court did not hold that the organization of the practice of professions, such as law, into associations, or colegios, was per se a violation of the Convention. Id. P 68.

[FN267]. For a discussion of the facts underlying this request, see Thomas Buergenthal, Remembering the Early Years of the **Inter-AmericanCourt** of **HumanRights**, 37 N.Y.U. J. Int'l L. & Pol. 259, 264-69 (**2005**).

[FN268]. Advisory Opinion OC-5/85, P 85.

[FN269]. See Pedro Nikken, La Funcion Consultiva de la Corte Interamericana de Derechos Humanos, in El Sistema Interamericano de Proteccion de los Derechos Humanos en el

Umbral del Siglo XXI: Memoria del Seminario Noviembre de 1999, at 161, 178 (**2001**).

[FN270]. Editorial, For an Independent Press, Miami Herald, Sep. 9, **2004**, at 24A.

[FN271]. Id.

[FN272]. Id.

[FN273]. Id.

[FN274]. Id.

[FN275]. Press Release, Inter-American Commission on Human Rights, The IACHR Expresses its Concern over the Bolivarian Republic of Venezuela's Passage of the Social Responsibility in Radio and Television Bill, No. 25/04 (Nov. 30, **2004**) (expressing concern about Venezuela's passage of the Social Responsibility in Radio and Television Bill), http://www.cidh.org/Comunicados/English/**2004**/25.04.htm.

[FN276]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 8; see also Declaration of Chapultepec, supra note 261, Preamble ("Judges with limited vision order journalists to reveal sources that should remain in confidence.").

[FN277]. Goodwin v. United Kingdom, 22 Eur. H.R. Rep. 123 (1996).

[FN278]. Id. at 141.

[FN279]. Id. at 126-28.

[FN280]. Id.; see Richard S. Gordon et al., The Strasbourg Case Law: Leading Cases from the European Human Rights Reports 1186-87 (**2001**).

[FN281]. Goodwin v. United Kingdom, 22 Eur. H.R. Rep. 123, 146 (1996).

[FN282]. Id. at 125.

[FN283]. Id. at 146.

[FN284]. Id. at 143.

[FN285]. Id. at 143.

[FN286]. Parker, supra note 235.

[FN287]. Branzburg v. Hayes, 408 U.S. 665, 708 (1972). Branzburg was a staff reporter for a daily Kentucky newspaper. Id. at 667. He reported on two stories which subsequently resulted in a case before the Supreme Court. Id. First, Branzburg did a story detailing his time spent with two youths selling marijuana. Id. at 667-71. Soon after the piece ran, Branzburg was subpoenaed before a grand jury. Id. However, Branzburg refused to reveal the names of the parties involved. Id. In the second case, Branzburg published a story,

developed from interviews with drug users. Id. The article contained unnamed sources and once again Branzburg was subpoenaed to reveal the names of his sources. Id. Branzburg claimed he had a privilege as a journalist to refuse to reveal confidential sources. Id.

[FN288]. In re Special Proceedings, 373 F.3d 37, 44 (1st Cir. **2004**) (citing Branzburg, 408 U.S. at 690-91). More recently reporters from Time Magazine and the New York Times were charged with contempt when they refused to reveal their sources to a grand jury. A special prosecutor for the Justice Department was investigating the leak of the name of a CIA operative which occurred after the operative's husband had criticized a claim by the Bush administration that Iraq had attempted to acquire uranium from Niger. See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. **2006**) cert. denied sub. nom. Miller v. United States, 125 S.Ct. 2977 (**2005**).

[FN289]. Josh Kobrin, A Shield for Journalists, American Constitution Society for Law and Policy Blog, Dec. 7, **2004**, http://www.acsblog.org/criminal-law-512-a-shield-law-for-journalists-.html.

[FN290]. Id.

[FN291]. In introducing his free speech bill in the U.S. Senate, Senator Dodd stated,

> [t]his legislation is fundamentally about good government and the free and unfettered flow of information to the public .... The American people deserve access to a wide array of views so that they can make informed decisions and effectively participate in matters of public concern. When the public's right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are endangered. The legislation that I am introducing today will protect these rights, and ensure that the government remains open and accountable to its citizens.

Press Release, Christopher Dodd, Dodd Introduces the Free Speech Protection Act of **2004** (Nov. 19, **2004**), http://www.senate.gov/~ dodd/press/Releases/04/1119.htm.

[FN292]. General Assembly of the Organization of American States, AG/Res. 2121 (XXXV-0/05) Access to Public Information: Strengthening Democracy, (May 26, **2005**).

[FN293]. See Henry H. Perritt, Jr. & Christopher J. Lhulier, Information Access Rights Based on International Human Rights Law, 45 Buff. L. Rev. 899 (1997). The World Bank and the International Monetary Fund also have been pressuring countries to adopt a more open style of government. See id. These organizations are interested in legitimatizing financial systems in these countries by eliminating secrecy and corruption. See id.

[FN294]. David Banisar, The Freedominfo.org Global Survey: Freedom of Information and Access to Government Record Laws Around the World 3 (**2004**).

[FN295]. Joint Declaration of the Special Rapporteurs, supra note 166.

[FN296]. Id.

[FN297]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 4. The Declaration also provides that "[e]very person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained

in databases or public or private registries, and if necessary to update it, correct it and/or amend it." Id. Principle 3.

[FN298]. Banisar, supra note 294, at 3. At least forty of these countries enacted freedom of information legislation in the past decade. Freedom of Expression Rapporteurs Call for more open Government, International Freedom of Expression eXchange [IFEX], http://www.ifex.org/en/content/view/full/63092/.

[FN299]. Banisar, supra note 294, at 1-2. Banisar provides each State's access to information laws as of May **2004**. See id.; see also Parker, supra note 235.

[FN300]. Parker, supra note 235.

[FN301]. Banisar, supra note 294, at 4.

[FN302]. Joint Declaration of Special Rapporteurs, supra note 166.

[FN303]. Banisar, supra note 294, at 5.

[FN304]. Marcel Claude Reyes v. Chile Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/11.118, doc 70 rev. 2, at 222 (**2003**).

[FN305]. See id.; see also Written Comments of Open Society Justice Initiative et. al. as Amici Curiae in the Marcel Claude Reyes v. Chile case.

[FN306]. Marcel Claude Reyes v. Chile, Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/II. 118 Doc 70 rev. 2, at 222 (**2003**); see also Open Society Justice Initiative, First Freedom of Information Case Reaches America's Court, Inter-American Commission Finds Chile in Violation of Human Rights Charter, July 14, **2005**.

[FN307]. Marcel Claude Reyes v. Chile, Case 12.108, Report No. 60/03, Inter-Am. C.H.R., OEA/Ser. L/V/II. 118 Doc 70 rev. 2, at 222 (**2003**).

[FN308]. Karaca, supra note 1, at 7.

[FN309]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 33 (Nov. 13, 1985). The Inter-American Court's comments against monopolization of the media were made in the context of an advisory opinion which has no binding force. See id.

[FN310]. Id. P 34.

[FN311]. Id. P 33.

[FN312]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 12.

[FN313]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, P 34.

[FN314]. Karaca, supra note 1, at 10.

[FN315]. Declaration of Principles on Freedom of Expression, supra note 35, Principle 2.

[FN316]. See The Declaration of Principles of Freedom of Expression in Africa, African Commission on Human and People's Rights, Oct. **2002**, Principle III.

[FN317]. ICCPR, supra note 37, art. 19.3.

[FN318]. European Convention, supra note 37, art. 10.2.

[FN319]. American Convention, supra note 13, art. 32 ("Every person has responsibilities to his family, his community and mankind," and "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.").

[FN320]. Prosecutor v. Nahimana, Barayagwiza and Ngeza Case ICTR-99-52, Judgment and Sentence P 945 (Dec. 3, **2003**).

[FN321]. Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R (ser. A) No. 5, (Nov. 13, 1985).

[FN322]. Herrera Ulloa, **2004** Inter-Am. Ct. H.R. (ser. C) No. 107, PP 132-135.

[FN323]. Canese v. Paraguay, **2004** Inter-Am. Ct. H.R. (ser. C) No. 111, P 106; Palamara Iribarne v. Chile, **2005** Inter-Am. Ct. H.R. (ser. C) No. 135, P 88.

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Article

# ***203** INTERNATIONAL RECOGNITION OF VICTIMS' RIGHTS

M. Cherif Bassiouni[FNa1]



## Abstract

Since its inception, the United Nations has adopted two General Assembly resolutions dealing with the rights of victims: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the **2006** Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The focus of the former was on victims of domestic crimes, while that of the latter is on victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The **2006** Principles are, for all practical purposes, an international bill of rights of victims. Their adoption has been hard-fought, but their implementation both at the national and international levels is sure to still face many obstacles. Parallel to this historic development have been decisions by the European Court of Human Rights and the **Inter-AmericanCourt** of **HumanRights**, as well as provisions in the statute of the International Criminal Court (ICC), giving standing to victims in ICC proceedings, but also certain rights of compensation. These parallel developments, as well as others within domestic legal systems, evidence a wide movement towards the recognition of the rights of victims of crime, whether domestic or international, or gross violations of human rights. This article re-traces the historic origin of victims' rights in domestic and international legal systems, focusing particularly on the adoption of the two international instruments mentioned above, and more particularly on the negotiating history of the **2006** Principles. A detailed commentary of these Principles constitutes the centerpiece of this article.

## *2041. Introduction

This article outlines a theory of victims' rights, reviewing the historical evolution of the concept and elucidating recent developments, and argues for a strengthening of current victims' rights norms. [FN1] In accordance with these norms, States must respect, ensure respect for and enforce international human rights and humanitarian law norms contained in treaties to which they are a State Party, in customary international law or in domestic law. The obligation to respect, ensure respect for, and to enforce international human rights and

humanitarian law includes a State's duty to prevent violations, investigate violations, punish violators, provide victims with equal and effective access to justice and provide for or facilitate reparation to victims.

Even more crucially, this article seeks to fundamentally alter the legalistic frameworks of international human rights and humanitarian law that have traditionally ignored victims' perspectives. By squarely adhering to a victimcentric rather than a conflict-centric perspective, this article reformulates definitions of international crimes, making them dependent on the suffering experienced by victims rather than the nature of the conflict or the context within which such violations took place. The literature on victims is as disparate as are the disciplines concerned with the subject. This includes victimology, criminology, penology, criminal law and procedure, comparative criminal law and procedure, international criminal law and human rights. Each of these disciplines pursues different goals, relies on different methodologies, employs different terminology and provides for different roles and rights for the victim. More importantly, there is a lack of commonly-shared understanding between these disciplines as to the role and rights of victims. If the victim is our concern and interest, then legal distinctions and technicalities surrounding various classifications of crimes against victims should be re-conceptualised. [FN2] For instance, this article's approach would make it irrelevant to focus on whether a victim of torture was abused in the context of an international conflict, an internal conflict or as a result of police brutality outside of any such conflict. Rather, the issue of the torture itself would be central to a legal analysis, and would be framed from a victim's viewpoint. Up to now, international human rights law and humanitarian law have created multiple ***205** overlapping sources of law that apply to such victimisation. [FN3] Thus, from a purely legal perspective, victims' fate and the punishment of violators vary and depend on whether lawyers apply international human rights law, international humanitarian law, international criminal law or domestic criminal law. Such distinctions are of little significance to victims in their quest for redress.

A significant gap exists between international human rights law and international criminal law. [FN4] The parallel nature of these two bodies of law limits the reach of international criminal law to punish fundamental human rights violations. These rights generally remain without effective enforcement, except as provided for in the European Court of Human Rights (ECtHR) and the **Inter-AmericanCourt** of **HumanRights** (IACtHR). [FN5] If the concept of victims' redress continues to develop in a compartmentalised fashion with gaps and overlaps, victims' rights will never be effectively addressed. [FN6]

So far, international legal instruments have not given victims a greater role than those provided under national law. Nevertheless, international human rights law has sought to slightly expand victims' right to access, disclosure, compensation, **reparations**, and above all, symbolic recognition in the context of criminal proceedings.

While there is a growing symbolic recognition of the victim in national criminal proceedings, there is only a limited right for the victim to have access to criminal proceedings, except with respect to those crimes for which public criminal action can only start with an individual's complaint. The area where there has been most growth, both at the international and national law levels, has been with respect to victim compensation. However, it should be noted that while victim compensation is sometimes regarded as justice, it is also regarded as a way of inducing victims to participate in the process so as to

enhance successful ***206** prosecution. Up to this point there is no evidence in international or national law that there is a right to compensation, **reparations**, and redress other than as a consequence to the establishment of responsibility for the harm produced. Thus, the idealistic notion of providing compensation, **reparations**, and redress to a victim on the basis of human or social solidarity is not yet part of mainstream legal thinking, particularly in connection with criminal proceedings. Instead, we find this notion of human and social solidarity in social legislation that provides assistance to those in need and includes victims. However, within this legal context, the person who receives public assistance or support is not considered a victim as in the case of criminal and civil proceedings. Thus, an important distinction must be made between criminal and civil legal proceedings that are driven by the concept of responsibility as opposed to human and social solidarity reflected in social assistance and support programs that are driven by other considerations. This article begins with a discussion of the evolution of victims' rights in international law then sketches the normative framework of a victim's right to reparation under classical international law, and also reviews the jurisprudence of regional and international courts on victims' rights. The article outlines some mechanisms for obtaining reparation for victims, then summarises the history and goals of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (**2006** Basic Principles and Guidelines). [FN7] The article ends with reflections on economic and political obstacles to victims' rights.

## 2. The Evolution of Victims' Rights in International Law

From the early recorded legal systems a private cause of action has existed for persons who have suffered personal harm or material damage at the hands of another. [FN8] The right to redress in its various forms has existed in every ***207** organised society. Significantly, no legal system known to humankind has ever denied the right of victims to private redress of wrongs. [FN9]

Redress of wrongs is a fundamental legal principle that constitutes both a general principle of law and a customary rule of law recognised and applied in all legal systems. This principle applies to private claims for which the collectivity, tribe or State provides a forum and enforcement of the remedy. If ever there was an implied social contract [FN10] between individuals and their collective entity, it was to provide access to some form of justice, to ensure that the justice process functioned, and to enforce a remedy for the aggrieved party. The right to redress was often based on some concept of responsibility rather than human or social solidarity, but did not extend to claims against the collective entity.

Providing remedies to victims of crimes finds its roots in the earliest societies and in many early religious traditions. Legal systems throughout history have provided different fora for the adjudication of claims. They differed as to access, procedures, remedies and decision-making processes. Some were more readily accessible, such as tribal councils, which are still in existence in certain tribal societies in Africa, Asia, the Arab world, South America and other sub-regions of the world. [FN11] Anthropological studies show that tribal societies had a more advanced concept of social responsibility than that existing in modern societies. Some so-called primitive or tribal systems even provided for what is now called punitive damages as opposed to only restorative damages. [FN12]

Provision of remedies to victims of crimes has historically been seen as a way to settle disputes between the offender and the victim, thus preventing individualised vindication and further disturbances of peace. [FN13]***208** However, with the centralising of the administration of justice by European States, and as retributivism gained increased acceptance as the dominant theory of criminal punishment, victims' rights to redress were marginalised during the 1700s and 1800s. Not until the late 1800s did victims' rights play a more significant role in the administration of justice once more. Better organised victim-oriented institutions and a widespread shift away from a purely retributive theory of criminal justice expanded the role of victims in the legal process and their right to redress. The Age of Enlightenment brought about new concepts such as humanism and the rule of law as the mediator of personal and collective grievances. [FN14]

The 20th century saw the beginning of wars in which new weapons wrought even more devastating human victimisation and material destruction. This culminated in the tragedies of World War I (WWI) [FN15] and World War II (WWII). International law's concern for the protection of the individual is in part a result of legal developments that occurred in the wake of the atrocities of WWII and the international community's subsequent pursuit of individual criminal responsibility. [FN16] Once international law made individuals subjects of that discipline for the purposes of international criminal responsibility, the individual became the subject of international legal rights, which ***209** explains, in part, the beginning of international human rights law. [FN17] Until WWII, the rights and obligations of the individual *vis à vis* the State were the exclusive prerogative of municipal law, and a State was free under international law to treat its own citizens as it pleased. [FN18] The magnitude of human victimisation arising out of WWI and WWII and the conflicts thereafter derived essentially from State action, either intentional or negligent. This new reality brought to the fore the need to extend the same rights and obligations that existed among the individuals within a society to the relationship between the individual victim and his/her victimiser. After WWII, numerous international instruments established protections and rights for individuals, requiring States to enact domestic legislation to protect these rights. [FN19]

The international community's enunciation of internationally protected individual rights was accompanied by efforts to ensure the protection of these rights through a variety of international enforcement mechanisms. [FN20] Indeed, many instruments on the protection of human rights have created special monitoring bodies as well as procedures to receive complaints of violations of individual rights, and to investigate or adjudicate them, or at least to report on such violations. [FN21]

Despite the post-WWII human rights conventions, within 50 years of WWII conflicts of an international and non-international character resulted in ***210** casualties double those of the two World Wars. [FN22] An estimated 70-170 million people have died since WWII in over 250 conflicts around the world. [FN23]

However, in the aftermath of WWII, a number of human rights and victims mechanisms continued to flourish. A notable example of this trend is the development of the European human rights system, where individuals can bring claims before the ECtHR for violations of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). [FN24] Classic notions of rights and responsibilities for victim redress were extended beyond private actors to public actors, at least in the doctrine of State

responsibility. [FN25] The very nature of large-scale victimisation brought about a new social basis for redress, and its impact on world order reinforced the proposition that prevention is an essential goal of security, which brought about accountability as a component of redress. [FN26]

In addition to regional mechanisms like the ECHR, national mechanisms expanded. The movement in many societies to provide compensation for victims of domestic crimes originated in developed societies whose affluence diminished economic concerns regarding compensation. A 1960s 'victimology' movement grew that was not only concerned with monetary compensation of victims of common crimes but also offered an incentive to governments by linking such compensation to victims' cooperation in the pursuit of criminal prosecutions. Canada and several states within the United States began providing victim compensation for common crimes and thereby encouraged victim participation in criminal prosecutions. [FN27] The movement gained prominence until the 1980s. ***211** when experts of victimology and other fields sought to extend monetary compensation to other forms of redress, including medical, psychiatric and psychological treatment and to expand the basis of such compensation and redress modalities to violations committed by State agencies and State officials. [FN28] By the 1980s, the movement of victim compensation started to lose momentum. States were willing to recognise victims' rights when the harm arose from individual action, but not when the harm was a product of State policy or committed by State actors. [FN29] States' reluctance increased significantly when proponents of victims' rights began to claim **reparations** for historic violations, and were successful in some of these claims. Throughout the 1980s and 1990s, the cause of victims' rights was furthered as a result of the establishment of *ad hoc* and hybrid tribunals and the International Criminal Court (ICC), various national prosecutions, and the burgeoning truth commission industry. In addition, victims' rights have been fundamentally strengthened by the **2006** Basic Principles and Guidelines. An individual victim's right to redress has increasingly become an indispensable component of efforts to protect individual human rights.

## 3. The Normative Framework of a Victim's Right to Reparation Under Classical International Law

What follows is a description of victims' rights and means of redress under contemporary international law.

### *A. State Responsibility*

The doctrine of State responsibility has long existed. While it comprehends responsibility for wrongful conduct against individuals, the doctrine has historically only applied between States, and has not recognised individual claims against States. Individual claimants have to resort to their State of ***212** nationality to espouse their claims, and present them as a State claim against another State. [FN30] From the Peace at Westphalia in 1648 to WWII, the State has been the primary subject of international law. Individuals were deemed objects and not the subjects of rights and obligations that derived not from international law. But before national law the individuals were legal subjects. Individuals who were harmed by a State other than their State of nationality could only claim fulfilment of rights through their own State of nationality. This pre-supposed that the State of nationality would espouse its national's claim and pursue it through diplomatic channels or

by judicial means. [FN31] Such an assumption evidences the State-centric nature of international law, whereby injury to a State's citizens is deemed an indirect injury to the State itself. [FN32] Vattel expressed this concept in the late 1700s in *Les Droits des Gens*, wherein he states: '*Quiconque maltraite un citoyen offense indirectement l'état qui doit protéger ce citoyen.*'[FN33] This is still the foundation of States' claims on behalf of their nationals. Indeed, a State that presents a claim against another State for injuries to its citizens, does so purely on a discretionary basis. [FN34]

States, however, remain averse to committing themselves to accountability to individual victims for obvious political and economic reasons. [FN35] States that resort to the use of force are reluctant to acknowledge even the principle of civil liability for individual harm and property damage. These States argue legal technicalities about the differences of legal sources and their binding obligations, distinguishing between international humanitarian law, human rights law and ***213** international criminal law. Moreover, such States almost always rely on traditional doctrines of State sovereignty in international law to oppose responsibility. [FN36]

### *B. States' Duty to Provide a Remedy Grounded in International and Regional Conventions*

A State's duty to provide a domestic legal remedy to victims of violations of international human rights and humanitarian law norms committed in its territory is well-grounded in international law. Provisions of numerous international instruments either explicitly or implicitly require this duty of States. Furthermore, a survey of contemporary domestic legislation and practice reveals that States endeavour to provide remedies for victims injured within their borders.

The existence of a States duty to provide a remedy is grounded in several international and regional conventions. The Hague Conventions of 1899 [FN37] and 1907 [FN38] were the first international instruments codifying the customary law of armed conflicts. Under these conventions, violations by a State engaged in an international armed conflict that resulted in physical harm or damage to civilians and to civilian property, as well as harm to combatants protected by these customary norms, resulted in the right of the State of nationality to request compensation on behalf of its citizens. [FN39] This recognition gave rise to damages based on the injuries of individuals, but did not give rise to an individual right of legal action against a State. [FN40] In keeping with the law of diplomatic protection, it simply allowed the State of nationality or the territorial State in which the violations of these norms occurred to present a claim against the State that committed these violations.

Since WWII, human rights have been codified in numerous international instruments. [FN41] With respect to violations of international humanitarian law, the following additional conventions implicitly recognise the right to a remedy. These conventions impose a duty on the violating party to provide compensation for violations: (1) the Geneva Convention Relative to the Treatment of Prisoners of ***214** War; (2) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and (3) Protocol I Additional to the Geneva Convention. [FN42]

Moreover, several regional conventions [FN43] also provide for an individual's right to redress or to receive compensation. For example, the ECHR and the American Convention

on Human Rights (ACHR) provide for individual compensation for damages arising out of a State's violation of protected rights. [FN44]

Likewise, the International Covenant on Civil and Political Rights 1966 (ICCPR) expanded victims' rights. Article 2(3) provides that each State Party to the ICCPR undertakes to:

> (a) ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) ensure that the competent authorities shall enforce such remedies when granted.

While the ICCPR does not mandate a State Party to pursue a specific course of action to remedy the violation of protected rights, the language of this provision clearly envisages that the remedy is effective, of a legal nature and enforceable. Significantly, the ICCPR renders the 'act of State' defence inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity. This limitation is fundamental to ensuring that human rights and international humanitarian law violations are remedied, since these acts are often committed only by States. The State Parties to the ICCPR established the United Nations Human Rights Committee (HRC) in 1976, with the goal of ensuring compliance with the provisions of the ICCPR. The jurisprudence of this body has made considerable contributions to defining and clarifying victims' right to redress arising under the provisions of the ICCPR. [FN45]

***215** The International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) also exemplifies an explicit requirement that States provide a remedy. This convention requires States Parties to:

> assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. [FN46]

Like the ICCPR, ICERD envisages that the remedy be effective and carried out by competent tribunals and officials.

Other conventions also explicitly require that a State provide a remedy for human rights violations or contain provisions regarding the right to some form of reparation, which implies the right to a remedy. [FN47] For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, contains language identical to the aforequoted provision of the ICCPR. [FN48]

In addition to conventions, which create binding obligations on the part of States Parties, numerous international declarations re-affirm the principle that a State has a duty to provide a remedy to victims of human rights abuses and international humanitarian law. The 1993 World Conference on Human Rights emphasised the need for victim reparation stating, '[e]very State should provide an effective framework of remedies to redress human rights grievances or violations'. [FN49]

***216** Several declarations of international and regional organisations reflect the principle that a State has the duty to provide a remedy. For example, the Universal Declaration of Human Rights (Universal Declaration) plainly articulates that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. [FN50] The United Nations Declaration on the Elimination of All Forms of Racial Discrimination further reflects the concept that 'everyone shall have the right to an effective remedy and protection against any discrimination ... through independent national tribunals competent to deal with such matters'. [FN51] In addition, the Declaration on the Protection of All Persons from Enforced Disappearance envisions a duty to provide 'an effective remedy' as a means of determining the status of such disappeared individuals. [FN52] Furthermore, the Declaration requires 'adequate compensation' for victims. [FN53] The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that the victim of official torture be 'afforded redress and compensation in accordance with national law'. [FN54] The American Declaration on the Rights and Duties of Man provides that 'every person may resort to the courts to ensure respect for his legal rights'. [FN55] The Muslim Universal Declaration on Human Rights, issued by the Islamic Council, states that 'every person has not only the right but also the obligation to protest against injustice; to recourse and to remedies provided by the Law in respect to any unwarranted personal injury or loss'. [FN56]

A comprehensive treatment of this duty was also found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985 Basic Principles of Justice). [FN57] These Principles set forth comprehensive details concerning a State's duty to provide a remedy to individual victims. [FN58] They provide that victims are entitled to redress and recommend that States establish ***217** judicial and administrative mechanisms for victims to obtain prompt redress. [FN59] However, the 1985 Basic Principles of Justice are primarily concerned with the victims of domestic criminal law and are only applicable in the event that the domestic criminal law of a given State has incorporated the applicable international human rights or humanitarian norm. [FN60]

Specific language in international instruments articulates the duty to provide **reparations**. With respect to violations of international humanitarian law, the major conventions that regulate armed conflict contain provisions both vesting individuals with the right to claim compensation against State Parties and requiring States to provide reparation for their breaches. [FN61]

Treaty-based and customary law do not impose an explicit duty on States to create special procedures. However, the language of the international instruments noted earlier contemplates that the remedy be 'effective' and administered by 'competent' tribunals and personnel in order to provide 'just' and 'adequate' **reparations**. Thus, to the extent that a State's existing legal framework is inadequate to handle the claim, it would seem that the

State is implicitly in violation of the requirements of the treaty-based law. [FN62]

Even in instances where the judicial system has not collapsed, a State may find it advantageous to establish special procedures with respect to situations involving numerous claimants, or with respect to the settlement and distribution of the proceeds of lump sum agreements between States. [FN63]

Treaty-based and customary law reflect the principle that States' nationals and aliens should have the right to a remedy for violations committed within a State's territory. [FN64] This is evidenced in treaty-based law by the use of ***218** language such as 'any persons' [FN65] and 'everyone within their jurisdiction'. [FN66] Failing to provide an alien with an effective remedy amounts to a denial of justice that subsequently gives rise to an international claim by the alien's State of nationality. Thus, clearly a State must afford national treatment to aliens in the provision of remedies for violations committed within its territory.

The aforementioned declarations also provide that human rights violations shall be remedied. If the State is the author of the violation, the duty to make **reparations** can fall to no other.

### *C. State Practice*

A survey of contemporary State practice, as evidenced in the substantive laws and procedures functioning in domestic legal systems, confirms the duty to provide a remedy to victims. Contemporary State practice, evident in a survey of various domestic legal frameworks, reinforces the hortatory statements contained in the aforementioned declarations as a norm of customary international law. [FN67] State practice reflects both the legal framework and practice of providing **reparations** to victims.

***219** In the aftermath of WWII, the first comprehensive restitution and compensation process was undertaken to remedy human rights abuses that took place during the war. Since 1949, the Federal Republic of Germany has undertaken a comprehensive effort to provide compensation for crimes committed by the Nazi regime. Subsequent to WWII, the Allies did not impose **reparations** or collective sanctions on the German people. However, claims by victims of the Holocaust were made against Germany and were advocated by the newly created State of Israel, even though that State did not exist at the time the victimisation occurred. Germany passed a law entitled 'Wieder Gut Machung,' which provided for individual compensation to Holocaust victims and, for those victims who did not have survivors, their share went to the State of Israel. Subsequently, in the years **2000**-**2003**, Germany made additional victim compensation settlements for the use of slave labour in its industry. Austria similarly compensated victims of the Holocaust and slave labour, and Switzerland compensated victims who held numbered Swiss accounts and who disappeared during WWII. These claims were driven by the World Zionist Organization with strong support from the US government. Some major Jewish organisations had, for years, pursued claims for the WWII Jewish Holocaust. [FN68] In the late 1990's, significant breakthroughs occurred when the World Zionist Organization was able to negotiate a substantial settlement with Swiss banks, followed by similar successful settlements with German and Austrian industries between 1999-**2001**. [FN69] The German remedies provided in the aftermath of WWII have 'focused both on restitution and on compensation

for individual suffering, loss of life, health and liberty'. [FN70] Through a series of laws and agreements (starting with the 1952 Luxemburg Agreement between the Federal Republic ***220** of Germany, the State of Israel and the Jewish Claims Conference), the German government and private corporations have provided over $104 billion (US) for compensation to victims of Nazi crimes. [FN71] In addition to providing material compensation for personal injuries, deprivation of freedom and other abuses that have been perpetrated on account of race, religion, political belief, physical disability or sexual orientation, the German government and industry have also provided other forms of remedies including apologies, [FN72] laws providing restitution for lost property, [FN73] compensatory pensions and other compensatory laws and agreements and settlements aimed to supplement the legal framework noted earlier. [FN74] Germany has also entered into a number of bilateral agreements with European nations and the United States pursuant to which further compensation was paid to victims and their families. [FN75]

The US government provided redress to American citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated and interned by the government during WWII. [FN76] Through the enactment of the 1988 Civil Liberties Act, the Unietd States government provided $20,000 (US) to each Japanese American person interned during WWII who survived until 1986. [FN77] The total cost of the effort to compensate this group of victims is ***221** estimated at $1.65 billion (US). [FN78] The US has also provided remedies arising out of the Indian Tribe Land Claims, [FN79] the Tuskegee Syphilis Study [FN80] and the claims of victims arising out of the 1923 Rosewood massacre. [FN81] The US government, however, has not recognised claims made by the descendants of former slaves. [FN82]

In an effort to account for its human rights abuses of past decades, Chile has created a national commission whose goal is to provide compensation to victims' families. [FN83]**Reparations** include monthly pensions, fixed sum payments and health and educational benefits.

Finally, corporations (such as banks and insurance companies) that have benefited from human rights abuses have also provided material **reparations** to victims as a result of both class action suits filed against them and media, non-governmental organisation (NGO) and political pressure. [FN84] There is thus ***222** some indication that State practice supports a State's duty to provide **reparations** for serious violations of human rights and international humanitarian law. However, this remains a contested matter, as evidenced by the recalcitrant State practice of countries like Japan. Where Germany sought to compensate Holocaust victims, to deliver justice to war criminals and to bear witness to the historical record, Japan, while providing monetary and developmental aid to the nations it attacked, has not accepted moral responsibility for its past action. [FN85] Japan has faced severe criticism from China and Korea for its post-war policy. Japan has provided some compensation for its use of foreign slave labour during WWII and for other violations of human rights during WWII, [FN86] establishing a private consolation fund for comfort women who claim that they were used as sex slaves during the war, [FN87] and paying monetary **reparations** to many of the individual nations it invaded (it allocated $3.9 billion (US) to the Philippines, Vietnam, Burma and Indonesia). Many governments, including Thailand and China, have relinquished their claims to Japanese **reparations** at the inter-governmental level.

However, Japan has consistently rejected individual victims' claims in its domestic courts. In recent years, former slave labourers have brought lawsuits to Japanese courts seeking compensation, however, most claims have been dismissed on the grounds that the relevant statute of limitations has lapsed and those decisions in favour of plaintiffs have yet to result in the payment of compensation. [FN88]

Many of Japan's victims' claims raised in the US courts have failed. [FN89] For example, victims of Japanese slave labour have filed over two dozen lawsuits in the US ***223** courts against Japanese corporations that employed slave labour during the war. [FN90] Plaintiffs included both US and Allied POWs, as well as civilians of various countries. [FN91] In a case consolidated in the Northern District of California, [FN92] the court dismissed the lawsuits while relying on the 1951 peace treaty with Japan, [FN93] which provided, in relevant part, for the waiver of 'all **reparations** claims by the Allied Powers, other claims of the Allied powers and their nationals arising out of any action taken by Japan and its nationals in the course of the prosecution of the war'. [FN94] A lawsuit filed by 'comfort women' who acted as sex slaves of the wartime Japanese army was also dismissed in **2001**. [FN95]

Many countries like Japan not only fail to provide material compensation, but also refuse to give victims moral compensation. The Diet of Japan has consistently refused to issue an official apology. Japanese textbooks have been criticised for downplaying the extent of Japan's war crimes. Most former Japanese Prime Ministers failed to apologise directly for the invasion of China, except in the form of the word regret (*'hansei'*), which Chinese, Korean, and peace activists in Japan consider insufficient. However, the former Prime Minister of Japan, Murayama Tomiichi, offered an official apology (*'owabi'*) in 1995 on the fiftieth anniversary of the end of WWII.

### ***D. State Reparations** for Violations Committed by Non-State Actors*

A non-State actor perpetrating a violation of human rights and international humanitarian law is individually liable for **reparations** to victims. [FN96] While it remains a laudable aspiration, a State's duty to provide reparation for violations by non-State actors is best described as an emerging norm. [FN97]

***224** With respect to Europe, the European Convention on the Compensation of Victims of Violent Crimes 1983 [FN98] (European Compensation Convention) mandates this principle in instances when applicable international human rights or humanitarian law norms are incorporated within the domestic criminal law. The European Compensation Convention was established by the Council of Europe to introduce or develop compensation schemes for victims of violent crime, in particular when the offender has not been identified or is without resources. [FN99] At a minimum, the European Compensation Convention mandates that compensation be paid to victims who have sustained serious bodily injury directly attributable to an intentional violent crime, or to the dependants of the persons who have died as a result of such crime, when compensation is not fully available from other sources. [FN100] In these instances, compensation is to be awarded whether the offender is prosecuted or not. [FN101] The European Compensation Convention does not mandate any particular compensation scheme; rather it focuses on establishing minimum provisions. [FN102] As a result, several significant limitations may be placed on a State's duty to provide compensation. Article 3 provides that:

> Compensation shall be paid by the State on whose territory the crime was committed:
>
> (a) to nationals of the States party to the convention;
>
> (b) to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.

Thus, a State Party can deny compensation to a victim who is either a nonresident or a citizen of a State that is not a member of the Council of Europe. [FN103] Furthermore, States may limit compensation in situations where a minimum threshold of damage is not met [FN104] or based on the applicant's financial situation. [FN105] Moreover, compensation can be reduced or refused: (1) on account of ***225** the victims' conduct before, during or after the crime; (2) on account of the victims' involvement in organised crime; or (3) if a full award is contrary to a sense of justice or public policy. [FN106]

With respect to the countries that are not State Parties to the European Compensation Convention, the 1985 Basic Principles of Justice provide a legal foundation for asserting that a State has a duty to provide a victim with **reparations**. The 1985 Basic Principles of Justice provide that:

> [W]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:
>
> (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of a serious crime;
>
> (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization. [FN107]

While this recommendation envisions **reparations** to victims of crime, it would be applicable in cases where the relevant international violations had been incorporated into the domestic criminal law. A survey of national systems reflects this principle in the growing State practice of providing **reparations** to victims of crime and their families when the perpetrator is unable to do so. [FN108]

In 1996, the United Nations (UN) surveyed State practice with respect to the implementation of the 1985 Basic Principles of Justice, and received responses from 44 States. [FN109] In Cuba, Denmark, Finland, France. Mexico, Jordan, Romania and Sweden, financial compensation from the State was 100% of the **reparations** that the victim could claim from the offender. [FN110] Furthermore, 18 States reported that State funds for compensation to victims had been established pursuant to the recommendations in the 1985 Basic Principles of Justice. [FN111]

The concept of providing **reparations** from sources other than the violator has also been recognised at the international level in the ICC Statute. [FN112] The principle is being put into practice as evinced by the efforts of individual States and the world community (for example, through the trust fund contemplated by the ICC Statute). [FN113] Thus, the groundwork is being laid for establishing collective responsibility that seeks to make victims whole again.

***226** However, while the European Compensation Convention and the 1985 Basic Principles of Justice set an important precedent establishing States' duty to provide **reparations** for the conduct of non-State actors, this duty is neither a universal norm nor without significant reservations.

### 4. Regional and International Courts' Jurisprudence on Victims' Rights

#### *A. Jurisprudence from the Inter-AmericanCourt of HumanRights*

International human rights law instruments contain a general provision that States Parties are under an obligation to respect or secure the rights embodied in the instrument. [FN114] These provisions have been interpreted by international bodies to require that some violations--namely serious violations of physical integrity, such as torture, extra-judicial executions and forced disappearances--must be investigated and those responsible for them brought to justice. *A fortiori*, this applies to *jus cogens* international crimes.

The groundbreaking case in which such an interpretation was first adopted is the case of *Velásquez-Rodríguez* before the IACtHR. [FN115] The case concerned the unresolved disappearance of Velásquez-Rodríguez in Honduras in violation of Article 7 of the ACHR, which, according to the findings of the Inter-American Commission, was committed by persons connected to or acting in pursuance of orders from the armed forces. The IACtHR interpreted Article 1(1) in conjunction with Article 7 to mean that '... States must prevent, investigate, and punish any violation of the rights recognised by the Convention and ... if possible to restore the right violated and provide compensation as ***227** warranted for damages resulting from the violation'. [FN116] The Court furthermore indicated that:

> the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. [FN117]

According to the IACtHR, the obligation not only requires States 'to effectively ensure ... human rights' [FN118] but also requires that investigations be conducted 'in a serious manner and not as a mere formality preordained to be ineffective'. [FN119] The Court concluded that '[I]f the State apparatus acts in such a way that the violation goes unpunished ... the State has failed to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction.' [FN120]

The IACtHR regarded this due diligence requirement to be binding 'independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal', [FN121] Thus, the obligations are equally applicable to new governments that were not in power at the time the violation occurred. Furthermore, the holding of the Court suggests that it is applicable irrespective of the scale of violations and thus even covers cases of a single, isolated violation. [FN122]

While both the IACtHR and the Inter-American Commission confirmed this in later decisions, [FN123] the exact scope of such an obligation to respect and ensure, however, is a matter of discussion, namely as regards the question of whether it implies a duty to

conduct criminal proceedings. Some warn not to read too ***228** much into the judgment because the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance despite the fact that the lawyers for the victims' families, the Inter-American Commission and a group of international experts acting as *amici curiae* had specifically made a request to that effect. In light of the absence of any express reference to criminal prosecution as opposed to other forms of disciplinary action or punishment, the obligation to investigate violations, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation does not appear to exclude non-criminal responses *per se*, as long as one assumes a broad notion of what constitutes 'punishment.' On the other hand, the Inter-American supervisory organs have derived additional criteria for the permissibility of such non-criminal responses from the right to a remedy, as provided for in Article 25 of the ACHR, and the right to a judicial process, contained in Article 8, read together with the obligation to ensure respect embodied in Article 1. The due diligence standard set forth by the ACHR excludes some non-criminal responses, namely blanket amnesties, as elucidated by the jurisprudence of the IACtHR and Inter-American Commission, which held that the amnesty laws adopted in El Salvador, [FN124] Argentina, [FN125] Uruguay [FN126] and Peru [FN127] were incompatible with the mentioned obligations flowing from the Convention. [FN128]

### *B. Jurisprudence of the HRC and ECtHR*

While differing in the degree of permissible margins of appreciation in complying with the requirements flowing from the respective instruments, the jurisprudence of the Inter-American supervisory organs was confirmed by ***229** the HRC and the ECtHR. The HRC concluded in its General Comment No. 20, [FN129] with respect to the prohibition of torture contained in Article 7 of the ICCPR, that amnesties are incompatible with the duty of States to investigate such acts; to guarantee freedom of such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible. [FN130] The HRC also confirmed its view that amnesties are incompatible with States' obligations under the ICCPR in a number of its communications. [FN131]

In contrast to the Inter-American human rights bodies and the HRC, no jurisprudence with respect to amnesties has emerged in the ECtHR as yet. However, the Strasbourg organs were confronted with the question of States Parties' obligation to investigate and prosecute violations of rights guaranteed by the ECHR. In *Selmouni v France*, [FN132] the Court had to consider whether an inquiry for alleged acts of torture was effective. The Court affirmed earlier decisions [FN133] and stated that the notion of an effective remedy [FN134] entails the State's thorough and effective investigation capable of leading to the identification and punishment of those responsible. [FN135]

In the recent decision of *Al-Adsani v United Kingdom*, the ECtHR confirmed this approach. [FN136] However, it did not accept the applicant's claim that the UK was in breach of its obligations under the ECHR by granting State immunity to Kuwaiti authorities, at whose hands the applicant suffered from torture in Kuwait, thus precluding him from civil claims of compensation against the Kuwaiti authorities. While the Court accepted '[ ... ] that the prohibition of torture has achieved the status of a peremptory norm in international law', it observed that the case at hand concerned the immunity of a State in a civil suit for

damages in respect of acts of torture within the territory of ***230** that State, rather than the criminal liability of an individual for alleged acts of torture. In such a case, the Court considered itself 'unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged'. [FN137] However, by stressing the difference between criminal and civil liability, [FN138] it might be argued that the ECtHR would have come to the conclusion that the UK was in breach of the ECHR, had it granted immunity from its *criminal* jurisdiction to individuals that were responsible for torturing the applicant.

### *C. The International Criminal Court*

One of the most important recognitions of the victim as a subject of international criminal law is contained in the ICC Statute. The Statute's scheme reflects the most advanced position that exists in established international criminal justice. This instrument recognises several significant principles concerning victims: (1) victim participation in the proceedings; (2) protection of victims and witnesses during Court proceedings; (3) the right to **reparations** or compensation; and (4) a trust fund out of which **reparations** to victims may be made. [FN139] However, it is uncertain how these provisions will be made operative and how such a right will be funded.

### *D. The Permanent Court of International Justice*

A State's duty to make **reparations** for its acts or omissions is well-established in treaty-based and customary law. [FN140] The Permanent Court of International Justice affirmed this proposition in the *Chorzów Factory Case* when it stated:

> It is a principle of international law that the breach of an engagement involves an obligation to make **reparations** in an adequate form. Reparation therefore is the indispensable complement of a failure to ***231** apply a convention and there is no necessity for this to be stated in the convention itself. [FN141]

## 5. Mechanisms for Obtaining Reparation for Victims

The provision of a remedy and **reparations** for victims of serious violations of international human rights and humanitarian law is a fundamental component of the process of restorative justice. [FN142] States and their national legal systems serve as the primary vehicle for the enforcement of international human rights and humanitarian law. Accordingly, the existence of State duties to provide a remedy and **reparations** forms the cornerstone of establishing accountability for violations and achieving justice for victims.

While monetary compensation may be central to this process, victims often desire that their suffering be acknowledged, their violators condemned and their dignity restored through some form of public remembrance. [FN143] Thus, perhaps the most important goals of this process are the 're-humanisation' of victims and their restoration as functioning members of society. Achieving these restorative goals is fundamental to both the peace and security of any State since it eliminates the potential of future revenge and any secondary victimisation that may result from the initial violation. [FN144]

Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to either the victims or their families. This often results from the reality that the provision of remedies and **reparations** are undertaken by either the violator regime or a successor government ***232** that has treated post-conflict justice as a bargaining chip rather than an affirmative duty. However, the international community has become increasingly concerned with providing a legal framework that ensures the redress of violations of international human rights and humanitarian law norms.

Providing victims with a right of reparation is, therefore, an empty victory if there is no corresponding mechanism to provide a victim with a forum to press a claim or obtain an award. One of the cornerstones of a victim's right to reparation is that States have an obligation to have some form of mechanism in place to redress violations of their international and domestic legal obligations.

### *A. National Prosecutions or Civil Remedies*

(i) Universal Jurisdiction

Traditionally, States have enacted criminal laws which provide that their national courts can prosecute anyone accused of committing crimes on their territory, regardless of the nationality of the accused and the victim. [FN145] However, under international law. States can also enact national criminal laws that allow national courts to investigate and prosecute people suspected of crimes committed outside the State's territory, including crimes committed by a national of the State, crimes committed against a national of the State and crimes committed against a State's essential security interests. There is, however, an all-inclusive form of jurisdiction called universal jurisdiction which provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the State where the court is located. Certain crimes, including, specifically, genocide, crimes against humanity, war crimes, torture, slavery and slave-like conditions, extrajudicial executions and disappearances are so serious that they amount to an offence against the whole of humanity, and therefore, all States have a responsibility to bring those responsible to justice. This view is illustrated in the Preamble to the ICC Statute. [FN146]

***233** While some States have opened their courts to victims of violations that occurred outside of their borders, this type of remedy is not without difficulties. As a general rule, the 'courts of one country will not sit in judgment on the acts of the government of another done within its own territory'. [FN147] With few exceptions, [FN148] this renders a foreign State immune for its conduct within another State's domestic legal system, regardless of whether the action attributed to the State violates international law. For example, in *Siderman de Blake v Argentina*, a US court held that Argentina was immune from legal process for its alleged *jus cogens* violations of international law. [FN149]

Notwithstanding, whilst States have been unwilling to pass judgment on the foreign sovereign, this rule has not prohibited them from sitting in judgment on the acts of citizens of another State, whether State or non-State actors. [FN150] Thus, if the domestic legal system has an adequate basis to assert jurisdiction over the person, then the State of nationality may permit either a civil claim against the violator or a *partie civile* to

complement its own criminal prosecution. In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as *partie civile* in criminal proceedings. Victims and their heirs should be able to institute legal actions to obtain compensatory damages or to receive some form of injunctive relief, compelling the inclusion of a person in national criminal prosecution or in the category of those subject to lustration laws. [FN151]

***234** A State has limited ability to provide a remedy to non-national victims who were not injured in that State's territory. Still, a limited number of national systems provide access to a remedy for alien victims. The exercise of these domestic remedies is quite limited as a result of both strict jurisdictional requirements and the reality of enforcing the judgment.

(ii) The US Alien Tort Claims Act

Under the Torture Victim Protection Act, [FN152] the United States provides jurisdictional grounds for its nationals to sue an individual for an official act of torture. However, this cause of action is limited by both the claimants' ability to gain *in personam* jurisdiction over the defendant and their exhaustion of local remedies in the foreign jurisdiction. A requirement of personal jurisdiction over the offender constitutes a serious limitation with respect to the victim's pursuit of a remedy, whether civil or criminal. Unless the offender happens to be in the jurisdiction by chance, this remedy is often meaningless. However, the national's State could request extradition based on a protective interest theory. Nevertheless, if the victim was unable to obtain a remedy in the foreign State, it is doubtful that the State would either extradite the individual or enforce a foreign civil or penal judgment.

The US Alien Tort Claims Act (ATCA) [FN153] provides that 'the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. [FN154] Over the past 20 years, claims have been filed under the ATCA by alien plaintiffs ***235** for genocide, [FN155] war crimes, [FN156] slavery, [FN157] torture, [FN158] forced disappearance, [FN159] arbitrary detention, [FN160] summary execution, [FN161] cruel, unusual and degrading treatment [FN162] and environmental damage. [FN163] Under the ATCA, only violators in their individual capacity can be named as defendants and, as such, a violator foreign State is immune. [FN164] Furthermore, the court must be able to exercise *in personam* jurisdiction over the individual defendant, which requires the defendant to be present in the United States at least for service of process. This requirement presents a unique challenge, and severely limits the ability of a plaintiff to pursue a claim, as personal jurisdiction is often achieved only by chance. For example, in one case, a victim of torture in Ethiopia who was living in exile in the United States stumbled across her former torturer in a hotel in Atlanta where they both happened to work. [FN165]

One of the most important cases interpreting the ATCA is the *Kadic* case decided by the Second Circuit Court of Appeals in 1995. [FN166] In that case, two groups of victims from Bosnia and Herzegovina brought actions for damages (under the ATCA) against Radovan Karadzic, the then-President of the Serbian part of the Bosnian Federation called Republika Srpska. The victims and their representatives asserted that they were victims of various atrocities including brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution which were carried out by Bosnian-Serb military forces as part of a

genocidal campaign conducted in the course of the war in former Yugoslavia. [FN167] Karadzic's liability was predicated on the fact that the plaintiff's injuries were committed 'as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by military forces under his command'. [FN168]

***236** The suit was dismissed in September 1994 by a District Court judge who held that 'acts committed by non-state actors do not violate the law of nations'. [FN169] Finding that the 'current Bosnian-Serb warring faction' did not constitute a 'recognized state', [FN170] and that 'the members of Karadzic's faction do not act under the color of any recognized state law,' the District Judge found that 'the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied' thorough the ATCA. [FN171]

The Court of Appeals reversed that decision, holding that the plaintiffs sufficiently alleged violations of customary international law and the laws of war for the purposes of the ATCA. The Court dismissed the argument that the law of nations 'confines its reach to state action'. [FN172] Rather, the Court of Appeals held that 'certain forms of conduct violate the law of nations whether undertaken by those acting under the 'auspices of the state or only as private individuals'. [FN173] Noting that the customary international law of human rights 'applies to states without distinction between recognized and unrecognized states', the Court held that the plaintiffs sufficiently alleged that Republika Srpska was a 'State' and that Karadzic acted under colour of law for the purposes of international law violations requiring official action. [FN174] Finally, the Court held that Karadzic was not immune from personal service of process while an invitee of the UN [FN175] and that the causes of action brought by the plaintiffs were not precluded by the political question doctrine. [FN176] As a result of these findings, the decision of the District Court was reversed and the cases were remanded for further proceedings. [FN177]

The potential monetary judgments in ATCA cases are substantial. For example, in *Mushikiwabo v Barayagwiza*, over $100 million (US) was awarded ***237** to five plaintiffs against a single defendant arising out of the genocide in Rwanda. [FN178] But the actual likelihood of attaining full satisfaction from the defendant is minimal; unless the defendant has significant assets in the jurisdiction or his State of nationality is willing to enforce the judgment, the victim is likely to receive virtually no compensation. [FN179] ATCA cases illustrate that domestic remedies in a third State can be complicated due to the lack of effective inter-State mechanisms for the recognition of foreign judgments. [FN180] However, it does serve the purposes of documenting the violations and providing, at the very least, a public forum for the victim to expose and denounce the perpetrator.

Many domestic courts are not willing or able to fulfil and enforce international and domestic legal obligations. In some cases, a violator regime is still in power or the domestic legal infrastructure has been so devastated by conflict that it is unable to cope with claims. [FN181]

(iii) Specialised National Courts

An example of a national human rights mechanism established by the parties to the conflict in the former Yugoslavia, and pursuant to an internationally-brokered peace agreement, is the Commission on Human Rights (which is ***238** comprised of an Ombudsperson and a Human Rights Chamber) established pursuant to the provisions of the

Dayton Peace Agreement signed in Paris on 14 December 1995. [FN182] Pursuant to the terms of the Peace Agreement, [FN183] the Human Rights Chamber, had jurisdiction over violations of human rights as provided in the ECHR, as well as 15 other documents provided for in the Peace Agreement. [FN184] The Chamber was composed of 14 members, eight being appointed by the Committee of Ministers of the Council of Europe, four members appointed by the Federation of Bosnia and Herzegovina and two members by Republika Srpska. [FN185] Victims could submit cases to the Chamber either in their individual capacity or through representative organisations and groups. In cases where a violation was found, the Chamber had competence to award **reparations** which it deemed most appropriate to redress the violation in question, including restitution of illegally taken property and monetary compensation. Although alternative forms of reparation have been awarded in a small number of cases, the principal form of redress awarded by the Chamber has been monetary compensation. [FN186]

### *B. Regional Commissions and Courts*

Several regional mechanisms also exist that provide victims with an alternative venue to pursue a claim. These include the African, American and European human rights commissions and courts. [FN187] These entities provide an important check to national systems. However, it should be noted that they are not venues of first instance as they all require victims' prior exhaustion of domestic remedies.

In the Inter-American System, the victim presents claims first to the Inter-American Commission. [FN188] The Commission investigates the claims and attempts to facilitate a settlement with the offending State. [FN189] If this is not accomplished ***239** and there is merit to the claim, then the Inter-American Commission may submit the claim to the IACtHR, if the defendant State has accepted that Court's jurisdiction. [FN190]

While the victim also has a right of access to the ECtHR, the jurisprudence of the ECtHR includes many decisions involving several Member States as to the rights of victims with respect to access to national criminal proceedings. This jurisprudence evidences the symbolic nature of victims' participation in domestic legal processes even when such a right is legislatively recognised. However, the ECtHR has never recognised that under the ECHR a victim has a right to participate in national criminal proceedings if national law does not provide such a right. Some legal systems allow the victim to initiate a criminal action but through an official channel such as the prosecutor or the judge of instruction. However, even in those cases, the victim does not have the right to examine witnesses or appeal decisions in criminal cases. Criminal proceedings are more limiting than civil proceedings, which are not only initiated by the victim but are carried out by the victim, who is the moving party in the proceedings. The jurisprudence of the ECtHR that limits the rights of victims in the course of criminal proceedings is without prejudice to victims' rights with respect to compensation, **reparations** and other redress modalities as may be provided under national law. The jurisprudence of the IACtHR and the ECtHR has played a significant role in clarifying the rights of victims to redress and is reflected in the 1985 Basic Principles of Justice. [FN191]

### *C. International Claims or Criminal Prosecutions*

As noted earlier, victims have limited standing to pursue claims for violations of human

rights and international humanitarian law norms. Typically, such claims have had to be presented by the State of nationality or a State with a 'genuine link' to the victim. Even the language of the famous *obiter dictum* in *Barcelona Traction* conceived of *erga omnes* obligations owed to 'the international community as a whole', and did not imply an individual right of enforcement. [FN192] However, international treaty bodies such as the Committee Against Torture, established by the Convention Against Torture, [FN193] provide for different standing thresholds. Movement in this direction is positive but, as yet, incomplete in assimilating the rights of victims and their access to justice.

***240** (i) United Nations Compensation Commission

In 1991, after the war in Iraq, the UN Security Council established a Compensation Fund and UN Compensation Commission (UNCC), under Chapter VII of the UN Charter, to administer and process compensation claims arising out of Iraq's unlawful invasion and occupation of Kuwait. [FN194] The UNCC was not envisioned as a court or tribunal, but rather a 'claims resolution facility'. [FN195] It was designed to deal with property compensation issues arising from unlawful activities and international human rights and humanitarian law violations. The UNCC was the first victim-compensation system ever to be established by the Security Council acting under Chapter VII of the UN Charter. It provided individual victims with a primary role in the process of compensation. In contrast to the established practice of providing compensation only to injured States, the UNCC compensation scheme provides a pioneering procedure whereby a State is required to provide direct compensation to both individual victims and corporate entities. [FN196] Since its establishment in 1991, the UNCC has received over 2.7 million claims seeking compensation in excess of $350 billion (US). [FN197] The claims were considered and resolved by panels, each of which was made up of three Commissioners who were independent experts, with the assistance of technical experts and consultants with respect to the verification and valuation of the claims. The panel's recommendations on the claims were then submitted to the Governing Council, whose membership was identical to that of the Security Council, for approval. The payment of compensation awards awarded by the UNCC was provided from the Compensation Fund established by the Security Council, which was principally funded by ***241** a percentage of the proceeds generated by export sales of Iraqi petroleum and petroleum products. [FN198] The work of the UNCC concluded in June **2005**, when the UNCC had approved awards of approximately $52.5 billion (US) in respect of approximately 1.55 million claims, of which $20.6 billion (US) has been made available to the governments and international organisations for distribution to successful claimants. Sadly, while the UNCC provided an interesting model for incorporating victims' voices in mass claims resolutions, [FN199] it also had a major impact upon ordinary Iraqis, in effect, punishing a war-weary and impoverished society for the aggressions of a dictator.

(ii) The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

In 1993, responding to serious violations of international humanitarian law committed in the former Yugoslavia, the UN Security Council passed a resolution creating the International Criminal Tribunal for the former Yugoslavia (ICTY). Security Council Resolution 827 of 25 May 1993, which contained the Statute of the ICTY, stated in its preambular language that the 'work of the International Criminal Tribunal will be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for

damages incurred as a result of violations of humanitarian law'. [FN200] In 1994, in response to the murder of approximately 800,000 Rwandans, the UN Security Council passed a resolution creating the International Criminal Tribunal for Rwanda (ICTR). [FN201]

Although both *ad hoc* tribunals play a role in the enforcement of international criminal and humanitarian law, they fail to adequately address the issue of victim **reparations**. The tribunals' statutes and judge-made rules ***242** of procedure and evidence provide only limited guidance on the issue of **reparations**. In particular, the legal provisions of both tribunals limit **reparations** to the return of stolen property 'to their rightful owners', without providing redress for personal injuries of a physical or mental nature. [FN202] Rule 106 in both the tribunals' Rules of Procedure allows a victim, or persons claiming through the victim, to bring a legal action in national courts (or other competent body) for compensation, provided that relevant national legislation is available. [FN203] Thus, the structure of the tribunals pre-supposes individual access to national courts on the part of individual victims and leaves the ultimate decision on whether to provide compensation to a victim to national justice systems. ***243** In post-war Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases. [FN204]

(iii) The International Criminal Court

The most promising potential for the development of victims' rights lies in the ICC provisions concerning victim compensation. [FN205] Rule 85 of the ICC Rules of Procedure and Evidence defines victims as: (a) 'Natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court' and (b) 'organizations or institutions that have sustained direct harm to any of their property'. [FN206] The definition of a victim under the ICC Statute and Rules is broader than those set out in the ICTY and ICTR provisions. It does not require that the victim be a direct target of the crime. [FN207] Rule 85, therefore, covers all persons who have directly or indirectly suffered harm as a result of a commission of any crime within the jurisdiction of the court. [FN208] Since the ICC definition also includes 'organizations,' this definition is also broader than the definition contained in the 1985 Basic Principles of Justice that speaks of 'persons' and does not include 'legal persons'. [FN209] The inclusion of entities in the definition of victims is established through Article 8 of the ICC Statute, which denotes certain objects as forbidden targets of military operations, [FN210] owners of which may properly be considered victims of **reparations**.

***244** The ICC also has the power to order the payment of appropriate reparation to the victims by the convicted person. [FN211] The Court, either by request or in exceptional circumstances on its own motion, may determine the scope and extent of any damage, loss and injury to victims. [FN212] The Court may, then, make an order for reparation (compensation, restitution and rehabilitation) directly against the convicted person. [FN213] Before making an order, the ICC may invite and take account of representations from or on behalf of the offender, victims and other interested persons or States. [FN214] By inviting comment from other interested persons, the Court may take into account the needs of the victim and others who might be affected by the award, such as the offender's family or a *bona fide* purchaser of property that is to be restored. In order to facilitate enforcement of awards, the ICC Statute mandates States Parties to give effect to all decisions entered. [FN215]

The ICC Statute also envisions a Trust Fund for the benefit of victims and their families. [FN216] Assets of the Trust Fund may come from money or property collected through fines or forfeiture. [FN217] The ICC Statute leaves open the determination of what the court may do with forfeitures. The Court may use forfeiture funds to order **reparations** to victims, or it can turn over the proceeds of forfeitures to the Trust Fund for distribution to victims. [FN218] The Court is powerless to order **reparations** from anyone other than the individual violator. Thus, even though the individual offender's acts may be attributed to the State, an order for **reparations** cannot be imposed on that State. However, nothing in Article 75 is ***245** to be interpreted as prejudicing the rights of victims under national or international law; thus these claims can be pursued in other fora. [FN219]

In addition to the potential for reparation, the ICC Statute contains other victim-centred notions. Specifically, the Statute envisions the creation of a Victims and Witnesses Unit. [FN220] Victims are allowed to participate in several stages of the proceedings at the discretion of the court, [FN221] including: (a) the Pre-Trial Chamber's decision to authorise an investigation; [FN222] and (b) the award of reparation. [FN223] However there is a great deal of ambiguity as well as lack of clarity in the mechanisms applicable to victims' access, participation and rights. For example, the ICC Statute uses alternatively the term 'participant' and 'party' in addressing victims without regard to the implications of these terms for the role of victims in the proceedings. If the victim is deemed a 'party', then the victim has certain procedural rights by implication. If the victim is a 'participant', then the victim has only those procedural rights specified in the Statute. As a 'participant', a victim does not have the right to present evidence or to examine and cross-examine witnesses for the prosecution and for the defence. As a 'party', it may by implication have such rights, although there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant. Nevertheless, these ambiguities have given rise to a difference in ***246** approach between the Pre-Trial Chamber and the Office of the Prosecutor, as evidenced in two Pre-Trial Chamber decisions (17 January **2006** and 29 June **2006**) that are presently on appeal before the Appeals Chamber. An expanded procedural role for the victim may be in contradiction with the role and prerogatives of the Office of the Prosecutor. It should be noted that the ICC Statute's provisions and the Rules of Procedure are very detailed as to the role of the Office of the Prosecutor, and it would be highly inconsistent with the goals and purposes of these provisions to allow the victim a parallel role or one that could be in conflict with the Office of the Prosecutor.

### *D. Limitations of National, Regional and International Prosecutions*

Although the existing national, regional and international mechanisms provide some provisions regarding **reparations**, there are several reasons why they cannot always ensure victims' access to **reparations**. [FN224] First, only some of the instruments that exist today (such as the CAT) are binding treaties. Others, such as the 1985 Basic Principles of Justice, are binding only to the degree they reflect principles of customary international law. [FN225] Such instruments are often referred to as 'soft law' because of their non-binding nature. [FN226] It is not uncommon, however, for these to be later turned into treaties or conventions. Even binding treaties that provide for victim **reparations** can be limited by States' willingness or ability to comply. [FN227] Second, many of the human rights instruments available today lack effective enforcement measures. [FN228] For example, while the CAT gives individuals the right to lodge a complaint with the Committee Against Torture, in order for the Committee to admit and examine the complaint in question

the State Party must first expressly recognise the Committee's competence to do so. [FN229] In most cases of State-perpetrated abuses and violence, the State is unwilling to do so. In addition, even if a State does recognise the jurisdiction and competence of the competent body, many States are unable to provide **reparations** to victims due to a lack of resources. [FN230]

### *2476. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The 1985 Basic Principles of Justice, [FN231] which are founded, in part, on Article 8 of the Universal Declaration, were the first international instrument to articulate victims' right to access justice and obtain reparation for their injuries. This instrument distinguishes between victimisation that occurs as a result of actions in breach of national criminal law committed by individuals, and those that are the result of an 'abuse of power' by the State. [FN232] Indeed, with respect to victims of crimes committed by other individuals, the Principles fully articulate the steps that States 'should endeavor' to take in order to provide victims with compensation, restitution and rehabilitation. [FN233] Although not specifically mentioned, this includes compensation for international crimes.

#### *A. Evolution of the Basic Principles*

In 1984, the United Nations Basic Principles of Justice for Victims of Crime and Abuse of Power were prepared by a committee of Experts which I had the honour of chairing, hosted in Ottawa by the Canadian Ministry of Justice. [FN234] The Ottawa draft was quite extensive with respect to the obligations of States for victimisation occurring as the result of a State's 'abuse of power'. However, when the text was adopted at the Seventh United Nations Congress on Crime Prevention and Criminal Justice held in Milan, Italy in 1985, the draft was significantly shortened. [FN235] Governments did not want to assume any responsibility, even for the acts of their own agents, preferring to limit victims' rights to the commission of crimes committed by non-State actors. That position persisted until the adoption of the **2006** Principles. It is also the reason why ***248** there has never been a convention on the rights of victims, even though there are many treaties dealing with many other diverse human rights issues.

After the adoption of the 1985 Basic Principles of Justice in Milan, and the General Assembly's Resolution adopting the resolutions of the Seventh United Nations Congress on Crime Prevention, there was a loss of momentum by the NGO community supporting victims' rights, and it took approximately four years for a new momentum to develop to bring about a resolution to implement the 1985 Basic Principles of Justice. However, by then, the focus had shifted away from the work of what was then called the United Nations Centre for Crime Prevention and Criminal Justice located in Vienna (UNOV), to the United Nations in Geneva (UNOG), and more specifically, to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. [FN236]

In 1989, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities entrusted a study concerning the status of the right of reparation for victims of human rights violations to Mr Theo van Boven who, in 1997, prepared the Draft Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for

Victims of Gross Violations of Human Rights and Fundamental Freedoms. [FN237] The Commission on Human Rights found this document useful, and circulated the draft among States and interested organisations for comments. The task of finalising a set of basic principles and guidelines based on the comments of interested States and organisations was then entrusted to the author by the Commission on Human Rights pursuant to its Resolution 1998/43. [FN238]

The subsequent drafting process included extensive research of extant international law norms, consultations with representatives of interested governments and organisations, as well as highly respected experts. This resulted in the preparation, by the author, of the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (**2000** Draft Principles and Guidelines), which were presented to the Commission on Human Rights in April **2000**. [FN239] Between **2000** and **2002**, the Office of High Commissioner for Human Rights ***249** (OHCHR) circulated this text, which resulted in comments being received from Member States, inter-governmental organisations and NGOs. [FN240]

However, the adoption of the draft text was delayed as a result of the September **2001** World Conference on Racism where the issue of victim compensation was contested by many States. [FN241] In preparation for the World Conference on Racism, many governments and NGOs advanced the proposition that governments which carried out racist policies, including colonialism and slavery, should be required to pay **reparations**. [FN242] Major governments with a past of colonialism, slavery and racism joined forces to put the whole question of victims' rights on hold, fearing that claims arising out of their past racial or colonial practices could be raised. The adoption of the **2000** Draft Principles and Guidelines was thus postponed by the Commission until **2001**, and then postponed again to **2002**.

This was followed by an international consultation convened by the OHCHR with the cooperation of the government of Chile to finalise the text. [FN243] A report on the consultative meeting was submitted to the Commission at its 59th session in **2003**, recommending that the Commission establish an appropriate and effective mechanism with the objective of finalising the elaboration of the Draft Principles and Guidelines. [FN244] It was desired by the majority of States that a UN normative instrument on the right to reparation for victims of human rights and humanitarian law violations be adopted. [FN245]

In accordance with Commission resolution **2003**/34, the Chairperson-Rapporteur of the consultative meeting, in consultation with Mr Van Boven and myself, prepared a revised version of the **2000** Draft Principles and ***250** Guidelines on 14 August **2003**. In accordance with the same resolution, a second consultative meeting was held in Geneva on 20-23 October **2003**. During this meeting, governments, inter-governmental organisations and NGOs reviewed the revised text and submitted comments that were incorporated by the Chairperson-Rapporteur and the two independent experts into a revised (24 October **2003**) version of the text. [FN246]

As noted by the Chairman-Rapporteur in his Report on the Second Consultative Meeting, the Draft Principles and Guidelines ‘greatly benefited from the broad consultative process facilitated by the two consultative meetings'. [FN247] The 24 October **2003** version of the guidelines incorporated ‘input from various governments, intergovernmental

organizations' and NGOs, as well as the 'ongoing efforts and assistance of the two experts.' [FN248] The preparatory work then continued with a third consultative meeting held on 29 September and 1 October **2004** in accordance with Commission resolution **2004**/34. The foundation for this consultation was a revised (5 August **2004**) version of the guidelines.

In **2005**, after some 20 years of work on the text, the Basic Principles and Guidelines were approved by Member States. The resolution was adopted by the Commission by a roll-call vote (requested by the United States) with 40 countries voting in favour, none against and 13 abstentions. [FN249] The **2006** Basic Principles and Guidelines were then placed before the UN General Assembly, which adopted them by consensus.

****251B. The Goals of the Basic Principles***

Rather than creating new substantive international or domestic legal obligations, the **2006** Basic Principles and Guidelines are drafted from a 'victim-based perspective' and provide 'mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law'. [FN250] With the goal of maximising positive outcomes and minimising the diversity of approaches that may cause uneven implementation, the principles 'seek to rationalize through a consistent approach the means and methods by which victim's rights can be addressed.' [FN251]

The provisions principally address 'gross violations of human rights law' and 'serious violations of international humanitarian law', which involve the protection of life, physical integrity and other 'matters essential to the human person and to human dignity'. In the course of consultations, various governments emphasised the need to differentiate between the terms 'gross violations', 'serious violations' and 'violations.' [FN252] The precise wording of the document evolved over time, and the adopted version refers to 'gross violations of international human rights law and serious violations of international humanitarian law', as opposed to earlier constructions which referred to 'violations of international human rights and humanitarian law'. The evolution of this wording represents an attempt to narrow the focus of the **2006** Basic Principles and Guidelines.

However, the terms 'gross violations of international human rights law' and 'serious violations of international humanitarian law' should be understood to qualify situations with a view to establishing a set of facts that may figure as a basis for claims adjudication, rather than to imply a separate legal regime of **reparations** according to the particular rights violated. [FN253] In addition, the Principles and Guidelines also address separately violations of human rights and humanitarian law that 'constitute international crimes or that require States to take measures associated with criminal violations such as ***252** investigation, prosecution, punishment and international cooperation in connection with the prosecution or punishment of alleged perpetrators'. [FN254]

Throughout the consultations, some States sought to underscore the differences between international human rights law and international humanitarian law. Some States emphasised that international humanitarian law is a separate body of law that has no place in a human rights instrument. [FN255] The final wording adopted in this respect seems to adopt this viewpoint and seeks to clearly differentiate the two bodies of law. The **2006** Basic Principles ***253** and Guidelines refer to two separate bodies of law and apply differing

standards in connection with each. [FN256] This wording gives the appearance that these two bodies of law are fully separate and distinct. Principle 2 of the adopted text refers to 'respective bodies of law', which further indicates a substantive division. This view, however, ignores moves towards the union of the two regimes. During consultations in **2003**, the government of Chile argued that the ICC Statute already criminalises violations of both the international human rights and humanitarian law, thus setting a precedent for the unification of the two sources of law. Chile also went on to describe a second precedent set when the Security Council established the ICTY which specifies its rulings are 'without detriment to the right of victims to reparation'. [FN257]

Throughout the process, the present author emphasised the fact that distinguishing between types of violations diminishes the purpose of the document and its relevance to the victims. The document does not address the substantive claims of human rights and international humanitarian law and it does not enumerate what falls under their respective ambits. It simply says that violations require remedies. [FN258] However, it is clear from the comments and approaches of various Member States and the wording of the **2006** Basic Principles and Guidelines that there is significant resistance to conceptualising international human rights law and international humanitarian law as linked and unified. [FN259]

***254** The relationship between the right to reparation in human rights law and that in relevant international humanitarian law is complex, filled with overlapping norms. Non-derogable human rights, such as the right not to be tortured, killed or enslaved, intersect with norms of international humanitarian law. A normative connection exists between the right to reparation in both ***255** international human rights law and international humanitarian law. [FN260] The International Committee of the Red Cross describes international humanitarian law as 'the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities'. These rules are to be observed by both governments and any other parties involved in the conflict. [FN261] Human rights law stems from the same commonly shared human values as international humanitarian law. There is an overlap between the two legal regimes. The **2006** Basic Principles and Guidelines attempted to create a bridge between international human rights and humanitarian law, because for victims it would be artificial and counterproductive to make separations on the basis of legal definitions.

The evolution of international humanitarian law has not always been linear. There have been overlaps and gaps, and it is sometimes difficult to retrace an obligation or right to an initial legal source. [FN262] This article argues that irrespective of how the issue is approached by each source, it is imperative that we consider the violation from the point of view of the victim. [FN263] UN Secretary-General Kofi Annan emphasised the importance of a victim-based perspective in his address to the **2003** Commission on Human Rights:

> When we speak of human rights, we must never forget that we are laboring to save the individual man, woman or child from violence, abuse and injustice. It is that perspective--the individual's--which must guide your work, and not the point of view of contending States. [FN264]

### *C. Defining the Term 'Victim'*

An issue of concern during consultations was the precise definition of a 'victim.'

Throughout the consultation process it was important that a victim be considered a person and not a moral or abstract entity. That person, however, could be part of a collectivity or group. [FN265] Principle 8 of the **2006** Basic Principles and Guidelines defines 'victims' of gross violations of international ***256** human rights law and serious violations of international humanitarian law as follows:

> Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. [FN266]

The aforequoted definition [FN267] is quite similar to that adopted by the Preparatory Commission on the Establishment of the ICC in its Rules of Procedure and Evidence. [FN268] The definition contemplates four types of victims: (1) those individuals who directly suffer harm; (2) dependents or family of a direct victim who suffer indirectly because of the primary victimisation; (3) individuals injured while intervening to prevent violations; and (4) collective victims such as organisations or entities. [FN269]

The first category of victims includes those individuals who personally are the victims of violations such as torture and arbitrary arrest or property confiscation. The second category includes members of their household or dependants who suffer because of the primary violation. For example, if the primary income earner is 'disappeared' or unable to work because of injuries sustained, then the family suffers loss as well. The trauma suffered by the family members of a victim can be severe and have long-lasting implications. According to Huyse, this can include: 'serious socio-economic deprivation, bereavement, the loss of a breadwinner, missed educational opportunities [and] family breakdown'. [FN270]

***257** The third category includes individuals who are injured trying to intervene on behalf of a victim. Injuries that such a person might suffer are from physically trying to pull a victim from harm's way, loss of employment or imprisonment for challenging authorities for persecuting a targeted group. [FN271]

The collective victim is, perhaps, best illustrated by organisations or entities who suffer harm to property that is dedicated to religious, educational, humanitarian or charitable purposes. This includes those entities that are in fact the community's custodians of cultural property, such as historical monuments. [FN272] Collective victims are part of a specific population, targeted as such. This fourth category also includes victims who belong to an identifiable group whose victimisation, irrespective of the merits of the case by and against the causes of the conflicts that gave rise to it, was based on their belonging to a given group. Since WWII, three non-international conflicts have produced an estimated total of five million collective victims. [FN273]

An important step in the recovery and reintegration of a victim into society is that his/her status as a 'victim' be acknowledged. Dismissing a victim or placing blame for what Huyse describes as 'a perceived passivity to their fate' are attempts to depreciate their pain and suffering. [FN274] Individuals and groups categorised as victims benefit from States'

obligation to treat victims with humanity [FN275] and ***258** respect, as well as to ensure that appropriate measures are taken for their safety and privacy and that of their family. [FN276] Moreover, inter-governmental organisations, NGOs and private enterprises also serve victims' needs.

### *D. Protection of Victims, Their Families and Witnesses*

The **2006** Basic Principles and Guidelines elaborate on an emerging norm: the protection of victims along with their families and witnesses who participate in judicial, administrative or other proceedings that affect the interests of such victims. This remains largely aspirational, but should be further developed, and has increasingly been recognised in international and regional conventions and instruments. [FN277] In particular, the ICC Statute requires the special protection of victims at trial by allowing such measures as the presentation of evidence by closed-camera or other means, particularly to protect children and victims of sexual violence from re-traumatisation. [FN278] Moreover, the ICC Statute entrusts the Registrar of the Court to establish a Victim and Witnesses programme to provide relevant protection and services. [FN279]

### **259E. Non-Discrimination*

The **2006** Basic Principles and Guidelines also stress the need for non-discrimination in the matter of who is categorised as a victim. Principle 26 provides that in application the Guidelines must 'be without any discrimination of any kind or ground, without exception'. There were several discussions over what to include in this non-discrimination provision. Initial drafts elaborated on types of discrimination, stating the principles must be:

> without any adverse distinction founded on grounds such as race, colour, gender, [FN280] sexual orientation, [FN281] age, [FN282] language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability. [FN283]

The final version of the **2006** Basic Principles and Guidelines, however, was changed to refer to non-discrimination without listing specific categories.

### **260F. The Rights of Victims*

A victim's right to remedies [FN284] for violations of international human rights encompasses three overarching rights. [FN285] The first is equal and effective access to justice. The second is the right to adequate, effective and prompt reparation for the harm suffered. The third is the right to truth. [FN286]

(i) Equal and Effective Access to Justice

Principle 12 of the **2006** Basic Principles and Guidelines describes the right of access to justice as follows:

> A victim of a gross violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms,

modalities, and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and ***261** retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy for gross violations of international human rights or serious violations of international humanitarian law. [FN287]

Principle 13 adds to the aforequoted as follows,

In addition to individual access to justice. States should endeavor to develop procedures to allow groups of victims to present collective claims for reparation and to receive reparation collectively, as appropriate. [FN288]

The inclusion of Principle 13 in the **2006** Basic Principles and Guidelines indicates recognition that, while the Principles and Guidelines deal 'essentially with individual rights', they do not 'exclude the concept of collective rights or the rights of collectivities'. [FN289] As noted in the Chairman-Rapporteur's Report, the issue of collective rights is of particular relevance to the rights of indigenous peoples and 'certain collective communities of victims, who are unable to represent themselves and more so to have their individual members, seek remedies under domestic or international law'. [FN290] The only way to provide for the presentation of such claims is to 'recognize their right to do so in a collective capacity'. [FN291]

The term 'collective rights' is intended to cope with two types of scenarios. The first are the situations where violations are committed against a 'class of persons or an identifiable group, and those who represent that class or group seek to implement or enforce the rights of individuals as members of that class or group'. The second are the situations where violations are committed by States 'in a manner that targets a specific group as a whole'. [FN292] With respect to the former, the term 'collective rights' provides for 'enforcing rights already established in a manner that enhances the capacity of States to address these claims ***262** in a collective as opposed to individualised manner'. [FN293] The latter 'gives rise to that group's ability to address procedurally its claims to a State and receive the remedies provided for in these principles and guidelines'. [FN294] Due to the concerns expressed by several States regarding the use of the term 'collective', the word was changed to 'groups'. [FN295]

The duty of States to make known the availability of remedies has been recognised in

Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, which is supplemental to the United Nations Convention against Transnational Organized Crime. [FN296] This State duty was also affirmed by both the UN Special Rapporteur on Torture [FN297] and the Council of Europe Committee of Ministers. [FN298] Similarly, the State's duty to facilitate assistance to victims seeking access to justice has also been recognised in both the universal ***263** treaties [FN299] and the jurisprudence of the ECtHR. [FN300] At present, however, international law does not provide for the modalities pursuant to which a victim may present a claim. [FN301]

A victim's right to access justice includes the State's duty to prosecute those responsible for human rights violations. The duty to prosecute contained in Principle 4 of the **2006** Basic Principles and Guidelines is 'intended to reflect the general international law obligation to proceed under national law or in accordance with the statutes of international judicial organs'. [FN302] The framing of prosecutions as a victim's right has emerged primarily from international human rights tribunals' interpretation of provisions in human rights treaties that establish a right to access to justice or to be heard and the right to an effective remedy. [FN303] A victim's right to prosecution, however, is not a substitute for the State's duty to ensure respect for international human rights and humanitarian law, but rather co-exists with it. [FN304] Victims' claims to prosecution have, therefore, become a justifiable right that victims should be able to claim against a State. [FN305]

A victim's right to prosecution has developed as a remedy for violations of international human rights and humanitarian law. [FN306] The right to criminal ***264** prosecution is included in Principle 22(f), which provides for the availability of judicial or administrative sanctions against persons liable for violations, as part of the satisfaction and guarantees of non-repetition. [FN307] Thus, where States fail to conduct effective prosecutions they violate not only their general duty to ensure respect for and enforce human rights, but also the victim's right to an effective remedy. [FN308] The absence of judicial responsibility and punishment, in turn, undermines a State's legitimacy and its ability to promote the rule of law. [FN309] Criminal accountability for gross human rights violations is essential ***265** for achieving the goals of accountability, retribution, and equal treatment under the law. [FN310] In some scholars' view, the victims' right to the truth is best revealed through the criminal process, even in situations where a State offers alternative remedial means such as truth commissions. [FN311]

(ii) Reparation for Harm Suffered

If an individual is a victim of a violation of an applicable international human rights or humanitarian law norm, then effective reparation must be made. [FN312] Such **reparations** may be made to either the individual victim or other persons, such as, for example, the victim's family and dependants [FN313] as well as those who ***266** have 'suffered harm in intervening to assist victims in distress or prevent victimization'. [FN314] The reparation should be proportional to the gravity of the harm suffered. [FN315] In accordance with its domestic and international legal obligations, a State shall provide reparation to victims for its acts or omissions that can be attributed to the State and constitute gross violations of international human rights and humanitarian law. [FN316] In cases where an individual, a legal person or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim. [FN317]

States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations. [FN318] To such ends. States ***267** should seek to establish national programmes, [FN319] in keeping with Article 78 of the ICC Statute [FN320] and with the **2006** Basic Principles and Guidelines' call to establish such programmes. [FN321] The establishment of national funds for reparation was previously contemplated by the **2000** Draft Principles and Guidelines, which also included an explicit principle dealing with **reparations** owed by successor governments 'in cases where the State under whose authority the violation occurred is no longer in existence'. [FN322] The principle was deleted after delegations expressed concern over whether it was in alignment with relevant international legal principles governing State succession.

A State is also required to enforce its domestic judgments for **reparations** and 'shall endeavor to enforce valid foreign legal judgments'. [FN323] Under their domestic laws, States are to provide effective mechanisms for the enforcement of reparation judgments. [FN324]

As stated in the Principles and Guidelines, there are four principal forms of reparation available for violations of international human rights and humanitarian law, namely: (1) restitution; (2) compensation; (3) rehabilitation; and (4) satisfaction and guarantees of non-repetition. [FN325]

***268** Restitution should, whenever possible, restore the victim to the original situation before the gross violation of international human rights law or serious violation of international humanitarian law occurred. [FN326] Restitution includes, as appropriate: restoration of liberty. [FN327] enjoyment of human rights, [FN328] identity, family life and citizenship, [FN329] return to one's place of residence, [FN330] restoration of employment and the return of property. [FN331]

Compensation is, in turn, designed for economically assessable damages resulting from a violation, including: physical or mental harm, lost opportunity ***269** (including employment, education and social benefits), [FN332] material damages and loss of earnings including earning potential, moral damage and costs associated with presenting a claim. [FN333] During the course of consultations, NGOs like Amnesty International emphasised the important role compensation plays in setting the victim on a path to reintegration in society. With regard to torture, attempts to obtain compensation are important to survivors and their supporters. Often, compensation can be easier to pursue than criminal prosecution because it is less threatening to authorities. Amnesty International strongly supported the view that compensation is a 'tangible recognition of wrong inflicted'. [FN334] Efforts to include concepts of victim compensation in international texts like the statutes of international *ad hoc* tribunals have met with great resistance. [FN335]

***270** Rehabilitation includes the provision of medical and psychological care as well as legal and social services. [FN336] It is necessary that rehabilitation addresses the victim's psychological needs and empowers them to move past their pain. Silence and repression [FN337] of emotions can lead to the psychological effects of victimisation, especially in cases of torture, being transmitted to subsequent generations. According to Huyse:

> The second generation, particularly, tends to absorb and retain pain and grief, consciously or unconsciously. They carry traces of the experience into adulthood, and this is a problematic heritage that can threaten the future of a society. [FN338]

A victim is also entitled to satisfaction and guarantees of non-repetition which should include, where applicable, any or all of the following:

> (a) Effective measures aimed at the cessation of continuing violations; [FN339]
>
> (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.
>
> (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance ***271** with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; [FN340]
>
> (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; [FN341]
>
> (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; [FN342]
>
> ***272** (f) Judicial and administrative sanctions against persons responsible for the violations; [FN343]
>
> (g) Commemorations and tributes to the victims; [FN344]
>
> (h) Inclusion of an accurate account of the violations that occurred in international human rights and international humanitarian law training and in educational material at all levels. [FN345]

Moral **reparations**, including commemorations and tributes, are often more important to the victim than material ones. Danieli states that they help bridge a gap between victims and their community. ‘Commemorations can fill the vacuum with creative responses and may help heal the rupture not only internally but also the rupture the victimisation created between the survivors and their society.’ [FN346] They include a variety of actions, most having to do with a need to share their experiences and see justice being carried out.

**Reparations** are not simply backward-looking but also help ensure a victim's place in the future. They serve to recompense for losses and also to help reintegrate the marginalised and isolated back into society. [FN347] Cohen argues:

> There is a need for victimization to be addressed at the community level and not be shouldered entirely by the victim. When the world ***273** community takes steps to

redress victimization and analyze its causes, this will free the victims and reduce their need to retaliate. [FN348]

Within national legal systems, the guarantees of non-repetition should include, where applicable and as appropriate, any or all of the following: [FN349]

(a) Ensuring effective civilian control of military and security forces; [FN350]

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; [FN351]

(c) Strengthening the independence of the judiciary; [FN352]

(d) Protecting persons in the legal, medical and health care professions, the media and other related professions and human rights defenders; [FN353]

***274** (e) Providing on a priority and continued basis, human rights and international humanitarian law education to all sectors of society, including law enforcement officials, as well as military and security forces; [FN354]

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well by economic enterprises; [FN355]

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; [FN356]

(h) Reviewing and reforming laws contributing to or allowing gross violations of human rights law and serious violations of international humanitarian law. [FN357]

Each of the forms of reparation may be sought either singularly or collectively. [FN358] Moreover, several are not dependant on a judicial proceeding, ***275** and indeed may in many cases only come about by decisions of a State's political branches. This is especially true with respect to the elements of satisfaction and guarantees of non-repetition. In addition, inter-governmental organisations and NGOs can assist in providing forms of reparation such as the facilitation of truth and rehabilitation services and commemoration. However, such actions by third parties are in no way a substitute for reparation provided by the principal violator and by the necessary and appropriate redress modalities that a State or international organisation can offer. [FN359]

(iii) The Right to Truth

An important aspect of the guarantee of non-repetition includes the victims' right to access factual and other relevant information concerning the violation. [FN360] Understanding and public disclosure of the truth is important to victims because the truth (1) alleviates the suffering of the surviving victims; (2) vindicates the memory or status of the direct victim of the violation; (3) encourages the State to confront its dark past; and (4) through it, seek reform. [FN361]

***276** Truth can help provide an historical record, educate people, promote forgiveness and prevent future victimisation. [FN362] Truth is an imperative, not an option to be displaced by political convenience.

Recent attempts to engage in truth finding have involved the establishment of truth commissions and other forms of fact-finding commissions in a number of countries predominantly in South America and Africa. [FN363] Such efforts include the establishment of the National Commission on Disappeared Persons and an accompanying reparation scheme in Argentina; [FN364] the National Commission on Truth and Reconciliation established in 1990 in Chile, to shed light on human rights violations that occurred during the military dictatorship from 1973 to 1990; [FN365] the Commission on Truth in El Salvador established in 1992 under the direction of the UN, to investigate serious acts of violence that occurred since 1980; [FN366] and the Truth and Reconciliation Commission established in post-apartheid South Africa. [FN367] Although some commissions may have played an important restorative role in the process of reconciliation and peace-building, the work of truth commissions to date has not produced the most effectual results in terms of individual victim redress.

### 7. Economic and Political Considerations

Victims' right to redress has not been universally guaranteed, but rather has been dependent on States' whims and political exigencies. Even in cases where victims' **reparations** issues are addressed, a victim-oriented resolution does not always ensue:

> Where victims' **reparations** issues have been eventually addressed, they have been dealt with in the context of peace settlements, national ***277** reconciliation programmes or peace-building efforts, but they have often been subordinated or even sacrificed to political or strategic considerations. Worse, victim's **reparations** have sometimes been bargained away completely in peace negotiations or postponed indefinitely. [FN368]

Economic factors remain critical in any evolution of victims' rights. Who bears the costs? Victims of State violence are often denied their rights when the government that has perpetrated the harm is still in power, or when a new government (perhaps even representing those who have been previously victimised) is impoverished. The post-genocide regime change in Rwanda illustrates the difficulty of this question. Can a Tutsi government with no resources be expected to provide compensation to Tutsi citizens for violations committed by a Hutu regime?

Some feel that there is a duty of human social solidarity requiring the establishment of an international trust fund. Regrettably, this is far from being achievable, either politically or economically. With respect to torture, the UN established a Voluntary Fund for Victims of Torture (Voluntary Fund) in 1981, which is funded by voluntary donations of governments, [FN369] organisations and individuals. Although the Voluntary Fund could address the State compliance problem by pooling the resources of wealthier countries, it does not currently provide direct financial compensation to victims of torture. [FN370] Rather, it provides funding for NGOs that provide ‘direct medical, psychological, social, economic, legal, humanitarian or other forms of assistance to torture victims and members of their family’. [FN371] The Voluntary Fund lacks monetary resources. [FN372] Other examples of UN-sponsored victim redress mechanisms include the UN Voluntary Trust Fund on

Contemporary Forms of Slavery; [FN373]***278** and the UNDP Trust Fund for Rwanda established in 1995. [FN374] With regard to terrorism, the Security Council established a working group in **2004** to 'consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organisations, their members and sponsors'. [FN375] Efforts to bolster victims' rights through the creation of 'funds' are incremental and will probably remain limited to certain conflicts or categories of victims.

## 8. Conclusion

The victim's right to reparation has been recognised in numerous international and regional instruments and in the jurisprudence of various adjudicatory and supervisory bodies. States bear the obligation to respect and enforce norms of international human rights and humanitarian law that are incorporated in treaties to which they are parties, found in customary international law, and those that have been incorporated into their domestic legal system. This obligation gives rise to a State's duty to take appropriate legislative, administrative and other measures to prevent violations; investigate violations and take action against those allegedly responsible; provide victims with equal and effective access to justice and provide effective remedies to victims, including reparation.

An increasing concern for victims of human rights violations can be traced through the evolution of international law over the course of the last 50 years, especially between 1984 and **2006**. The adoption of the **2006** Basic Principles and Guidelines is a monumental milestone in the history of human rights as well as international criminal justice. The road leading to its adoption has been a long and winding one wrought with obstacles and challenges, but its adoption is a step towards putting victims on the road to recovery and reparation. In some instances, legal developments have sparked practical progress to ensure that victims are not denied the basic right of redress for their injuries. There is already evidence that the document is having an effect on State policies. Several Latin American countries have taken the draft version of the Principles and Guidelines into consideration when preparing legislation on reparation for victims. The IACtHR has referred to the draft in several rulings, [FN376]***279** and Article 75 of the Statute of the ICC includes elements of the draft relating to victim reparation. [FN377] The document has also been used as a standard for governments when implementing programmes for victims [FN378] and its effect can be seen in the provisions of both universal and regional instruments. [FN379]

However, despite the positive developments in international law which have taken place, much more is needed to make this academic progress a reality for victims on the ground. While the **2006** Basic Principles and Guidelines are indeed a triumph for victims, the quest for reparation has not yet ended. The realisation of victims' rights requires the establishment of implementation mechanisms and governmental will to take the Principles from being mere words on a page and put them into practice. The international legal system is far from being victim-oriented.

By honouring victims' rights to benefit from remedies and reparation, the international community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law. Recognising the rights of victims of gross human rights violation

is the most crucial imperative of our age. After all, we may one day find ourselves in their place. In the eloquent words of John Donne:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main ... Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee .... [FN380]

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[FN1]. The author was a principal participant throughout much of the process discussed herein and was present during certain formal and informal consultations and meetings for which no documentary record was publicly distributed. When referencing such consultations, the author relies on his personal notes gathered throughout the process. These notes will hereinafter be referred to as 'Bassiouni Personal Notes.'

[FN2]. For a victim-oriented approach, see Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes'. (**2004**) 26 *Human Rights Quarterly* 605; and Aldana-Pindell. 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', (**2002**) 35 *Vanderbilt Journal of Transnational Law* 1399.

[FN3]. For the overlap between international humanitarian law and international human rights law, see Bassiouni, 'Humanitarian Law', in Shelton et al. (eds), *Encyclopedia of Genocide and Crimes Against Humanity Volume 1* (New York: Macmillan, **2004**) 469. For the recognition of the co-equal application of the twin regimes of international humanitarian law and international human rights law, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports **2004**, 131. For the connection between international humanitarian law and international human rights law, see Bassiouni, *Introduction to International Criminal Law* (Ardsley, New York: Transnational, **2004**) at 109 *et seq*.

[FN4]. See Bassiouni, 'The Proscribing Function of International Criminal Law in the International Protection of Human Rights', (1982) 9 *Yale Journal of World Public Order* 193.

[FN5]. Ibid. See also Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', in Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, New York: Transnational, **2002**) 3.

[FN6]. Victims' rights are not addressed, in part, because of the uncertainty and unpredictability of which source of law applies and thus which normative prescription will apply, and, in part, because governments use the overlaps and gaps between these sources to create legal vacuums as the United States has sought to do in establishing a detention

camp for 'enemy combatants' at the US Naval Base in Guantánamo Bay in Cuba. See, for example, Amann, 'Guantanamo', (**2004**) 42 *Columbia Journal of Transnational Law* 263. This article explores the international law basis for an internationally based victim-oriented set of rights and a concomitant set of State obligations which are not necessarily responsibility-based.

[FN7]. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res, 147, 21 March **2006**, A/RES/60/147; 13 IHRR 907 (**2006**) ('**2006** Basic Principles and Guidelines'). It is important for the reader to note that this Resolution was adopted by the General Assembly on the report of the Third Committee (A/60/509/Add.1), the matter having been referred to the Third Committee on the basis of the Economic and Social Council's Resolution **2005**/30 of 25 July **2005**, which in turn was based on the Commission on Human Rights Resolution **2005**/35 of 19 April **2005**. The **2005** Commission Resolution was based on the Report of the Independent Expert, Mr. M. Cherif Bassiouni, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, 18 January **2000**, E/CN.4/**2000**/62. Consequently, the sequence of documents is in the reverse order from what is listed above.

[FN8]. For an overview of world legal systems, see Wigmore, *A Panorama of World Legal Systems* (Washington: Washington Law Book Company, 1936). See also Ellul, *Histoire des Institutions* (Paris: Presses Universitaires de France, 1955) at 1-2.

[FN9]. For the family of legal systems of the world, see David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1973).

[FN10]. See Grimsley (ed.), Rousseau, *Du Contrat Social* (Oxford: Clarendon Press, 1972).

[FN11]. One such example is in Afghanistan, where the *jirga* or *shura* council of tribes handles most personal disputes including *diyya* (compensation) for homicides. See Johnson *et al., Afghanistan's Political and Constitutional Development* (Overseas Development Institute, **2003**) at 19-20.

[FN12]. See, for example, Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (MA: Kessinger Publishing, **2004**).

[FN13]. The concept of awarding damages to victims can be found in the ancient Assyrian Code, as well as the Hittite Laws, which provided for specific payments to victims of offenses against life. The Code of Hammurabi (1750 BCE) similarly provided for a principle of compensation to victims, but also included an early form of compensation by the community in cases where the offender was unknown. The Code of Hammurabi also provided for compensation against medical practitioners' negligence. See Wigmore, supra n. 8 at 86-93. Roman law accorded a well-defined system of reparation to victims starting with the Lex XII Tabularum, developed in the fifth century BCE. Although in its early form this law provided for victims to seek individualised justice against a particular offender (in all cases except those affecting the public order), the Lex XII Tabularum was later modified to provide a strict system of monetary compensation for many types of offenses, and was followed by a more comprehensive set of remedies found in the Praetorian law (in the

second century BCE), and the Lex Aquilia de damno (Aquilian law). In the Roman legal system, the right to private redress of wrongs was based on the responsibility for fault. Roman Law over two millennia ago recognised the two sources of criminal and civil responsibility based on *dolus* and *culpa*, the first being intentional and the second being negligence. See Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd edn (The Hague: Kluwer Law International, 1999) at 127 on principles of legality. From these early examples, the rights of victims have been progressively developing in different legal systems throughout the centuries. For instance, the Islamic criminal justice system, whose application started in the days after the Prophet's *hejra* (migration) from Mecca to Medina in 622 CE, developed the notion of *qesas* (meaning equality or equivalence), which delineated specific categories of crimes involving violations of the rights of individuals, namely homicide and battery. The sanctions prescribed for such *qesas* crimes were the *talion*, the equivalent infliction of physical or bodily harm against the perpetrator, or, in the alternative, *diyya* (compensation) to be paid to the victim or their family by the perpetrator or their family. A victim, with respect to *qesas* crimes, is not only the moving party with respect to the prosecution but has the right to present evidence, interrogate witnesses, and also bring the criminal action to a close by accepting the *diyya*, or victim compensation, as a substitute to prosecution or dismissing the action on the basis of forgiveness. See Bassiouni, 'Qesas Crimes', in Bassiouni (ed.), *The Islamic Criminal Justice System* (New York: Oceana Publications, 1982) 203; and Bassiouni, 'Les Crimes Relevant du Precepte de Quesas', (1989) 4 *Revue Internationale de Criminologie et de Police Technique* 484.

[FN14]. See, generally, Durant and Durant, *The Story of Civilization Vol. 10: Rousseau and Revolution* (New York: Simon and Schuster, 1967).

[FN15]. After WWI, the Allies imposed collective sanctions on Germany that were in the nature of compensation to the Allies. See US Department of State, *The Treaty of Versailles and After* (New York: Greenwood Press, 1968) (reprinting and providing commentary on Parts VIII and IX of the Versailles Treaty). The burden of the collective sanctions proved to be both unfair to the German people and unwise as they were a principal cause for the rise of national socialism and the start of World War II. See Gannett (trans.), Schacht, *The End of* ***Reparations*** (New York: Hyperion Press, 1979).

[FN16]. See Bassiouni, 'The Need for International Accountability', in Bassiouni (ed.), *International Criminal Law, Volume 3*, 2nd edn (Ardsley, New York: Transnational, 1999) 3. See also Paust, 'The Reality of Private Rights, Duties, and Participation in the International Legal Process', (**2004**) 25 *Michigan Journal of International Law* 1229 at 1241*et seq*.

[FN17]. See, for example, Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (Ardsley, New York: Transnational, 1994); Bayefsky, *How to Complain to the UN Human Rights Treaty System* (Ardsley, New York: Transnational, **2002**); Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, New York: Transnational, **2001**); Lyons and Mayall (eds), *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Lanham, MD: Rowman & Littlefield, **2003**); Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edn (Ithaca and London: Cornell University Press, **2003**); Kretzmer and Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (London: Kluwer Law International, **2002**); Andreopoulos (ed.). *Concepts and Strategies in International Human Rights* (New York: Peter Lang, **2002**); and Gane and Mackarel (eds).

*Human Rights and the Administration of Justice: International Instruments* (The Hague: Martinus Nijhoff, 1997).

[FN18]. See Jennings and Watts (eds). *Oppenheim's International Law*, 9th edn (Harlow: Longman, 1992) at 846 *et seq*.

[FN19]. See, for example, Article 2(3). International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); Universal Declaration on Human Rights, GA Res. 217A (III), 10 December 1948, A/810 at 71 (Universal Declaration); African Charter on Human and Peoples' Rights 1981, (1982) 21 ILM 58 (AfChHPR); American Convention on Human Rights 1969, 1144 UNTS 123 (ACHR); and European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS No. 5 (ECHR).

[FN20]. For a discussion of these enforcement mechanisms, see Lasco, 'Repairing the Irreparable; Current and Future Approaches to **Reparations**', (**2003**) 10 *Human Rights Brief* 18. See also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2.

[FN21]. Such monitoring bodies include: the Inter-American Commission on Human Rights (established pursuant to the ACHR), the European Commission on Human Rights (established pursuant to the ECHR) (upon amendment of the ECHR in 1998 with the adoption of Protocol 11, the European Commission ceased to exist); and the African Commission on Human and Peoples' Rights (established pursuant to the AfChHPR).

[FN22]. Since World War II, there have been more than 250 conflicts resulting in 70 million casualties at the low end of estimates, and 170 million casualties at the high end. See Balint, 'An Empirical Study of Conflict, Conflict Victimization and Legal Redress', (1998) 14 *Nouvelles Etudes Pénales* 101. See also SIPRI Yearbooks 1975-1996; as well as, Jongman and Schmid, 'Contemporary Conflicts: A Global Survey of High and Lower Intensity Conflict and Serious Disputes', (1995) 7 *PIOOM Newsletter and Progress Report* 14. See also Schmid, 'Early Warning of Violent Conflicts: Casual Approaches', in Schmid (ed.), *Violent Crime and Conflicts* (Milan: ISPAC 1997) 47; PIOOM World Conflict Map 1994-1995, (1995) 7 *PIOOM Newsletter and Progress Report*; and Rummel, *Death by Government* (New Brunswick, NJ: Transaction Publishers, 1994) at 3 and 9 (reports a total of 72,521 million casualties).

[FN23]. According to a study performed by this author, since WWII there have been over 250 conflicts in which an estimated 170 million people have been killed. See Bassiouni, supra n. 16.

[FN24]. See Jacobs and White, *The European Convention on Human Rights*, 3rd edn (by Ovey and White) (Oxford: Oxford University Press, **2002**); Gomien, *Judgments of the European Court of Human Rights, 1959-95* (Strasbourg: Council of Europe Publishing, 1996); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995); Janis, Kay and Bradley, *European Human Rights Law: Text and Materials* (Oxford: Oxford University Press, 1995); and Macdonald et al. (eds), *The European System for the Protection of Human Rights* (The Hague: Martinus Nijhoff, 1993).

[FN25]. See, generally, supra n. 19.

[FN26]. See Bassiouni, supra n. 5.

[FN27]. For Canadian legislation see Policy Center for Victim's Issues, Legislation, available at: http:// www.canada.justice.gc.ca/en/ps/voc/vocleg.html#Victim%20Impact%20Statement. See also the compilation of national legislation on victimology and victims' rights, available at: http://www.victimology.nl/. For US resources, see Victims of Crime Act--Crime Victims Fund, available at: http:// www.ojp.usdoj.gov/ovc/publications/factshts/vocacvf/welcome.html. For a listing of US programmes for compensating victims of crime, see: http:// www.ojp.usdoj.gov/ovc/help/progdir.htm. For a listing of Victims' Rights Statutes in the US see Victims' Rights in 50 States, available at: http:// www.klaaskids.org/vrights.htm.

[FN28]. See Tobolowsky, 'Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime', (1999) 25 *New England Journal on Criminal and Civil Confinement* 21; and Anderson and Woodard, 'Victim and Witness Assistance: New State Laws and the System's Response', (1985) 68 *Judicature* 221 at 222-3.

[FN29]. See *X et al v State*, Tokyo District Court, Judgment of 27 July 1995, (1996) 39 *Japanese Annual of International Law* 266, where the Tokyo district court held that 'neither the general practice nor the convictions (*opinio juris*) that the State has a duty to pay damages to each individual when that State infringes its obligations under international human rights or international humanitarian law can be said to exist'. This decision was later affirmed in two other **2002** Tokyo district court decisions which rejected claims arising from violations committed by the Japanese Germ Warfare Units in China in 1941-2 and the 1932 massacre of Chinese villagers in Liaoling.

[FN30]. In **2001**, the ILC adopted its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 31 May **2001**, A/56/10 (**2001**) which, in Article 33(2), provide that the ILC's approach to the question of State responsibility does not prejudice 'any rights, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' Thus, although the Draft Articles primarily deal with **reparations** from States to other States or the international community as a whole, the inclusion of this language may evidence the possibility that an obligation may be owed to a non-State entity--a principle which is re-affirmed in the ILC Commentary to Article 33. See Crawford. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, **2002**) at 209-10.

[FN31]. See, for example, Lillich, *International Claims: Their Adjudication by National Commissions, Volume VI* (Syracuse: Syracuse University Press, 1962).

[FN32]. See Jennings and Watts (eds), supra n. 18.

[FN33]. Vattel, *Le Droit des yens, Principes de la loi naturelle appliquée à la conduite des affaires des nations souverains* (1773) at 289.

[FN34]. See, for example, *Mavrommatis Palestine Concession Case (Greece v UK)*.

Jurisdiction, PCIJ Reports 1924. Series A No. 2, 12. But see the English Court of Appeal's judgment in *R (Abassi) v Secretary of State for Foreign Affairs* **2002** EWCA Civ 1598 and the South African Constitutional Court's judgment in *Kaunda v President of the Republic of South Africa* 10 BCLR 1009, in which some limits to a State's discretion were indicated.

[FN35]. *Mavromatis Palestine Concession Case*, ibid. See also infra Section 7; Bassiouni, 'Combating Impunity for International Crimes', (**2000**) 71 *University of Colorado Law Review* 409; and Bassiouni, 'Searching for Justice in the World of Realpolitik', (**2000**) 12 *Pace International Law Review* 213.

[FN36]. Except where State responsibility exists under international law. See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, Merits. Judgment, ICJ Reports 1986, 14.

[FN37]. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1899.

[FN38]. Convention (IV) Respecting the Laws and Customs of War on Land 1907, (1908) 2 *American Journal of International Law* Supplement 90 (1907 Hague Convention).

[FN39]. See, for example, Article 3, 1907 Hague Convention.

[FN40]. For example, 1907 Hague Convention (XII) provided for the establishment of an International Prize Court, in which proceedings could be instituted by individuals against foreign States for claims involving property rights. However, this convention never entered into force.

[FN41]. These include, *inter alia*, the Universal Declaration; the ICCPR; the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (ICERD); the Convention Against Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT); and the Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC).

[FN42]. Convention Relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), 75 UNTS 135: Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV), 75 UNTS 287; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3 (Additional Protocol I).

[FN43]. The principal ones are: the AfChHPR, the ACHR and the ECHR.

[FN44]. See Article 63, ACHR; and Article 41, ECHR.

[FN45]. See, for example, *Rodriquez v Uruguay* (322/88), CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995) (holding that the State Party's failure to conduct an investigation into human rights violations constituted a considerable impediment to the pursuit of civil remedies, for example compensation, and declaring that the adoption of amnesty laws in cases of gross human rights violations to be incompatible with the obligations of states arising under Article 2(3)); *Blancov v Nicaragua* (328/88), CCPR/C/51/D/328/1988 (1994);

2 IHRR 123 (1995) (clarifying the scope of the victim's right to an effective remedy); and *Bautista de Arellana v Columbia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996) (discussing the victim's right to remedy beyond compensation).

[FN46]. Article 6, ICERD.

[FN47]. The following instruments all contain provisions regarding the right to some form of reparation, which implies the right to a remedy: Articles 2, 15 and 6, Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989, ILO No. 169; Article 24, Convention Relating to the Status of Stateless Persons 1954, 360 UNTS 117; Article 14, CAT; Article 39, CRC; Articles 63(1) and 68, ACHR; Article 41, ECHR; and Article 7. AfChHPR (providing individuals with the right to have their cause heard and the right to an appeal to competent national organs against acts violating their fundamental rights as recognised and guaranteed by conventions, laws regulations and customs in force, and therefore, implying by reference a right to some form of reparation).

[FN48]. Article 83, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, (1991) 30 ILM 1521; 12 IHRR 269 (**2004**). Furthermore, the Convention articulates an 'enforceable right to compensation' with respect to unlawful detention or arrest (Article 16(9)). It requests States Parties provide assistance to migrant workers or their families for the prompt settlement of claims relating to death (Article 71(2)). Also, the Convention provides the right to 'fair and adequate' compensation for the expropriation of the migrant's assets by the State. (Article 15).

[FN49]. Vienna Declaration and Programme of Action, World Conference on Human Rights, 25 June 1993, A/CONF.157/23 at para. 27; 1-1 IHRR 240 (1993) (Vienna Declaration).

[FN50]. For the Declaration's status as a source of customary law, see generally Hannum. 'The Status of the Universal Declaration of Human Rights in National and International Law', (1996) 25 *Georgia Journal of International and Comparative Law* 287 at 316-51.

[FN51]. Article 7(2), ICERD.

[FN52]. Article 9, Declaration on the Protection of All Persons from Enforced Disappearances, GA Res. 47/133, 18 December 1992, A/RES/47/133.

[FN53]. Article 19, Enforced Disappearances Declaration, ibid.

[FN54]. Article 11, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment, GA Res. 3452, 9 December 1975, A/10034 (1975).

[FN55]. Article 18, American Declaration on the Rights and Duties of Man, 2 May 1948, OAS Res. XXX.

[FN56]. See Article IV(b), Muslim Universal Declaration on Human Rights, reprinted in Lampe (ed.), *Justice and Human Rights in Islam* (Washington, DC: International Law Institute, 1997) at 14.

[FN57]. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, 29 November 1985, A/CONF.121/22/Rev.1 (1985 Basic Principles of Justice).

[FN58]. See, generally, Bassiouni (ed.), *International Protection of Victims, 7 Nouvelles Études Pénales* (Eres: Association International de Droit Penal, 1988); and Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 17 April 1988, E/CN.15/1998/CRP.4.

[FN59]. Principles 4-5, 1985 Basic Principles of Justice.

[FN60]. Principles 18-9, 1985 Basic Principles of Justice.

[FN61]. For example, Article 3, 1907 Hague Convention provides for the duty of a State to pay indemnity in cases of violations of its regulations. Furthermore, the Four Geneva Conventions of 12 August 1949 contain similar provisions with respect to the grave breaches of the convention. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I), 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea 1949 (Geneva Convention II), 75 UNTS 85; Geneva Convention III; and Geneva Convention IV, In addition, Article 91, Additional Protocol I provides that a State Party shall be liable 'to pay compensation' for violations of the Convention.

[FN62]. For example, Togo noted that during a period of internal strife, *'l'Etat avait perdu certaines de ses prérogatives: le gouvernement était impuissant à faire réprimer les actes délictuels ou criminels qui émaillaient cette période et la justice était loin de disposer des moyens d'agir.'* Specifically, Togo planned to create a ministry of human rights, adopt legislative measures aimed at compensating victims of socio-political problems, and ensure the independence of the judiciary and equal protection for all citizens.

[FN63]. See generally Lillich, supra n. 1; Lillich. *International Claims: Postwar British Practice* (Syracuse, New York: Syracuse University Press, 1967); and Lillich and Weston (eds), *International Claims: Contemporary European Practice* (Charlottesville, Virginia: University Press of Virginia, 1982).

[FN64]. See generally, Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, Virginia: University of Virginia Press, 1983); and Lauterpacht and Collier (eds), *Individual Rights and The State of Foreign Affairs: An International Compendium* (New York: Praeger, 1972).

[FN65]. See Articles 2(3)(a) and 2(3)(b), ICCPR.

[FN66]. See Article 6, ICERD.

[FN67]. For example, many States have extensive human rights protections within their national constitutions and provisions that create a remedy in cases of their violation. For example, in States such as Peru, Malta, Romania, Uruguay and the United States, the constitution contains, either explicitly or implicitly, an extensive list of human rights

guarantees and provides a remedy for their violation. Other States perhaps lack specific legislation with respect to human rights violations; however, their legal systems contain other general remedies which encompass specific violations. For example, under Swedish and UK law, domestic tort law provides a remedy for the compensation of gross violations of human rights. In China, the State Compensation Act and Administrative Proceedings Act allows its citizens to receive compensation when they have been denied their civic rights. Still other States such as Cyprus and Nepal, noted that they were in the process of enacting legislation with respect to redressing individual victims. For Romania, Togo and the UK, see Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment, 18 January 1996, E/CN.4/1996/29/Add.3; Cyprus and Kuwait, see Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission Resolution 1995/137, 20 December 1996, E/CN.4/1997/Add.1; Argentina, the Czech Republic, Chile, China, Colombia, Ghana, Mauritius, Namibia, Nepal, the Philippines, the Sudan and Sweden, see Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, 27 November 1995, E/CN.4/1996/29; Peru. The Administration of Justice and the Human Rights of Detainees, 13 June 1995, E/CN.4/Sub.2/1995/17/Add.1; China, Malta, Mexico, Uruguay and Yugoslavia, see The Administration of Justice and the Human Rights of Detainees, 26 July 1995, E/CN.4/Sub.2/1995/17/Add.2; Belarus and the Netherlands, see The Administration of Justice and the Human Rights of Detainees, 11 May 1995, E/CN.4/Sub.2/1995/17; US, see Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment, 18 January 1996, E/CN.4/1996/29/Add.2. For the constitutions of the world see Blaustein and Flanz (eds), *Constitutions of the Countries of the World* (Dobbs Ferry, New York; Oceana, 1992, updated through **2002**), as well as the following internet-based databases: Constitution Finder database (offers constitutions, charters, amendments and other related documents), available at: http:// confinder.richmond.edu/; Constitutions, Treaties and Official Declarations Around the World database (includes links to full texts of foreign constitutions, treaties and declarations and other resources) available at: http://www.psr.keele.ac.uk/const.htm; and the National Constitutions database (developed by the Constitution Society) available at: http:// www.constitution.org/cons/natlcons.htm.

[FN68]. See Statement by Under Secretary of Commerce Stuart Eizenstat before the House Banking and Financial Services Committee, Washington, DC, 11 December 1996, available at: http://www.state.gov/www/regions/eur/961219eizen.html. For a listing of related documents see US Department of State, Holocaust Issues, available at: http://www.state.gov/www/regions/eur/holocausthp.html. See, for example, US Department of State, Press Statement by James P. Rubin/Spokesman, German Government Agreement on Holocaust Compensation, 13 January 1998, available at: http:// secretary.state.gov/www/briefings/statements/1998/ps980113b.html.

[FN69]. Ibid. See also US Department of State, Press Statement by Nicholas Burns/Spokesman, Swiss Banks to Create Fund, 5 February 1997, available at: http://secretary.state.gov/www/briefings/statements/970205b.html. For more recent developments see US Department of State, Press Statement, Philip T. Reeker, Holocaust Insurance Agreement Reached, 19 September **2002**, available at: http://www.state.gov/r/pa/prs/ps/**2002**/13580.htm.

[FN70]. German Compensation for National Socialist Crimes, Background Papers, available at: http://www.germany-info.org/relaunch/info/archives/background/nscrimes.html. For a

table providing a summary of major holocaust compensation programs, as well as major direct compensation programs for Jewish victims of Nazi persecution, see Compensation and Restitution at a Glance, available at: http:// www.claimscon.org/compensation.guide.asp. See, generally, Schwerin, 'German Compensation for Victims of Nazi Persecution', (1972) 67 *Northwestern University Law Review* 479. For an examination of restitution claims arising out of the Nazi regime in Austria see Kriebaum, 'Restitution Claims for Massive Violations of Human Rights During the Nazi Regime: The Austrian Case', in Ulrich and Boserup (eds), *Human Rights in Development Yearbook* ***2001*** (The Hague: Kluwer, **2002**).

[FN71]. German Compensation for National Socialist Crimes, ibid. Approximately $624 million (US) continues to be paid each year to about 100,000 pensioners.

[FN72]. See, for example, Statement of Konrad Adenauer, 27 September 1951, excerpts available at: http://www.germany-info.org/relaunch/info/archives/background/ns.crimes.html.

[FN73]. Claims for property loss resulting from Nazi persecution are handled according to the Federal Restitution Law (Bundesruckerstattungsgesetz) of 19 July 1957. According to official German government sources, as of January 1987, 735, 076 claims had been made and settled on the basis of this law. See German Compensation for National Socialist Crimes, supra n. 70.

[FN74]. Such laws included a 1949 law which restored the rights and privileges of whose who have been discriminated against in Nazi legislation, laws extending the assistance to (by Nazi law) ineligible war victims (1949), lump sum payments to former concentration camp internees who were the objects of medical experimentation and prisoners of war from Palestine, who, because of their Jewish background, did not receive the humane treatment guaranteed to prisoners of war. For these and other examples of compensatory laws and agreements, see German Compensation for National Socialist Crimes, supra n. 70. In addition, on 17 December 1999, the German industry agreed to a $5 billion (US) global settlement of all US litigation to compensate the approximately one million surviving Nazi-era slave and forced labourers. See Bazyler and Fitzgerald, 'Trading With the Enemy: Holocaust Restitution, the United States Government and American Industry', (**2003**) 28 *Brooklyn Journal of International Law* 683 at 695.

[FN75]. See German Compensation for National Socialist Crimes, supra n. 70 (noting that there are 15 agreements with Western European nations and one with the US).

[FN76]. See Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge, MA: Harvard University Press, **2001**); and Gott, 'A Tale of New Precedents: Japanese American Interment as Foreign Affairs Law', (1998) 40 *Boston College Law Review* 179.

[FN77]. See Civil Liberties Act, Pub.L.No. 100-383, 102 Stat. 903 (1988) (expired 1998). See also Committee on Wartime Relocation and Internment of Civilians, Committee on Internal and Insular Affairs, 102nd Congress, Personal Justice denied (Comm. Print 1992).

[FN78]. In 1992, the funding for the Act was increased from $1.25 billion to $1.65 billion (US). Other, more recent examples of US efforts to remedy past violations of human rights,

take the form of apologies. During his term in office, President William J. Clinton made apologies for the genocide in Rwanda, execution of civilians during the Korean War, and the US support of Guatemala's military while it committed numerous serious human rights violations. See Aka. 'The 'Dividend of Democracy: Analyzing U.S. Support for Nigerian Democratization', (**2002**) 22 *Boston College Third World Law Journal* 225 at 276-7 (discussing Clinton's apologies). See also Broader, 'Clinton Offers His Apologies to Guatemala', *New York Times*, 11 March 1999.

[FN79]. This was the first reparation program created by the US Congress in 1946 and aimed to address a number of claims raised by Indian tribes, including the loss of lands under treaties entered into under duress. Approximately $1.65 billion (US) was awarded. See Newton, 'Compensation, **Reparations** and Restitution: Indian Property Claims in the United States', (1993) 28 *Georgia Law Review* 453.

[FN80]. In 1975, the US government also settled a class action lawsuit brought on behalf of the participants (and their families) in the Tuskegee Syphilis Study, agreeing to donate approximately $9 million (US) to the settlement fund. This was followed by a further apology by President Clinton in 1997, as well as other remedial measures. See Mitchell, 'Clinton Regrets "Clearly Racist" U.S. Study', *New York Times*, 17 May 1997.

[FN81]. In this case, the state of Florida awarded each of the nine survivors of the massacre $ 150,000 (US) and paid between $375 and $22,535 (US) to each of the 145 descendants of Rosewood residents. See generally, Yamamoto, 'Racial **Reparations**: Japanese American Redress and African American Claims', (1998) 40 *Boston College Law Review* 477 at 490.

[FN82]. For a discussion of US legal issues arising out of proposed **reparations** for slavery, see Brophy, 'Some Conceptual and Legal Problems in **Reparations** for Slavery', (**2003**) 58 *New York University Annual Survey of American Law* 497.

[FN83]. See Commission on Crime Prevention and Criminal Justice, Addendum to the Report of the Secretary-General: Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 10 April 1996, E/CN.15/1996/16/Add.3 at para. 55.

[FN84]. A well-known example is the Holocaust Victim Asset Litigation that took place in US Federal Court in 1998 and where selected Swiss banks agreed to pay $1.25 billion (US) to settle claims made by Jewish WWII depositors. For more information see: http://www.swissbank-claims.com. For other examples of litigation related to the Jewish holocaust, including claims against German, Austrian and French banks, as well as cases filed against European insurance companies, see Bazyler, 'The Holocaust Restitution Movement in Comparative Perspective'. (**2002**) 20 *Berkeley Journal of Internartional Law* 11; and Bazyler and Fitzgerald, supra n. 74 (discussing settlements reached with Swiss, German, French, Austrian and Israeli industries and the importance of US pressure on reaching the settlements in the lawsuits filed against corporate entities). For insurance-related claims see the website of the International Commission on Holocaust-Era Insurance Claims in Washington D.C., available at: www.icheic.org.

[FN85]. See Scheiber, 'Taking Responsibility: Moral and Historical Perspectives on the Japanese War-**Reparations** Issue', (**2002**) 20 *Berkeley Journal of International Law* 233.

[FN86]. For example, Japan entered into bilateral treaties with Sweden, Spain, Burma, Denmark, the Netherlands and Russia, pursuant to which it agreed to pay compensation to the nationals of those countries. See Bazyler, supra n. 84 at 31 (providing the example that, in the bilateral treaty between the Netherlands and Japan entered into in 1956, Japan agreed to pay $10 million (US)).

[FN87]. See Yu, '**Reparations** of Former Comfort Women of World War II', (1995) 36 *Harvard Journal of International Law* 528.

[FN88]. See Webster, 'Sisyphus in a Coal Mine: Responses to Slave Labor in Japan and the United States', (**2006**) 91 *Cornell Law Review* 733 at 745-55 (discussing history of slave labor litigation in Japanese domestic courts and noting that '[s]ince 1995, former Chinese slave laborers have filed fifteen suits in Japanese district courts. Two of these suits have been settled, six have been decided (and subsequently appealed), and seven are pending. Among the six decisions handed down, a clear split emerges: three courts have found for plaintiffs, and three courts have found for defendants. The Supreme Court of Japan is currently hearing appeals from three different high courts, and its decisions will provide important guidance to lower courts faced with slave-labor disputes.') It should also be noted that as of April **2006**, preparations were being made by former forced Chinese labourers to file class-action lawsuits against Japanese corporations in Chinese domestic courts. See Underwood, 'Lawsuits over Wartime Forced Labor Fuel China-Japan Conflict', 25 April **2006**, *New America Media*, available at: http://news.newamericamedia.org/news/view.article.html?article.id=40298e382434db7510a4776fbb4de354.h

[FN89]. For a discussion of legal problems arising from WWII Japanese forced labour claims in US courts see Haberstroh. 'In Re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts', (**2003**) 10 *Asian Law Journal* 253.

[FN90]. For a discussion of these and other lawsuits against Japanese companies see Bazyler, supra n. 84 at 25-32.

[FN91]. Bazyler, ibid. at 27.

[FN92]. In *Re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. **2000**).

[FN93]. Treaty of Peace with Japan 1951, 136 UNTS 45.

[FN94]. Article 14(b), Treaty of Peace with Japan, ibid.

[FN95]. See *Hwang Geum Joo v Japan*, No. 00-CV-288 (D.D.C. filed 27 April **2001**). The 'comfort women' lawsuit was dismissed after the US government filed a Statement of Interest in the case, urging the case to be dismissed. For a discussion of **reparations** for 'comfort women' see Nearey. 'Seeking **Reparations** in the New Millennium: Will Japan Compensate the "Comfort Women" of WWII?', (**2001**) 15 *Temple International and Comparative. Law Journal* 121; and Bazyler, supra n. 84 at 25-32.

[FN96]. See also Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, **2001**).

[FN97]. The question posed is essentially different from that in *Velasquez Rodriguez*, where Honduras was found to bear responsibility for a failure to investigate and prosecute a crime committed by its agents. In that case, the State did in fact bear responsibility, but not simply for the underlying act committed by its agents, but rather for the distinct wrong, which is commonly characterised as a 'denial of justice' in failing to properly investigate and bring the perpetrators to justice. See *Velasquez Rodriguez (Preliminary Objections)* IACtHR Series C 1 (1987); and *Velasquez Rodriguez (Compensatory Damages)* IACtHR Series C 7 (1989).

[FN98]. ETS No. 116.

[FN99]. See Preamble, European Compensation Convention.

[FN100]. Article 1, European Compensation Convention.

[FN101]. Ibid.

[FN102]. Ibid.

[FN103]. Member States of the Council of Europe have adopted domestic measures to facilitate compensation to victims of crimes. See, for example, Victims Assistance Act and Compensation Scheme for Victims of Violent Crimes 1985 (Belgium) (providing for a fixed 'solidarity contribution' to be paid by all those who are convicted of crimes); General Compensation Scheme (enacted in the Law of 6 July 1990) (France) (providing for State compensation for victims of crime); Criminal Injuries Compensation Act of 1975 (Netherlands); Compensation from the State for Personal Injury Caused by a Criminal Act 1976 (Norway) (establishing a Compensation Tribunal for victims of violence); and Scheme of Compensation for Personal Injuries Criminally Inflicted of 1974 (Ireland) (establishing the Criminal Injuries Compensation Tribunal).

[FN104]. Article 5, European Compensation Convention.

[FN105]. Article 6, European Compensation Convention.

[FN106]. Article 8, European Compensation Convention.

[FN107]. See Principle 12, 1985 Basic Principles of Justice.

[FN108]. See Report of the Commission on Crime Prevention and Criminal Justice, supra n. 83.

[FN109]. Ibid.

[FN110]. Para. 38, ibid.

[FN111]. The following are representative: Australia, Belgium, Canada, Cuba, Finland, France, Jordan, Luxembourg, Mexico, Netherlands, Oman, Peru, Philippines, Qatar, Republic of Korea, Romania, Spain and Sweden. See para. 41, ibid.

[FN112]. See Article 79, Rome Statute of the International Criminal Court 1998 (ICC Statute), 2187 UNTS 90; 6 IHRR 232 (1999).

[FN113]. For a commentary on Article 79, see Schabas, *An Introduction to the International Criminal Court* (Cambrudge: Cambridge University Press, **2001**) at 150; Friman and Lewis, 'Reparation to Victims', in Lee and Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, New York: Transnational, **2001**) 474 at 487; and Jennings, 'Article 79: Trust Fund', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 1005.

[FN114]. See Article 2(1), ICCPR ('to respect and to ensure ... the rights ...'); Article 1, ECHR ('shall secure'); and Article 1(1), ACHR ('to respect and to ensure ...'). See also Article 2, CAT; Article 3, ICERD; Article 2, Convention on the Elimination of All Forms of Violence Against Women 1979, 1249 UNTS 13 (CEDAW); Article 2(1), CRC; Article 7, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ('to respect and to ensure ... the rights ...'); Article 1, Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277 ('to prevent and punish'); Common Article 1, 1949 Geneva Conventions and Optional Protocol 1; Article 2(1), Universal Declaration; Principle 1(1), Vienna Declaration; Article 2, Declaration on the Protection of all Persons From Enforced Disappearance; Article 4(c), Declaration on the Elimination of Violence Against Women, 23 February 1944, A/Res/48/104; Article 1(1), Inter-American Convention on Forced Disappearances 1994, 33 ILM 1429; and Article 1, Inter-American Convention to Prevent and Punish Torture 1988, OAS Treaty Series No. 67.

[FN115]. *Velásquez Rodríguez* IACtHR Series C 4 (1988).

[FN116]. Ibid. at para 166.

[FN117]. Ibid. at para. 174.

[FN118]. Ibid. at para. 167.

[FN119]. Ibid. at para. 177.

[FN120]. Ibid. at para. 176.

[FN121]. Ibid. at para. 184.

[FN122]. See Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress', in Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995) 24 at 31; Orentlicher, 'Settling Accounts-- The Duty to Prosecute Human Rights Violations of a Prior Regime', (1991) 100 *Yale Law Journal* 2537; Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', (1990) 78

*California Law Review* 451 at 475. For opinions of the African Commission on Human and Peoples' Rights, see 211/98. *Legal Resources Foundation v Zambia*, Decision adopted during the 29th Ordinary Session (**2001**); 9 IHRR 256 (**2002**) at para. 62; and 155/96. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*. Decision adopted during the 30th Ordinary Session (**2001**); 10 IHRR 282 (**2003**) at paras 44-8 (duty of the State to respect, protect, promote and fulfil all rights).

[FN123]. For decisions of the IACtHR, see, for example; *Garrido and Baigorria* (**Reparations**) IACtHR Series C 39 (1998); 7 IHRR 70 (**2000**) at para. 72; *Godínez Cruz* IACtHR Series C 8 (1989) at para. 184 *et seq.*; *Aloeboetoe et al*. IACtHR Series C 11 (1991) at para. 76 *et seq.*; *Gangaram Panday* IACtHR Series C 16 (1994); 2 IHRR 360 (1995); *El Amparo* IACtHR Series C 19 (1995); 3 IHRR 349 (1996) at para. 23 *et seq.*; *Neira Alegria et al*. IACtHR Series C 20 (1995); 3 IHRR 362 (1996) at para. 41 *et seq.*; *Caballero Delgado y Santana* IACtHR Series C 22 (1995); 3 IHRR 548 (1996) at para. 135 *et seq.*; *Barrios Altos* IACtHR Series C 75 (**2001**); 10 IHRR 487 (**2003**) at paras 41-4. For decisions of the Inter-American Commission on Human Rights, see, for example: Case 10.559, *Chumbivilcas v Peru* Report No. 1/96 (1996); 4 IHRR 593 (1997) (State must ensure the effectiveness of all the rights contained in the Convention by means of a legal, political and institutional system appropriate for such purposes; prevent; re-establish; compensate; duty to adopt such domestic provisions, investigate); Case 10.235, *Villamizar et al*. Report No. 11/91 (1992); Case 10.454, *Jurado* Report No. 32/92 (1992); Case 10.581, *Pedraza* Report No. 33/92 (1992); Case 10.433, *Chocas et al* Report No. 9/93 (1993); Case 10.443, *Capcha* Report No. 11/93 (1993); Case 10.528, *Castillo* Report No. 11/93 (1993); Case 10.531, *Navarro* Report No. 12/93 (1993); and Case 10.480, *Lucio Parada Cea et al*. Report No. 1/99 (1999) at para. 130. See also Ambos, 'Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen'. (1999) 37 *Archiv des Völkerrechts* 318 at 319-21, with further references.

[FN124]. Case 10.287, *Masacre Las Hojas* Report No. 26/92 (1992).

[FN125]. Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, *Herrera et al*. Report No. 28/92 (1992).

[FN126]. Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, *Santos Mendoza et al*. Report No. 29/92 (1992).

[FN127]. See *Barrios Altos Case*, supra n. 123.

[FN128]. For a detailed discussion of this jurisprudence, see Cassel, 'Lessons from the Americas; Guidelines for International Response to Amnesties for Atrocities', (1996) 59 *Law and Contemporary Problems* 197 at 208-19.

[FN129]. General Comment No. 20, replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), 10 March 1992, HRI/GEN/1/Rev.7 at 150; 1-2 IHRR 26 (1994).

[FN130]. See HRC General Comment 6, The Right to Life (Article 6), 30 April 1982, HRI/GEN/1/Rev.7 at 128; 1-2 IHRR 4 (1994) at para. 305; HRC General Comment 16. The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour

and Reputation (Article 17), 8 April 1988, HRI/GEN/1/Rev.7 at 142; 1-2 IHRR 18 (1994) at para. 1; HRC General Comment 29, States of Emergency (Article 4), 31 August **2001**. CCPR/C/21/Rev.1/Add.11; 9 IHRR 303 (**2002**) (on derogations during a state of emergency).

[FN131]. See, for example, *Rodriguez v Uruguay*, supra n. 45 at paras 12.3-4.

[FN132]. *Selmouni v France* 1999-V 149; (1999) 29 EHRR 403.

[FN133]. Among others, these include the following judgments; *Aksoy v Turkey* 1996-VI 2260; (1997) 23 EHRR 553;*Assenov and others v Bulgaria* 1998-VIII 3290; (1998) 28 EHRR 652; and, *mutatis mutandis, Soering v United Kingdom*, A 161 (1989); (1989) 11 EHRR 439 at paras 34-5 and 88.

[FN134]. Article 13, ECHR.

[FN135]. *Selmouni*, supra n. 132 at para. 79. For cases finding a duty to investigate unlawful killings, see *McCann v United Kingdom* A 324 (1995); (1995) 21 EHRR 97 at para. 161; and *Finucane v United Kingdom***2003**-VIII 328; (**2003**) 37 EHRR 29 at para. 67.

[FN136]. *Al-Adsani v United Kingdom***2001** XI 761; (**2001**) 34 EHRR 273 at paras 38-40.

[FN137]. Ibid. at para. 61. The *Al-Adsani* case was distinguished in *Ferrini v FRG*, 87 *Rivista di Diritto* Internazionale 539 (**2004**) concerning a war crime on the territory of the State of jurisdiction. See Gattini, 'War Crimes and State Immunity after the Ferrini Decision', (**2005**) 3 *Journal of International Criminal Justice* 224.

[FN138]. For the ECtHR's emphasis on this difference see *Al-Adsani*, supra n. 136 at para. 65.

[FN139]. Articles 57, 68(3) and 75 (victims' participation in various stages of Court proceedings); Articles 43 and 68 (protection of victims and witnesses); Articles 75 and 85 (rights to reparation and compensation); and Articles 75 and 79, ICC Statute (trust fund for victims). See also infra section 5 C(iii).

[FN140]. See *Palmagero Gold Fields* 5 RIAA at 298 (1931); *Spanish Zones of Morocco Claims* 2 RIAA 615 (1925) (holding that commission of a wrongful act entails a duty of reparation); *Russian Indemnity* 11 RIAA at 431 (1912); and *Martini* 2 RIAA 975 at 1002 (discussing *restitutio in integrum*).

[FN141]. See *Chorzów Factory (Claim for Indemnity)*, Jurisdiction, PCIJ Reports 1927. Series A No. 8, 21.

[FN142]. See, generally, Bassiouni, 'Searching for Peace Achieving Justice: The Need for Accountability', (1998) 14 *Nouvelles Etudes Pénales* 45; Danieli, 'Justice and **Reparations**: Steps in the Healing Process', (1998) *Nouvelles Études Pénales* 303; van Boven, 'Accountability for International Crimes: The Victim's Perspective'. (1998) 14 *Nouvelles Études Pénales* 349; Sandoz, 'Reflection on Impunity and the Need for Accountability', (1998) 14 *Nouvelles Études Pénales* 381; Almeida, 'Compensation and **Reparations** for

Gross Violations of Human Rights', (1998) 14 *Nouvelles Études Pénales* 399; and Baehr, 'How to Deal with the Past', (1998) 14 *Nouvelles Études Pénales* 415.

[FN143]. See also Danieli, ibid. at 308-12. With respect to refusing compensation out of principle. Danieli quotes an Israeli idealist who had previously fought against taking money from the Germans after WWII: 'I refused. Today, I am sorry, because I concluded that I did not change anything by refusing. There are aging survivors who don't have extended family. The steady sum enables them to go on. The fact that I gave up only left the money in the hands of the Germans. We were wrong.' (at 308). For further discussion of the forms of non-monetary victim reparation, see, generally, Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, MA: Beacon Press, 1999).

[FN144]. For example, the victims may be forced to flee their homelands or deprived of any means of providing for themselves or their families, which subsequently leaves them vulnerable to future victimisation, including starvation, discrimination, and slave-like working conditions. See Victims of Crimes: Working Paper Prepared by the Secretariat, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1 August 1985, A/Conf.121/6, in Bassiouni, supra n. 58 at 241.

[FN145]. See Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, **2003**); and Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (**2001**) 42 *Virginia Journal of International Law* 81.

[FN146]. The Preamble to the ICC Statute states in part:

> Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time. Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.
>
> Recognizing that such grave crimes threaten the peace, security and well-being of the world.
>
> Affirming 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.
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ...

[FN147]. See *Underhill v Hernandez* 168 US 250, 252 (1897). See also *Banco Nacional de Cuba v Sabbatino* 376 US 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Alfred Dunhill of*

*London Inc. v Republic of Cuba* 96 S.Ct. 1854, 1859, 425 US 682, 691, 48 L.Ed.2d 301, 301 (1976); and *US v Pink* 62 S.Ct. 552, 567, 315 U.S. 203, 233, 86 L.Ed. 796, 796 (1942).

[FN148]. See Foreign Sovereign Immunities Act, 28 USC §§1330, 1602-11. The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign State in US courts. This statute provides for only commercial suits against a state. See *Nelson v Saudi Arabia* 508 US 349 (1993) (alleged acts of torture were not within the commercial exception to sovereign immunity).

[FN149]. See *Siderman de Blake v Argentina* 965 F.2d 699, 719 (9th Cir. 1992); See also *Hirsch v Israel* 962 F. Supp. 377, 385 (SDNY 1997); and *Von Dardel v Union of Soviet Socialist Republics* 736 F. Supp. 1 (DDC 1990). The reasoning in *Siderman de Blake* was also adopted in the English case of *Al-Adsani v Kuwait* [1995] 103 ILR 420.

[FN150]. See Evans, 'International Wrongs and National Jurisdiction', in Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart Publishing, 1998) 173 at 175 and 182-9. Evans is of the opinion that the new emphasis in international law on individual responsibility obfuscates the need to hold States accountable for their failure to comply with their international obligations.

[FN151]. But see *Linda R.S. v Richard D.* 410 US 614, 619 (1973), where the Court held that 'in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.'

[FN152]. Torture Victim Protection Act, Pub. L. 102-256, Mar. 12, 1992 (codified at 28 USC § 1350). See Goodman, 'Congressional Support for Customary International Human Rights as Federal Common Law: Lessons of the Torture Victim Protection Act', (1998) 4 *ILSA Journal of International and Comparative Law* 455; Murray, 'The Torture Victims Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts', (1987) 25 *Columbia Journal of Transnational Law* 673; Haffke, 'The Torture Victim Protection Act: More Symbol Than Substance', (1994) 43 *Emory Law Journal* 1467; Gruzen, 'The United States as a Forum for Human Rights Litigation: Is This the Best Solution?', (**2005**) 14 *Transnational Law* 207 at 230-3 (discussing overlap between the Torture Victim Protection Act and the Alien Tort Claims Act); and Aceves, 'Affirming the Law of Nations in U.S. Courts', (**2002**) *Federal Lawyer* 33 at 36.

[FN153]. Alien Tort Claims Act, 28 USC § 1350. See Stephens, 'Individuals Enforcing International Law: The Comparative and Historical Context', in 'Symposium; Export/Import: American Civil Justice in a Global Context', (**2002**) 52 *DePaul Law Review* 433; Delisle, 'Human Rights, Civil Wrongs and Foreign Relations: A 'Sinical' Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad', ibid. 473; Shaw, 'Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act', (**2002**) 54 *Stanford Law Review* 1359; Poullaos, 'The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations', (**2002**) 80 *Washington University Law Quarterly* 327; Betz, 'Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict Ridden Nations', (**2001**) 14 *DePaul Business Law Journal* 163; and Dellapenna, 'Civil Remedies for International Terrorism', (**2000**) 12 *DePaul Business Law Journal* 169.

[FN154]. 28 USC § 1350.

[FN155]. *Kadic v Karadzic* 70 F.3d 232, 241 (2d Cir. 1995). For an example of a class action lawsuit under the ATCA, see *In Re Estate of Ferdinand E. Marcos* 978 F.2d 493 (9th Cir. 1992); and *In Re Estate of Marcos* 25 F.3d 1467 (9th Cir. 1994) ('*Marcos* litigation').

[FN156]. *Kadic*, ibid. at 242-3; and *Doe I v Islamic Salvation Front* 993 F. Supp. 3, 8 (DDC 1998).

[FN157]. *Doe I v Unocal* 963 F. Supp. 880, 892 (CD Cal. 1997).

[FN158]. *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980).

[FN159]. *Forti v Suarez-Mason* 694 F. Supp. 707 (N.D. Cal. 1988).

[FN160]. *Martinez v City of Los Angeles* 141 F.3d 1373 (9th Cir. 1998); and *Eastman Kodak v Kavlin* 978 F. Supp. 1078, 1092 (SD Fla. 1997).

[FN161]. *Xuncax v Gramajo* 886 F. Supp. 162 (D. Mass. 1995).

[FN162]. Ibid. at 887.

[FN163]. *Aguinda v Texaco, Inc.* 1994 WL 142006 at *1 (No. 93 Civ. 7527) (SDNY April 11, 1994).

[FN164]. Foreign Sovereign Immunities Act, supra n. 148.

[FN165]. See *Abebe-Jira v Negewo* 72 F.3d 844 (11th Cir. 1996).

[FN166]. *Kadic*, supra n. 155. In this case, the plaintiffs were among the rape victims who were interviewed by the Commission of Experts in 1993. A published summary of what they and other victims suffered is contained in the Annex II to the Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), 27 May 1994. S/1994/674 (1994); *Annexes to the Final Report*, 27 May 1994, S/1994/674/Add.2 (1994).

[FN167]. *Kadic*, ibid. at 236-7.

[FN168]. Ibid. at 237.

[FN169]. 866 F. Supp. 734, 739.

[FN170]. Ibid. at 741.

[FN171]. Ibid. at 740-1.

[FN172]. *Kadic*, supra n. 155 at 239.

[FN173]. Ibid.

[FN174]. Ibid. at 245.

[FN175]. Ibid. at 248.

[FN176]. Ibid. at 249 and 250. The act of State doctrine was not asserted in the District Court and, therefore, was waived on appeal, ibid. at 250.

[FN177]. Despite the court's ruling, Karadzic did not submit to a requested deposition in the matter and the case was appealed all the way to the US Supreme Court, which denied review. See 518 US 1005 (1996). On 27 February 1997, without giving the requisite deposition, Karadzic notified his attorney Ramsey Clark that he no longer wanted to mount a defense to the suit. See Appleson, 'Karadzic Drops Human Rights Case Defense', *Reuters News Service*, 4 March 1997. Following Karadzic's default. US District Court Judge Peter Leisure entered a default judgment against the former Bosnian Serb leader finding him liable for directing troops to terrorise the women of Bosnia and Herzegovina through an organised campaign of mass rape between 1991 and 1993. In August **2000**, a jury awarded $745 million (US) to the plaintiffs. See Freund, 'Karadzic Verdict', available at: http://www.hri.org/news/usa/voa/**2000**/00-08-10.voa.html#03. In another case against Karadzic, also brought under the provisions of ATCA, the jury in New York awarded $4.5 billion in compensatory and punitive damages to the plaintiffs. See 'Radovan Karadzic Proven Guilty of Atrocities', *Associated Press*, 27 September **2000**.

[FN178]. *Mushikiwabo v Barayagwiza* 1996 WL 164496 at *3 (94 Civ. 3627) (SDNY April 9, 1998) (not reported in F.Supp.). Other similar awards include one of several million dollars per plaintiff against a single individual defendant in *Xuncax*, supra n. 161 at 197-202, and a judgment of over $10 million (US) against a defendant police inspector in *Filartiga v Pena-Irala* 577 F. Supp. 860, 867 (EDNY 1984).

[FN179]. In other cases brought under the ATCA, progress towards the recovery of damages awarded by US courts has been extremely limited. For example, in *Filartiga v Pena-Irala* the plaintiffs were unsuccessful in attempting to enforce the judgment of the US Court in Paraguay. In *Forti v Suarez-Mason*, supra n. 159, where $8 million (US) was awarded as total damages in 1990, the plaintiffs could only recover $400 (US) from the defendant via a local bank account from which a defendant's family member was receiving a monthly disbursement. The plaintiffs in *Abebe-Jira v Negewo*, supra n. 165 (damages award of $1.6 million (US)) and *Mushikiwabo v Barayagwiza*, ibid. (damages award of $105 million (US)), have all been unsuccessful in their attempts to enforce the judgments and collect damages awarded. In the *Marcos* litigation part of the damages award has been turned over from Swiss banks to the Philippines government and the plaintiffs are presently trying to enforce the judgment in Philippines courts.

[FN180]. A pair of conventions aimed at addressing this problem in the Member States of the European Union are the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention), [1972] OJ L/299/32, as amended by the 1989 Accession Convention, and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention). Since the conventions only apply to parties that are members of the EU, they have a limited geographic reach. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments

in Civil and Commercial Matters, adopted by the Special Commission of the Hague Conference on Private International Law at its fifth meeting in October 1999, is intended to be universal in scope and provide a more comprehensive solution to the problems associated with the enforcement of foreign judgments.

[FN181]. A good example is found in the case of Guatemala where officials obstruct the criminal process and the incompetence and inadequate resources for the administration of justice resulted in a record of impunity for human rights violations. See Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1480-1501.

[FN182]. The signing of the Dayton Peace agreement ended the conflict in the former Yugoslavia. It was concluded by the Republic of Bosnia and Herzegovina, the Federal Republic of Yugoslavia, and the Republic of Croatia on 21 November 1995 in Dayton, Ohio. For the text of the Agreement see (1996) 35 *International Legal Materials* 75. See Williams and Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Oxford: Rowman & Littlefield Publishers, **2002**); and Gaeta, 'The Dayton Peace Agreement and International Law', (1996) 7 *European Journal of International Law* 2.

[FN183]. In particular, Annex II, Article II, Dayton Peace Agreement.

[FN184]. See Appendix to Annex VI, Dayton Peace Agreement. The Chamber ceased functioning in December **2003**.

[FN185]. See the website of the Bosnian Human Rights Chamber, available at: http://wwwuser.gwdg.de/~ujvr/hrch/hrch.htm.

[FN186]. Alternative measures of victim redress awarded by the Human Rights Chamber include the revocation of a municipal ordinance for the closure of a Muslim cemetery ordered in *Islamic Community in BiH v Republika Srpska* Case No. CH/99/2177 (**2000**); 10 IHRR 584 (**2003**) and the ordering of investigation into the conduct of local enforcement officials involved in the commission of human rights abuses against the applicant in *Przulj v Federation of BiH* Case No. CH/98/1374 (**2000**); 8 IHRR 845 (**2001**).

[FN187]. See supra n. 21.

[FN188]. Article 44, ACHR.

[FN189]. Article 48, ACHR.

[FN190]. Articles 60 and 61, ACHR.

[FN191]. See notes accompanying Section 3.

[FN192]. *Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain)* ICJ Reports 1970, 3.

[FN193]. See Rodley, *The Treatment of Prisoners Under International Law*, 2nd edn (Oxford: Oxford University Press. 1999); Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other*

*Cruel, Inhuman, or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988); and de la Cuesta Arzamendi, *El Delito de Tortura* (Barcelona: Bosch, 1990).

[FN194]. See SC Res. 692, 20 May 1991. S/RES/692 (1991). See also Crook, 'Current Development: the United Nations Compensation Commission--A New Structure to Enforce State Responsibility', (1993) 87 *American Journal of International Law* 144.

[FN195]. Secretary-General's Report, 2 May 1991. S/22559.

[FN196]. Individual victims and corporations were required to present their claims through their respective governments or international organisations on behalf of those individual victims who are not in a position to have their claims filed by a government. The latter type of claims were submitted by, for example, the United Nations Development Program and the UN High Commissioner for Refugees.

[FN197]. See UNCC website, available at: http://www.unog.ch/uncc/start.htm.

[FN198]. The Fund is principally funded from 25% of revenues of the sales of Iraqi oil in accordance with the UN Oil-for-Food Program.

[FN199]. While the approach of the UNCC in incorporating victims in the processing of mass claims resolutions is innovative, it should also be noted that the experiences of international dispute resolution bodies dealing with commercial claims are instructive as to the possibility of processing large numbers of individual claims and can be seen as a potential model with respect to future processes established to process the claims of victims who have experienced serious violations of fundamental rights. The Iran-United States Claims Tribunal (IUSCT) is one such arbitral body. The IUSCT arose as one of the measures taken to resolve the hostage crisis at the US Embassy in Tehran and the subsequent freeze of Iranian assets by the US. The IUSCT was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, commonly referred to as the Algiers Accords. See Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution', (1990) 84 *American Journal of International Law* 104. The IUSCT began hearing claims for the taking of property in 1983. For the text of the Accords, see 1 Iran-United States Claims Tribunal Reports 9. Further information regarding the IUSCT is available at: http://www.iusct.org. The IUSCT received 4,700 private claims by US citizens filed against the Government of Iran, most of which have been resolved and have resulted in more than $2.5 billion (US) in awards to the US citizens and companies; the period for filing new private claims against Iran expired on 19 January 1982. See Iran--United States Claims Tribunal, available at: http:// www.state.gov/s/l/3199.htm. The example of collective mechanisms such as the IUSCT and the implementation of this type of model with respect to victims' rights could serve the overall goal of the **2006** Basic Principles and Guidelines.

[FN200]. See SC Res. 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 25 May 1993, S/RES/827 (1993) (ICTY Statute). It was clear at that time that there was no intention on the part of the Security Council to

implement victims' rights in the Statute. For a comment on the ICTY's reference to victims in its Statute's Preamble, see Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Ardsley Park, NY: Transnational Publishers, 1996) at 234-45.

[FN201]. SC Res. 955, Establishing the International Tribunal for Rwanda (with Annexed Statute), 8 November 1994. S/RES/955 (1994) (ICTR Statute). The ICTR Statute does not refer to victim compensation.

[FN202]. Article 24(3), ICTY Statute. See Lasco, supra n. 20 at 19. Rule 105 at both *ad hoc* tribunals further elaborates on the procedure for carrying out restitution in case the Trial Chamber can determine the rightful owner. The issue of victims' **reparations** has also been inadequately addressed by the hybrid tribunals that have been established in East Timor, Sierra Leone and Kosovo and the hybrid tribunal that is to sit in Cambodia. The Special Panels for Serious Crimes in East Timor were the most ambitious of the hybrid tribunals with respect to victims' rights and victim compensation. However actual results were disappointing. See United Nations Transnational Administration in East Timor (UNTAET) Regulation **2000**/11 on the Organization of Courts in East Timor, 6 March **2000**, UNTAET/REG/**2000**/11; UNTAET Regulation **2000**/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, 6 June **2000**, UNTAET/REG/**2000**/15; and UNTAET Regulation **2000**/30 on Transitional Rules of Criminal Procedure, 25 September **2000**, UNTAET/REG/**2000**/30 (adopting the law of the ICC with minor variations with respect to the rules and procedures governing the Special Panels for Serious Crimes). While the mechanisms for addressing victims' rights were modelled on the expansive ICC provisions regarding the victim compensation, see infra Section 5 C(iii), the rights of victims were not truly taken into account or properly addressed in the decisions of the panels. The structure and provisions establishing and governing the hybrid tribunals of Sierra Leone, Kosovo and Cambodia are less ambitious with respect to victims' rights. See Article 14, Statute of the Special Court for Sierra Leone; and Article 10, Special Court Agreement (**2002**) Ratification Act (incorporating the Rules of Procedure and Evidence of the ICTR aplicable at the time of establishment of the Special Court) and Rules of Procedure and Evidence, as amended 14 May **2005** (amending Rules 105 and 106 in a non-substantive manner with respect to the approach to victim **reparations** and providing no further mechanism for obtaining victim **reparations**); United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation 1999/5 on Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor, 4 September 1999, UNMIK/REG/1999/5; UNMIK Regulation 1999/6 on Recommendations for Structure and Administration of the Judiciary and Prosecution Service, 7 September 1999, UNMIK/REG/1999/6; UNMIK Regulation **2000**/15 on Establishment of the Administrative Department of Justice, 6 June **2000**, UNMIK/REG/**2000**/15; UNMIK Regulation **2000**/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December **2000**, UNMIK/REG/**2000**/64; and Article 39, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, **2001**(providing that the Court may, in addition to ordering imprisonment, order the confiscation of personal property, money and real property acquired unlawfully or by criminal conduct; however, any such confiscated property is to be returned to the State).

[FN203]. Rule 106, Rules of Procedure and Evidence. National courts are bound by the

Tribunals' findings with respect to the criminal responsibility of the convicted person. Nothing has come from Rule 106, however, even though the cases dealt with by the ICTY evidenced the victimisation of specific persons, as well as a larger category of victims mostly unidentified in the cases.

[FN204]. Rules 105 or 106 have yet to be applied in the jurisprudence of the ICTY, and no restitution or compensation was ordered pursuant to these provisions in the national courts of the former Yugoslavia. See Chifflet. 'The Role and Status of the Victim', in Boas and Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff. **2003**) 75. In October **2000**, the President of the ICTY proposed to the UN Security Council the establishment of a 'claims commission' that would provide a 'method of compensation' for the victims of crimes in the former Yugoslavia. (Ibid. at 102, citing the Report attached to a letter dated 12 October **2000** from the President of the ICTY addressed to the Secretary-General, S/**2000**/1063, Annex, para. 45.) As noted by Chifflet, this effectively ended any prospect that the proceedings before the Tribunal would be extended to include the granting of compensation to the victims of crimes committed in the former Yugoslavia (ibid. at 104). In addition, the Security Council is yet to respond to the President's invitation to create a compensation commission. The situation is similar at the ICTR where the judges have rejected proposals to amend the ICTR Statute with the aim of providing direct redress to victims. See Letter of 14 December **2000** by the UN Secretary-General to the UN Security Council, 15 December **2000**, S/**2000**/1198, at Annex.

[FN205]. Articles 75 and 79, ICC Statute.

[FN206]. Rule 85, International Criminal Court Rules of Procedure and Evidence, 9 September **2002**, ICC-ASP/1/3 (ICC Rules of Procedure and Evidence).

[FN207]. See Timm, 'The Legal Position of Victims in the Rules of Procedure and Evidence', in Fischer, Kress and Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin: Arno Spitz, **2001**) 307.

[FN208]. Rule 85, ICC Rules of Procedure and Evidence. See also Donat-Cattin, 'The Rights of Victims and International Criminal Justice', in ELSA (ed.), *International Law as We Enter the 21st Century* (Berlin: Arno Spitz, **2001**) 186; and Donat-Cattin, 'The Role of Victims in ICC Proceedings', in Lattanzi and Schabas (eds), *Collection of Essays on the Rome Statute of the International Criminal Court* (Sirente: Ripa Fagnano Alto, 1999) 1.

[FN209]. See 1985 Basic Principles of Justice.

[FN210]. Article 8, ICC Statute.

[FN211]. Article 75, ICC Statute. See also Donat-Cattin, 'Article 75: **Reparations** to Victims', in Triffterer (ed.). *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, supra n. 113, 965.

[FN212]. Article 75(1), ICC Statute, Under Rule 102, ICC Rules of Procedure and Evidence, a victim's request for **reparations** shall be made in writing. The request is filed with the Registrar and must be as specific as possible in terms of content. Thus, it should include, at a minimum, the victim's identity and address, a description of the incident, injury, loss or

harm suffered, the form of compensation sought, as well as the identity of the alleged perpetrator (if known). See Timm, supra n. 207 at 302 and 303 (discussing conditions and content of the Award).

[FN213]. Article 75(2), ICC Statute.

[FN214]. Article 75(3), ICC Statute, Claims for **reparations** can be heard in a separate hearing (related to sentencing) and may be initiated by the victims or their legal representative. See Article 76(3), ICC Statute and Rule 143, ICC Rules of Procedure and Evidence. At the hearing, the legal representative of the victim(s) may question witnesses, experts and the convicted person. (Rule 93(4), ICC Rules of Procedure and Evidence.)

[FN215]. Article 75(5), ICC Statute, Under the provisions of this Article, **reparations** are treated in the same manner as fines and forfeitures. National courts may not modify the order for **reparations** during its enforcement. (Rule 129, ICC Rules of Procedure and Evidence.) Furthermore, Rule 218 provides for the content of every reparation order issued by the Court.

[FN216]. Article 79, ICC Statute. See also Ingadottir. 'The Trust Fund for Victims', in Ingadottir (ed.), *The International Criminal Court; Recommendations on Policy and Practice; Financing, Victims, Judges and Immunities* (Ardsley, New York: Transnational, **2003**) 111.

[FN217]. Article 79(2), ICC Statute.

[FN218]. Ibid.

[FN219]. Article 75(6), ICC Statute. A number of States Parties to the ICC have enacted legislation to implement the victim's right to reparation contained in the ICC Statute and facilitate cooperation with the ICC in the enforcement of both reparation orders under Article 75 and orders of fines and forfeiture ordered pursuant to Article 77(2). Such legislation includes, for example, the Canadian Crimes Against Humanity and War Crimes Act of **2000**; Part IV. UK's International Criminal Court Act of **2001**; French Loi No. **2002**-268 relative à la Cooperation avec la Cour Penale Internationale; and s.151-2, Australian International Criminal Court Act of **2002**.

[FN220]. Article 43(6), ICC Statute. See also Ingadottir et al., 'The Victim and Witnesses Unit', in Ingadottir (ed.), supra n. 216, 1.

[FN221]. Article 68(3), ICC Statute allows presentation of the views and concerns of victims where the personal interests of the victim are affected. Such views and concerns are to be presented at appropriate stages of the proceedings as determined by the Court. In January **2006**, Pre-Trial Chamber I considered a request on behalf of victims to be 'grant[ed] status as victims in the procedure ... [to] allow them to present their views and concerns during the rest of the proceedings under way on the "Situation in the Democratic Republic of Congo."' Application No. ICC-01/04-31-Conf-Exp-tEN at para. 23. See also the application forms presented to the Chamber. Application No. ICC-01/04-25-Conf-Exp-tEN; Application No. ICC-01/04-26-Conf-Exp-tEN; Application No. ICC-01/04-27-Conf-Exp-tEN; Application No. ICC-01/04-28-Conf-Exp-tEN; Application No. ICC-01/04-29-Conf-Exp-tEN; and Application No. ICC-01/04-30-Conf-Exp-tEN. The Chamber took an expansive view of the

role of victims, rejecting the arguments of both the Prosecutor and *ad hoc* Defence counsel and decided that Article 68(3), ICC Statute is applicable to 'the stage of investigation of the situation', and accorded the applicants the status of victims 'allowing them to participate in the proceedings at the stage of investigation of the situation in the DRC.'. Decisions on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ICC-01/04-101-tEN-Corr at para. 42.

[FN222]. Article 57, ICC Statute.

[FN223]. Article 75, ICC Statute. In addition to the ICC, victims' participatory rights in the criminal process are also mentioned in several declarations or recommendations from the UN and Council of Europe and in the case law of the ECtHR. See Aldana-Pindell, 'In Vindication of Justiciable Victims Rights', supra n. 2 at 1425-37.

[FN224]. See Lasco, supra n. 20 at 18.

[FN225]. Ibid.

[FN226]. In the **2003** consultations, the US argued that in view of the widely differing domestic legal systems of States, the **2006** Principles and Guidelines should be characterised as 'aspirational and not binding in law.' See International Movement Against All Forms of Discrimination and Racism. Second Consultative Meeting on 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law', 20-23 October **2003** (IMADR) available at: http:// www.imadr.org/geneva/**2003**/2nd.CM.restitution.html.

[FN227]. Ibid. Lasco, supra n. 20, notes that, with respect to the CAT, while many of its provisions have attained the status of customary international law, States Parties to the CAT bear the burden of determining the amount of compensation to victims of torture. This is especially problematic in light of the fact that many of the abuses are committed by governments.

[FN228]. IMADR, supra n. 226.

[FN229]. Ibid.

[FN230]. See infra Section 7.

[FN231]. See supra n. 57. The instrument was adopted by the UN General Assembly in Resolution 40/34 of 29 November 1985, on the recommendation of the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders. The author wishes to acknowledge that throughout the 21-year evolution from the 1985 Basic Principles of Justice to the **2006** Basic Principles and Guidelines, the most consistent supporter of this effort was Irene Melup, a lifelong staff member of the UN. Everyone involved in this effort knows that it was Irene's untiring and dedicated efforts that brought about this result. This is why, in **2004**, many of her friends contributed to a book of studies in her honor dedicated to victims' rights. See Vetere and David (eds), *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (New York: United Nations, **2005**). The two editors have also been consistent advocates of victims' rights and supporters of UN efforts involving

these rights.

[FN232]. See Article 18, 1985 Basic Principles of Justice.

[FN233]. Articles 19-21, ibid.

[FN234]. See supra n. 231.

[FN235]. See Bassiouni, supra n. 58 at 10.

[FN236]. This is another example of the unfortunate lack of integration of UN's efforts. For years, UNOV has dealt with problems of crime and criminal justice, while UNOG has dealt with human rights issues. It is obvious that issues of criminal justice are not distinct from issues of human rights and *vice versa*, but the administrative division has produced a dual track of UN efforts and instruments concerning these two respective subjects, which are, in many respects, inseparable.

[FN237]. Draft Basic Principles and Guidelines on the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, 16 January 1997, E/CN.4/1997/104, Annex.

[FN238]. UNCHR Res. 1998/43, 17 April 1998, E/CN.4/1998/43.

[FN239]. Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, 18 January **2000**, E/CN.4/**2000**/62. Annex (**2000** Draft Principles and Guidelines).

[FN240]. This was based on UNCHR Res. **2000**/41, 20 April **2000**, E/CN.4/RES/**2000**/41; and UNCHR Res. **2002**/44, 23 April **2002**, E/CN.4/RES/**2002**/41.

[FN241]. See Report of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, 25 January **2002**, A/CONF.189/12. See also World Conference on Racism, Daily Highlights, 8 September **2001**, available at: http://www.un.org/WCAR/dh/: and UN Race Conference On Thin Ice. *CBS News*, 25 July **2001**, available at: http:// www.cbsnews.com/stories/**2001**/07/25/world/main303313.shtml. For the European Commission view, see Council Conclusions on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available at: http://europa.eu.int/comm/external.relations/human.rights/doc/ gac.07.01.htm.

[FN242]. See Bowcott, 'Africans Call For Slavery **Reparations**', *Guardian Unlimited*, 29 June **2001**, See also, African Regional Preparatory Conference For the World Conference against Racism, Racial Discrimination. Xenophobia and Related Intolerance. Declaration and Recommendations (**2001**), available at: http://www.hri.ca/racism/official/dakar.shtml.

[FN243]. This consultation was chaired by Mr Alejandro Salinas (Chile) and was attended by the mandated authors of the Draft Principles and Guidelines. Mr Van Boven and the author.

[FN244]. The Commission took note of the report in resolution **2003**/04. See Report of the

Consultative Meeting on the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, 27 December **2002**, E/CN.4/**2003**/63 (First Consultative Meeting Report).

[FN245]. Joint NGO Position Paper Second Consultative Meeting. The Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation For Victims of International Human Rights and Humanitarian Law, available at: http://www.redress.org/publications/NGO_common_position.paper.pdf.

[FN246]. Pursuant to Resolution **2003**/34, the Chairperson-Rapporteur of the Second Consultative meeting, Mr Alejandro Salinas (Chile), prepared a Report of the Second Consultative Meeting that incorporated the Chairperson-Rapporteur's general observations and specific observations on the revised principles and guidelines, the Explanatory Comments (intended to be read in conjunction with the Chairperson-Rapporteur's report), as well as the Chairperson-Rapporteur's Recommendations for the follow-up to the Second Consultative Meeting. The annex of the Report also contains the 24 October **2003** revised version of the Basic Principles and Guidelines, as well as the Chairperson-Rapporteur's and independent experts' proposal arising out of the second Consultative meeting. See Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Geneva 20, 21 and 23 October **2003**), 10 November **2003**, E/CN.4/**2004**/57 (Second Consultative Meeting Report).

[FN247]. Second Consultative Meeting Report at 5.

[FN248]. Ibid.

[FN249]. The following States abstained from the vote: Australia, Egypt, Eritrea, Ethiopia, Germany, India. Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo, and the United States. Delegations gave various reasons for abstaining. The United States opposed the inclusion of the International Criminal Court (Explanation of Vote, US), Germany cited as its reason a failure to 'adequately differentiate between human rights law on the one hand and international humanitarian law on the other.' (Explanation of Vote, Germany). India indicated it was considering national legislation on the subject.

See also Bassiouni, 'Appendix II', in Vetere and David (eds), supra n. 231, 628. While the adoption of the **2006** Basic Principles and Guidelines was a major milestone, the comments of various Member States indicate that the controversy surrounding the interpretation of the scope of the document still exists.

[FN250]. Second Consultative Meeting Report at 26 (Explanatory Comments).

[FN251]. Ibid.

[FN252]. See the comments of Chile, 16 January 1997, E/CN.4/1997/104 at paras 2-4.

[FN253]. Report of the Independent Expert on the Right to Restitution. Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, 8 February 1999, E/CN.4/1999/65 at 85. The Explanatory Comments further note that this is not intended to minimise the importance of other violations of human rights law, but

merely to distinguish those violations which require the implementation mechanism provided in the guidelines. The following (included in Annex II of the Second Consultative Meeting Report) provides the proposed definition of 'gross violations of international law' that emerged from consultation in October **2003**:

> For purposes of this document gross violations of international law means unlawful deprivation of the right to life, torture, or other cruel, inhuman treatment or punishment, enforced disappearance, slavery, slave trade and related practices, deprivation of the rights of persons before the law and similar serious violations of fundamental rights and freedoms and norms guaranteed under applicable international law.

[FN254]. Second Consultative Meeting Report at 26-7. The Comments further notes that these violations are commonly referred to as grave breaches of the 1949 Geneva Conventions and Protocol I thereto, as well as war crimes under customary law of armed conflict. In addition, the Comments note that although not identified as either grave breaches or war crimes in the Conventions, violations of Common Article 3 of the 1949 Geneva Conventions have been recognised in customary international law as equivalent to their counterparts relating to international armed conflict. (Ibid. at 27.)

The language in connection with this obligation was also revised. Initial Drafts used the term 'violator,' but this was seen as too harsh a term and was changed to 'those allegedly responsible,' Article 2, Principle 3(b), **2006** Basic Principles and Guidelines. However, in an attempt to clarify the relationship of the various types of violations. Article 12. Non-Derogation, sought to make clear that the classification of 'gross violations of international human rights law and serious violations of international humanitarian law' did not restrict or derogate 'from any rights or obligations arising under domestic and international law', and that the impact of the document was 'without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law'.

[FN255]. During the **2003** consultations, the US proposal called for only human rights to be addressed in the meeting and for international humanitarian law to be addressed in a separate forum. The United States argued that international humanitarian law is outside of the competence of the Commission on Human Rights and its mandate. The United States stressed that the two have different implications. For example, international humanitarian law in wartime tolerates acts including the killing of innocent victims, lawful collateral damage and imprisonment without trial in a court of law. The United Kingdom expressed the view that only States can violate human rights law while others can violate international humanitarian law. See First Consultative Meeting Report at Principle 3, section 34. Various other objections were raised by Member States during the consultations preceding adoption. The former colonial powers, including the United States, France and the United Kingdom, noted their objections to the use of the **2006** Basic Principles and Guidelines in connection to claims over colonial policies and slavery. The potential retrospective impact of the **2006** Basic Principles and Guidelines also coloured the views of Japan, which expressed concern regarding the effect of the Basic Principles and Guidelines on previously concluded treaty arrangements arising out of the cessation of hostilities following WWII. While these treaty arrangements represent 'hard law' obligations. Japan worried that the Basic Principles and Guidelines could evolve from 'soft law' obligations into binding obligations that would supersede such treaty arrangements. Germany expressed concern regarding potential future obligations for **reparations** in light of their extensive **reparations** programs for

atrocities and violations committed during WWII. The United Kingdom also sought to emphasise the non-binding nature of the **2006** Basic Principles and Guidelines. US objections centred on the duty to prosecute individuals and hold them criminally responsible for violations. This raised the further possibility that the threshold for bringing civil suits would be lowered under the ATCA. The United States also raised objections regarding potential government liability for military operations in light of the extensive military engagements of the US armed forces. Civil jurisdictions opposed the inclusion of common-law based actions and mechanisms for remedies, including 'class-actions' for groups of victims: Bassiouni, Personal Notes.

[FN256]. The adopted language refers to 'gross violations of international human rights law' and 'serious violations of international humanitarian law', as opposed to the previous formulation, which covered 'violations of international human rights and humanitarian law'. Compare the **2006** Basic Principles and Guidelines and the **2000** Draft Principles and Guidelines. The implication of the revision is that these are wholly separate and distinct bodies of law, which would also help to justify the varying standards for determining liability for **reparations**. In the *Wall* case, the ICJ regarded the two regimes as co-equal: see supra n. 3.

[FN257]. IMADR, supra n. 226. See also Article 5, ICC Statute.

[FN258]. IMADR, ibid.

[FN259]. The **2006** Basic Principles and Guidelines also differ in various other ways from the previously considered drafts. The thrust of the majority of revisions is an overall attempt to soften the obligations of States. In this respect, the revisions to Principles 1 and 3 are instructive which contemplated '[t]he obligation to respect, ensure respect for and enforce international human rights and humanitarian law'. The adopted text refers to '[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law'. Principles 1 and 3, **2006** Basic Principles and Guidelines. The softening of the language is subtle but nonetheless evident, as the obligation to implement has prospective implications, as opposed to the more stringent requirements of enforcement. However, the State duty to implement international legal obligations in domestic law has been recognised in the following instruments: Article 2(2). International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR); Article 2(1), CAT: Articles 3 and 4, ICERD: Articles 2-16, CEDAW: Article 4, CRC: Article 2, ACHR: Article 6(1), Inter-American Convention to Prevent and Punish Torture: Article III, Inter-American Convention on Enforced Disappearance: Article 1, AfrCHPR; Article 3, Declaration on the Protection of All Persons from Enforced Disappearances; Article 1, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Article 4, Declaration on the Elimination of Violence against Women; and Article 4(2). Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief. This duty was further recognised in the jurisprudence of various adjudicative and supervisory bodies. See, for example, *Exchange Of Greek and Turkish Populations*, Advisory Opinion, PCIJ Reports, Series B 10 (1925) at 20 (States have to adopt the adequate modifications to their internal laws so as to comply with their national obligations); HRC General Comment No. 3, Implementation at the National Level, 29 July 1981. HRI/GEN/1/Rev.7 at 126; 1-2 IHRR 2 (1993) at para. 1; HRC General Comment No. 18, Non-Discrimination, 10 November 1989, HRI/GEN/1/Rev.7 at 146; 1-2 IHRR 22 (1993) at

para. 4; HRC Concluding Observations: Peru. 15 November **2000**, CCPR/CO/70/PER at para. 8 (State is to take necessary measures to guarantee rights recognised in the ICCPR); *Garrido and Baigorria (**Reparations**)*, supra n. 123 at para. 68 (duty to adopt effective internal measures); *Mayagna (Sumo) Awas Tingnl Community* IACtHR Series C 79 (**2001**); 10 IHRR 758 (**2003**) at para. 164 (duty to adopt, pursuant to Article 2, ACHR, the necessary legislation and other measures); *Bamaca Velasquez (**Reparations**)*. IACtHR Series C 91 (**2002**); 11 IHRR 655 (**2004**) at para. 85 (duty to adopt internal measures to guarantee international humanitarian law and human rights): *Caracazo (**Reparations**)*. IACtHR Series C 95 (**2002**); 12 IHRR 169 (**2005**) at para. 120 (adopt law to insure investigation and punishment); and Case 12.051, *Maria Da Penha Maia Fernandez*, Report No. 54/01 (**2001**) at para. 60(4) (State violated obligation to adopt measures).

Principle 1. Article 2(d) is similarly narrowed. The draft text stated that in harmonising domestic law with international legal obligations. States must ensure 'in the case that there is a difference between national and international norms, that the norm that provides the greatest degree of protection is applied', Principle 1, **2000** Draft Principles and Guidelines. The adopted text only requires States to ensure 'that their domestic law provides at least the same level of protection for victims as required by their international obligations', Principle 1, **2006** Basic Principles and Guidelines. The overall effect, in practical terms, is likely not to be significant, but reflects a spirit of greater modesty.

The 'duty to prosecute' in cases of gross violations of international human rights law and serious violations of international humanitarian law was also softened such that States have a duty to 'investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations,' Ibid. at Principle 3. The effect of this change was also seen in the treatment of statutes of limitations. While the previous text tilted toward the lack of applicability of statutes of limitations when dealing with violations, the adopted text qualifies their application to 'where so provided for in an applicable treaty or contained in other international legal obligations', Principle 4, **2006** Principles and Guidelines, while domestic statutes of limitations for other types of violations that do not constitute crimes under international law 'should not be unduly restrictive', Principle 4, **2006** Principles and Guidelines.

In distinction to this more modest trend, the obligation of investigation was bolstered such that a State's duty includes the duty to '[i]nvestigate violations effectively, promptly, thoroughly and impartially', Principle 1, **2006** Principles and Guidelines, as opposed to simply investigating violations 'in accordance with domestic and international law', Principle 2, **2000** Draft Principles and Guidelines. The duty to extradite was also qualified in the adopted version to explicitly provide that such extraditions must be 'consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment', Principle 3, **2006** Basic Principles and Guidelines. Additionally, the treatment of victims was made more comprehensive and stated that 'appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy', Principle 6, **2006** Basic Principles and Guidelines.

[FN260]. See 1999 Report of Independent Expert, supra n. 253. See also Roht-Arriaza. '**Reparations**, Decisions and Dilemmas', (**2004**) 27 *Hastings Law Review* 157 at 164.

[FN261]. See Bassiouni, supra n. 3 at 469.

[FN262]. For example, historically, torture has been a crime under customary law under the

Hague Conventions of 1889 and 1907, followed by incorporation in the 1929 Geneva Convention, and then again in 1949 and 1977. Thus there are overlaps on torture between the customary law of armed conflict and treaty-based law. In addition, other sources prohibit torture. See IMADR, supra n. 226.

[FN263]. See ibid.

[FN264]. Press Release, Human Rights Commission, 'UN Secretary General to Commission On Human Rights: We Must Hope A New Era of Human Rights in Iraq Will Begin Now', 24 April **2003**, available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/975E2E36F2593DCAC1256D12002DDDBF?opendocument.

[FN265]. See First Consultative Meeting Report at Principles 8 and 9, section 78.

[FN266]. See also Principle 8, **2000** Draft Principles and Guidelines.

[FN267]. See also Rules of Procedure of the **Inter-AmericanCourt** of **HumanRights**, at Definition 31; EC Council of Ministers Framework decision of 15 March **2001** on the standing of victims in criminal proceedings, [**2001**] OJ L 82/1, 'Definitions'; and Second Consultative Meeting Report at 8 ('Consistent with this definition, it is not necessary for the State to be directly culpable in order for a person to fall within the definition.')

[FN268]. Rule 85, ICC Rules of Procedure and Evidence. See also supra Section 5.

[FN269]. During the drafting and consultation process, a view was expressed that the definition of victim was too narrow and that it should embrace groups, such as those affected by violations that impact whole communities. See Second Consultative Meeting Report at 8. The **2000** definition of a victim included the term 'legal personality,' which would include corporate entities, but the term was eliminated during the October **2003** Consultation.

[FN270]. Bloomfield, Barnes and Huyse (eds), *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, **2003**), available online at: http://www.idea.int/publications/reconciliation/upload/reconciliation.chap04.pdf.

[FN271]. During consultations, several States felt that only direct victims and their immediate families could be classified as 'victims'. See comments of Germany in First Consultative Meeting Report. The author stressed the point that if we, as a society, wish to encourage victim intervention, then one who intervenes and is harmed must be given some rights and protection.

[FN272]. The recognition of collective victims is found in the following international and regional treaties and instruments: Article 1, ICESCR; Article 1, ICCPR; Article 2, Indigenous and Tribal People's Convention; Article 2, Optional Protocol to CEDAW; and Article 3(2). European Framework Convention for the Protection of Minorities. For the recognition of collective victims in the jurisprudence of international and regional tribunals, see *Mayagna (Sumo) Awas Tingni Community*, supra n. 260; and Case 11.10, '*Coloto Massacre*' Report

No. 36/00 (**2000**) at paras 23 and 75(3) ('social **reparations**' for an indigenous community after massacre).

[FN273]. This includes one million Biafrans, one million Bengalis/Bangladeshis, and three million Cambodians. See Bassiouni. 'The Protection of Collective Victims in International Law', in Bassiouni (ed.), supra n. 7, 184.

[FN274]. An example of this occurred during the Jewish Holocaust when victims were described passively as 'going like sheep to the slaughter.' See Bloomfield, Barnes and Huyse, supra n. 270 at 61. See also Danieli. 'The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Reflections from a Psychological Perspective', in Vetere and David (eds), supra n. 231.

[FN275]. Initial Drafts used the term 'compassion' but some delegations took the view that there should be a focus on treating victims 'with respect for their dignity', Principle 10, Second Consultative Meeting Report. It was noted, however, that the 1985 Basic Principles of Justice also used the term 'compassion.' See Article 4, 1985 Basic Principles of Justice. In addition, with regard to 'special consideration' to be provided to victims, the Report noted that 'an appropriate balance should be sought with regard to the rights of others, in order to avoid imbalances between the accused and the victim'. Second Consultative Meeting Report at 10. Several countries including Mexico, Chile and Angola objected to the use of the word 'compassion' stating that it carries paternalistic connotations, and they sought terms with legal implications. IMADR, supra n. 226. The author disagreed with this assessment as compassion is more than a sentimental desideratum. Rather, it reflects societal values and the way a legal system treats victims. The Resolution's Preamble, however, did retain the term stating 'victims should be treated with compassion and respect for their dignity', Preamble, para. 4, **2006** Basic Principles and Guidelines. An explanation for this discrepancy is due to the fact that a preamble is not seen as a having a normative character and therefore terms may often be retained in the Preamble even though they are deleted from the main document.

[FN276]. Principle 10, **2006** Basic Principles and Guidelines. Principle 10 also states that a 'person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim'.

[FN277]. See Articles 6-8, ICTY Statute and ICTR Statute; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children **2001**, A/45/49 supplementing the UN Convention against Transnational Organized Crime, 15 November **2000**, A/RES/55/25; Articles 13(3) and 13(5), Declaration on the Protection of All Persons from Enforced Disappearance; Article 2, Council Framework Decision of 15 March **2001** on the standing of victims in criminal proceedings, supra n. 267; Principles 4-7, 1985 Basic Principles of Justice; UNCHR Res. **2003**/72, 25 April **2003**, E/CN.4/RES/**2003**/72 at para. 8 (participation and protection of victims and witnesses); UNCHR Res. **2003**/38, 23 April **2003**, E/CN.4/RES/**2003**/38 at para. 4(c) (protect witnesses, lawyers and families); Report of the Special Rapporteur on Violence against Women on Trafficking in Women, 29 February **2000**, E/CN.4/**2000**/68 at para. 116; Council of Europe Committee of Ministers, Recommendation No. R (85) on the position of the victim in criminal law and criminal

procedure, 28 June 1985 at paras 1.8 and 15.

[FN278]. Article 68, ICC Statute. See Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in Triffterer (ed.), supra n. 113, 869; and, Bitti and Friman, 'Participation of Victims in the Proceedings', in Lee and Friman (eds), supra n. 113, 456.

[FN279]. Article 43(6), ICC Statute. See Tolbert, 'Article 43: The Registry', in Triffterer (ed.), supra n. 113, 637; and Dive. 'The Registry', in Lee and Friman (eds), supra n. 113, 262.

[FN280]. Women are often the most victimised during conflict situations. They are exposed to increasing risks of abuse including the use of rape as a weapon of war. Many women also lack basic knowledge of redress mechanisms available to them and are uncomfortable with consulting the proper authorities. See Bloomfield, Barnes and Huyse, supra n. 270 at 55. [footnote added.]

[FN281]. At the Second Consultative meeting, some delegations, including Pakistan on behalf of the Organization of the Islamic Conference (OIC), raised objections to the inclusion of sexual orientation in the document. The author noted, however, that regardless of the direct treatment of different sexual orientations by domestic legal orders, there was no legal basis for discrimination against persons of different sexual orientation in terms of access to remedies for human rights violations. OIC States do not discriminate on the basis of sexual orientation with regards to health services and police protection. See Principle 27. First Consultative Meeting Report. The reason for the initial inclusion of the term was due to the fact that sexual orientation has been the basis for persecution and torture of some victims, [footnote added.]

[FN282]. Child victims are guaranteed victims' rights as outlined in Article 39, CRC; 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts'. Children are particularly susceptible to victimisation in conflict situations. For example, more than half a million children have been abducted or recruited as child soldiers and female children often are used as both soldiers and sex slaves. It is estimated that at any given time over 300,000 children under the age of 18 are actively engaged in conflicts around the world. See UNICEF. *Adult Wars, Child Soldiers*, available at: http://www.unicef.org/publications/pub.adultwars.en.pdf. Countries opposed specific wording that would create classes of victims, including the child victim, because of the financial and social implications. They did not want to be responsible for implementing specific measures for redress such as the hiring of legal advocates to represent the child, [footnote added.]

[FN283]. Principle 27, **2000** Draft Basic Principles and Guidelines.

[FN284]. The victims' right to remedy for violations of human rights has been recognised in the following international and regional instruments: Article 2(3), ICCPR; Article 13, CAT; Article 6, ICERD; Article 6(2), Protocol to Prevent. Suppress and Punish Trafficking in Persons. Especially Women and Children; Article 13, ECHR; Article 47, Charter of Fundamental Rights of the European Union; Article 7(1)(a)(25), ACHR; Article XVIII.

American Declaration of the Rights and Duties of Man; Article III(1), Inter-American Convention on Forced Disappearance of Persons; Article 8(1), Inter.-American Convention to Prevent and Punish Torture; Article 7(a). AfrCHPR; Article 9, Arab Charter on Human Rights; Article 8. Universal Declaration; and Articles 9 and 13, Declaration on the Protection of All Persons from Enforced Disappearance. In addition, the victims' right to a remedy has also been recognised in the following jurisprudence: UNCHR General Comment 29, supra n. 130 at para. 14; and *Chahal v United Kingdom*, 1996-V 1831; (1997) 23 EHRR 413 at paras 150-1 (scope of the remedy varies with the nature of the right).

[FN285]. Principle 11, **2006** Basic Principles and Guidelines. The Second Consultative Meeting Report notes that there was debate concerning the structure of this principle and the linguistic problems associated with the terms 'remedy' and '**reparations**', which, the Report notes, 'should be maintained as different concepts', Second Consultative Meeting Report at 6.

[FN286]. Principle 11, **2006** Basic Principles and Guidelines.

[FN287]. See also Principle 12, **2000** Draft Principles and Guidelines. The language in connection with a victim's access to justice was revised and narrowed in the adopted version. Access to justice is defined in reference to international law. While other remedies available to victims in accordance with domestic law are not prejudiced, the victim's access to justice must not specifically include such domestic laws other than to the extent necessary to ensure compliance with obligations arising under international law.

[FN288]. See also Principle 13, **2000** Draft Principles and Guidelines.

[FN289]. Second Consultative Meeting Report at 28 (Explanatory Comment 5).

[FN290]. Ibid. at 9.

[FN291]. Ibid.

[FN292]. Ibid. at 28 (Explanatory Comment 5).

[FN293]. Ibid. States can achieve administrative and judicial economy by recognising collective claims and class actions.

[FN294]. Ibid. at 28 (Explanatory Comment 5). The Explanatory Comment further notes that, insofar as international law has not reached the level that requires States to provide for the judicial exercise of collective rights, 'such notions as "class actions" are left to the determination of domestic law.' At the second consultative meeting, delegates raised a number of issues with respect to 'collective rights'. See ibid. at 9. A principal point of contention arose with regards to the issue of collective rights and claims for **reparations**, with the Report noting that 'it might be difficult to resolve the issue of collective rights' (ibid.). The Report includes a compromise solution to this issue which could be achieved by 'inserting a reference to relevant mechanisms for protection of collective rights that may exist under domestic law' or to 'clarify in more detail what was meant by collective rights and when collective **reparations** would be appropriate' (ibid.). The Reports further notes that, while some legal systems allow for organisations or groups representing collectivities

to act in a collective capacity to present claims and even receive remedies on behalf of the group or collectivity, most legal systems 'do not recognize a cause of action ... unless an agency relationship exists' (ibid.). Although the Report notes that it may be difficult to reconcile these two approaches at the present time, Explanatory Comment 6 explicitly notes that nothing in the **2006** Basic Principles and Guidelines 'precludes the future development of victims' collective rights under treaty-based and customary international law' (ibid. at 28 (Explanatory Comment 6)). For an example of a class action lawsuit aimed at addressing serious human rights violations in the United States, see *Marcos* litigation, supra n. 155. In this case, close to 10,000 Filipinos filed a class action suit under the ATCA alleging mass human rights violations including torture, extrajudicial killings and detention committed during the Marcos regime. The US District Court in Hawaii held the estate of Marcos responsible for the violations and the jury awarded close to $1.2 billion (US) in punitive damages and $766 million (US) in compensatory damages.

[FN295]. During the first consultative session, the government of Portugal stated that their delegation 'recognize(s) groups of victims, but not collective victims as such'. See Principle 8, First Consultative Meeting Report. Deletion of the term 'collective' was later proposed by the International Commission of Jurists and the United Kingdom at the Second Consultative Session. The Chairperson-Rapporteur proposed the insertion of 'groups'. First Consultative Meeting Report at 17. The Preamble, however, retained the term collective saying that (victimisation) 'may nevertheless also be directed against groups of persons who are targeted collectively'. Preamble, **2006** Basic Principles and Guidelines.

[FN296]. See also Article 4, EC Council of Ministers Framework Decision of 15 March **2001**, supra n. 267.

[FN297]. See Consolidated Recommendations of the Special Rapporteur on Torture, 3 July **2001**, A/56/156, at para. 39(c).

[FN298]. See Council of Europe, Committee of Ministers, Recommendation No. R (85), supra n. 277 at para. 2.

[FN299]. Article 6(2)(b), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Article 6, Council Framework Decision of 15 March **2001**, supra n. 267 (providing for advice, and where appropriate, free legal aid).

[FN300]. See *Airey v Ireland* A 32 (1979); (1979) 2 EHRR 305 at para. 33 (right to legal assistance). See also, CEDAW General Recommendation 19, Violence Against Women, 29 January 1992, HRI/GEN/1/Rev.7 at 246; 1-1 IHRR 25 (1994) at para. 24(e).

[FN301]. For a discussion of victims' access to the international criminal justice system, see Jorda, 'Victim's Access to the International Criminal Justice System', in Doucet (ed.). *Terrorism, Victims, and International Criminal Responsibility* (Paris: SOS Attentats, **2003**) 258. For the rights of victims in German criminal trials and their right to seek civil damages in a criminal court, see Maigne, 'Victims' Rights in German Criminal Trials', in Doucet (ed.). ibid., 198. For the provisions in French law allowing victims to join as civil parties before a criminal court, see Article 421 (1) *et seq*. of the French Penal Code.

[FN302]. Second Consultative Meeting Report at 27 (Explanatory Comment 3). The

Comments, however, further note that the duty to prosecute is 'not intended to have any bearing on the concept of complementarity between national and international legal organs, and is also not intended to have any bearing on theories of criminal jurisdictions that states and international judicial organs may rely on'. (Ibid.) The delegates at the second consultative meeting expressed the view that it was important to ensure that the obligation to prosecute did not exceed the relevant legal boundaries. (Ibid. at 7.) In response to these concerns, the Explanatory Comments clarify the meaning of the 'duty to prosecute', within the meaning of the principles and guidelines.

[FN303]. See Bassiouni, supra n. 5. For the jurisprudence of international human rights tribunals, see also Aldana-Pindell. 'In Vindication of Justiciable Victims' Rights', supra n. 2 at Part II B(1), and the cases cited therein.

[FN304]. See Aldana-Pindell, ibid. at 1415. The author notes that this point was reinforced in the IACtHR's decision in *Villagran-Morales v Guatemala. (The Street Children Case) (**Reparations**)*, IACtHR Series C 77 (**2001**); 10 IHRR 995 (**2003**) where the Court declared that the duty to conduct an effective criminal process is independent and separate from the State's duty to repair.

[FN305]. See Aldana-Pindell, ibid. at 1415 at footnote 88.

[FN306]. See supra Section 6A.

[FN307]. See also Principle 25(f), **2000** Draft Principles and Guidelines, supra n. 240. The duty to prosecute and punish has been recognised in numerous international instruments. See Articles 4, 5 and 7, CAT; Articles 3 and 4. ICERD; Article 2(b), CEDAW; Articles IV, V and VI, Genocide Convention; Article 18. Indigenous and Tribal Peoples Convention; Article 4(d). Declaration on the Elimination of Violence against Women; Article 4. Declaration of the Protection of All Persons from Enforced Disappearance; Articles 1 and 6, Inter-American Convention to Prevent and Punish Torture; Articles I and IV, Inter-American Convention on Forced Disappearance of Persons; Article 49, 1949 Geneva Convention I; Article 50, 1949 Geneva Convention II; Article 129, 1949 Geneva Convention III; Article 146, 1949 Geneva Convention IV. For cases discussing the right to prosecution and punishment see *Nydia Bautista v Colombia* (563/93), CCPR/C/55/D/563/993 (1995); 3 IHRR 315 (1996) at para. 8.2 (administrative or disciplinary action is not sufficient, it must be a judicial remedy); *Celis Laureano v Peru* (540/93), CCPR/C/56/D/540/1993 (1996), 4 IHRR 54 (1997) at para. 10 (bring to justice those responsible for disappearance); HRC Concluding Observations; Libyan Arab Jamahiriya, 6 November 1998. CCPR/C/79/Add.101 at paras 7 and 10; HRC Concluding Observations; Hungary, 19 April **2002**, CCPR/CO/74/HUN at para. 2; HRC General Comment 20, supra n. 129 at para. 13; *Hajrizi Dzemajl et al. v Yugoslavia* (161/**2000**), CAT/C/29/D/161/**2000** (**2002**); 10 IHRR 411 (**2003**) at paras 9.4 and 11; *Velasquez Rodriquez (Compensatory Damages)*, supra n. 97 at paras 34-5; *Garrido and Baigorria (**Reparations**)*, supra n. 123 at para. 74; *Loayza Tamayo* Case *(**Reparations**)* IACtHR Series C 42 (1998); 7 IHRR 136 (**2000**) at paras 170-1; *Castillo Paez (**Reparations**)* IACtHR Series C 43 (1998); 7 IHRR 179 (**2000**) at para. 107; *Suarez Rosaro (**Reparations**)* IACtHR Series C 44 (1999); 7 IHRR 633 (**2000**) at para. 80; *Blake (**Reparations**)* IACtHR Series C 7 (1999); 7 IHRR 661 (**2000**) at paras 64-5; *Panel Blanca (**Reparations**)* IACtHR Series C 76 (**2001**); 10 IHRR 698 (**2003**) at paras **200**-1; *Street Children (**Reparations**)*, supra n. 304 at paras 99-101; *Cesti Hurtado* (**Reparations**).

IACtHR Series C 78 (**2001**); 10 IHRR 1050 (**2003**) at paras 63-4; *Cantoral Benavides (**Reparations**)* IACtHR Series C 88 (**2001**); 11 IHRR 469 (**2004**) at paras 69-70; *Durand and Ugarte (**Reparations**)* IACtHR Series C 89 (**2001**); 11 IHRR 501 (**2004**) at para. 39(c); *Bamaca Velasquez (**Reparations**)*, supra n. 259 at paras 73-8; *Juan Sanchez* IACtHR Series C 99 (**2003**); 13 IHRR 451 (**2006**) at para. 185 (the Inter-American Court's jurisprudence reveals that the duty to punish is an obligation to combat impunity); *Maria Da Penha Maia Fernandez*, supra n. 259 at para. 61(1) (criminal proceedings against perpetrator of domestic violence); Council of Europe Committee of Ministers, Interim Resolution DH (99) 434, Action of the Security Forces in Turkey; Measures of General Character, 9 June 1999 (duty to punish agents of security forces who abuse their powers so as to violate human rights); 54/91, *Malawi African Ass. et al. v Mauritania* 13th Annual Activity Report of the ACHPR (**2000**); 8 IHRR 268 (**2001**) ('bring to book' authors of violations).

[FN308]. See Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1425. See also CEDAW General Recommendation No. 19, supra n. 300 (noting that a State may be responsible under international law for private acts if it fails to provide compensation to the victims, as part of a duty to prevent unlawful acts and punish those who committed such acts).

[FN309]. The absence of prosecutions, or too lenient a punishment, also fails to purge a State of those who perpetrate violence and deter others from committing similar acts in the future. See Aldana-Pindell, ibid. at 1457.

[FN310]. Aldana-Pindell, ibid. at 1444.

[FN311]. Aldana-Pindell, ibid. at 1442. The author notes that 'to many surviving human rights victims, truth commissions that substitute for criminal prosecutions comprise individual accountability.' (at 1442-3.)

[FN312]. Principle 15, **2006** Basic Principles and Guidelines. Reparation is 'intended to promote justice by redressing gross violations of international human rights or serious violations of humanitarian law', Second Consultative Meeting Report at 10. However, a number of delegations at the meeting considered that the appropriate focus ought to be on 'gross violations' of human rights, while others believed that the principles should 'relate to all violations of human rights.'

[FN313]. International and other instruments recognise the following persons or groups entitled to **reparations**; Article 9(5), ICCPR (victim); Articles 14(1) and 14(2), CAT (victim or other persons); Articles 16(4) and 16(5), Indigenous and Tribal Peoples Convention (peoples removed from land and relocated persons); Articles 75(1) and 85, ICC Statute (victims of crime); Rule 106, ICTY Rules of Procedure and Evidence and Rule 106, ICTR Rules of Procedure and Evidence (victims of crime); Article 35(5), ECHR (victim); Articles 10 and 63(1), ACHR (victims and injured party); Articles 9(1) and 9(2), Inter-American Convention to Prevent and Punish Torture (victim of torture and victim or other persons under national law); Article 21(2), AfrCHPR (dispossessed people); Article 68, 1949 Geneva Convention III (prisoners of war); Article 91. Additional Protocol I to the Geneva Conventions (prisoners of war); and Article 19, Declaration on the Protection of All Persons from Enforced Disappearance (victims, family and dependants). See also Articles 34-37, ILC

Draft Articles on Responsibility of States for Internationally Wrongful Acts.

The categories of persons entitled to **reparations** have also been recognised in the jurisprudence of various adjudicatory and supervisory bodies. See, for example. *Aksoy v Turkey*, supra n. 133 at para. 113 (father of the victim); *Kurt v Turkey* 1998-III 1152; (1998) 27 EHRR 373 at para. 174 (applicant on behalf of her son and on her own behalf); *Mahmut Kaya v Turkey* 1998-I 297; (1999) 28 EHRR 1 at para. 139 (brother of the victim); *Ulku Ekinci v Turkey*, Judgment of 16 July **2002**, Application No. 27602/95 at para. 167 (applicant on behalf of her husband and herself); *Aktas v Turkey* **2003**-V 194; (**2004**) 38 EHRR 18 at paras 349-64 (brother on behalf of victim and for widow and daughter of victim); *Finucane v United Kingdom*, supra n. 135 at paras 85-93 (widow); *Loayza Tamayo (**Reparations**)*, supra n. 307 at para. 92 (all persons with a close family link, including children, parents, and siblings); *Panel Blanca (**Reparations**)*, supra n. 307 at paras 85 and 86 (next of kin if there was a relationship of effective and regular dependence); *Street Children (**Reparations**)*, supra n. 304 at para. 68 (next of kin if there was a relationship of effective and regular dependence); *Bamaca Velasquez (**Reparations**)*, supra n. 259 at paras 31-6 (parents, wife and children; other next of kin or third parties if there was a relationship of effective and regular dependence); *Juan Sanchez*, supra n. 307 at para. 152 (family members for victim and in their own right, siblings, non-biological father, wife and other partner); *Almeida de Quinteros et al. v Uruguay* (107/1981). CCPR/C//19/D/107/1981 (1983) at paras 14 and 16 (disappeared and mother, who is also a victim); *John Khemraadi Baboeram et al. v Suriname* (146/1983), CCPR/C/24/D/146/1983 (1985) at para. 16 (surviving families); HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 7 (victims and their families). See also *Malawi African Ass. et al. v Mauritania*, supra n. 307 (widows and beneficiaries of victims).

[FN314]. Reference to 'persons who intervened to assist a victim or prevent occurrence of further violations,' was proposed by the International Commission of Jurists at the October **2003** consultation. See Second Consultative Meeting Report at 21. This is accounted for in the 1985 Basic Principles of Justice at para. 2. 'The term victims also includes, where appropriate, ( ... ) persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.

[FN315]. Principle 15, **2006** Basic Principles and Guidelines. See also Principle 16, **2000** Draft Principles and Guidelines.

[FN316]. Principle 15, **2006** Basic Principles and Guidelines. See also Principles 12 and 13, 1985 Basic Principles of Justice. Initial drafts used the term 'should.' See discussion of 'should' versus 'shall', Second Consultative Meeting Report.

[FN317]. Principle 15, **2006** Basic Principles and Guidelines. See also Principle 17, **2000** Draft Principles and Guidelines. See also Principle 11, 1985 Basic Principles of Justice; and Council of Europe Committee of Ministers Recommendation No. R (85), supra n. 277 at paras 3, 5, 6 and 7 (consideration of victim's right to **reparations** in decision on prosecution, information of victim on police inquiry and on decision to prosecute or discontinue the proceedings, right of victim to appeal the decision to prosecute or discontinue prosecution). During the process of drafting the Principles and Guidelines, it was noted that in relation to 'non-State actors', the use of the term 'abuse' was to be preferred to 'violation'. See Second Consultative Meeting Report at 10 (noting that, in Principle 17, one suggestion was that the text might read: 'In cases where the abuse is not attributable

to the State ...'). It should also be noted that the **2006** Basic Principles and Guidelines reflect a more stringent threshold for **reparations** in such cases. Previously, such **reparations** were to be provided if 'the violation is not attributable to the State'. Principle 17, **2000** Draft Principles and Guidelines. The language that was adopted requires provision of **reparations** only in such instances where 'a person, a legal person, or other entity is found liable for reparation to a victim', indicating that a formal legal judgment is necessary prerequisite.

[FN318]. Principle 15, **2006** Basic Principles and Guidelines; and Principle 17, **2000** Draft Principles and Guidelines. See also Principles 12 and 13, 1985 Basic Principles of Justice. With respect to 'non-State actors' the Explanatory Comments note that '[t]here is no legal reason why such non-State actors would be excluded either from responsibility for their actions or for the consequences of their policies and practices with respect to victims of these policies and practices'. The Comments further state that 'the intention here is not to make States responsible for the policies and practices of non-State actors, but to make these non-State actors responsible for their policies and practices, while at the same time allowing victims to seek redress on the basis of social and human solidarity and not on the basis of State responsibility', Second Consultative Meeting Report at 27 (Explanatory Comment 4). The delegates at the Second Consultative meeting considered the extent of a State's obligation to provide **reparations** in circumstances where it is not responsible for the violation, nor for the violation of a relevant non-State actor. Ibid. at 9 ('There were considered to be a number of ways in which a State party could facilitate redress, on the basis of solidarity with the victim, in situations where it is not responsible for the breach in question.').

[FN319]. Principle 16, **2006** Basic Principles and Guidelines, Compare Principle 17, **2000** Draft Principles and Guidelines. Prior to the Second Consultative Meeting, this principle referred to the establishment of 'national funds'. During the meeting, it was suggested that the reference to such funds is too narrow and that it should be replaced with the more general reference to 'programmes.' See Second Consultative Meeting Report at 10 ('This would embrace a much broader range of possible support mechanisms, extending beyond only the financial.')

[FN320]. Article 78, ICC Statute.

[FN321]. Article 13, 1985 Basic Principles of Justice.

[FN322]. Principles 18 and 20, **2000** Draft Principles and Guidelines. See also Second Consultative Meeting Report at 10.

[FN323]. Principle 17, **2006** Basic Principles and Guidelines; and Principle 19, **2000** Draft Principles and Guidelines.

[FN324]. Ibid. The International Commission of Jurists commented that an act committed by an individual may be the actual violation; however, the State would be responsible if it does not take appropriate action. See Second Consultative Meeting Report at 13 (stating that, with respect to the enforcement of judgments under Principle 18, it is evident that, where enforcement is not possible, such as where the doctrine of sovereign immunity or act of State applies, the obligation of a State should be limited to its best efforts).

[FN325]. Principle 18, **2006** Basic Principles and Guidelines; and Principle 21, **2000** Draft Principles and Guidelines. See Second Consultative Meeting Report at 10 (noting that the list contained in this principle could be interpreted as being exhaustive and that it would be appropriate to insert wording that makes clear that the list is 'open ended'). See also *Loayza Tamayo (**Reparations**)*, supra n. 307 at para. 85 (noting that **reparations** is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, and guarantees of non-repetition among others)).

[FN326]. Principle 19, **2006** Basic Principles and Guidelines; and Principle 22, **2000** Draft Principles and Guidelines. See also Second Consultative Meeting Report at 10 (noting that during the meeting, some concerns were raised that the wording of this principle was 'too categorical' by requiring that restitution should, whenever 'possible,' restore the victim to the original situation, and it was suggested that other words could be used. Also, a number of delegations also considered the final sentence of Principle 21 to be 'too prescriptive' and that less mandatory language should be used).

[FN327]. Principle 19, **2006** Basic Principles and Guidelines; and Principle 22, **2000** Draft Principles and Guidelines. See also *Loayza Tamayo* IACtHR Series C 33 (1997); 6 IHRR 683 (1999) at para. 5; HRC Concluding Observations; Peru, supra n. 259 at para. 11(b); and *Reece v Jamaica* (796/1998), CCPR/C/78/D/796/1998 (**2003**); 11 IHRR 72 (**2004**) at para. 9 (improve conditions of detention or release applicant).

[FN328]. Principle 19, **2006** Basic Principles and Guidelines. Initial drafts of the document included the term 'legal rights' but this was later removed. See Principle 22, **2000** Draft Principles and Guidelines, Restitution of legal rights as a form of restitution has been recognised in the jurisprudence of various bodies. See, for example, *Loayza Tamayo (**Reparations**)*, supra n. 307 at para. 122 (annulment of all effects of a judgment in violation of the ACHR); *Suarez Rosaro (**Reparations**)*, supra n. 307 at para. 76 (annulment of fine and deleting from register on criminal background); Application No. 2673/95, *Yoyler v Turkey* Judgment of 24 July **2003** at para. 124; Council of Europe Committee of Ministers, Interim Resolution DH (**2001**) 106, 23 July **2001**, on Violations of Freedom of Expression in Turkey: Individual Measures (consequences of convictions contrary to freedom of expression as found by the Court must be erased): HRC Concluding Observations: Peru, supra n. 259 at para. 11 (pardon is not a sufficient compensation for an illegally convicted person).

[FN329]. Principle 19, **2006** Basic Principles and Guidelines; and Principle 22, **2000** Draft Principles and Guidelines. For restoration or recognition of citizenship see *Malawi African Ass. et al. v Mauritania*, supra n. 307.

[FN330]. Principle 19, **2006** Basic Principles and Guidelines; and Principle 22, **2000** Draft Principles and Guidelines. See also *Jimenez Vaca v Columbia* (859/99), CCPR/C/74/D/859/1999 (**2002**); 9 IHRR 916 (**2002**) at para. 9 (State has an obligation to take all measures to protect security of applicant and allow his return home); and, *Malawi African Ass. et al. v Mauritania*, supra n. 307.

[FN331]. Principle 19, **2006** Basic Principles and Guidelines; and Principle 22, **2000** Draft

Principles and Guidelines. For cases addressing the right to restoration of employment, see *Loayza Tamayo (**Reparations**)*, supra n. 307 at paras 113-6 (right to restoration of employment--if not available, then victim has a right to a guarantee of salary, social security and employment benefits); *Malawi African Ass. et al. v Mauritania*, supra n. 307 (reinstate the rights due to the unduly dismissed and/or forcibly retired workers); and *Busyo v Congo* (960/**2000**), CCPR/C/78/D/933/**2000** (**2003**) at para. 6.2 (restoration of employment or similar employment). For cases discussing the right to return of property see *Papamichalopoulos v Greece* A 330-B (1993); (1993) 16 EHRR 440 at para. 38 (return of land); *Brumarescu v Romania***2001**-1 105; (**2001**) 33 EHRR 36 at para. 22; and *Malawi African Ass. et al. v Mauritania*, supra n. 307.

[FN332]. At the Second Consultative meeting, some delegations expressed the belief that compensation for 'lost opportunities' was problematic 'as such opportunities could be very difficult to assess and quantify for the purpose of compensation.' See Second Consultative Meeting Report at 10. The government of Cuba expressed the opinion that 'lost opportunities should not only include education, but also food, employment, and health' (ibid. at 131).

[FN333]. Principle 20, **2006** Basic Principles and Guidelines; and Principle 23, **2000** Draft Principles and Guidelines. Numerous legal instruments provide for various forms of compensation. See, for example, Article 14, CAT; Article 75(1), ICC Statute; Article 63(1), ACHR; Articles 16(4) and 16(5), Indigenous and Tribal Peoples Convention: Article 9, Inter-American Convention to Prevent and Punish Torture; Article 21(2), AfrCHPR; Article 41(3). EU Charter of Fundamental Rights; Article 68, 1949 Geneva Convention III; and Article 91. Protocol I to the 1949 Geneva Conventions, The following instruments provide for the right to compensation resulting from unlawful arrest, detention, or conviction: Article 9(5), ICCPR; Article 5(5), ECHR; Article 10, ACHR; Article 16, Arab Charter on Human Rights; and Article 85, ICC Statute. The victims' right to compensation has also been affirmed in the following jurisprudence: HRC Concluding Observations; Libyan Arab Jamahiriya, supra n. 307 at para. 7; *Malawi African Ass. et al. v Mauritania*, supra n. 307 (compensation not defined by Commission); Case 11.771. *Catalan Lincolei v Chile* Report No. 61/01 (**2001**); 9 IHRR 450 (**2002**) at para. 96(3) (providing for compensation for physical and non-physical damages, including moral damages, for members of family); *Maria Da Penha Maia Fernandez*, supra n. 259 at para. 61(3) (symbolic and actual compensation for State failure to prevent domestic violence); Case No. 10.247, *Extrajudicial Executions and Forced Disappearances of Persons v Peru* Report No. 101/01 (**2001**); 10 IHRR 829 (**2003**) at para. 253(3) (noting that the Inter-American Commission recommends compensation, but does not determine the exact amount); and *Hajrizi Dzemajl et al v Yugoslavia*, supra n. 307 at para. 11. For a collective entitlement to compensation see Case 11.100, *Caloto v Columbia* Report No. 36/00 (**2000**); 8 IHRR 676 (**2001**) at paras 23 and 75(3) ('social **reparations**' for an indigenous community after massacre).

At the Second Consultative Meeting, suggestions were made with regards to the principle dealing with 'moral damage.' This term was chosen over previous versions that used 'harm to reputation and dignity'. See Second Consultative Meeting Report at 10.

[FN334]. Amnesty International, Combating Torture: A Manual for Action, available at: http:// www.amnesty.org/resources/pdf/combating.torture/combating.lorture.pdf.

[FN335]. In 1993, the author was in a position to propose the inclusion of a victim

compensation provision in SC Res. 827 establishing the ICTY. See Bassiouni and Manikas, *The Law of the International Tribunal for the Former Yugoslavia* (Ardsley, New York: Transnational, 1996) at 199-235. But, as stated above, there was only a reference to victims in the Resolution's preambular language, and not in the Statute's text. The Resolution establishing the ICTR. however, does not even mention victim compensation.

[FN336]. Principle 21, **2006** Basic Principles and Guidelines; and Principle 24, **2000** Draft Principles and Guidelines. See also Article 14, CAT: Article 39, CRC; Article 75, ICC Statute; Article 19. Declaration on the Protection of all Persons from Enforced Disappearances: Principles 14-7, 1985 Basic Principles of Justice; Report of the Special Rapporteur on Torture, 10 January 1999, A/54/426 at para. 50: HRC Concluding Observations: Mexico, 27 July 1999, CCPR/C/79/Add.109 at para. 15; *Elena Beatriz Vasilskis v Uruguay* (80/1980), CCPR/C/18/D/80/1980 (1983) at para. 12 (medical care); and UNCAT, Conclusions and Recommendations: Turkey, 27 May **2003**, CAT/C/CR/30/5 at para. 7.

[FN337]. Dr Rojas Baeza, neuro-psychiatrist, defines this type of victim response as 'frozen mourning' because the victim remains paralysed in a static existence, unable to move past their traumatisation. This can be linked to rage, guilt, and non-acceptance. See Baeza, 'Mental Health Disturbances Caused by the Absence of Truth and Justice', paper delivered at the 6th International Conference for Health and Human Rights, organised by the International Society for Health and Human Rights, Cavtat, Croatia, **2001**, available at: http:// www.ishhr.org/conference/articles/rojas.pdf. The *Caracazo* Case, supra n. 259, also discussed this phenomenon, stating 'daily normality is hardly ever recovered, as mourning remains frozen in one of its stages, linked to rage and non-acceptance of the outcome'.

[FN338]. Bloomfield, Barnes and Huyse, supra n. 270. See also Danieli, 'Right to Restitution', supra n. 274 at 252 (discussing Holocaust survivor's victims). See also Danieli, 'Separation and Loss in Families of Survivors of the Nazi Holocaust', (1985) 29 *Academy Forum* 7.

[FN339]. See Draft Articles on State Responsibility: *Bleier v Uruguay* (30/78), CCPR/C/15/D/30/1978 (1982) at para. 5; and *Trujillo Oroza (**Reparations**)* IACtHR Series C 92 (**2002**); 11 IHRR 701 (**2004**) at para. 110 (duty to make all measures to guarantee non-repetition in the future). On the ICJ's approach to non-repetition, see *LaGrand*, Judgment, ICJ Reports **2001**, 466. [footnote added.]

[FN340]. The forms of satisfaction described in (b) and (c) may be referred to generally as a duty to conduct a prompt, effective, independent and impartial investigation into grave human rights violations, including disappearances. The full verification and facts and disclosure of truth (i.e. right to truth, see infra) contained in principle 25(b) and the duty to search for the whereabouts of the disappeared and the bodies of those killed, and the return of such bodies to relatives in principle 25(c) have been referenced in the following international instruments: Article 12, CAT; Article 8, Inter-American Convention to Prevent and Punish Torture; Article 9, Declaration on the Protection of all Persons from Enforced Disappearances; UNCHR Res. **2003**/72, supra n. 277 at para. 8 (impunity); UNCHR Res. **2003**/38, supra n. 277 at para. 5(c); UN Expert on the Right to Restitution, Compensation, and Rehabilitation, Report to the Human Rights Sub-Commission, 2 July 1993, E/CN.4/Sub.2/1992/8 at para. 5.2. See also *Hajrizi Dzemajl et al. v Yugoslavia*, supra n. 307 at paras 9 and 11; HRC General Comment 6, supra n. 130 at para. 8; *Rodriquez v*

*Uruguay*, supra n. 45 at para. 12(3) (investigate torture); HRC Concluding Observations: Peru, supra n. 259 at para. 22 (investigate excessive use of force); *Velasquez Rodriquez (Compensatory Damages)*, supra n. 97 at paras 34 and 35; *Garrido and Baigorria (**Reparations**)*, supra n. 123 at para. 74; *Loayza Tamayo (**Reparations**)*, supra n. 307 at paras 170-1; *Castillo Paez (**Reparations**)*, supra n. 307 at para. 107; *Suarez Rosaro (**Reparations**)*, supra n. 307 at para. 80; *Blake (**Reparations**)*, supra n. 307 at paras 64 and 65; *Panel Blanca (**Reparations**)*, supra n. 307 at paras **200**-1; *Street Children (**Reparations**)*, supra n. 304 at paras 99-101; *Cesti Hurtado (**Reparations**)*, supra n. 307 at paras 63-4; *Cantoral Benavides (**Reparations**)*, supra n. 307 at paras 69-70; *Durand and Ugarte (**Reparations**)*, supra n. 307 at para. 39(c); *Bamaca Velasquez (**Reparations**)*, supra n. 259 at paras 73-8; *McCann v United Kingdom*, supra n. 135 at para. 161; *Aksoy v Turkey*, supra n. 133 at paras 95-100; *Ulku Ekinci v Turkey*, supra n. 313 at para. 179 (awarding no right to investigation under Article 41. ECHR as reparation, because *restitution in integrum* is not possible); *Finucane v United Kingdom*, supra n. 135 at para. 89; Council of Europe, Committee of Ministers, Interim Res. DH(99)434, supra n. 307 (duty to investigate so as to comply with Court's decision on violation for lack of investigation); and *Malawi African Ass. et al. v Mauritania*, supra n. 307 (duty to clarify fate of disappeared, identify perpetrators). The reference to search for the 'identities of the children abducted,' was added following consultations in **2003**, see Second Consultative Meeting Report. [footnote added.]

[FN341]. See, for example, *Panel Blanca*, supra n. 307 at para. 105 (judicial decision of an international tribunal may constitute satisfaction in itself, but in case of a grave violation it is not sufficient): *Bamaca Velasquez (**Reparations**)*, supra n. 259 at para. 84 (judgment is a form of reparation next to others); and *Golder v United Kingdom* A 18 (1975); (1975) 1 EHRR 524 at para. 46. But see *Ocalan v Turkey* (**2003**) 37 EHRR 238 at para. 250 (Court's finding constitutes sufficient satisfaction). [footnote added.]

[FN342]. See, for example, UNCHR Resolutions on Impunity: UNCHR Res. **2001**/70, 25 April **2001**, E/CN.4/RES/**2001**/70 at para. 8; UNCHR Res. **2002**/79, 25 April **2002**, E/CN.4/RES/**2002**/79 at para. 9, and UNCHR Res. **2003**/72, supra n. 277 at para. 8; *Cantoral Benavides (**Reparations**)*, supra n. 315 at para. 79; and *Juan Sanchez*, supra n. 307 at para. 188 (publication of judgment in official newspaper). For sources regarding the right to apology and recognition of responsibility see, for example, UNSubCHR Res. **2002**/5, 12 August **2002**. E/CN.4/SUB.2/RES/**2002**/5 at para. 3 (recognition of responsibility and reparation for flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism, and wars of conquest); *Bamaca Velasquez (**Reparations**)*, supra n. 259 at para. 84; and *Durand and Ugarte (**Reparations**)*, supra n. 307 at para. 39(b). Some recent examples of States accepting responsibility and providing apologies for crimes committed in the past include the 1996 declaration of responsibility by France for crimes against humanity committed during the Vichy regime; President Cardozo's statement of responsibility for human rights violations committed during the military dictatorship in Brazil between 1964 and 1985; and the US government's acknowledgment that US soldiers had killed unarmed civilians during the Korean War. [footnote added.]

[FN343]. See also supra Section 6F(i). [footnote added.]

[FN344]. See, for example, UNSubCHR Res. **2002**/5, supra n. 342 at para. 4 (recognition of

responsibility and reparation for flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism, and wars of conquest); *Street Children (**Reparations**)*, supra n. 304 at para. 103 (State must name an educational centre after the victims); and *Trujillo Oroza*, supra n. 339 at para. 122 (educational centre to be named after victim), [footnote added.]

[FN345]. Principle 22(h), **2006** Basic Principles and Guidelines,

Accounts of history are often altered to suit a specific viewpoint. For example, conservative, neo-nationalists in Japan who did not feel a moral or legal responsibility for 'comfort women' (women and girls forced to provide sexual services to officers and soldiers during WWII) engaged in campaigns to remove historical references to them. This resulted in five of the eight middle-school history textbooks, approved for use from the year **2002**, not mentioning the military 'comfort women'. See Soh, *Japan's Responsibility Toward Comfort Women Survivors*, Japan Policy Research Institute Working Paper No. 77, May **2001**, available at: http:// www.jpri.org/publications/workingpapers/wp77.html.

[FN346]. Danieli, supra n. 274 at 261.

[FN347]. See Roht-Arriaza, supra n. 260 at 160.

[FN348]. Cohen, Secretary General Conference 'Confronting Anti-Semitism: Education for Tolerance and Understanding'. UN Chronicle, 21 June **2004**, available at: http:// www.un.org/Pubs/chronicle/**2004**/webArticles/062104.sg.remarks2.asp.

[FN349]. Principle 23, **2006** Basic Principles and Guidelines.

[FN350]. See UNCHR Res. **2000**/47, 25 April **2000**, E/CN.4/RES/**2000**/47; OAS GA Res. 1044 (XX-0/90) (1990); HRC Concluding Observations: Romania, 28 July 1999, CCPR/C/79/Add.111 at para. 9; HRC Concluding Observations: Lesotho, 8 April 1999, CCPR/C/79/Add.106 at para. 14; and Case No. 11.286, *Cavalcanti et al v Brazil* Report No. 55/01 (**2001**) at para. 168(6) (independent, impartial and effective supervision of military police). [footnote added.]

[FN351]. During the Second Consultative meeting, the role of military tribunals in peacetime was discussed by the delegates. See Second Consultative Meeting Report at 11. While many of the delegates appeared to be satisfied with the current provision, a number of other delegations raised concerns (ibid.). Some considered that military tribunals should have no role in peacetime, while others felt that it was 'important to allow a role for military tribunals even in peacetime, and that to do otherwise would create problems in relation to their domestic legislation' (ibid.). The Report notes that 'the provision to limit the jurisdiction of military tribunals to military offenses committed by military personnel is not intended to address the general issue of military jurisdiction ... Rather, it addresses only those cases in which military tribunals have a record of violations, and therefore by limiting their jurisdiction one can achieve non-repetition' (ibid. at 13). Some delegations also noted that the restriction on the jurisdiction of these tribunals 'could apply to cover other ad hoc tribunals invested with special jurisdiction'. (ibid. at 11.) See also Article 16(2), Declaration on the Protection of All Persons from Enforced Disappearance: Article IX, Inter-American Convention on Forced Disappearance of Persons; HRC Concluding Observations: Peru, supra n. 259 at para. 12; *Durand and Ugarte (**Reparations**)*, supra n. 307 at paras 117-8;

*Cantoral Benavides (**Reparations**)*, supra n. 307 at para. 75; *Cavalcanti et al*, ibid. at para. 168(5). For the ECtHR jurisprudence on this issue, see *Incal v Turkey* 1998-IV 1547; (**2000**) 29 EHRR 449 at paras 68-73; *Ciraklar v Turkey* 1998-VII 3059; (**2001**) 32 EHRR 535 at paras 39-41; and Application No. 24919/94, *Gerger v Turkey* Judgment of 8 July 1999 at paras 60-2. The final version of the document included both civilian and military proceedings but did not specify jurisdiction. See Second Consultative Meeting Report at 22. [footnote added.]

[FN352]. See, for example, UN Basic Principles on the Independence of the Judiciary; UNCHR Resolutions on the Independence of the Judiciary. UNHCR Res. **2001**/39, 23 April **2001**, E/CN.4/RES/**2001**/39; UNHCR Res. **2002**/43, 23 April **2002**, E/CN.4/RES/**2002**/43; and UNHCR Res. **2003**/43, 23 April **2003**, E/CN.4/RES/**2003**/43; HRC Concluding Observations: Algeria, 18 August 1998, CCPR/C/79/Add.95 at para. 14; and HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 14. [footnote added.]

[FN353]. See, for example, Articles 12-31, Additional Protocol I to the 1949 Geneva Conventions: UNCHR Res. **2003**/32, 23 April **2003**, E/CN.4/RES/**2003**/32 at para. 11 (torture); and Case 11.405. *Mendez et al v Brazil* Report No. 59/99 (1999) at para. 120(2) (guarantee judicial protection to representatives of rural workers and human rights defenders). [footnote added].

[FN354]. See, for example, Article 10(2), Protocol to Prevent. Suppress and Punish Trafficking in Persons: Principle 16, 1985 Basic Principles of Justice: Article 25, AfrCHPR; UNCHR Res. **2003**/32, ibid. at para. 20 (torture); HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 10; HRC Concluding Observations: Columbia, 5 May 1997, CCPR/C/79/Add.76 at para. 35; *Trujillo Oroza*, supra n. 339 at para. 121; *Caracazo (**Reparations**)*, supra n. 259 at para. 127 (educating and training all members of armed forces and security services); Case 11.291, *Carandiro v Brazil* Report No. 34/00 (**2000**) at Recommendation 3 (training of prison personnel); and Council of Europe Committee of Ministers, Interim Resolution DH (99) 434, supra n. 307 (duty to train members of security forces, judges and prosecutors). [footnote added.]

[FN355]. See Second Consultative Meeting Report at 11 (noting that this sub-principle, by listing specific sectors of society in reference to the promotion of codes of conduct 'excludes other sectors.' The Report suggested that 'it would be prudent to either delete references to these sectors, or make clear that the listed categories are inclusive, not exclusive'). [footnote added.]

[FN356]. Initial drafts used the term 'preventive social intervention'. Principle 25(g), **2000** Draft Principles and Guidelines. At the Second Consultative meeting, the term 'intervention' was discussed at some length. Second Consultative Meeting Report at 11 ('Concern was raised about the word 'intervention', and questions were raised about the intended meaning of this new provision.'). Some States thought that the term suggested external intervention in a State's internal affairs. The Second Consultative Meeting Report notes, however, that the wording of this principle 'was intended to focus attention on social tensions and conflicts that may give rise to situations where human rights abuses occur, and that States should take appropriate preventive measures to avoid such situations' (ibid.). [footnote added.]

[FN357]. This sub-part was added in response to suggestions at the Second Consultative meeting which highlighted the responsibility of States to reform laws that have contributed to or permitted the violation of human rights. See Second Consultative Meeting Report at 11. With regard to Principle 26 as a whole, it was suggested that the provision 'would benefit from a paragraph stating that concrete legislative and administrative measures should be taken in relation to guaranteeing the non repetition and prevention of violations' (ibid.). [footnote added.]

[FN358]. Principle 22, **2006** Basic Principles and Guidelines, An example of a newer, mixed form of reparation orders that combines the typical criminal sanction and the civil law claim for compensation is found in the British compensatory order. See Timm, supra n. 207. See also Redner, 'National Report of England', in Eser and Walter (eds), *Reparation in Criminal Law: Vol 1* (Freiburg: Max Planck Institute for Foreign and International Criminal Law, 1996) 109 at 169-80.

[FN359]. See Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1499.

[FN360]. Principle 24, **2006** Basic Principles and Guidelines describes the 'right of access' that victims are guaranteed. '[V]ictims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and to learn the truth in regard to these violations'. The right to the full disclosure of truth (i.e. right to truth) has been recognised in international humanitarian law. See, for example, Articles 16 and 17, 1949 Geneva Convention I; Articles 122 *et seq*, 1949 Geneva Convention III: Articles 136 *et seq*. 1949 Geneva Convention IV; and Article 33, Additional Protocol I to the Geneva Conventions (duty to search for missing persons). This right has also been recognised in the jurisprudence of various international bodies. See HRC Concluding Observations: Guatemala, 3 April 1996, CCPR/C/79/Add.63 at para. 25 (right to truth applies to all human rights violations); Case 11.481, *Ignacio Ellacuria v El Salvador* Report No. 136/99 (1999); 8 IHRR 501 (**2001**) at para. 221 (right to truth linked to the right to a remedy); Case 10.480, *Lucio Parada Cea v El Salvador* Report No. 1/99 (1998) at para. 147 (right to know what happened, the reasons and the circumstances, as well as the participants); *Velasquez Rodriguez* IACtHR Series C 4 (1988) at para. 181; *Godinez Cruz*, supra n. 123 at para. 191; *Castillo Paez (**Reparations**)*, supra n. 307 at para. 90; *Blake (**Reparations**)*, supra n. 307 at para. 97; and *Caracazo*, supra n. 259 at para. 118. The persons or groups entitled to the right to truth include the following: *Bamaca Velasquez (**Reparations**)*, supra n. 259 at paras 73-8 (family members and society); *Caracazo*, supra n. 259 at paras 115 and 118 (investigation and search for the truth as a benefit to society); and *Juan Sanchez*, supra n. 307 at para. 185 (public disclosure of truth to the society). See also *Ellacuria v El Salvador*, ibid. at para. 224 (collective right that ensures society's access to information and private right for relatives of the victims, which affords a form of compensation).

[FN361]. During the process of drafting, delegations suggested that this principle should be properly aligned with principle 11(c), 'in order to facilitate the access by victims and their representatives to factual information concerning violations.' Second Consultative Meeting Report at 12 ('the text should refer to the right to know, seek, obtain and retain information on the alleged violations, and to the truth.'). See also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1439-43. Aldana-Pindell divides the right to truth into the substantive and procedural right to truth, noting that the right to the truth is not

violated if the State does not uncover each of the components of truth that surviving human rights victims seek from the State (at 1441).

[FN362]. See Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', (1995) 144 *University of Pennsylvania Law Review* 493.

[FN363]. See Hayner, 'Fifteen Truth Commissions--1974 to 1994: A Comparative Study', (1994) 16 *Human Rights Quarterly* 597.

[FN364]. See Pasqualucci, 'The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System'. (1994) 12 *Boston University International Law Journal* 321; and Hayner, *Confronting State Terror and Atrocity* (London: Routledge, **2000**).

[FN365]. Although limited in its mandate, as of 1996 the Chilean Commission paid compensation to close to 5,000 relatives of victims totaling over $80 million (US). See Reisman, 'Compensation for Human Rights Violations', in Randelzhofer and Tomuschat (eds). *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Kluwer Law International, 1999) 106.

[FN366]. See From Madness to Hope: The 12-Year War in El Salvador, report of the Commission on the Truth for El Salvador, annexed to a Letter dated 29 March 1993 from the Secretary-General to the President of the UN Security Council, 1 April 1993, S/25500.

[FN367]. See Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid Regime* (Cambridge: Cambridge University Press, **2001**).

[FN368]. Bottigliero, *Redress for Victims of Crimes Under International Law* (Leiden: Martinus Nijhoff, **2004**).

[FN369]. As of the 21st session of the Board of the Fund in **2003**, contributions were received from 38 of the 191 Member States. United Nations Voluntary Fund for Victims of Torture. Report of the Secretary General, 14 August **2003**, A/58/284.

[FN370]. See Lasco, supra n. 20 at 18.

[FN371]. Ibid. Lasco notes that, in order for victims of torture to receive these services, they must reside in the region where a Voluntary Fund-supported NGO operates, be aware of the NGO and its services, have the means to request assistance, and meet the guidelines the particular NGO establishes. (ibid. at 19.)

[FN372]. Ibid. **2003** figures indicate the amount available for allocation to new grants came to a little over $7 million (US) while the total sum of requests was over $13 million (US). As a result, only a small fraction of torture victims worldwide receive necessary rehabilitation or support. United Nations Voluntary Fund for Victims of Torture Report of the Secretary General, supra n. 379.

[FN373]. Established by GA Res. 46/122, 17 December 1991, A/RES/46/122, with the goal of assisting individuals who were victims of contemporary forms of slavery. See Report of

the Secretary-General on the Status of the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, 18 July **2000**, A/55/204.

[FN374]. UNDP Trust Fund for Rwanda succeeded the Secretary General's Trust Fund for Rwanda, which was organised with the goal of providing humanitarian assistance to victims of the Rwanda atrocities in 1994. See UNDP Trust Fund for Rwanda, Progress Report No. 15 (1999).

[FN375]. SC Res. 1566, 8 October **2004**, S/RES/1566 (**2004**).

[FN376]. See *Bamaca Velasquez (**Reparations**)*, supra n. 259 at para. 75; and *Castillo Paez*, supra n. 307.

[FN377]. Article 75, ICC Statute provides that the Court shall establish principles relating to **reparations** to, or in respect of, victims, including restitution, compensation and rehabilitation.

[FN378]. For example, the draft was also used as a point of reference by the US Secretary of State in requesting that the Northern Ireland Human Rights Commission consult and advise the Secretary on the scope of a Bill of Rights for Northern Ireland. The Commission relied on the standards set forth in the draft when dealing with victim's rights and defining the term victim. 'Making a Bill of Rights for Northern Ireland,' consultation document by the Northern Ireland Human Rights Commission, September **2001**, as cited in Joint NGO Position Paper Second Consultative Meeting, supra n. 245.

[FN379]. The HRC, in General Comment No. 29, supra n. 130 at para. 14, recalled that even during a state of emergency, the right to a remedy is non-derogable.

[FN380]. Donne, *Devotions Upon Emergent Occasions* XVII (London, 1626).

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# ***281** THE EVOLUTION OF INTERNATIONAL INDIGENOUS RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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## Abstract

Indigenous communities in the Western hemisphere are increasingly relying on international law and international fora for enforcement of their human rights. When there are no domestic laws that recognise indigenous rights, or such laws exist but there is no political will to enforce them, indigenous peoples in the Americas may turn to the Inter-American human rights system. Consequently, the **Inter-AmericanCourt** of **HumanRights** and the Inter-American Commission on Human Rights have developed a progressive case law in this area. In **2005** and **2006**, the Inter-American Court decided seminal indigenous ancestral land rights cases and a political rights case. This article analyses these cases and the previous jurisprudence and decisions on indigenous rights in the Inter-American system.

## 1. Introduction

Indigenous peoples are part of the pluricultural populations of most American States. In general, these peoples are descendants of the original inhabitants of the land before the formation of the State, who have their own traditions, ***282** customary law and cultural values. [FN1] Indigenous communities have long suffered violations of their most basic human rights, either perpetrated by the State or by third parties who acted free from interference by the State. Indigenous peoples have been killed, their rights to ancestral lands have been extinguished, their lands have been invaded by those attempting to exploit natural resources, their customs have been denigrated and they have been denied judicial remedies for these abuses. These violations continue today. In **2004**, the Sarayaku Indigenous Peoples petitioned the Inter-American system for interim measures to protect the community from the acts of an Argentine oil company that had been granted governmental permission to search for oil on Sarayaku ancestral lands without the community's permission. [FN2] To intimidate the community, the petroleum company had planted land mines in their hunting areas, detonated explosives that destroyed their springs and sacred sites and beaten and threatened villagers. [FN3]

Indigenous communities in the Western hemisphere are increasingly relying on

international law and international fora for enforcement of their human rights. It is important for human rights systems to respect and protect indigenous rights and customs. When there are no domestic laws that recognise indigenous rights, or such laws exist but there is no political will to enforce them, indigenous peoples in the Americas may turn to the Inter-American human rights system. Every American State has accepted the competence of the Inter-American Commission to consider violations of human rights in its jurisdiction, just by virtue of having ratified the Charter of the Organization of American States, a treaty. Thus, the Dann Sisters, members of the Western Shoshone Peoples of the Southwest United States, could take their case alleging the US government's violation of their land rights before the Inter-American Commission when the US Supreme Court denied them relief. [FN4] If the State, as is the case with both the United States and Canada, has not also ratified the ***283** American Convention on Human Rights (American Convention), [FN5] the Commission will determine whether the State violated the protections set forth in the American Declaration on the Rights and Duties of Man (American Declaration). [FN6] For those American States that are also States Parties to the American Convention, the Commission determines whether there have been violations of that Convention. [FN7] The Commission or the State Party involved then may refer a case to the **Inter-AmericanCourt** of **HumanRights** if the State has also accepted the jurisdiction of the Court either *ipso facto* for all cases or by special agreement in a particular case. [FN8] Consequently, some indigenous rights cases, most notably those against the United States, Canada and Belize, were decided solely by the Inter-American Commission, whereas the Inter-American Court also issued judgments in other cases brought against Nicaragua, Colombia, Guatemala and Paraguay.

Although the American Convention, unlike its African counterpart, [FN9] generally sets forth only individual rights and does not directly address the corresponding rights of peoples, [FN10] the **Inter-AmericanCourt** of **HumanRights** and the Inter-American Commission on Human Rights have developed a progressive case law on indigenous peoples' rights. The Inter-American Court has recently decided seminal indigenous rights cases, giving its judicial imprimatur to evolving principles of international indigenous law. [FN11] In a case brought by the ***284** Yakye Axa people against Paraguay, the Court expanded on its earlier decision in the *Awas Tingni* case against Nicaragua regarding enforced indigenous communal land rights. In *Yakye Axa*, the Court opined that when the State is to determine whether communal ancestral land rights or current individual land rights will prevail in the same property, it could be necessary to restrict the right to individuals' private ownership of property in order to preserve 'the cultural identity of a democratic and pluralistic society'. [FN12] In the *Yatama* case against Nicaragua, the Inter-American Court dealt with the right of indigenous peoples to participate in government. [FN13] The Court held that Nicaraguan electoral law constituted a disproportionate restriction on the political rights of the candidates of an indigenous and ethnic party because the State's requirements for participation in the municipal elections required a form of organisation that was foreign to the customs and traditions of the people. [FN14]

In these cases, the Inter-American Court became the first international judicial body to give its imprimatur to a progressive interpretation of a wide range of indigenous rights and the principles underlying those rights. The Court and the Inter-American Commission are establishing precedents in indigenous rights that add to the authority set forth in a limited but increasing number of international instruments, draft declarations, decisions and comments. The precedents established also apply to other peoples who share communal

lands and who celebrate their own culture and traditions within the framework of democratic nations.

This article analyses the case law on indigenous rights of the Inter-American Court as well as certain decisions of the Inter-American Commission. Section 2 sets forth basic international principles that underlie decisions of the Court and Commission, such as non-discrimination, the right of indigenous people to participate in decisions affecting them, respect for indigenous customary law, continuing violations and the applicability of indigenous law to tribal and other peoples. Section 3 explains the importance of State recognition of the juridical personality of indigenous peoples for their attainment of communal rights. Section 4 analyses the Inter-American Court and Commission's decisions on indigenous ancestral land rights, including collective rights, the right to title and demarcation of their land, and the right to control of natural resources. Section 5 interprets the Inter-American Court's contribution to the right of indigenous peoples to participate in government in accordance with their customary law. Sections 6 and 7 discuss Court holdings on indigenous peoples' right to religion and right to life. Section 8 evaluates the effectiveness of the remedies provided by States for the violation of indigenous rights. Section 9 describes the Court and Commission's use of interim measures to provide ***285** indigenous peoples with immediate protection, and Section 10 sets forth the types of **reparations** ordered by the Inter-American Court for violations of indigenous rights.

## 2. Principles Applied in Indigenous Rights Cases

Before examining the principles that the Court has articulated in its statement of indigenous rights, it may be helpful to note the following elements of the Court's approach to the interpretation of the Convention. An important consideration in the matter of indigenous rights is that the Court holds 'that human rights treaties are living instruments whose interpretation must consider changes over time and present-day conditions.' [FN15] The Court also interprets the American Convention in the light of other treaties, resolutions and declarations. [FN16] In interpreting indigenous peoples' rights under the American Convention, the Inter-American Court and Commission may take into account the International Labor Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force in 1991 and has been ratified by 17 States. [FN17] Many of the ratifying States are members of the OAS, including Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela, Certain indigenous rights recognised in ILO Convention 169, particularly the inalienability of collective land rights, also have been recognised in the constitutions of some American States. [FN18] The Draft UN Declaration on Indigenous Rights [FN19] and the Draft American Declaration on the ***286** Rights of Indigenous Peoples, [FN20] which do not create binding State obligations, reflect current progressive views on indigenous law. [FN21] The Inter-American Court and Commission have referred to provisions of the above ILO Convention 169 in their interpretations of the indigenous rights protected by the American Convention and the American Declaration.

### *A. Non Discrimination and Equal Protection of the Law*

The Inter-American Court and the Inter-American Commission apply general principles of non-discrimination and equal protection of the law when considering indigenous rights. The Inter-American Court relies on natural law to hold that equality arises directly from the

unity of the human family and is inextricably linked to the dignity of the individual. [FN22] The Court explained that the principle of non-discrimination

> cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character. [FN23]

The American Convention and the American Declaration both include broad non-discrimination clauses. [FN24] In addition, they provide that 'all persons are ***287** equal before the law'. [FN25] Consequently, all persons are entitled, 'without discrimination, to equal protection of the law'. [FN26] The Inter-American Court stated categorically that '[i]n the current stage of the evolution of international law, the fundamental principal of equality and non-discrimination has entered into the domain of *jus cogens*', an imperative norm. [FN27]

The Inter-American Court cautioned States that, pursuant to the equal protection clause of the American Convention, States are obligated to refrain from adopting discriminatory laws or regulations, to eliminate discriminatory regulations and practices and to establish laws and administrative measures that 'recognize and assure the effective equality of all persons before the law'. [FN28] A State is barred from exercising discrimination either in law or in fact not only as to the rights set forth in the American Convention but also with respect to any rights recognised under its domestic laws. [FN29]

The Court does not hold that all discrepancies in legal treatment are *per se* discriminatory, but rather only those that have 'no objective and reasonable justification'. [FN30] According to the Court, certain inequalities may be instrumental in attaining justice for those who are in a 'weak legal position'. [FN31] Specifically in reference to indigenous peoples, the Inter-American Court has emphasised that 'in order to effectively guarantee [the rights of members of an indigenous community] when interpreting and applying domestic norms, States must take into consideration the characteristics that differentiate members of indigenous peoples from the population in general and that make up their cultural identity'. [FN32] The Court also held that '[i]n respect to indigenous peoples, it is indispensable that States grant effective protection that takes into account their particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores'. [FN33]

### *B. Participation of Indigenous Peoples in Decisions Affecting Them*

The Inter-American Court recognises that indigenous people have the right to participate in decisions affecting them and that those decisions must reflect their customary law and culture. [FN34] State and international decisions that affect indigenous peoples should only be made in conjunction with the active ***288** participation of the people in question. [FN35] Such consultations must be culturally appropriate and procedurally adequate, in that the indigenous peoples must have access to sufficient information to permit them to participate meaningfully in the decisions that will impact their communities. [FN36] Moreover, measures adopted by States to protect indigenous peoples 'shall not be contrary to the freely expressed wishes of the peoples concerned'. [FN37]

In this regard, the Inter-American Commission specified that any State determination as to the maintenance of the rights of indigenous peoples to their ancestral land must be 'based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.' [FN38] In the *Maya Indigenous Communities* case, the Inter-American Commission specified that 'one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories'. [FN39]

The Inter-American Court requires that indigenous peoples must be consul ted when the State undertakes to fulfil a Court-ordered remedy. [FN40] For example, in ordering **reparations** in the *Awas Tingni* case, the Inter-American Court specified that the State should undertake the demarcation and titling of the Community's ancestral lands with full participation of the Community, taking into account its customary law, values, customs and mores. [FN41] In the *Yakye Axa****289** case, the Court also explained that when ancestral lands cannot be returned to indigenous peoples, the decision to award them alternative land or to pay them just compensation must be made by an agreement with the peoples involved and in accordance with their consultation procedures, values and customary law. [FN42] Except for its early decision in the *Aloeboetoe* case, where the Court exhibited some paternalism in setting up a trust fund for the compensation owed to both the adults and the children in the community, [FN43] the Court has ordered that indigenous and ethnic people be consulted in decisions that will affect them.

### *C. Observance of Indigenous Customary Law and Cultural Values*

The Inter-American Court takes into consideration the customary law of indigenous peoples when analysing indigenous rights. [FN44] Customary law within this context are the long-held customs and practices of a people, which its members regard as mandatory. In the *Aloeboetoe* case, the Inter-American Court considered the marriage customs of the Saramaca people in apportioning compensation to the victims' next of kin. [FN45] The Court had accepted Suriname's recognition of its international responsibility for the kidnapping and extra-judicial execution of seven young village men by the Surinamese military. [FN46] In determining the beneficiaries of the **reparations**, the Court ruled that official Surinamese family law was not effective in the region inhabited by the Saramaca and, thus, would not be applied in the case. [FN47] Rather, the Court took into account the customary marriage practices of the Saramacan people in its decision as to who qualified as family members who would be awarded **reparations**. [FN48] Under Saramacan tribal customs, polygamy was common, and marriages were not registered with the State. [FN49]***290** Consequently, the Court ordered that **reparations** be paid to all the wives, children and, in some cases, the parents of the victims, in accordance with the local cultural law of succession. [FN50]

The Inter-American Court ordered **reparations** to reinforce the cultural traditions and customary law of the Achí Mayan peoples when their culture was almost destroyed through human rights violations. The Court found in the *Massacre of Plan de Sánchez* case that the deaths of the women and elderly, who were traditionally the oral transmitters of the Mayan

Achí culture, interrupted the passage of cultural knowledge to future generations, producing a cultural vacuum. [FN51] The militarisation and repression to which the survivors and especially the young people were subjected after the massacre resulted in their loss of faith in their traditions. The survivors of the massacre could not freely practice Mayan cultural ceremonies and rights because the Guatemalan military controlled all their activities. [FN52] Thus, the traditional Mayan values of respect, service and action by consensus were forcibly replaced by authoritarianism and the arbitrary use of power. [FN53] The Inter-American Court recognised the importance of the Mayan culture to the identity of the people and, thus, ordered as a form of **reparations** that the communication system among the Mayan Achí villages be improved and that instruction in the Mayan Achí culture be instituted in the affected communities. [FN54]

### *D. Application of Indigenous Case Law to Tribal and Other Peoples*

International indigenous law may be applicable to tribal and other peoples who hold land collectively and have long-held customs and traditions similar to those of indigenous peoples. ILO Convention 169 is entitled the 'Indigenous and Tribal Peoples Convention.' [FN55] In international law, self-identification as 'indigenous' is a fundamental criterion in determining who is considered indigenous. [FN56]

***291** The Inter-American Court has applied to tribal and other peoples the jurisprudence that it developed in indigenous cases. The Court accords special protection to tribal and other groups who exercise an 'omni-comprehensive relationship' with their ancestral lands. [FN57] When peoples hold their ancestral land communally and have a close spiritual and cultural relationship with that land, the Inter-American Court will apply its jurisprudence on indigenous land rights and other related rights. [FN58]

In the *Moiwana v Suriname* case, the Court applied the case law that it developed in indigenous rights cases to the peoples of the N'djuka Maroon community who had been driven from their traditional land by a massacre perpetrated by the Surinamese military. [FN59] The ancestors of the inhabitants of this community had been brought to the territory, which is now Suriname, in the 17th century as African slaves. [FN60] Over time, many of them escaped to the rainforest, where they established autonomous communities and came to be known as Maroons. [FN61] The N'djuka People, whose village was massacred, are one of the six Maroon communities having their own language, history, cultural traditions and religion. [FN62] The villagers have not been able to return to their traditional lands since the 1986 massacre and are living as internally displaced people in Suriname or as refugees in French Guiana. [FN63] Although they are not technically indigenous to the area, the Court applied its jurisprudence on indigenous land rights to the N'djuka 'tribal people' in accordance with international law. [FN64] Their tradition of sharing land communally, their relationship to the land and the pre-eminent role they accord custom and common religious and spiritual practices is sufficiently similar to the practices and customs of the indigenous peoples for them to merit similar protection. The diversity of a democratic society is equally enhanced by protection of the life style and values of peoples such as the N'djuka.

### *E. Continuing Violations of Indigenous Rights*

Generally, an international human rights court has jurisdiction *ratione temporis* if the

alleged violation takes place during a time when the court has jurisdiction over the State, States may file preliminary objections to the court's jurisdiction ***292** because the violation occurred before the entry into force of the treaty for that State or before the State accepted the jurisdiction of the tribunal. [FN65] Many violations of indigenous rights, especially land rights, took place before the American Convention entered into force for any State or before the 1980s and 1990s when most States Parties to the Convention accepted the jurisdiction of the Inter-American Court. Thus, were there no exceptions to this principle, even the current continuing effects of these violations would be beyond the jurisdiction of the Inter-American Court and other international adjudicative bodies.

Although a State may violate human rights long before it ratifies a human rights treaty or accepts the jurisdiction of an international tribunal, if the legal effects of that violation continue thereafter, the tribunal may have jurisdiction *ratione temporis* over the effects of those violations that constitute continuing violations. Under this principle, even when indigenous peoples are deprived of their lands before the State ratified the American Convention, the Inter-American Court may hold that it has jurisdiction *ratione temporis* to determine if there is a 'continuing' violation of the right to property. [FN66]

When the peoples are still displaced and the State has not returned their land, provided them with acceptable alternative lands or compensated the peoples for the loss of their ancestral lands, the Court holds that a violation of the rights continues to the present day. For example, in *Moiwana v Suriname*, the N'djuka tribal people had been forcefully displaced from their lands by a massacre in 1986 and had not been able to return. [FN67] Suriname, however, had not acceded to the American Convention or accepted the jurisdiction of the Inter-American Court until 1987. The State, thus, objected to the Court's jurisdiction of the case *ratione temporis*. [FN68] The Court held that it could not consider the human rights violations that took place during the massacre and the forced displacement of the people. [FN69] The Court could, however, rule on violations that occurred after or continued after the State's accession and acceptance of jurisdiction. In this regard, the Court stated 'Moiwana community members continue to be either internally displaced within Suriname or to live as refugees in French Guiana. Thus, the Tribunal may properly exercise jurisdiction over the ongoing nature of the community's ***293** displacement, which--although initially produced by the 1986 attack on the Moiwana Village--constitutes a situation that persisted after the State recognized the Tribunal's jurisdiction in 1987 and continues to the present day'. [FN70]

Similarly, the Inter-American Court could not rule on a massacre of indigenous peoples that took place in Guatemala before Guatemala ratified the American Convention and accepted the jurisdiction of the Court, but it did rule on related events which took place after the Court had jurisdiction. In Guatemala a genocidal policy against the Mayan Indians was instituted during internal fighting in the 1970s and 1980s. According to the established facts of the *Massacre of Plan de Sánchez* case, from 1978 to 1983 when Guatemala was in the midst of an internal armed insurgency, the Guatemalan military planned a counter-insurgency campaign aimed at the destruction of Mayan people and villages that could be aiding the insurgents. [FN71] The Guatemalan Historic Clarification Commission reported that Guatemala's highest military authorities had ordered and carried out the massacres of 626 defenseless villages. [FN72] Under its doctrine of national security, the Guatemalan army had identified members of the Mayan indigenous peoples as 'internal enemies'. [FN73]

In the *Massacre of Plan de Sánchez* case the Inter-American Court dealt with the aftermath of the 1982 massacre of one Mayan highland village. [FN74] On the day of the massacre, approximately 60 military and paramilitary troops went from door to door in the village gathering the people to central locations. [FN75] Many of the men escaped, assuming that they would be the targets and that the women, children and old people would not be harmed. [FN76] However, everyone who was found was a target and most of them were killed. The young women and girls were taken to a house where they were raped, beaten and then killed. [FN77] The other children were beaten to death. [FN78] Grenades were thrown into the house where the elderly and others were enclosed, and anyone who tried to leave was shot. [FN79]

***294** Jurisdictional limitations restricted the violations which could be considered by the Inter-American Court. Although Guatemala had ratified the American Convention in 1978, four years before the massacre of Plan de Sánchez, the State did not accept the jurisdiction of the Court until 1987. [FN80] Therefore, the Court was barred jurisdiction *ratione temporis* from considering the violations committed during the massacre itself. [FN81]

The Court had authority, however, to consider violations of the American Convention that occurred subsequent to Guatemala's acceptance of the Court's jurisdiction. These violations included the harassment of survivors and the government's continuing refusal to allow the survivors to discuss the massacre, bring legal actions based on the killings or bury the dead in accordance with their religious convictions. In **2004**, Guatemala accepted international responsibility before the Court for violations of the rights to humane treatment, a fair trial, privacy, property, equal protection, judicial protection and freedom of association, religion and expression. [FN82]

### 3. Juridical (Legal) Personality of Indigenous Peoples

The American Convention provides that 'every person has a right to recognition as a person before the law'. [FN83] The recognition of the legal or juridical personality of an indigenous community is important because it allows a people to bring legal and administrative actions before State domestic organs in the name of the community. As stated by the Inter-American Court, '[t]he juridical personality, ***295** for its part, is the legal mechanism that confers on [indigenous peoples] the necessary status to enjoy certain fundamental rights, as for example the rights to communal property and to demand protection each time they are vulnerable'. [FN84]

States have effectively delayed recognition of indigenous peoples' rights or judicial remedies for violation of those rights by creating obstacles to the administrative procedure whereby indigenous peoples are granted legal personality. In the *Yakye Axa* case against Paraguay, the Yakye Axa indigenous people applied for the recognition of its legal personality in accordance with Paraguayan domestic law so that it could, as a people, demand the restitution of its ancestral lands. [FN85] The State initially delayed three years in granting recognition to the leaders of the group, and then delayed an additional three years before it recognised the community's legal personality. [FN86] The State then argued that the administrative procedure for the restitution of the lands did not begin until the State granted the application for recognition of juridical personality. [FN87] The Inter-American Court rejected the State's argument, reasoning that juridical personality only

makes operative the pre-existing rights of indigenous communities that they have exercised historically. [FN88] State recognition is not their beginning as legal persons. [FN89] Indigenous political, social, economic, cultural and religious rights and forms of organisation, as well as the right to reclaim their traditional lands belongs to the people themselves who are recognised even by the Paraguayan Constitution as pre-existing the State. [FN90] The recognition of juridical personality is merely a legal formality. [FN91] Consequently, the Court concluded that indigenous rights do not stem from State recognition of the legal status of the community.

### 4. Ancestral Land Rights

The colonisation of the western hemisphere resulted in many indigenous peoples losing possession of their ancestral lands and territories. In recent years, some of these peoples have demanded the restitution of those lands. The American Convention does not specifically address the issue of the restitution of ancestral lands; it does provide, however, that '[e]veryone has the right to the use and enjoyment of his property'. [FN92]

***296** In interpreting this right with respect to indigenous peoples, the Inter-American Court has recognised that one aspect of the right of indigenous people to their ancestral lands is based on the distinct relationship that they have to those lands. In this regard, the Court stated that

> [i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. [FN93]

#### *A. Collective Land Rights*

The Inter-American Court has clarified that the American Convention's provision protecting the right to property is broader than the individual right to own property. It also includes the right to own property collectively. [FN94] Although during the drafting of the American Convention the provision on property initially referred to 'private property,' the adjective 'private' was deleted in English but not in other languages. [FN95]

The Court recognises that indigenous peoples traditionally own land communally as well as, in some cases, individually. [FN96] An indigenous community settlement typically includes a 'physical area comprised of a nucleus of houses, natural resources, gardens, plantations and their surroundings tied when possible to their cultural tradition'. [FN97]***297** The Inter-American Court holds that 'the close relationship of the indigenous peoples with their traditional territories and the natural resources found there, which are connected to their culture, as well as the incorporeal elements that arise from them, should be safeguarded by [the right to property provision] of the American Convention'. [FN98] Moreover, the Court recognised that 'the possession of its traditional territory is etched in an indelible form in the historic memory' of indigenous people. [FN99]

### *B. Restitution of Ancestral Lands*

The right to property set forth in the American Convention may require that the State return ancestral lands to indigenous people. In the *Yakye Axa* case, the Inter-American Court ordered Paraguay, if possible, to return ancestral land to a small group of indigenous peoples who no longer lived on the land. [FN100] After years of pursuing unsuccessful proceedings in Paraguay, the Yakye Axa, a Paraguayan indigenous people, petitioned the Inter-American human rights system for a determination that their human rights had been violated and for **reparations**, including the restitution of their lands. [FN101] The people had traditionally lived by hunting, fishing and gathering on its communally-owned lands. At the end of the 19th century, however, the lands of the Yakye Axa and of other Paraguayan indigenous peoples were sold to British business owners. [FN102] The Anglican Church then arrived to convert the indigenous peoples to Christianity and oversee grain ranches. [FN103] The indigenous peoples were employed as labourers on the land that had been their own. [FN104]

In the 1980s, the Anglican Church purchased lands for new indigenous settlements and provided the indigenous groups that moved to these settlements with agricultural, sanitary and educational assistance. [FN105] At that time, the conditions of the Yakye Axa people, who were still living as workers on their ancestral land, were economically difficult and physically dangerous. The Yakye Axa men received no pay or low wages for their work, the women were ***298** sexually exploited by Paraguayan workers and the entire community suffered from insufficient food and the absence of health services. [FN106] Due to these conditions, the members of the Yakye Axa People moved to a new settlement in 1986, leaving their ancestral lands. [FN107] The move, however, did not improve their living conditions. The land was overcrowded for a hunting and gathering society, there was little food and water, and the Yakye Axa people, who were not native to that area, were marginalised by local indigenous groups. [FN108]

In 1993, the Yakye Axa attempted to begin proceedings in domestic courts for the restitution of their ancestral lands. [FN109] At that time, several Yakye Axa families moved to the side of the road at the entrance of the territory they claimed communally. [FN110] Although the Paraguayan Constitution provides that indigenous peoples have the right to their ancestral land, [FN111] the private owners of the range land that was claimed by the Yakye Axa were not willing to sell part of the ranch to the State for restitution to the Yakye Axa. [FN112] Paraguayan law specifies that indigenous peoples can only reclaim their ancestral land if one of the following conditions applies: it is State-owned land; the current owners are not making rational use of the land; or the current owners are willing to sell the land to the State. [FN113] As none of these conditions applied, Paraguay did not return the land to the Yakye Axa people.

### *C. Balancing Ancestral Communal Land Rights Against Private Land Rights*

The right to communal ancestral indigenous lands is relative, and must be balanced against competing claims to the land in question. The Inter-American Court has ruled that the American Convention's protection of property rights applies to both private individual ownership and communal ownership. [FN114] The Court specified in the *Yakye Axa* case that when there is a conflict between private property rights and communal ancestral indigenous rights in the same land, which requires the State to recognise one right over the

other, the State should analyse the elements of the restriction on property on a case-by-case basis. [FN115]

***299** The American Convention and the jurisprudence of the Inter-American Court set forth guidelines to determine admissible restrictions on the enjoyment and exercise of rights in general, including the right to property. [FN116] These restrictions must be established by domestic law and must be necessary, proportionate and passed with the goal of reaching a legitimate objective in a democratic society. [FN117] The American Convention's provision for the right to property specifies that State law may subordinate the use and enjoyment of property 'to the interest of society.' [FN118] The Court specified that '[t]he necessity of legally contemplated restrictions will depend on if [the restrictions] are oriented to satisfy a compelling public interest'. [FN119] It is insufficient for the State to demonstrate, for example, that the law fulfils a useful or opportune purpose. [FN120] The Court further stated that 'the restriction must be proportionate to the interest that justifies it and be closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right restricted'. [FN121] Finally, to be compatible with the Convention, the restrictions should be justified according to collective objectives that, by their importance, clearly predominate over the necessity for the full enjoyment of the right restricted. [FN122] In this regard, the Court emphasised that

> States should bear in mind that indigenous territorial rights include a broader and different concept that is related to the collective right of survival as an organized people, and that the control of their habitat is a necessary condition for the reproduction of their culture, for their development and to fulfill their life plans. Ownership of the land guarantees that members of indigenous communities conserve their cultural patrimony. [FN123]

Moreover, the Court said that a State's 'failure to recognize the ancestral right of the members of indigenous communities to their lands could affect their other basic rights such as their right to cultural identity and the very survival of the indigenous communities and their members'. [FN124]

The Court noted that it could be necessary to restrict the right to individuals' private ownership of property to preserve 'the cultural identity of a democratic and pluralistic society' and that such a restriction would be proportional if just ***300** compensation was made to those who must give up their private property. [FN125] In general, the American Convention permits the subordination of the use and enjoyment of property rights 'to the interest of society'. [FN126] The Court's position that the recognition of indigenous ancestral property rights is important to the survival of cultural diversity in a democratic society would support a permissible restriction on private property 'to the interest of society'.

Although the Court's pronouncements appear to favour the return of indigenous ancestral lands, the Court also stated that '[t]his does not mean that whenever there is a conflict between the territorial interests of individuals or the State and the territorial interests of the members of indigenous communities, the latter will prevail over the former'. [FN127] When the Yakye Axa asked for an interpretation of the Court's judgment because the State appeared unwilling to expropriate the private land claimed by the Yakye Axa people and intended to provide other land in the general area, the Court would not dictate to the State which specific lands were to be returned by the State to the Yakye Axa people. [FN128]

### *D. The Right to Alternative Lands or Compensation When the State Cannot Return Ancestral Communal Land*

When a State cannot return ancestral land to indigenous peoples, it should, with the agreement of the interested people, attempt to find them alternative lands, taking into account their customs, values and intended use of the land. [FN129] ILO Convention 169, cited by the Inter-American Court, provides that whenever possible, if ancestral land cannot be returned to indigenous people, through the agreement of the people and the State, or, if agreement cannot be reached, through appropriate procedures, the people shall be given 'lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development'. [FN130] If alternative land is not available or acceptable, with their agreement the people should be given compensation for the land. That compensation should principally take into account 'the meaning that the land has for them'. [FN131]

***301** The Inter-American Commission considered the principles of restitution and compensation in *Mary and Carrie Dann v United States*, finding that the government had violated the ancestral land rights of Mary and Carrie Dann, members of the Western Shoshone Indigenous People of the Southwest United States. [FN132] The Dann sisters had been denied restitution and ownership of their ancestral lands, and the compensation which they refused to accept did not take into account the meaning of the land to them or to the Western Shoshone people. [FN133] The US government argued that the rights of the Western Shoshone to the lands in question had been extinguished in 1872 through the encroachment of non-native Americans. [FN134] In 1977, the US Indian Claims Commission (ICC), which did not have authority to order the return of the land to the Western Shoshone, agreed that they would be compensated for the loss of their ancestral lands at a rate of approximately 15 cents per acre in accordance with 1872 land values. [FN135] The People refused the compensation and it was placed in a US government trust fund. [FN136]

After the US Supreme Court affirmed the ICC ruling, the Dann sisters brought their case to the Inter-American Commission. [FN137] The Inter-American Commission held that the Dann sisters' domestic property claims to their ancestral lands had not been determined through a fair process that complied with international human rights norms. [FN138] The Inter-American Commission found that the decision of the ICC that the land rights of the Western Shoshone had been extinguished, was made based upon an agreement between the US government and only one band of the Western Shoshone people. [FN139] Other Western Shoshone bands, such as the Danns, were not allowed to intervene in the proceedings even though the ICC's determination also extinguished their rights to much of their ancestral land. [FN140] The Inter-American Commission concluded that the Danns had not been afforded equal protection of the law in the ICC proceedings. [FN141] The case could not be referred to the Inter-American Court because the US has not ratified the American Convention or accepted the jurisdiction of the Court.

### **302E. Demarcation and Title to Ancestral Land*

The land rights of indigenous peoples who continue to live on their ancestral lands also may be tenuous if they lack title to the land or its boundaries have not officially been established. Indigenous title to ancestral lands is essential to deter the State or third parties

from encroaching on the land. The Inter-American Court has stated that 'as a result of customary practices, possession of the land should suffice for indigenous communities lacking actual title to the land to obtain official recognition of their property and for [its] consequent registration'. [FN142]

Although some State constitutions recognise indigenous ancestral land rights, the Court has made clear that 'the merely abstract or juridical recognition of indigenous lands, territories and resources practically lacks sense if the property has not been established and physically delimited'. [FN143] In the *Awas Tingni* case, the Inter-American Court ordered Nicaragua to demarcate and title the lands of the Awas Tingni People of the Atlantic Coast of Nicaragua. [FN144] The indigenous people's representatives had filed a complaint in the Inter-American human rights system to oppose the governmental grant of a logging concession on lands long possessed by the Awas Tingni, an indigenous community made up of more than 600 people. [FN145] The people relied on their ancestral land for their subsistence, using it for family farming, communal agriculture, hunting and fishing. [FN146] Extensive logging of their land would have destroyed their forests and disrupted their customs and lifestyle. The community did not have a deed or title to the lands where they and their ancestors had long lived, [FN147] even though the Nicaraguan Constitution recognised the right of indigenous peoples to communal ownership of their land. [FN148] The Inter-American Court ordered the government to officially recognise the Awas Tingni's right to their ancestral lands. [FN149]

The Inter-American Court allows States a margin of appreciation in identifying the ancestral lands of indigenous peoples. The Court does not deem itself competent to identify traditional lands; rather, the Court's role is to determine whether the State has respected and guaranteed the right of indigenous peoples to their communal property. [FN150] The Court has stated that it is then for ***303** the State to delimit, demarcate, title and return the lands to the people because it is the State that possesses the technical and scientific expertise to do so. [FN151]

The State's obligation to identify indigenous ancestral lands, however, is subject to limitations. The State must take into account that 'the possession of traditional territory is indelibly marked in the historic memory [of the members of the Community] and that the relation that they maintain with the land is of a quality that severing their connections with the land implies a certain risk of an irreparable ethnic and cultural loss with a consequent loss of diversity as a result'. [FN152] Nonetheless, it is the State that makes the final determination, with the participation of the peoples, as to the exact location of the lands that will be returned. In the request for an interpretation of the judgment in the *Yakye Axa* case made by the representatives of the victims, it appeared that the State was ignoring the community's request that it be awarded particular lands and was instead giving them other lands that the State claimed to be their greater traditional territory. [FN153] Although the Court reminded the State of the people's connection to their ancestral lands, it left the ultimate determination of the State to decide on the exact location of the lands to be awarded to the Yakye Axa people. As a practical matter, the Court can set forth the general principles for States to follow in identifying and titling ancestral lands, but it cannot become involved in every dispute between the State and the people. It is incumbent upon the State to fulfil the spirit as well as the letter of the Court's order to return ancestral lands to indigenous peoples.

A further complicating factor to the State's obligation to demarcate and title ancestral lands is that due consideration must be given to other peoples or individuals, whether they be indigenous, ethnic or other, who live in close proximity and who may have overlapping claims to the land at issue in a particular case. [FN154] In its ruling on the request for interpretation of its judgment in *Moiwana Community v Suriname*, the Inter-American Court specified that the State must determine the boundaries of the Moiwana traditional lands with the participation and informed consent of the Moiwana People and of the neighbouring villages and indigenous communities. [FN155] It would be inequitable for the State to title the lands of the applicants who were victorious in a suit before an international tribunal without determining the rights of neighbouring claimants. At the same time, it must be recognised that a land-titling procedure that would recognise the rights to all possible competing and overlapping claims to land may well take longer than the Court has allocated to the State to make **reparations** by titling the land in question.

***304** While indigenous land rights do not depend on recognition in domestic legal systems, [FN156] the Inter-American Court has used the protections offered by the State's domestic laws in its interpretation of the American Convention right to property. [FN157] Constitutions and laws in some States such as Nicaragua [FN158] and Paraguay protect communal indigenous ancestral lands. [FN159] Nicaraguan law provides that such lands are 'inalienable' and cannot be sold, donated, encumbered or taxed. [FN160] The Paraguayan Constitution provides that '[i]ndigenous peoples have the right to communal property, in the amount and quality sufficient for the conservation and development of their characteristic lifestyle'. [FN161] The Inter-American Court ordered Paraguay to return and demarcate the ancestral lands of the Yakye Axa people and, likewise, ordered Nicaragua to demarcate the traditional lands of the Awas Tingni Community.

In the absence of domestic recognition of indigenous land rights, however, the Court will interpret the American Convention to protect the communal ancestral land rights of indigenous and tribal peoples in accordance with its earlier jurisprudence. For example, Suriname, does not recognise communal property rights, [FN162] and the victims in the *Moiwana v Suriname* case, the N'djuka tribal people, have neither individual nor collective title to the land traditionally occupied by them. [FN163] Surimese law provides that the land belongs to the State. [FN164] The Inter-American Court found that the N'djuka people, like indigenous people, have an important spiritual, cultural and material relationship with their traditional lands that they had occupied until 1986 and that their occupation of the land for many years and their relationship should suffice to provide them with government recognition of their property. [FN165] As **reparations**, the Court ordered ***305** Suriname to return the land to the People, demarcate the land and grant the N'djuke People collective title to the land and the traditional resources on it. [FN166]

### *F. Control of Natural Resources*

Even when the State has recognised the legal right of indigenous peoples to their communal property, conflicts may arise over the control of natural resources on or beneath that land. States sometimes grant contracts to third parties authorising them to exploit the natural resources on lands that historically have been in the possession of indigenous peoples or on lands that have been titled communally to the people. Such contracts can be lucrative for national governments and for the State officials who facilitate those contracts. In recent years, the Nicaraguan government granted logging rights on untitled indigenous

lands to a Korean company; [FN167] the government of Belize granted logging rights and oil exploration rights on Mayan reservations to a private company; [FN168] and the Ecuadorian government, which retains the right to exploit subsurface minerals, granted exploration rights on indigenous lands to private foreign companies. [FN169] These companies can be ruthless in attempting to gain access to indigenous communal property. [FN170]

The natural resources on ancestral lands often support the indigenous peoples' subsistence economy and are important to the religious and cultural lives of the people. The people may live by hunting in forested areas, fishing in unpolluted streams and rivers and worshiping at undisturbed historic sacred sites on the land where their ancestors worshiped. Access to their ancestral lands and the natural resources on those lands is directly linked to their ability to obtain adequate food and clean drinking water. [FN171] The Inter-American Court recognised the importance of these resources to indigenous peoples, stating

> [t]he culture of the members of the indigenous communities corresponds to a particular way of being, seeing, and acting in the world, as a result of their close relationship with their traditional territory and ***306** the resources found there, not only because those resources are their principal means of sustenance, but also because they constitute an integral element in their view of the world, religion and finally, their cultural identity. [FN172]

Likewise, the Inter-American Court recognised in the *Massacre of Plan de Sanchez* case, that '[f]or the members of these communities, harmony with the environment is expressed by the spiritual relationship that they have with the land, their manner of managing resources, and their profound respect for nature'. [FN173] ILO Convention 169 specifies that the rights of indigenous peoples to the natural resources on their lands must be safeguarded, and that they must have the right to participate in the 'use, management and conservation of these resources'. [FN174] Indigenous peoples can only continue to live by their traditional values if they have control of the natural resources on their lands. The decisions of the organs of the Inter-American human rights system are reinforcing indigenous rights to their natural resources.

### 5. Freedom to Participate in Government

Indigenous peoples have the right, common to all people, to participate in government at every level of the State. The American Convention specifies that every citizen has the right to vote, to be elected, and to participate in public affairs, either directly or through a freely chosen representative. [FN175] The State must guarantee these rights equally to all citizens. [FN176]

In its only decision to focus on the political rights of indigenous peoples, in *Yatama v Nicaragua* the Inter-American Court held that Nicaragua violated the political rights of the indigenous and ethnic communities of the Atlantic Coast during the **2000** Nicaraguan municipal elections. [FN177] The Nicaraguan ***307** Constitution recognises that '[t]he Communities of the Atlantic Coast have the right to maintain and develop their cultural identity within national unity; to have their own form of social organization and to manage their local affairs according to their traditions'. [FN178] The Constitution further provides that the 'State guarantees these communities ... the free election of their authorities and representatives'. [FN179]

The indigenous and ethnic peoples of the Nicaraguan Atlantic Coast have a distinctive form of political organisation, which is referred to as communitarian democracy, and is typified in the YATAMA party. [FN180] The stated purpose of the YATAMA party is to 'defend the historic rights of the indigenous peoples and ethnic communities over their traditional lands and to promote self-government, [ ... ] emphasize the economic, social and cultural development of the Yapti Tasba, creating a communitarian democracy within the framework of democracy, peace, and the unity of the Nicaraguan state/nation'. [FN181] Candidates for the YATAMA party are nominated through an open town meeting process that is rooted in the tradition of the peoples. [FN182]

The YATAMA candidates were not allowed to participate in the **2000** Nicaraguan elections because YATAMA had not fielded candidates in 80 percent of the Nicaraguan municipal elections in accordance with a new national electoral law. [FN183] YATAMA had neither the connections nor the funding to enter candidates in elections in non-indigenous areas, [FN184] and, therefore, it was disqualified from entering candidates in any election, even in the areas where the party had structure and leadership. [FN185] State law did not permit any appeal from the decision of the electoral commission, [FN186] so representatives of the party took the case to the Inter-American human rights system.

The Inter-American Court held that the Nicaraguan electoral law constituted a disproportionate restriction that unduly limited the political candidates running on behalf of YATAMA. [FN187] In this regard, the Court reasoned that the State's restrictions required a form of organisation that was foreign to the customs and traditions of the people. [FN188] The Court stated that

> [t]he restriction of participating through a political party imposes on the candidates proposed by YATAMA a form of organization foreign to ***308** its uses, customs and traditions, as a requirement to exercise the right of political participation, in contravention of the internal norms that obligate the State to respect the forms of organization of the communities of the Atlantic Coast, and negatively affected the electoral participation of those candidates in the municipal elections of **2000**. The State has not justified that this restriction fulfills a useful and suitable purpose that is necessary to satisfy an imperative public interest. To the contrary, this restriction is an impediment to the full exercise of the right to be elected of the members of the indigenous and ethnic communities that make up YATAMA. [FN189]

The Court also held that because of the close relationship between the right to be elected and the right to vote, the violation of the rights of the candidates who were not allowed to participate in the elections also violated the rights of the voters. [FN190] According to the explanation of the Inter-American Court the closely-connected rights to be elected and to vote represent individual and social political participation. [FN191] Therefore, the citizens' right to vote was violated when the State refused to authorise the YATAMA candidates to participate in the election because it limited voters' options. [FN192] The Court reasoned that YATAMA 'contributes to establish and preserve the cultural identity of the members of the indigenous and ethnic communities of the Atlantic Coast. Its structure and goals are linked to the traditions, customs and forms of organization of these communities'. [FN193] As a result, the Court held that the exclusion of their candidates put those who would have voted for them in a position of inequality. Indigenous voters could no longer vote for the persons they had chosen in their assemblies in accordance with their

traditions and customs. [FN194]

At the public hearing before the Inter-American Court, the Nicaraguan government recognised that its electoral law required reform. [FN195] This statement was interpreted by the Inter-American Court as an admission that the law in question violated the American Convention's right to the political participation of the indigenous and ethnic peoples. [FN196] The Court did not accept the government's excuse that it would be difficult to reform the law before the next election in **2006**. [FN197] Rather, the Court reminded the State that it ***309** 'cannot invoke the provisions of its internal law as justification for its failure to fulfil international obligations'. [FN198]

### 6. Freedom of Religion

In the jurisprudence of the Inter-American Court, the religious freedom of indigenous peoples has most often been addressed in cases involving limitations on their right to engage in their religious cultural burial customs. Everyone has the right to manifest his or her religious beliefs. [FN199] This right includes the exercise of specific indigenous burial customs which often reflect the religious beliefs in the afterlife of the indigenous peoples. When States do not permit the people to observe their burial customs, the Inter-American Court has held that the peoples' religious rights have been violated. [FN200]

The Court honoured the religious and cultural values of the Mayan Indians of Guatemala in the *Bámaca Velásquez* and the *Massacre of Plan de Sánchez* cases. In those cases, the Court recognised that '[t]raditions, rites, and customs have an essential place in [Mayan] community life. Their spirituality is reflected in their close relationship between the living and the dead, and it is expressed by the practice of burial rights, as a permanent form of contact and solidarity with their ancestors'. [FN201] In *Bámaca Velásquez*, the Court required that the Guatemalan government locate the body of the victim, an indigenous leader in the guerrilla forces of Guatemala; conduct an exhumation; and move his remains to the burial site chosen by his family. [FN202] The Court stated that the funeral ceremonies for the Mam ethnic group of the Mayan culture

> ensure the possibility of the generations of the living, the deceased person, and the deceased ancestors meeting anew. Thus, the cycle between life and death closes with these funeral ceremonies, allowing them to express their respect for Efraín [the victim], have him near and return him or take him to live with the ancestors, as well as for the new generations to share and learn about his life, something that is traditional in his indigenous culture. [FN203]

The right of the Mayan Achí people to observe their religious death and burial rituals after the massacre of the village Plan de Sánchez in Guatemala was also ***310** violated by the Guatemalan government. [FN204] Mayan Achí death rites normally continue for nine days and are detailed and elaborate. [FN205] Following the massacre in 1982, when most victims were buried quickly in mass graves, the survivors could not observe their religious customs. The Inter-American Court held that this violated the right to religion of the victims and the survivors. It was not until 1994 that the community could begin to bury the victims of the massacre in accordance with Mayan religious customs and beliefs. [FN206] At the public hearing before the Inter-American Court, the Guatemalan government accepted international responsibility for its failure to guarantee to the victims' families and other members of the community 'the freedom to manifest their religious, spiritual, and cultural

beliefs'. [FN207]

### 7. Right to Life

The American Convention provides that 'every person has a right to have his life respected'. [FN208] The Inter-American Court interpreted the right to life to have an additional dimension in the *Yakye Axa* case. In that case, the Court stated that essentially, the fundamental right to life is broader than freedom from the arbitrary deprivation of life. [FN209] The Court specified that the right to life includes the right to live a 'vida digna' or a dignified existence. [FN210] According to the Inter-American Court, the State, pursuant to its duty to guarantee life, has the obligation to generate living conditions that are at least 'minimally compatible with the dignity of the human person'. [FN211] The State also has the duty 'not to induce conditions that impede life or make it difficult.' [FN212] In this regard, the Court clarified that 'the State has the duty to adopt positive concrete measures oriented to satisfy the right to a "vida digna," especially when dealing with persons in a situation of vulnerability and risk', such as the Yakye Axa. [FN213]

***311** In the *Yakye Axa* case, the Inter-American Court held that Paraguay, by delaying the proceedings for the restitution of their ancestral lands, violated the rights of the Yakye Axa community members to live a dignified existence by worsening their living conditions. [FN214] The community members had lived for more than eight years at the side of the road that led to the entrance to their ancestral lands, awaiting the domestic resolution of their petition for the restitution of their lands. [FN215] The Court found that the people had lived in 'conditions of extreme misery' because of the precariousness of their temporary settlement and the related difficulties of obtaining food, clean water, adequate housing and healthcare. [FN216] Thus, the State was held liable for the violation of the right to life of the Yakye Axa people for 'not adopting measures in the face of the conditions that affected their possibility of having a dignified life.' [FN217] Considering the abject poverty and destitution in which many American indigenous peoples live as a result of the loss of their ancestral lands and systematic discrimination, States could be held liable for the violation of the right to a 'vida digna' in many indigenous land rights cases.

### 8. State's Obligation to Provide Effective and Appropriate Remedies

Indigenous peoples have a right to an effective remedy for the violation of their human rights. The American Convention requires States to adopt measures that will give effect to the rights set forth in the American Convention. [FN218] It also obligates States to suppress norms and practices that violate the Convention guarantees. [FN219] Moreover, States have an obligation under the American Convention not only to pass laws that provide a remedy for the violation of human rights but also to ensure due application of that remedy by State authorities. [FN220] In the *Awas Tingni* case against Nicaragua, the Inter-American Court found that remedies provided in the Nicaraguan Constitution and other laws were not, in fact, effective to protect the rights of the indigenous peoples to the enjoyment of their communal property. [FN221] The Inter-American Court held that although Nicaraguan law recognised and protected indigenous communal property in Nicaragua, [FN222] it did not set forth a legal procedure whereby indigenous people could have their ***312** communal lands demarcated and titled. [FN223] Thus, the State had failed to provide a remedy to indigenous peoples to enable them to enforce their right to their communal lands. As **reparations**, the Court ordered Nicaragua to adopt the necessary legislative and

administrative measures to effectively delimit, demarcate and title the property of the Awas Tingni people in accordance with their customary law, values, customs and mores. [FN224]

### *A. Judicial Recourse*

Under the American Convention, everyone has the right to an effective recourse before a competent tribunal for protection against the violation of human rights. [FN225] Indigenous peoples, therefore, have the right to the timely judicial protection of their fundamental human rights, whether those rights are recognised by the State constitution or domestic laws or by the international treaties that have been ratified by the State. The Inter-American Court has interpreted the American Convention's rights to judicial protection and to due process to mandate 'the obligation of the States, to offer, to all persons under their jurisdiction, [an] effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention, but also to those recognized by the Constitution or the law [of the State]'. [FN226] The ILO Convention likewise provides that 'the peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights'. [FN227]

In the *Yatama* case, the Inter-American Court found that the candidates for YATAMA, the party of the indigenous and ethnic peoples of the Nicaraguan Atlantic Coast, were given no recourse against a ruling that barred them from participating in municipal elections. [FN228] There was no ordinary or extraordinary judicial remedy provided by Nicaraguan law against decisions adopted by the Supreme Electoral Council. [FN229] The Inter-American Court held that Nicaragua's law violated the American Convention obligation to provide judicial recourse ***313** for human rights violations as some judicial control is indispensable when the powers of the Council were so broad as to favour certain political ends. [FN230]

The formal existence of remedies is not sufficient if the remedies are not effective to protect rights. [FN231] Even when applicable laws are in force, there may be a lack of political will on the part of State authorities to enforce those laws. When analysing a State's administrative process for the restitution of indigenous lands, the Inter-American Court first determines whether there is a formal remedy for indigenous peoples to request the restitution of their ancestral lands and, if such a remedy exists, the Court then analyses the effectiveness of the remedy. [FN232] 'It should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it'. [FN233]

### *B. Effectiveness of Remedy Dependent on Timeliness*

The effectiveness of the remedies available to indigenous peoples for the violations of their rights and the compliance with due process constraints is partially determined by whether the remedy can be implemented in a reasonable time. [FN234] The test applied by the Inter-American Court to determine whether the time period for a judicial remedy is reasonable in a particular case depends on three factors: (a) the complexity of the matter; (b) the activity engaged in by the interested party in processing the remedy; and (c) the conduct of the judicial authorities. [FN235] In the *Yakye Axa* case, the Inter-American Court

determined that the procedures for recognising the indigenous leaders and the juridical personality of the Yakye Axa people were of minimal complexity and that, therefore, the delay of almost 6 years was unjustified. [FN236] Moreover, restitution of the indigenous ancestral lands had not yet been made more than 11 years after the Community began to pursue the necessary actions. [FN237] The Court determined that such a prolonged delay was itself, in principle, a violation of judicial guarantees. [FN238]

Once a prolonged delay is shown, the burden then shifts to the State to prove that the delay bears a direct relationship to the complexity of the case or to the conduct of the parties. [FN239] Although the Court in the *Yakye Axa* case found that ***314** the overall proceeding was complex, it also found that the domestic delays were not a result of that complexity, but rather stemmed from the systematic delayed actions of State authorities. [FN240] As a result, despite the complexity of the administrative procedures necessary to provide for the return of ancestral lands of the Yakye Axa people, the Court found that the actions of State authorities were not compatible with the principle of reasonable time and, therefore, violated the rights of the Yakye Axa to a judicial remedy. [FN241]

The Court has also held that indigenous peoples' rights to a judicial remedy have been violated when their application to domestic courts for *amparo*, a Latin American emergency remedy for the violation of rights, is not decided expeditiously. The Court has stated that *amparo* is a 'simple, rapid, and effective mechanism' to protect rights. [FN242] When there is an unjustified delay in deciding an action for *amparo*, the Inter-American Court holds that the remedy is ineffective and illusory. [FN243] Nicaraguan domestic law specified that an action for *amparo* should be decided within 45 days. [FN244] The Awas Tingni Community's second request for *amparo* was not decided for over 11 months. [FN245] As a consequence, the Inter-American Court determined that the remedy was not decided within a reasonable time and was not, therefore, an effective remedy for the violation of the land rights suffered by the Community. [FN246]

The State's obligation to provide victims of human rights violations with a timely remedy encompasses its duty to investigate the acts that resulted in the violations and to identify, bring to trial and punish the perpetrators and masterminds of the violations. [FN247] Even 22 years after the massacre of the village of Plan de Sánchez, and 10 years after the findings of the Guatemalan Historical Clarification Commission listed the names of those responsible, the State had neither investigated the matter nor effectively punished the violators. [FN248] Without punishment, impunity reigns and there is neither individual nor general deterrence. Following the massacre, the survivors were persecuted, threatened, and intimidated by State agents to keep them from denouncing the massacre and from participating in domestic and international proceedings. [FN249] These acts violated the rights to due process and timely judicial recourse. The Inter-American Court held that the State, to guarantee due process, must provide all means necessary to protect victims from harassment and threats that are meant to obstruct human rights proceedings. [FN250]

### ***3159. Immediate Protection to Prevent Imminent Danger: Interim Measures**

International proceedings, which typically are not resolved for years, are inadequate in urgent circumstances to protect indigenous people from immediate irreparable harm. In that time, persons who are in imminent danger may be injured or killed, and communal indigenous lands may be stripped of natural resources or titled to another party.

The Inter-American Court and the Inter-American Commission have ordered States to take interim measures to protect the lives and physical integrity of indigenous people as well as to protect their lands and natural resources. The Convention authorises the Inter-American Court to adopt provisional measures 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'. [FN251] The Commission also issues requests to States to take precautionary measures to protect indigenous communities and their lands in 'serious and urgent cases'. [FN252] Interim measures are termed 'precautionary measures' when adopted by the Commission and 'provisional measures' when ordered by the Inter-American Court. The over-riding importance of interim measures in human rights cases arises from their potential to end an abusive situation rather than to compensate the victim or the victim's family after-the-fact.

In several instances, the Commission and the Court have issued interim measures to States to protect indigenous rights. The Court ordered Guatemala to protect the lives and physical integrity of witnesses in the *Massacre of Plan de Sánchez* case after some petitioners and witnesses were harassed and threatened. [FN253] In the *Kankuamo Indigenous People* case, both the Inter-American Commission and the Court issued interim measures in an attempt to secure protection for 6,000 community members living on the Kankuamo Indigenous Reserve in Colombia. [FN254] Due to the geographic location of their land, the members of the group were exposed to violence and threats from armed groups and paramilitaries sometimes affiliated with the ***316** Columbian military. [FN255] More than 144 members of the Kankuamo Indigenous Peoples had been killed in a 10-year period, and fear had driven many people from their land. [FN256] The State has an obligation to protect people within its jurisdiction not only from State authorities but also from third parties, including armed irregular groups. [FN257] The Court, therefore, ordered Colombia to immediately adopt the measures necessary to protect the lives and physical integrity of the Kankuamo indigenous people and to permit those who had been displaced from their lands to return. [FN258]

When third parties attempt to exploit natural resources on indigenous ancestral lands against the wishes of the people, the resulting violence may necessitate special measures to protect the community. In the *Indigenous People of Sarayaku* case, in which the Court ordered the government of Ecuador to take provisional measures to protect the Sarayaku People and their lands, the aggressors were employees of an Argentine petroleum company. The State of Ecuador had granted the Argentine Company a contract to explore and exploit petroleum in a region of the country [FN259] that included the ancestral lands titled to the Sarayaku. The Sarayaku objected to the oil exploration on their land. [FN260] The petroleum company, with the assistance of State officials, threatened, beat, robbed and tortured members of the Community and even their attorney. [FN261] Passage by river, the only principal route by which the Sarayaku People could reach its territory, was intentionally blocked with fallen trees, and the petrol company planted landmines in the Sarayaku hunting area which kept the people from hunting for their food. [FN262] Explosive detonations had destroyed their forests, springs, caves and sacred sites. [FN263]

The Commission issued precautionary measures in the *Maya Indigenous Communities* case, requesting that Belize 'take appropriate measures to suspend all permits, licenses, and concessions for logging, oil exploration and other natural resource development activity on lands used and occupied by the Maya communities in the Toledo District until the

Commission had the opportunity to investigate the substantive claims raised in the case'. [FN264] Likewise, in **2004*317** the Commission requested that the Brazilian government take measures to protect the indigenous peoples in a certain area of Brazil after a group armed with chainsaws and tractors attacked indigenous communities, killing one person, disappearing another and destroying 34 homes, the school and the health clinic. [FN265] The publicity resulting from the measures may have been partly influential in encouraging the government to demarcate the traditional lands of the indigenous peoples in the area, an act which was expected to end the violence perpetrated by ranching and other economic interests against the indigenous people. [FN266]

In the *Dann Sisters* case, the petitioners requested that the Commission issue precautionary measures. [FN267] Although the Dann sisters' petition was already under consideration by the Inter-American Commission, the US government had issued orders and decisions which would have negatively affected their rights and property before the Commission could issue its report. [FN268] The US Bureau of Land Management had published a notice stating that it would impound all livestock grazing on lands which the Western Shoshone peoples claimed as their ancestral lands. [FN269] Moreover, the US government accused the Dann sisters and the Shoshone of trespass on the lands and ordered them to pay a large fine for unauthorised grazing. [FN270] At that point, the Commission issued precautionary measures ordering the US government 'to stay its intention to impound the Dann's livestock until the Commission had an opportunity to fully investigate the claims raised in the petition'. [FN271] The US did not comply with the Commission's request for precautionary measures. Rather, the US Bureau of Land Management and 40 armed federal agents seized 225 head of the Danns' cattle from their ancestral lands and sold them to the highest bidder. Subsequently, the petitioners requested an amplification of the precautionary measures, notifying the Commission that two bills that had been introduced before the US Congress could cause irreparable harm to their 'ability to survive culturally, physically and economically and to their ability to pursue the very claim set forth in ***318** their submissions to the Commission'. [FN272] One bill authorised the US government to auction lands claimed by the Shoshone to private interests, and the other authorised the per capita distribution of the funds awarded but never accepted by the Shoshone for the extinguishment of rights to their ancestral lands. [FN273]

Although a State may not always take the interim measures requested, an international body's request to the State and the facts supporting that request bring public attention to bear on the situation. The publicity generated by an international call for interim measures may encourage the State to take more appropriate action, even if it does not explicitly comply with the measure ordered.

**10. Reparations** for Violations of Indigenous Rights

When the Inter-American Court holds that a State has violated the American Convention or when the State voluntarily accepts international responsibility for a violation, the State must make **reparations** to the injured party. [FN274] Financial compensation to the victims or their next-of-kin is the most common form of **reparations** in all human rights cases. State recognition of international responsibility for the violation of indigenous rights and an apology to the victims is another form of reparation. State acknowledgment of wrongdoing often replaces a denial and cover-up of the violations that, in some instances,

attempted to cast the blame on the victims themselves. [FN275] In the *Massacre of Plan de Sanchez* case, the President of Guatemala recognised the State's responsibility for the massacre of the Mayan village. [FN276] Moreover, in the public hearing before the Court, Guatemala expressed 'its profound condolences for the acts lived and suffered by the community of Plan de Sánchez on 18 July 1982, for which in the name of the State it ask[ed] the pardon of the victims, the survivors, and the family members, as a first sign of respect, reparation and the guarantee of non-repetition'. [FN277] The Court may require as **reparations** that the State ***319** acknowledge its responsibility domestically by undertaking acts that publicise its responsibility for the human rights violations. For instance, the Court ordered Guatemala to hold a ceremony in *Plan de Sánchez* to publicly honour the memory of the persons executed in the massacre. [FN278] In accordance with the Court's **reparations** decision, the Guatemalan government held the public ceremony in February **2006**, over 23 years after the massacre. [FN279] It brought in clowns, jugglers and at least 40 government staff members to commemorate the first of three payments that was made to the survivors as ordered by the Inter-American Court. [FN280]

**Reparations** in cases that involve violations of indigenous rights should include more than official recognition and financial compensation to individuals. The Inter-American Court also generally orders the State to make **reparations** to the community by requiring that the State improve its social investments in the indigenous communities affected by the violations. Many indigenous villages lack basic infrastructure such as health clinics, schools, roads and utilities. The **reparations** ordered by the Inter-American Court often reflect ILO Convention 169, which provides that '[t]he improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit'. [FN281]

The Inter-American Court ordered Guatemala to make **reparations** to the 'members of the community together' as well as to the individual victims in the *Massacre of Plan de Sánchez* case. [FN282] The **reparations** to the community required the State to contribute to the maintenance and improvement of the chapel where people pay tribute to the victims of the massacre, to provide a health centre, trained health personnel and potable water. [FN283] In the *Aloeboetoe* case, the Court ordered Suriname to re-open and staff the school and to make the medical dispensary operational. [FN284] Likewise, as **reparations** for immaterial damages in the *Awas Tingni* case, the Court ordered Nicaragua to invest $50,000 in 'works or services of collective interest for the benefit of the Community'. [FN285] The decision as to which works and services the State would improve was to be made by an agreement between the Community and the State. [FN286]

***320** Despite the value of monetary compensation to victims and communities, financial **reparations**, even accompanied by the State's acknowledgment of responsibility and public ceremonies, are not sufficient to repair the consequences of human rights violations. The Inter-American Court has held that the victims and the families of victims have a right to know the truth of what happened. [FN287] Therefore, as a form of **reparations**, States have an obligation to investigate the violations and prosecute and punish those responsible. Impunity, the failure to punish the perpetrators of violence against indigenous peoples, often results in future violence.

## 11. Conclusions

The jurisprudence of the Inter-American Court and the decisions of the Inter-American Commission are at the forefront of the progressive development of international indigenous rights. When there are no domestic laws that recognise indigenous rights, or such laws have been promulgated but political will does not exist to enforce them, indigenous peoples in the Americas rely on the Inter-American human rights system for the recognition of their rights and the redress of human rights violations.

The Inter-American Court's jurisprudence in indigenous rights provides a juridical imprimatur to many of the rights claimed by indigenous peoples and recognised by the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, the draft American and UN declarations on indigenous rights and the constitutions of certain American States such as Paraguay and Nicaragua. The Court recognises the vulnerability of indigenous peoples, holding that the non-discrimination clause of the American Convention does not bar all discrimination in treatment, especially when it is necessary to 'attain justice for those who are in a weak legal position' such as indigenous peoples. The Court and Commission recognise and protect the cultural differences that distinguish indigenous peoples from the dominant culture in most States. In doing so, the Court required that a Nicaraguan electoral law be revised because it constituted a disproportionate restriction that was foreign to the customs and traditions of the indigenous and ethnic peoples. [FN288] The Commission and Court supported the religious burial customs of indigenous groups, ruling that Guatemala violated their right to religion when the State did not allow the Mayan people to bury their dead according to their custom. The Court also emphasised the need of indigenous peoples for recognition of their juridical personality to enforce their collective rights, and the need for the restitution or protection of their ***321** communal ancestral lands for the continuing spiritual, cultural and economic survival of the peoples.

The Inter-American jurisprudence and decisions involving indigenous communal ancestral land rights have recognised that indigenous peoples' distinct spiritual relationship with their ancestral lands must be protected. In this regard, the Inter-American Court held that the American Convention's right to property includes the right to the collective ownership of property. The Court has ordered States to return land to the indigenous communities and to title and demarcate that land. When there is a conflict between private and collective land rights, the Court has held that, although the State must decide on a case-by-case basis, it could be necessary to restrict the right to individuals' private ownership of property to preserve 'the cultural identity of a democratic and pluralistic society.' [FN289] Moreover, the Court recognises that while indigenous people are deprived of their land, the effects of the violation of their right to property exist in the present giving the Court jurisdiction *ratione temporis* to consider the continuing violation to their right to property.

The decisions rendered by the organs of the Inter-American system will have an impact on the lives of indigenous peoples, however, only when States adopt and enforce domestic laws and measures that comply with the decisions and principles elucidated by the Inter-American Court and Commission. Nonetheless, the Court's jurisprudence lends strong support to the efforts of indigenous rights advocates to encourage or force States to recognise and enforce the rights of indigenous peoples to maintain their communal lands, their culture and their traditions.

**Addendum**

After this article was completed and in production, the Inter-American Court released another important international indigenous law decision, *Sawjoyamaxa Indigenous Community v Paraguay* IACtHR Series C 146 (**2006**), in which the Court clarified its jurisprudence on indigenous land rights and added a temporal condition to the right of indigenous peoples to claim their ancestral lands (paras 116-34). The facts in *Sawjoyamaxa* are similar to the facts in *Yakye Axa v Paraguay*. A small community of indigenous peoples had petitioned the Paraguayan government for the restitution of their lands (para. 2). The government had delayed a decision for several years, resulting in the indigenous peoples filing a complaint in the Inter-American system. In response to the petition before the Inter-American system, the government complained that it was being 'condemned for sins committed during the Conquest' and that granting petitions ***322** for the restitution of indigenous ancestral lands could result in the 'absurdity that the whole country could be returned to the indigenous peoples, since they were the first inhabitants of the territory that is now Paraguay' (para. 125). The Inter-American Court reviewed its jurisprudence stating that

> (1) [t]raditional possession by indigenous of their lands has the equivalent effect of full title granted by the State; (2) traditional possession gives the indigenous the right to demand the official recognition of their land and its registration; (3) the members of indigenous peoples that for reasons outside their will have left or lost possession of their traditional lands maintain their right to the property, even when they do not have legal title, except when the lands have been legitimately transferred in good faith to third persons; and (4) members of indigenous peoples that involuntarily lost possession of their lands which have been legitimately transferred to innocent third parties, have the right to recover them or to obtain other lands of equal size and quality. (para. 128.)

The Court also explained that there is a temporal limitation to the right of indigenous peoples to regain their lands (paras 131-3). Accordingly, indigenous peoples' right to restitution remains in force only so long as the people retain a spiritual and material relationship with their ancestral lands (para. 131). The necessary relationship can include 'traditional spiritual or ceremonial use or presence; settlements or sporadic cultivation; seasonal or nomadic hunting, fishing or gathering; the use of natural resources connected to their customs; and any other factor characteristic of their culture' (para. 131). If, however, the indigenous peoples are kept from the land by threats or violence, their right to restitution continues until these impediments disappear (para. 132). The Inter-American Court held that the Sawhoyamaxa Community retained a relationship with the land and that their right to reclaim it had not lapsed (para. 134).

Once it has been determined that the indigenous rights to their ancestral lands has not lapsed, the Inter-American Court will leave it to the State to determine whether the indigenous land rights are superior to the titles of the current good faith owners of the land (para. 136). If the State finds it to be impossible to return the lands to the indigenous people, for objective and fundamental reasons, the State must give them alternative lands of 'equal size and quality' that are chosen with the agreement of the peoples involved (para. 135). The Court clarified that 'the mere fact that the reclaimed lands are in private hands does not constitute a sufficient 'objective and fundamental' reason to refuse *prima facie* indigenous petitions (para. 138). Likewise, the argument that the lands are being productively used was not sufficient

(para. 139). Therefore, when conflicts exist between indigenous communal rights and current private rights to the land, the State must evaluate the claims on a case-by-case basis using the analysis set forth by the Court in *Yakye Axa v Paraguay* (para. 138).

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[FN1]. Under international law, the categorisation of who is indigenous is left to the people themselves. See Draft American Declaration on the Rights of Indigenous Peoples, 25 March **2006**, OEA/Ser.K/XVI GT/DADIN/doc260/06. The draft American Declaration on the Rights of Indigenous Peoples is still under negotiation. The latest draft can be viewed at: www.oas.org. One common description is that indigenous peoples are those who descended from the people who inhabited a geographic area before it was colonised and became a State and who retain a separate cultural identity. See Article 1(b), Indigenous and Tribal Peoples Convention 1989, ILO C169; 28 *International Legal Materials* 1382. See, generally, García Ramírez, *Estudios Jurídicos* (Mexico City, Universidad Nacional Autónoma de México, **2000**) at 191-255.

[FN2]. *Sarayaku Indigenous Community v Ecuador (Provisional Measures)* IACtHR Series E (**2004**) at para. 2.

[FN3]. Ibid.

[FN4]. Case 11,140, *Mary and Carrie Dann v United States* Report No. 75/02 (**2002**); 10 IHRR 1143 (**2003**) at paras 96-8. The reports of the Inter-American Commission can be viewed at the website of the Inter-American Commission on Human Rights at: http://www.cidh.oas.org.

[FN5]. American Convention on Human Rights 1969, OAS Treaty Series No. 1, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, updated to May **2004**, OAS/Ser.L/V/I.4 Rev. 10 at 27 (Basic Documents). The Basic Documents of the Inter-American human rights system and all opinions and decisions of the **Inter-AmericanCourt** of **HumanRights** can be viewed at the website of the Inter-American Court at: http://www.corteidh.or.cr.

[FN6]. American Declaration on the Rights and Duties of Man 1948, in Basic Documents at 17.

[FN7]. The following States are States Parties to the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. See Basic Documents at 56. See: http://www.cidh.oas.org.

[FN8]. 21 of the 24 States Parties to the American Convention have also recognised the jurisdiction of the Inter-American Court. They are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti,

Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela, Basic Documents at 56. For a more complete discussion of the functioning of the Inter-American human rights system see Pasqualucci, *The Practice and Procedure of the* ***Inter-AmericanCourt*** *of* ***HumanRights*** (Cambridge: Cambridge University Press. **2003**) at 1-25.

[FN9]. The African Banjul Charter on Human and Peoples' Rights 1981, CAB/LEG/67/3 rev.5; (1982) 21 *International Legal Materials* 58. The Banjul Charter specifically refers to both the rights of individuals and the rights of peoples. See generally, Buergenthal and Nikken. 'El Sistema Africano de los Derechos Humanos y de Los Pueblos' [The African System of Human and People's Rights] (1991) 79 *Revista de la Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela* 267.

[FN10]. See Crawford (ed.), *The Rights of Peoples* (Oxford: Oxford University Press. 1988) for a comprehensive discussion of peoples' rights.

[FN11]. For an analysis of the treatment of indigenous rights in the Inter-American human rights system prior to 1998, see Hannum. 'The Protection of Indigenous Rights in the Inter-American System', in Harris and Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Oxford University Press, 1998) 330.

[FN12]. *Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (**2005**) at para. 148. [All quotations from *Yakye Axa and Yatama* are translated by the author.]

[FN13]. *Yatama v Nicaragua* IACtHR Series C 127 (**2005**).

[FN14]. Ibid. at paras 218-9.

[FN15]. *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACtHR Series C 79 (**2001**); 10 IHRR 758 (**2003**) at para. 125.

[FN16]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 128. The Court explained that:

> [t]he *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the [international law's] faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law. (Ibid.)

[FN17]. Indigenous and Tribal Peoples Convention 1989, supra n. 1.

[FN18]. See OAS Report on the Human Rights Situation of the Indigenous People of the Americas, 20 October **2000**, OEA/Ser.L/V/II.108 Doc. 62, Constitutional reforms that strengthen the recognition of indigenous rights have been adopted in Panama (1971); Brazil (1988); Colombia (1991); El Salvador (1992); Guatemala (1992); Mexico (1992); Paraguay (1992); Peru (1993); Argentina (1994); Bolivia (1994) and Ecuador (1994). See the web

site of the Inter-American Indigenous Institute at: http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/Inter-American.System.asp.

[FN19]. Draft Declaration On The Rights Of Indigenous Peoples, Reprinted In the Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, 28 October 1994, E/CN.4/Sub.2/1994/56 at 105-15.

[FN20]. Draft American Declaration on the Rights of Indigenous Peoples, supra n. 1.

[FN21]. There have been two indigenous rights treaties promulgated, both under the auspices of the International Labor Organization (ILO). The original treaty, Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 328 UNTS 247, entered into force in 1959. It has been criticised as being too assimilationist. See Anaya, *Indigenous Peoples in International Law*, 2nd edn (Oxford: Oxford University Press, **2005**) at 54-5; and Smith and van den Ander (eds), *The Essentials of Human Rights* (London: Hodder Arnold, **2005**) at 175.

[FN22]. OC-4/1984, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* IACtHR Series A 4 (1984) at para. 55.

[FN23]. Ibid.

[FN24]. Article 1(1), American Convention provides that there can be no discrimination on the basis of 'race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'. See also Article II, American Declaration. In this regard, the Inter-American Commission stated that

> the notion of equality before the law set forth in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others. Further, Article II of the American Declaration, while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.

(*Mary and Carrie Dann v United States*, supra n. 4 at para. 143.)

[FN25]. Article II, American Declaration and Article 24, American Convention.

[FN26]. Article II, American Declaration; Article 24, American Convention.

[FN27]. *Yatama*, supra n. 3 at para. 184.

[FN28]. Ibid. at para. 185. See Article 24, American Convention.

[FN29]. *Yatama*, supra n. 3 at para. 186.

[FN30]. *Proposed Amendments of the Naturalization Provisions*, supra n. 22 at para. 56.

[FN31]. Ibid.

[FN32]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 51.

[FN33]. Ibid. at para. 63. Article XI(1), draft American Declaration on the Rights of Indigenous Peoples states in this regard that 'States shall adopt special measures, when necessary,' so that indigenous peoples can fully enjoy their human rights.

[FN34]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 164.

[FN35]. See Articles 2 and 5, Indigenous and Tribal Peoples Convention stating that any action planned or taken by the State with respect to indigenous peoples, should be undertaken 'with the participation of the peoples concerned'.

[FN36]. Anaya, 'Indigenous Peoples' Participatory Rights In Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', (**2005**) 22 *Arizona Journal of International and Comparative Law* 7 at 16. 'The concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere with to reach a common accord,' Ibid. citing the Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples Convention No. 169, 1989, made under Article 24 of the ILO Convention by the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL), 14 November **2001**, GB.282/14/2 at para. 38.

[FN37]. Article 4(2), Indigenous and Tribal Peoples Convention. In its General Comment 23, the UN Human Rights Committee observed that 'The enjoyment of [indigenous] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'. UN Human Rights Committee, General Comment No. 23: The rights of minorities (Article 27), 8 April 1994, CCPR/C/21/Rev.1/Add.5; 1-3 IHRR 1 (1993) at para. 7.

[FN38]. Case 12.053, *Maya Indigenous Communities of the Toledo District v Belize* Report No. 40/04 (**2004**); 13 IHRR 553 (**2006**) at para. 142.

[FN39]. Ibid.

[FN40]. See *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 164.

[FN41]. Ibid.

[FN42]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 151.

[FN43]. *Aloeboetoe et al. v Suriname (**Reparations**)* IACtHR Series C 15 (1993); 1-2 IHRR 208 (1993) at paras 101-2. See Pasqualucci, 'Victim **Reparations** in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure', (1996) 18 *Michigan Journal of International Law* 1 at 52-3.

[FN44]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 151. The Preamble to the American Declaration emphasises that 'since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power'.

[FN45]. *Aloeboetoe et al.,* supra n. 43 at para. 62.

[FN46]. Ibid. at para. 12.

[FN47]. Ibid. at para. 58. Under international law, rules of succession, which identify a decedent's beneficiaries, are generally determined under local law which would be national law. (Ibid. at para. 62.) Surinamese national law provides that a person's next of kin includes the legally recognised spouse, the children, and perhaps the decedent's dependent parents. (Ibid. at para. 62.) Moreover, Suriname law requires that marriages must be officially registered to be recognised by the State, and the State does not recognise polygamous relationships. (Ibid. at para. 17.) The Saramaca tribe, however, lived in a remote area and was not aware of national laws. Had they even known of and wished to comply with governmental requirements, there were no accessible facilities to officially register their marriages. (Ibid. at para. 58.)

[FN48]. Ibid. at para. 62.

[FN49]. Ibid. at paras 17 and 58.

[FN50]. Ibid. at para. 66.

[FN51]. *Plan de Sánchez Massacre v Guatemala (**Reparations**)* IACtHR Series C 116 (**2004**) at para. 49(12).

[FN52]. Ibid. at para. 49(13).

[FN53]. Ibid. at para. 49(16).

[FN54]. Ibid. at paras 6-9.

[FN55]. Article 1(a), Indigenous and Tribal Peoples Convention. But see Article 1(1), draft American Declaration on the Rights of Indigenous Peoples which states only that it 'applies to the indigenous peoples of the Americas'. The 1997 draft of the proposed American Declaration specified that it applied to 'indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations.' Article 1(1), Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997.

[FN56]. Article 1(b), Indigenous and Tribal Peoples Convention. Article 1(1), Draft American Declaration on the Rights of Indigenous Peoples.

[FN57]. *Moiwana Community v Suriname* IACtHR Series C 124 (**2005**) at para. 133.

[FN58]. Ibid. at paras 131-4.

[FN59]. Ibid.

[FN60]. Ibid. at para. 86.1. The N'djuka Community now numbers approximately 49,000 people. (Ibid. at para. 86.3.)

[FN61]. Ibid. at para. 86.1.

[FN62]. Ibid. at paras 86.1 and 86.4.

[FN63]. Ibid. at paras 86.19, 86.27 and 86.43.

[FN64]. Ibid. at paras 133-5.

[FN65]. See Pasqualucci, supra n. 8 at 107-13.

[FN66]. *Moiwana Community*, supra n. 57 at para. 43. The European Court of Human Rights also holds that there is a continuing violation of the right to property when land has not been returned to the victims (not a case of indigenous law). See *Loizidou v Turkey* (Merits) 1996-VI 2210; (1997) 23 EHRR 513 at para. 41. See also UN Human Rights Committee General Comment No. 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant, 2 November 1994, CCPR/C/21/Rev.1/Add.6; 2 IHRR 10 (1994) at para. 14.

[FN67]. *Moiwana Community*, supra n. 57 at paras 86.19, 86.27 and 86.43.

[FN68]. Ibid. at para. 34.

[FN69]. Ibid. at para. 45.

[FN70]. Ibid. at para. 108.

[FN71]. *Plan de Sánchez Massacre*, supra n. 51 at para. 42(5). Some human rights violations, such as the right to life, affect indigenous and non-indigenous alike. The long-term violence in Guatemala affected highland *campesinos*--both indigenous and non indigenous. See Hannum, supra n. 11 at 323-43. The prejudice, however, was directed again the indigenous. In its annual report on the Situation of Human Rights in Guatemala, the Commission stated that '[t]hose who retain characteristics that identify them as Mayas--language, community structure, dress, religious practices--are not only excluded from positions of power and prestige in the nation, but in general are scorned by politicians, conservative, liberals or marxists.' Inter-American Commission on Human Rights, Fourth Report on the Situation of Human Rights in Guatemala (1993) at 34 quoted in Hannum. ibid. at 335.

[FN72]. *Plan de Sánchez Massacre*, supra n. 51 at para. 42(6).

[FN73]. Ibid. at para. 42(7).

[FN74]. Ibid. at para. 42(15).

[FN75]. Ibid. at para. 42(17).

[FN76]. Ibid.

[FN77]. Ibid. at para. 42(18).

[FN78]. Ibid.

[FN79]. Ibid. at para. 42(19).

[FN80]. Ibid. at para. 4.

[FN81]. The Court was also barred from considering the petitioners' claim that Guatemala was responsible for a policy of genocide against the indigenous Mayan people, again due to jurisdictional limitations. (Ibid. at para. 51.) The Inter-American Court has jurisdiction to interpret and apply the provisions of the American Convention. It does not have jurisdiction to render judgments on violations of other treaties, unless that treaty confers jurisdiction on the Inter-American Court. When interpreting provisions of the Convention the Inter-American Court can take into account the relevant provisions of other treaties, especially if those provisions are *jus cogens*. See *Las Palmeras v Columbia* IACtHR Series C 67 (**2000**); 9 IHRR 61 (**2002**) at para. 32; and *Bámaca-Velásquez v Guatemala* IACtHR Series C 70 (**2000**); 9 IHRR 130 (**2002**) at paras 208-9. The Convention on the Prevention and Punishment of the Crime of Genocide 1948 does not confer such jurisdiction on the Inter-American Court. In the *Plan de Sanchez* Case, the Inter-American Court stated that

> [i]n relation to the theme of genocide that was referred to by the Commission, the Court has competence to declare violations of the American Convention of Human Rights and of other instruments in the Inter-American system of protection of human rights that confer jurisdiction on it. Nevertheless, facts such as those stated, that gravely affect the identity, values, and development of the members of the Maya Achi Peoples within a pattern of massacres, cause an aggravated impact that compromises the international responsibility of the State and which this Court will take into account when it resolves **reparations**. (Ibid.)

[FN82]. Ibid. at paras 36(3) and 36(4).

[FN83]. Article 3, American Convention. Article IV, proposed American Declaration on the Rights of Indigenous Peoples specifies that '[i]ndigenous peoples have the right to have their legal personality fully recognized by the States within their systems', supra n. 1.

[FN84]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 83.

[FN85]. Ibid. at para. 50(17).

[FN86]. Ibid.

[FN87]. Ibid. at para. 78.

[FN88]. Ibid.

[FN89]. Ibid.

[FN90]. Ibid. at para. 82.

[FN91]. Ibid.

[FN92]. Article 21(1), American Convention. The Inter-American Court has defined 'property' as 'those material things that can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and nonmovables, corporeal and incorporeal elements and any other tangible object capable of having value'. (Ibid. at para. 137, quoting *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 144.)

[FN93]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 149. The Inter-American Commission made a similar observation in the *Dann Sisters* case against the United States. The Commission stated that 'continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being and indeed the survival of indigenous peoples and that control over the land refers both to its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group'. (*Mary and Carrie Dann*, supra n. 4 at para. 128.)

[FN94]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 149. Article XXIII, American Declaration, however, provides that '[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'. For a discussion of cases involving collective indigenous rights before the Inter-American Commission, see generally Kreimer, 'Collective Rights of Indigenous Peoples in the Inter-American Human Rights System, Organization of American States, (**2000**) 94 *American Society of International Law Proceedings* 315.

[FN95]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 145

[FN96]. Ibid. at para. 149.

[FN97]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 139, quoting Paraguayan Law No. 43/89 at Article 3. See also *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 148: 'it is the opinion of this Court that Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua'.

[FN98]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 137. Article 21, American Convention. Article 13, ILO Convention 169 and the domestic laws of some States also recognise the right to restitution of indigenous lands, providing that 'governments shall respect the special importance for the cultures and spiritual values of the peoples concerned

of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship'.

[FN99]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 216, quoted in *Yakye Axa Indigenous Community v Paraguay (Interpretation of Judgment)*, IACtHR Series C 142 (**2005**) at para. 23.

[FN100]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 242, resolution 6. The Yakye Axa total approximately 90 families comprised of about 320 persons. (Ibid. at para. 50(10).)

[FN101]. Ibid. at paras 50.3 and 50.7.

[FN102]. Ibid. at para. 50.10.

[FN103]. Ibid. at para. 50.11.

[FN104]. Ibid.

[FN105]. Ibid. at paras 50.12 and 50.13.

[FN106]. Ibid. at para. 50.13.

[FN107]. Ibid.

[FN108]. Ibid. at para. 50.15.

[FN109]. Ibid. at para. 50.16.

[FN110]. Ibid. at para. 87.

[FN111]. Ibid. at para. 138, quoting the Paraguayan Constitution at Article 64.

[FN112]. Ibid. at para. 50.35.

[FN113]. Ibid. at para. 97.

[FN114]. Ibid. at para. 143. Anaya states that '[i]nasmuch as property is a human right, the fundamental norm of nondiscrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by the dominant society'. Anaya, supra n. 21 at 142.

[FN115]. *Yakye Axa Indigenous Community*, ibid. at para. 146.

[FN116]. Ibid. at para. 144.

[FN117]. Ibid.

[FN118]. Article 21(1), American Convention.

[FN119]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 145.

[FN120]. Ibid.

[FN121]. Ibid. The Inter-American Court cited its earlier jurisprudence in *Ricardo Canese v Paraguay* IACtHR Series C 111 (**2004**) at para. 96; and *Herrera Ulloa v Costa Rica* IACtHR Series C 107 (**2004**) at para. 127 (both cases addressing the restrictions within the context of freedom of expression.)

[FN122]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 145.

[FN123]. Ibid. at para. 146.

[FN124]. Ibid. at para. 147.

[FN125]. Ibid. at para. 148.

[FN126]. Article 21(1), American Convention.

[FN127]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 149.

[FN128]. *Yakye Axa Indigenous Community (Interpretation of Judgment)*, supra n. 99 at para. 22.

[FN129]. *Yakye Axa Indigenous Community*, supra n. 12 at paras 151 and 217.

[FN130]. Article 16(4), Indigenous and Tribal Peoples Convention quoted in *Yakye Axa Indigenous Community*, supra n. 12 at para. 150. But see Article XII(2), draft Declaration on the Rights of Indigenous Peoples which states only that 'Indigenous peoples have the right to restitution of the property that is part of that heritage of which they may be dispossessed, or, when restitution is not possible, to fair and equitable compensation', supra n. 1. The parties have not agreed on this principle or the wording of the principle as evidenced by the brackets surrounding the Article in the draft.

[FN131]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 149.

[FN132]. *Mary and Carrie Dann*, supra n. 4 at paras 1-2. The petitioners also claimed violations of their right to equality before the law, religious freedom, right to a family, right to work and right to a fair trial. (Ibid. at para. 35.)

[FN133]. Ibid. at paras 85 and 112.

[FN134]. Ibid. at paras 3 and 82.

[FN135]. Ibid. at paras 85 and 112.

[FN136]. Ibid. at paras 3 and 85.

[FN137]. A complainant may only pursue a case before the Inter-American human rights system after they have exhausted all domestic remedies. Article 46(1)(a), American Convention.

[FN138]. *Mary and Carrie Dann*, supra n. 4 at para. 142.

[FN139]. Ibid. at paras 140-2.

[FN140]. Ibid. at para. 142.

[FN141]. Ibid. at para. 143.

[FN142]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 151.

[FN143]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 143. See Amnesty International Report on 'Brazil, "Foreigners in Our Own Country" Indigenous Peoples in Brazil', 30 March **2005**, available at: http://web.amnesty.org/library/Index/ENGAMR190022005?openof=ENG-BRA.

[FN144]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 173, resolution 4.

[FN145]. Ibid. at para. 103.

[FN146]. Ibid. at paras 103(d) and (e).

[FN147]. Ibid. at para. 103(g).

[FN148]. Ibid. at para. 116, quoting the Nicaraguan Constitution at Article 5.

[FN149]. Ibid. at para. 173, resolution 4.

[FN150]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 215; and *Yakye Axa Indigenous Community (Interpretation of Judgment)*, supra n. 99 at para. 22.

[FN151]. *Yakye Axa Indigenous Community (Interpretation of Judgment)*, ibid. at para. 23.

[FN152]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 216.

[FN153]. *Yakye Axa Indigenous Community (Interpretation of Judgment)*, supra n. 99 at para. 18.

[FN154]. See *Moiwana v Suriname* (Interpretation of Judgment) IACtHR Series C 145 (**2005**) at para. 19.

[FN155]. Ibid.

[FN156]. *Maya Indigenous Communities of the Toledo District*, supra n. 38 at para. 117.

[FN157]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 138. Article 29, American

Convention provides that 'no provision of this Convention shall be interpreted as: b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State party or by virtue of another convention to which one of the said States is a party'.

[FN158]. Article 36, Nicaraguan Law No. 28 which regulates the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, 30 October 1987, published in La Gaceta No. 238 (the Official Gazette of the Republic of Nicaragua). This law states that: 'Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions: 1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor taxed, and they are inextinguishable; and 2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out'. See *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 150.

[FN159]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 138, quoting Article 64, Paraguayan Constitution.

[FN160]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 150.

[FN161]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 138, quoting Article 64, Paraguayan Constitution.

[FN162]. *Moiwana Community*, supra n. 57 at para. 86.5.

[FN163]. Ibid. at para. 130.

[FN164]. Ibid.

[FN165]. Ibid. at para. 86.6.

[FN166]. Ibid. at para. 199(2)(f).

[FN167]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 153.

[FN168]. *Maya Indigenous Communities of the Toledo District*, supra n. 38.

[FN169]. OAS Report on the Human Rights Situation of the Indigenous People of the Americas. 20 October **2000**, OEA/Ser.L/V/II.108 Doc. 62 at 314, citing the United Nations Centre on Transnational Corporations, Transnational Investments and Operations on the Lands of Indigenous Peoples, 18 July 1991, E/CN.4/Sub.2/1991 at 22, para. 6.

[FN170]. See *Sarayaku Indigenous Community (Provisional Measures)*, supra n. 2 at para. 2. For an historic and contemporary treatment of the development of indigenous land rights see Anaya and Williams, 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System', (**2001**) 14 *Harvard Human Rights Journal* 33.

[FN171]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 167. See generally Manus,

'Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law', (**2005**) 23 *Wisconsin International Law Journal* 553.

[FN172]. *Yakye Axa Indigenous Community*, ibid. at para. 135 [translation by the author].

[FN173]. *Plan de Sánchez Massacre (**Reparations**)*, supra n. 51 at para. 85.

[FN174]. Article 15, Indigenous and Tribal Peoples Convention. Article 15(2) further provides that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

[FN175]. Article 23(1)(a), American Convention.

[FN176]. Article 23(1), American Convention. *Yatama*, supra n. 13 at para. 195. Article 23(2), American Convention does allow the State to regulate political rights based on 'age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings'.

[FN177]. *Yatama*, supra n. 13 at para. 223.

[FN178]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 117, quoting Article 89, Nicaraguan Constitution.

[FN179]. Ibid. at para. 118, quoting Article 180, Nicaraguan Constitution.

[FN180]. *Yatama*, supra n. 13 at para. 124(11). YATAMA stands for Yapti Tasba Nanih Aslatakanka which means 'the organization of the Peoples of the Mother Earth'. (Ibid. at para. 124(9).)

[FN181]. Ibid. at para. 124(11).

[FN182]. Ibid. at paras 124(13)-(16).

[FN183]. Ibid. at paras 124(24) and 221.

[FN184]. Ibid. at para. 222.

[FN185]. Ibid.

[FN186]. Ibid. at paras 173 and 176.

[FN187]. Ibid. at para. 223.

[FN188]. Ibid. at paras 218-9.

[FN189]. Ibid. at para. 218. Article 6(b), ILO Convention 169 provides that Governments shall 'establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them'.

[FN190]. *Yatama*, supra n. 13 at para. 226.

[FN191]. Ibid. at para. 197.

[FN192]. Ibid. at para. 226.

[FN193]. Ibid. at para. 227.

[FN194]. Ibid.

[FN195]. Ibid. at paras 210 and 256.

[FN196]. Ibid. at para. 210.

[FN197]. Ibid. at para. 257.

[FN198]. Ibid. citing *Ricardo Canese*, supra n. 121 at para. 148. See also Article 27, Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[FN199]. Article 12, American Convention.

[FN200]. *Plan de Sánchez Massacre v Guatemala (Merits)* IACtHR Series C 105 (**2004**) at resolution 3; and *Bámaca-Velásquez v Guatemala*, supra n. 81 at paras 161 and 165.

[FN201]. *Plan de Sánchez Massacre (**Reparations**)*, supra n. 51 at para. 85.

[FN202]. *Bámaca-Velásquez v Guatemala (**Reparations**)* IACtHR Series C 91 (**2002**) at para. 82. Bámaca-Velásquez had been disappeared by the Guatemalan military. (Ibid. at para. 29A.)

[FN203]. Ibid. at para. 81.

[FN204]. *Plan de Sánchez Massacre (Merits)*, supra n. **200** at Resolution 3, holding that Guatemala had violated Articles 12(2) and 12(3), American Convention.

[FN205]. *Plan de Sánchez Massacre (**Reparations**)*, supra n. 51 at para. 38(d) (testimony of expert witness Augusto Willemsen-Díaz, attorney and international expert on the subject of the rights of indigenous peoples).

[FN206]. *Plan de Sánchez Massacre (Merits)*, supra n. **200** at para. 42(30).

[FN207]. Ibid. at para. 36(4). The State also accepted responsibility for violating the survivors' freedom of expression, since not only were the survivors prevented from manifesting their religious beliefs, but they were also prevented from denouncing or discussing the massacre for more than 10 years after it took place. (Ibid. at para. 87(e).)

[FN208]. Article 4(1). American Convention.

[FN209]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 161.

[FN210]. Ibid. at para. 161 citing *'Instituto de Reeducacíon del Menor' v Paraguay* IACtHR Series C 112 (**2004**) at para. 156.

[FN211]. *Yakye Axa Indigenous Community*, ibid. at para. 162.

[FN212]. Ibid.

[FN213]. Ibid.

[FN214]. Ibid. at paras 168 and 176.

[FN215]. Ibid. at paras 50.8 and 164.

[FN216]. Ibid. at paras 164-8.

[FN217]. Ibid. at para 161.

[FN218]. Article 2, American Convention.

[FN219]. *Baena Ricardo et al. v Panama* IACtHR Series C 72 (**2001**); 10 IHRR 130 (**2003**) at para. 180, quoted in *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 136.

[FN220]. Ibid. at para. 135.

[FN221]. Ibid. at para. 122.

[FN222]. Ibid.

[FN223]. Ibid. at paras 123-4.

[FN224]. Ibid. at paras 138 and 164.

[FN225]. Article 25(1), American Convention.

[FN226]. *Constitutional Court v Peru* IACtHR Series C 71 (**2001**); 9 IHRR 1003 (**2002**) at para. 89; and OC-9/1987. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)* IACtHR Series A 9 (1987) at para. 23, cited in *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 111.

[FN227]. Article 12, Indigenous and Tribal Peoples Convention.

[FN228]. *Yatama*, supra n. 13 at para. 176.

[FN229]. Ibid. at paras 171 and 173. A witness testified that the seven members of the Supreme Electoral Council were from the traditional electoral parties and none of them were indigenous. (Ibid. at para. 110(a).)

[FN230]. Ibid. at para. 175.

[FN231]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 114.

[FN232]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 65.

[FN233]. Ibid. at para. 61, quoting *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 113.

[FN234]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 65.

[FN235]. Ibid.

[FN236]. Ibid. at paras 67-73.

[FN237]. Ibid. at para. 85.

[FN238]. Ibid. at para. 86.

[FN239]. Ibid.

[FN240]. Ibid. at para. 88.

[FN241]. Ibid. at para. 89.

[FN242]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 131.

[FN243]. Ibid. at para. 134.

[FN244]. Ibid. at para. 131.

[FN245]. Ibid. at para. 133.

[FN246]. Ibid. at para. 137.

[FN247]. *Plan de Sánchez Massacre (Merits)*, supra n. **200** at para. 98.

[FN248]. Ibid. at para. 95.

[FN249]. Ibid. at para. 94.

[FN250]. Ibid.

[FN251]. Article 63(2), American Convention. The American Convention authorises the Commission in 'cases of extreme gravity and urgency' to circumvent its time-consuming procedures and immediately request that the **Inter-AmericanCourt** of **HumanRights** adopt provisional measures.

[FN252]. Article 25, Rules of Procedure of the Inter-American Commission of Human Rights, in Basic Documents at 150. Although neither the American Convention nor the Statute of the Inter-American Commission authorises the Commission to request that a State adopt precautionary measures, the Court holds that there is a presumption that Court-ordered provisional measures are necessary when the Commission has previously ordered precautionary measures on its own authority that were not effective and another threatening event has subsequently occurred. *Digna Ochoa y Plácido et al. v Mexico (Provisional Measures)* IACtHR Series E (1999) at para. 6.

[FN253]. *Plan de Sánchez Massacre (**Reparations**)*, supra n. 51 at paras 23-5.

[FN254]. *Kankuamo Indigenous Peoples v Columbia (Provisional Measures)* IACtHR Series E (**2004**) at para. 2.

[FN255]. Ibid. at para. 2(f).

[FN256]. Ibid. at paras 2(g) and 2(h).

[FN257]. Ibid. at para. 11.

[FN258]. Ibid. at Resolutions 1, 3 and 4.

[FN259]. *Sarayaku Indigenous Community v Ecuador (Provisional Measures)* IACtHR Series E (**2004**) at para. 2(a).

[FN260]. Ibid.

[FN261]. Ibid. at para. 2.

[FN262]. Ibid. at para. 2(d).

[FN263]. Ibid. at para. 2(t). The Inter-American Commission previously had ordered the State to take precautionary measures to protect the indigenous community, but to no avail. Ibid. at para. 2(m).

[FN264]. *Maya Indigenous Communities of the Toledo District*, supra n. 38 at para. 8. According to the Commission's Annual Reports for the years **2000**-**2005**, it has issued precautionary measures to protect indigenous communities or members of indigenous communities on 15 occasions.

[FN265]. Annual Report of the Inter-American Commission of Human Rights **2004**,

Precautionary Measures granted by the IACHR in **2004** (Brazil), 23 February **2005**, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at para. 13.

[FN266]. Rainforest Foundation, 'Victory! Brazil's President Ratifies Indigenous Territory', 19 April **2005**, available at: www.rainforestfoundation.org/brazil.victory.

[FN267]. *Mary and Carrie Dann*, supra n. 4 at paras 14, 16 and 23.

[FN268]. Ibid. at paras 14-25.

[FN269]. Ibid. at para. 14. The Western Shoshone had grazed their cattle on that land for generations. (Ibid.)

[FN270]. Ibid. at para. 18.

[FN271]. Ibid. at para. 22. Likewise, the United Nations Committee for the Elimination of Racial Discrimination (CERD) issued a decision to the United States under its Early Warning and Urgent Action Procedure urging the United States to adopt specific measures to freeze, stop and desist from acts that interfered with Western Shoshone land rights. See CERD, Early Warning and Urgent Action, Decision 1(68). United States of America, 7 March **2006**, CERD/C/USA/DEC/1.

[FN272]. *Mary and Carrie Dann*, ibid. at para. 23.

[FN273]. Ibid. As reported in July **2004**, President George W Bush signed HR884/PL 108-270 into law which distributes 15 cents per acre to the Western Shoshone Nation for the extinguishment of their ancestral lands. According to the article, 'the land is marked for gold extraction, nuclear testing and to expand Yucca Mountain for a nuclear waste repository.' See Hunter. 'Dann Sisters Hold Firm as Western Shoshone HR884 Turns Public Law 108-270', available at: http://www.thinkandask.com/news/shoshone.html.

[FN274]. Article 63(1), American Convention.

[FN275]. See *Bámaca-Velásquez*, supra n. 81 at para. 93(a). "'Military intelligence" has used slander as a strategy to obstruct the exercise of justice, by diminishing the credibility of the victims of human rights violations and intimidating those in charge of the criminal prosecution' (expert testimony of Helen Mack). See also *Plan de Sánchez Massacre (**Reparations**)*, supra n. 51 at para. 49(15), stating that the survivors of the massacre were stigmatised as being guerillas and were, thus, blamed for it, which forced them to remain silent about what had happened. (Ibid. at para. 87(c).)

[FN276]. *Plan de Sánchez Massacre*, supra n. **200** at para. 34.

[FN277]. Ibid. at para. 38.

[FN278]. Ibid. at para. 125, resolutions 2 and 3. The Court also ordered the State to translate the American Convention, and the two Inter-American Court judgments into the Maya Achí language. The Court also obligated the State to publish relevant sections of its judgment on the merits in both Spanish and Maya Achí. (Ibid. at para. 125, resolutions 4

and 5.)

[FN279]. Moore, 'Guatemalan Community's Search for Justice Continues', 1 March **2006**, available at: http://upsidedownworld.org/main/content/view/215/1/.

[FN280]. Ibid.

[FN281]. Article 7(2), Indigenous and Tribal Peoples Convention.

[FN282]. *Plan de Sánchez Massacre (**Reparations**)*, supra n. 51 at para. 86.

[FN283]. Ibid. at Resolutions 6-9.

[FN284]. *Aloeboetoe et al. (**Reparations**)*, supra n. 43 at Resolution 4.

[FN285]. *Mayagna (Sumo) Awas Tingni Community*, supra n. 15 at para. 6.

[FN286]. Ibid.

[FN287]. *Plan de Sánchez Massacre (Merits)*, supra n. **200** at paras 96-7.

[FN288]. *Yatama*, supra n. 13 at paras 218-9.

[FN289]. *Yakye Axa Indigenous Community*, supra n. 12 at para. 148.

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Articles

# ***429** ENDING IMPUNITY IN THE AMERICAS: THE ROLE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM IN ADVANCING ACCOUNTABILITY FOR SERIOUS CRIMES UNDER INTERNATIONAL LAW

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## I. Introduction

The establishment and operation of several international war crimes tribunals since the early 1990's, as well as "hybrid" or "mixed" tribunals having characteristics of both national and international courts, [FN1] have played a prominent and important role in advancing accountability for serious crimes under international law. [FN2] As the current***430** President of the International Criminal Tribunal for the former Yugoslavia previously observed, "[t]he work of the [International Criminal Tribunals for the former Yugoslavia and Rwanda] demonstrates that international investigation and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible." [FN3]

Also significant to the struggle against impunity has been the work of international and regional human rights treaty bodies, which have over roughly the past 30 years formulated a doctrine that places positive obligations upon states to investigate, prosecute and punish violations of the rights protected under their governing instruments, including those that constitute serious crimes under international law. [FN4] Human rights treaty bodies have also pressed for compliance with this imperative through the adjudication of individual complaints and other procedures.

As the main human rights treaty bodies of the Organization of American States, the Inter-American Commission on Human Rights and the **Inter-AmericanCourt** of **HumanRights** have played particularly longstanding and vigorous roles in advancing state responsibility for serious human rights violations, including violations that amount to international crimes. The Commission's initiatives in this respect began most determinedly with its efforts to address massive human rights violations perpetrated during the repressive regimes of Latin America in the 1970's and 1980's and have continued to the present day. This paper will discuss the instruments, procedures and jurisprudence of the inter-American human rights system relating to accountability for war crimes, crimes against humanity and other serious crimes under international law and the influence that the system has ***431** grown to have upon efforts to prosecute these violations at the national level. It will also

touch upon the potential impact that the creation of the International Criminal Court may have upon regional efforts to end impunity for serious crimes under international law.

In particular, for much of the history of inter-American human rights system, efforts to ensure accountability for serious violations of human rights have been largely unsuccessful, owing to the inability or unwillingness of governments in the region to confront past or ongoing atrocities through their criminal justice systems. Over the past several years, however, the work of human rights treaty bodies has started to bear fruit at the domestic level in some OAS Member States, most notably through decisions of national courts that have prevented amnesties, statutes of limitations and similar measures from impeding the prosecution of serious human rights violations committed during the military dictatorships in the region. These and other developments suggest that, as democracy and the rule of law have begun to consolidate in countries of the Americas, the executive, legislative and judicial branches of governments have started to take concrete measures to dismantle impediments to securing accountability for what are among the worst atrocities of modern times. In doing so, they have drawn upon the principles, procedures and jurisprudence of the inter-American system, including the doctrine requiring states to investigate, prosecute and punish serious human rights violations.

Moreover, the establishment of the International Criminal Court may likewise give renewed effect to the doctrine of the inter-American human rights system as it applies to future atrocities committed in the Americas. The entry into force of the Rome Statute in July **2002** created, for the first time in the Western Hemisphere, a legitimate alternative to domestic trials for determining individual criminal responsibility for serious human rights violations committed in states that have accepted the Court's jurisdiction. To this extent, the International Criminal Court constitutes a new and potentially effective mechanism for securing accountability in accordance with the jurisprudence of the Inter-American Commission and Court. There may also be considerable room for interaction between the International Criminal Court and the inter-American human rights treaty bodies in order to mutually facilitate and reinforce efforts to battle impunity. Measures of cooperation might include, for example, sharing information, procedures and jurisprudence on topics and situations of concern to both systems, while at the same time taking due account of differences***432** in the mandates and processes of international criminal courts and human rights treaty bodies.

## II. Accountability for Serious Crimes under International Law and the Procedures and Jurisprudence of the Inter-American System

### A. Origins and Structure of the Inter-American Human Rights System

The origins of the inter-American regional system are intimately connected with the broader development of intergovernmental relations between states of the Western Hemisphere over a period that witnessed, inter alia, efforts to create a “Perpetual Union, League and Confederation” between Colombia, Mexico, Central America and Peru during the 1826 Congress of Panama, the establishment of the Union of American Republics and the Pan American Union in 1910 and, finally, the creation of the Organization of American States (“OAS”) through the approval of the OAS Charter during the Ninth International Conference of American States held in Bogotá in 1948. [FN5] For its part, the OAS was established as a regional agency within the meaning of Article 52 of the UN Charter, with

the purposes of achieving an order of peace and justice, promoting solidarity, and defending their sovereignty, territorial integrity and independence. [FN6] Since 1948, ***433** the Organization has expanded to encompass thirty-five member states of North, Central and South America. [FN7]

The recognition and protection of individual human rights has constituted a subject of consideration within the inter-American system since its earliest meetings and conferences, which addressed such issues as labor rights and protection against discrimination. [FN8] Consistent with this tradition and as part of its agenda in approving the OAS Charter in 1948, the Ninth International Conference of American States adopted the American Declaration of the Rights and Duties of Man ("American Declaration"), [FN9] the first comprehensive effort to codify fundamental human rights and freedoms for population of the region. While initially viewed as an aspirational document, the Declaration has since been recognized by the Inter-American Commission and Court as a source of international obligation for all OAS Member States. [FN10] Indeed, Member States themselves, through approval of the Commission's Statute during the OAS General Assembly's ninth regular session in 1979 and associated state practice, have sanctioned the Commission's authority to examine communications and make recommendations concerning possible violations of the American Declaration***434** violations by Member States that are not parties to the American Convention on Human Rights ("American Convention"). [FN11]

In 1969, during the Inter-American Specialized Conference on Human Rights held in San José, Costa Rica, OAS Member States adopted the American Convention on Human Rights, which entered into force in 1978 and serves as the main human rights treaty of the inter-American system. [FN12] Since that time, the treaties of the inter-American human rights system have expanded to address a variety of human rights issues, including economic, social and cultural rights, [FN13] the death penalty, [FN14] torture, [FN15] forced disappearances [FN16] and violence against women. [FN17]

***435** As with other intergovernmental human rights systems, the inter-American system has created mechanisms for monitoring and adjudicating compliance by Member States with their human rights commitments. In 1959, eleven years after the OAS Charter's adoption, the Inter-American Commission on Human Rights was created during the Fifth Meeting of Consultation of Ministers of Foreign Affairs with the purpose of investigating and reporting on the situation of human rights in OAS Member States. [FN18] Initially, the Commission executed this mandate principally though the use of on-site investigations and the publication of related reports. [FN19] In 1965, Member States gave the Commission the explicit authority to investigate individual instances of human rights violations, inaugurating what has now become the system's predominant mechanism of protection - the petition system. [FN20] Further, in 1967, the OAS Charter was amended through the Protocol of Buenos Aires to include the Commission as an organ of the OAS with principal responsibility for promoting the observance and protection of human rights in the hemisphere and serving as a consultative organ of the OAS in these matters. [FN21] The drafting of the American Convention and its entry into force in 1979, together with the approval of the Commission's new Statute at the General Assembly held during the same year, largely preserved the existing powers ***436** and practices of the Commission, and strengthened its authority through a truly hemispheric human rights treaty.

The Inter-American Commission on Human Rights is comprised of seven members "of

high moral character and [with] recognized competence in the field of human rights," [FN22] who are elected in a personal capacity by the General Assembly of the OAS from a list of candidates proposed by OAS Member States. The Commission's members serve on a part-time basis and without remuneration, are elected for a term of four years, and may only be re-elected once. [FN23] The Commission is supported by a full-time Secretariat based at the Commission's headquarters in Washington, D.C. The Commission derives its authority from the OAS Charter, [FN24] the American Declaration, [FN25] the American Convention, [FN26] the Commission's Statute, [FN27] its Rule of Procedure, [FN28] and is also competent to receive complaints regarding violations of other treaties within the inter-American system. [FN29]

In addition to receiving individual complaints of human rights violations and conducting on-site investigations, the Commission's functions and duties encompass a variety of other responsibilities, including convening hearings on individual complaints and general human rights issues, providing Member States and other OAS organs with advice on human rights matters, undertaking promotional initiatives in the area of human rights protection, and litigating before the **Inter-AmericanCourt** of **HumanRights**. [FN30] The Commission generally meets in two three-week-long regular sessions per year, [FN31] during ***437** which time it must undertake a significant portion of its work, including convening hearings and approving reports in individual cases.

In 1979, the **Inter-AmericanCourt** of **HumanRights** was created following the coming into force of the American Convention. [FN32] As defined under Article 62 of the American Convention, the Court's "contentious" or "compulsory" jurisdiction, comprises all cases concerning the interpretation and application of the American Convention provisions in respect of those states that have accepted the Court's jurisdiction. [FN33] Cases may be submitted to the Court by the Commission or by a state party to the Court's jurisdiction, once the Commission has found that state responsible for violations of the American Convention in accordance with the procedures set forth in Articles 48 and 50 of the Convention. [FN34] The Court's judgments in contentious cases are expressly binding on the state concerned. [FN35] Pursuant to Article 64 of the American Convention, the Court is also competent to issue advisory opinions at the request of Member States of the Organization as well as certain OAS organs, including the Commission, regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American states. [FN36] Like the Commission, the Inter-American Court is a part-time body comprised of seven judges who are elected in their individual capacity by the OAS General Assembly, and is supported by a full-time Secretariat located at the seat of the Court in San José, Costa Rica.

***438** B. Principles and Jurisprudence on the Inter-American Human Rights System on Impunity

Owing to the timing of its evolution and the sequence of political events in the Americas, the inter-American human rights system has been particularly well placed to examine human rights protections in situations in which governments have failed to fulfill their obligation to prosecute serious crimes under international law and have enacted laws to ensure that such prosecutions never take place. As noted above, the community of American states had long afforded particular importance to human rights issues by the time military dictatorships began engulfing Latin America in the early 1970's. For its part, the

Inter-American Commission had been functioning for more than ten years before the military coups in Chile in 1973 and in Argentina in 1976. Accordingly, the Commission and its monitoring procedures were available as a means of monitoring and evaluating serious violations of human rights and freedoms during the dictatorships. Further, the mechanisms of both the Commission and the Inter-American Court have continued to be employed in the aftermath of the dictatorships to evaluate efforts by those regimes and their successor governments to suppress accountability for atrocities committed during that dark period of the region's history.

Other international human rights supervisory bodies, most notably the United Nations Human Rights Committee, have also played a role in addressing issues of impunity arising in the Americas and elsewhere around the globe. [FN37] At the same time, the treaty bodies of the inter-American human rights system have had comparatively more varied and flexible mechanisms through which to address the failure of states to prevent, prosecute and punish serious human rights violations.***439** In particular, as discussed above, the Commission, unlike the UN Human Rights Committee, has the authority to undertake on-site visits to OAS member states and issue corresponding country reports [FN38] as well as the capacity to facilitate the friendly settlement of human rights complaints. [FN39] In addition, the Inter-American Court is empowered to issue advisory opinions as well as judgments in contentious cases, the latter of which are, by the express terms of the American Convention, binding on the state concerned. These features of the inter-American system have in turn been used with some effect to press the issue of impunity with OAS Member States. [FN40]

In employing these various mechanisms, the doctrine of the Commission and the Court pertaining to the issue of impunity has evolved over time and with varying degrees of progressivism and consistency. It does not fall within the scope of this paper to undertake a detailed analysis of the evolution of inter-American jurisprudence, a topic that has been the subject of other scholarship. [FN41] Rather, the present state of inter-American jurisprudence relevant to the issue of accountability will, to the extent possible, be summarized, with a view to then reviewing whether and how that doctrine has influenced domestic and international efforts to account for atrocities.

In this respect, three main interrelated concepts have informed the treatment of impunity in the inter-American system, principally in the context of Articles 1 (obligation to respect rights), [FN42] 2 (domestic legal effects), [FN43] 8 (right to a fair trial) [FN44] and 25 (right to judicial protection)***440**[FN45] of the American Convention on Human Rights: the obligation of states to prevent, investigate, prosecute and punish human rights violations; the right of victims of human rights violations and members of their societies to know the truth of what transpired; and the right of victims of human rights violations to seek and receive a remedy including guarantees of non-repetition. These precepts have in turn formed the normative basis for a general proscription against specific legislative and related obstacles to pursuing accountability for serious crimes under international law, including amnesties and statutes of limitations. Indeed, as the discussion below indicates, it is principally in the context of efforts to apply amnesties and temporal proscriptions to violations of human rights that the doctrine of the inter-American system governing impunity and accountability has taken form. It is also in this context that courts and other authorities in some Member States have recently started to draw upon the doctrine of the inter-American system relating to impunity.

***441** 1. The Right to Justice, Judicial Protection, and the Obligation of States to Prevent, Investigate, Prosecute, and Punish

Both the Inter-American Commission and the Court have interpreted the obligations under Articles 1 (1) and 2 of the American Convention as prohibiting State Parties from violating the rights and freedoms protected under the treaty, and as requiring States to take the positive measures that may be necessary to ensure that individuals can effectively enjoy those rights and freedoms. [FN46] Both bodies have also held that the right to a fair trial and to judicial protection under Articles 8 and 25 of the Convention entails the right of victims of human rights violations to have those violations effectively remedied within the justice system of the state concerned. [FN47]

Drawing upon these basic principles and evolving customary and treaty law, the Court and Commission have held that states must investigate, prosecute and punish persons who commit or order the commission of gross violations of human rights or humanitarian law. [FN48] The Commission has also specifically held that this obligation encompasses acts that may constitute war crimes or crimes against humanity such as assassinations, forced disappearances, rape, forced movement or displacement, torture, inhumane acts aimed at intentionally causing death or serious harm to physical or psychological integrity, attacks on the civilian population or their property and recruitment of boys and girls under 15 years of age. [FN49] Further, this obligation has been held to be independent of whether the perpetrators are state agents or private ***442** individuals [FN50] and to apply even where other modes of accountability and reparation such as truth commissions and compensation have been undertaken. [FN51] Measures to investigate, prosecute and punish serious human rights violations are considered to play an important role in preventing the repetition of similar violations in the future. [FN52] The Inter-American Court has observed in this respect that "the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives." [FN53]

The jurisprudence of the system also mandates that the investigation, prosecution and punishment of human rights violations must take place before the civilian rather than military courts, in order to properly and effectively ensure accountability through competent, independent and impartial courts. [FN54] According to the Inter-American Court and Commission, military tribunals, by their very nature, do not satisfy the requirements of independent and impartial courts necessary to try civilians or to prosecute violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts. [FN55] In particular, military courts are not a part of the independent***443** civilian judiciary but rather are a part of the Executive branch, and their fundamental purpose is to maintain order and discipline by punishing military offenses committed by members of the military establishment. [FN56] In such instances, military officers assume the role of judges while at the same time remaining subordinate to their superiors in keeping with the established military hierarchy. [FN57] Accordingly, accountability for serious crimes under international law cannot be ensured through trials before military courts or tribunals.

2. The Right to Know the Truth

Much of the work of the human rights treaty bodies of the inter-American system relating to serious human rights violations in the Hemisphere has centered around the right of those affected by the violations, including relatives of victims and the society at large, to know the truth of what happened as well as the reasons why and the circumstances in which the violations were committed. [FN58] In its 1985-86 Annual Report, for example, the Inter-American Commission stated that:

> [e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. [FN59]

Likewise, according to the Inter-American Court: every person, including the next of kin of the victims of grave violations of human ***444** rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations. This right to the truth has been developed by International Human Rights Law; recognized and exercised in a concrete situation, it constitutes an important means of reparation. [FN60]

The obligation to prosecute serious human rights violations is interrelated with the right to the truth, as it has been recognized that the right to the truth is subsumed in the right of the victim or his or her next-of-kin to obtain from the competent organs of the State clarification of the facts and the prosecution of the persons responsible in keeping with the standards of Articles 8 and 25 of the American Convention. [FN61] Accordingly, it may not be possible to give full effect to the right to the truth absent proper procedures for prosecuting the individuals responsible for serious human rights violations.

3. Victims' Right to **Reparations**, Including Guarantees of Non-repetition

The issuance of **reparations** in the inter-American system has been premised principally upon the equality of persons and the right of victims of human rights violations to re-establish their status quo ante without discrimination. [FN62] The Inter-American Court has also held that where restitutio in integrum is not possible, compensation must be paid to the victim and/or his or her next of kin for the damages resulting from the violations and other measures of reparation may be necessary, such as medical and psychological care and social support services. [FN63]

Further, the Inter-American Court has held that adequate **reparations** may necessarily encompass guarantees of non-repetition that are aimed at preventing new human rights violations. According to the Court, it is a fundamental principle that every violation of an international***445** obligation which results in harm creates a duty to make adequate reparation and to put an end to the consequences of the violation. [FN64] Accordingly, the Court has held that a State may be obliged to take such measures as may be necessary to ensure that violation of the nature determined by the Court never again occur in its jurisdiction. [FN65] In this sense, both the obligation to prosecute and punish and the right to the truth can be seen as contributing to adequate **reparations**, by clarifying the circumstances of the violations, identifying the perpetrators and attempting to ensure that similar violations are not repeated in the future. [FN66]

4. Invalidity and Non-application of Measures Aimed at Precluding Accountability for Serious Crimes Under International Law, Including Amnesties and Statutes of Limitations

The principles and protections outlined above have played central and interconnected roles in the evolution of the inter-American doctrine governing amnesties, pardons, statutes of limitations and other measures [FN67] that potentially impede or terminate the investigation, prosecution and/or punishment of serious violations of fundamental human rights. Indeed, the Commission and Court have advanced much of their jurisprudence in the area of impunity by considering the compatibility of these types of impediments with the protections under applicable human rights instruments.

In its seminal 1992, decision in which it found the Due Obedience and Full Stop amnesties laws in Argentina to violate Article XVIII (right to a fair trial) of the American Declaration of the Rights and ***446** Duties of Man and Articles 1, 8 and 25 of the American Convention on Human Rights the Commission observed that:

> [t]he effect of passage of the laws and the Decree was to cancel all proceedings pending against those responsible for past human rights violations. These measures closed off any judicial possibility of continuing the criminal trials intended to establish the crimes denounced; to identify their authors, accomplices and accessories after the fact, and to impose the corresponding punishments. The petitioners, relatives or those injured by the human rights violations have been denied their right to recourse, to a thorough and impartial judicial investigation to ascertain the facts. [FN68]

Based largely upon this reasoning, the Commission has declared amnesty laws in other states of the Hemisphere to be incompatible with the American Convention, including laws in Uruguay, [FN69] El Salvador, [FN70] Chile [FN71] and Peru. [FN72] The Commission's findings in this regard have also evolved over time to encompass not only self-amnesties enacted by military dictatorships themselves, but also those adopted by subsequent civilian governments whether in response to direct or indirect pressure from the military or security forces or for political purposes to achieve peace and reconciliation. [FN73] Even where states have convened truth commissions to investigate a pattern of abuses of human rights or humanitarian law, the Commission has held that this constitutes an inadequate response vis-à-vis a state's positive obligations under the American Convention, at least in circumstances where the perpetrators are not identified and no punitive action is taken against them. [FN74] In summary, as the Commission recently stated in its Report on the Demobilization Process in Colombia,

> [w]henever amnesty laws or similar legislative measures render ineffective and meaningless the obligation of the states party to ensure judicial clarification of the facts of crimes of international law, ***447** they are incompatible with the American Convention, independent of whether the violations in question may be attributed to state agents or private persons. [FN75]

In its landmark judgment in the Barrios Altos Case, [FN76] the Inter-American Court determined that Peruvian Amnesty Laws No. 26479 and No. 26492 were incompatible with the American Convention, had no legal effect and could not impede the investigation, identification and punishment of persons responsible for violating rights enshrined under the American Convention. [FN77] Law No. 26479 was passed by the Congress of Peru in 1995, granting amnesty to all members of the security forces and civilians who had been accused, investigated, prosecuted or convicted, or who were carrying out prison sentences, for

human rights violations. [FN78] Law No. 26492, enacted later the same year, declared that the amnesty could not be "revised" by a judicial instance and expanded the scope of Law No. 26479 to grant a general amnesty to all military, police or civilian officials who might be the subject of indictments for human rights violations committed between 1980 and 1995. [FN79] In finding the laws to be invalid, the Inter-American Court broadly proclaimed that:

> all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derivable rights recognized by international human rights law. [FN80]

It is notable that in response to a subsequent request by the Commission for an interpretation of the Court's judgment in the Barrios Altos Case, the Court held that its decision proclaimed the promulgation of the amnesty law in Peru to constitute a per se violation of the American Convention, and therefore, that the judgment should be interpreted as having general effects and not as being limited to the application***448** of the law in the specific circumstances of the Barrios Altos Case. [FN81]

In its recent judgment in the case of Moiwana Village v. Suriname, the Court reaffirmed its view as to the incompatibility of amnesties, statutes of limitation and similar measures with the American Convention, stating that: "no domestic law or regulation - including amnesty laws and statutes of limitation - may impede the State's compliance with the Court's orders to investigate and punish perpetrators of human rights violations." If this were not the case, the rights found in the American Convention would be deprived of effective protection. This conclusion is consistent with the letter and spirit of the Convention, as well as general principles of international law. Figuring prominently among said principles, pacta sunt servanda requires that a treaty's provisions be given meaningful effect within a State Parties' internal legal framework. [FN82]

Further, in its determinations on **reparations** in the same case, the Court enumerated Suriname's obligations in relation to the determined violations of Article 1(1), 8 and 25 in the case in terms that could include measures to repeal the amnesty law:

> In fulfillment of its obligation to investigate and punish the responsible parties in the instant case, Suriname must: a) remove all obstacles, de facto and de jure, that perpetuate impunity; b) use all means at its disposal to expedite the investigation and judicial process; c) sanction, according to the appropriate domestic laws, any public officials, as well as private individuals, who are found responsible for having obstructed the criminal investigation into the attack on Moiwana Village; and d) provide adequate safety guarantees to the victims, other witnesses, judicial officers, prosecutors, and other relevant law enforcement officials. [FN83] [emphasis added]

Accordingly, it now appears to have been firmly established in the inter-American human rights system that whenever amnesty laws or similar measures hinder the investigation, prosecution and punishment of serious violations of human rights and humanitarian law, they are incompatible with the obligations of states parties under Article ***449** 1(1), 8 and 25 of the American Convention, have no force or effect and cannot be applied.

## III. The Impact of the Inter-American System on Efforts to Account for Serious Crimes Under International Law at the Domestic Level

As the foregoing overview indicates, the practice and jurisprudence of the inter-American human rights system has given rise to and reinforced international legal principles and standards governing the obligations of states to ensure individual accountability for serious human rights violations, including those infringements that would constitute crimes under international law. Further, the inter-American human rights system has provided a longstanding international mechanism to monitor and adjudicate compliance by OAS Member States with these obligations. For much of the system's history, the debate over impunity has started and ended with proclamations of state responsibility by the Commission and Court; little tangible progress has taken place in giving practical effect to that responsibility through investigations and prosecutions within domestic judicial systems. As the following discussion will address, however, the work of the inter-American human rights system has begun to have a discernible impact upon efforts to secure accountability for serious human rights violations in the region at the domestic level, in two interrelated areas.

First, the inter-American system has had a juridical impact, initially by providing an independent adjudicative forum for addressing accountability issues at a time when many local courts lacked the independence or capacity to do so, and, more recently, by influencing and emboldening the efforts of national courts in this area as they have acquired the capacity to address impunity issues competently, independently and impartially. Second, the inter-American system has had a political impact, by influencing legislation, policies and other measures of the executive and legislative branches of governments pertaining to accountability for human rights violations.

### A. Juridical Impact

The principles and jurisprudence of the inter-American system have influenced the work of domestic courts in a number of OAS Member States in addressing issues of impunity and accountability, including Argentina, Chile, Peru and Colombia. In several of these instances, the application of Inter-American instruments and jurisprudence by national courts has been explicit and direct, owing to the ***450** constitutional status that the American Convention and other human rights treaties have been given under domestic law of predominantly civil law countries of Latin America. [FN84]

One of the leading examples of juridical influence is the Argentine Courts' treatment of statutes of limitations and amnesty laws in the context of prosecutions for atrocities committed during the “Dirty War” in that country between 1976 and 1983. Most recently, on June 14, **2005**, the Supreme Court of Argentina issued its long-awaited judgment in the Case of Julio Hector Simon, [FN85] in which it declared Argentina's “Full Stop” law of 1986 (Law No. 23.492) [FN86] and “Due Obedience” law of 1987 (Law No. 23.521) [FN87] unconstitutional as inconsistent with the country's international legal obligations. [FN88] The “Full Stop” law was passed by Argentina's Congress during the administration of President Alfonsín and set a 60-day deadline for the initiation of new prosecutions for crimes arising out of the dictatorship. [FN89] When advocates, victims and families expedited the filing of complaints, however, the “Due Obedience” law was passed shortly after to grant automatic immunity from prosecution to all members of the military with the exception of

top commanders, [FN90] effectively barring all pending and future prosecutions. [FN91] In 1987, the Argentine Supreme Court ***451** rejected a challenge to the Due Obedience law and ruled that the law was constitutional. [FN92]

The laws were subsequently challenged in the inter-American system, however, and in 1992 the Inter-American Commission declared the laws to be contrary to Articles 1, 8 and 25 of the American Convention. [FN93] The Commission also recommended that Argentina pay just compensation to the petitioners for the violations and to adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the dictatorship. [FN94] More than a decade later, revitalized efforts to challenge the amnesty laws before the domestic courts culminated in the decision of the Julio Hector Simon Case, in which a 7 to 1 majority of the Argentine Supreme Court, with one abstention, declared both the Due Obedience law and the Full Stop law unconstitutional. [FN95] Judge Enrique Santiago Petracchi authored the main majority judgment and each of the six concurring judges issued separate opinions that provided slight variations in reasoning for their conclusions. However, all of the judges acknowledged the significance of the Inter-American Court's judgment in the Barrios Altos Case in concluding that prosecutions for serious crimes under international law such as forced disappearances cannot be precluded through amnesties, statutes of limi- tations or the principle of legality. [FN96]

In the main judgment, Judge Santiago Petracchi noted that the laws were enacted after Argentina had ratified the American Convention on Human Rights. [FN97] It was also noted that under the terms of the country's constitution, as reformed in 1994, the American Convention and other international treaties, as well as customary norms and general principles of international law, have constitutional, and therefore supreme, status in the national legal system. [FN98] Further, relying in part upon the jurisprudence of the Inter-American Commission and Court, ***452** the majority concluded that the jurisprudence of the Inter-American Commission and Court constitutes an “essential interpretive guideline” for the rights and obligations under the American Convention. [FN99]

Within this legal framework, the majority went on to find that the Full Stop and Due Obedience laws impeded the prosecution of individuals for forced disappearances and other serious crimes and were therefore inconsistent with the norms under the American Convention. [FN100] In this regard, Judge Santiago Petracchi explicitly referred to the case law of the Commission and the Court relating to accountability for human rights violations, beginning with the Inter-American Court's seminal judgment in the Velásquez Rodríquez Case concerning the obligation of states to prevent, investigate and punish human rights violations, whether committed by public or private actors. [FN101] The main judgment went on to cite at length the jurisprudence of the Commission and the Court on the impermissibility of amnesties for serious human rights violations, including in particular, the Commission's decision in Report 28/92 specifically finding the Full Stop and Due Obedience laws to be incompatible with Articles 1, 8 and 5 of the American Convention and Article XVIII of the American Declaration. [FN102] The Court made specific reference to the Commission's findings that the fact that an amnesty law may have been enacted by democratic bodies for the urgent needs of national reconciliation and the consolidation of a democratic regime is “practically irrelevant” to the determination of possible violations of the American Convention. [FN103]

Further, the judges concurred that any doubts concerning the concrete scope of Argentina's obligations in relation to the Full Stop and Due Obedience laws were resolved by the Inter-American Court in the Barrios Altos Case. [FN104] The main judgment undertook a detailed analysis of the circumstances underlying the passage by Peru of the amnesty laws at issue in the Barrios Altos case as well as the reasoning of the Inter-American Court in finding the laws to be incompatible***453** with Articles 1, 2, 8 and 25 of the American Convention. [FN105] In this respect, the Court referred specifically to the statements by Judge Garcia Ramirez in his concurring opinion that, even where amnesties may produce some beneficial effects in reestablishing peace with democratic support, these measures cannot be applied to the most serious violations of human rights. [FN106] The Court went on to conclude that the effect of the Argentine laws were, at base, the same as the self-amnesties addressed in Barrios Altos, namely to avoid prosecutions for grave violations of human rights, [FN107] that the laws impeded compliance by the Argentine State with its international obligations; and therefore, that the laws were inadmissible. [FN108]

According to the main judgment, neither the amnesty law nor any other law, including the principle of legality and the rule against the retroactive application of criminal law, could be invoked to preclude the prosecution of grave violations of human rights. [FN109] The Court reasoned that in order to give effect to international human rights treaties, the suppression of the Full Stop and Due Obedience laws must take effect without delay and in such a way that the laws cannot be used to present any normative obstacles to the prosecution of circumstances such as those that constitute the subject of the present case. This means that those who may be beneficiaries of these laws cannot invoke them nor can they invoke the prohibition against the retroactive application of criminal law as either it pertains to penalties that are more serious or to the act that has been tried. In accordance with the findings by the Inter-American Court in the cases cited above, such principles cannot be converted into an impediment to the nullification of the mentioned laws nor for the prosecution of matters to which the laws were enacted, nor matters that should have been initiated but never had been. In other words, the subjection of the Argentine state to the inter-American jurisdiction prevented the principle of non-retroactivity of criminal law from being invoked in order not to comply with the obligations assumed in relation to the prosecution of grave violations of human rights. [FN110]

***454** In this connection, the Court confirmed its findings in earlier judgments that forced disappearances constituted a crime against humanity and therefore a violation of a jus cogens norm, and accordingly could not be the subject of any statutes of limitations. [FN111] This in turn relates to another area in which the inter-American system has affected the jurisprudence of national courts in Argentina, namely the application of statutes of limitations to serious crimes under international law. In particular, in a series of cases, the most recent being its August 24, **2004** judgment in the case of Enrique Lautaro Arancibia Clavel, [FN112] the Supreme Court of Argentina proclaimed the 'imprescriptibility' in Argentina of crimes against humanity, including such acts as murder, forced disappearances, kidnapping and torture. [FN113] As stated in its main judgment in the Arancibia Clavel case, [FN114] the Supreme Court considered that the UN Convention on the Imprescriptibility of War Crimes and Crimes against Humanity represented a crystallization of principles binding on Argentina as part of the international community, that the crimes committed by Arancibia Clavel were imprescriptible at the moment of their commission and therefore that the case did not involve a retroactive application of international law, since a rule of customary international law binding on Argentina had

already existed since the 1960's. [FN115]

In reaching this conclusion, the Supreme Court relied to a significant extent upon the norms and jurisprudence of the inter-American human rights system. In particular, the Supreme Court relied upon the Inter-American Court's judgments in the Velásquez Rodríquez Case [FN116] and the Barrios Altos Case [FN117] to reinforce its finding that Argentina was obliged to prevent and prosecute violations of rights enshrined in the American Convention, including those that may constitute crimes against humanity, and could not apply prescriptions, ***455** amnesties and other measures that interfere with this obligation. After citing the pertinent findings in the Barrios Altos [FN118] and Velásquez Rodríquez [FN119] Cases, among others, the Supreme Court concluded that from this point of view, the application of internal legal regulations concerning prescription constitutes a violation of the State's obligation to prosecute and punish and, consequently, gives rise to its international responsibility. [FN120]

It is apparent, therefore, that over the past several years, the inter-American jurisprudence has had a specific and significant impact upon efforts by the judiciary in Argentina to remove amnesties and statutes of limitations as obstacles to prosecutions for serious human rights violations committed during the military dictatorship in that country.

The Supreme Court of Chile has reached similar conclusions regarding the non-application of statutes of limitations to forced disappearances, based upon the characterization of disappearances as a “permanent” or “continuing” crime, a conclusion first reached by the **Inter-AmericanCourt** of **HumanRights** in its judgment in the Velásquez Rodríguez Case. [FN121] In its November 17, **2004** decision in a case involving the January 1975 disappearance of Miguel Angel Sandoval Rodriguez, [FN122] the Supreme Court of Chile declared the inapplicability of amnesty laws and statutes of limitations to disappearances as permanent or continuing crimes. The case addressed whether Decree Law No. 2191 of 1978, which purported to extinguish criminal responsibility for certain crimes under the Penal Code, included the offense equivalent to forced disappearances under Article 141 of Chile's Penal Code. [FN123] In finding that the law did not extinguish responsibility for the crimes of forced disappearances, the Court did not rely explicitly on the jurisprudence of the inter-American system. However, it referred to the definition of forced disappearances under the Inter-American Convention against Forced Disappearances [FN124] in concluding that the provision of the Criminal Code at issue in the case described the same offense. Further, the Court concluded that the crime was ***456** permanent in the sense that it initiated a prolonged period during which the violation subsisted at the will of those responsible, and therefore that it was impossible to determine whether the crime had been committed within the time period covered by the amnesty or whether the time for prescription had begun to run. Consequently, the Court held that Decree Law No. 2191 could not be relied upon in the case to avoid prosecution. [FN125]

The inter-American system has also influenced the jurisprudence in Peru pertaining to accountability for serious human rights violations. With respect to amnesties, in 1995 a quite remarkable decision was issued by a Peruvian judge who at that time had been responsible for investigating the notorious massacre of Barrios Altos, the same atrocity addressed by the Inter-American Court in its Barrios Altos judgment. [FN126] On June 16, 1995, while the Fujimori government was still in power, Judge Antonia Saquieuray Sanchez held that Article 1 of the controversial amnesty law No. 26479 of June 14, 1995, which

purported to exonerate military, political or civilian personnel charged, investigated, prosecuted or condemned for crimes committed in connection with the war on terrorism since 1980, did not apply to individuals implicated in the Barrios Altos killings. [FN127] In reaching this decision, the magistrate referred to international human rights treaties, including the American Convention and the American Declaration, which she held to contain norms that constituted "mandatory imperatives," and further, held that in conformity with Article 1(1) of the American Convention: States Parties - including Peru - have the obligation to investigate violations of human rights and punish those responsible; principles and norms which the Peruvian State has not relinquished and that conflict with the cited legal provision. [FN128]

Judge Saquieuray Sanchez also referred to the right to a fair trial under Article 8 and the right to judicial protection under Article 25 of the American Convention and opined that the provisions of the Peruvian Constitution should be interpreted consistent with these protections so as to render Article 1 of the Amnesty law inapplicable to the process against the defendants.

Shortly after Judge Saquieuray Sanchez's decision, the Congress in Peru enacted a further amnesty law which, inter alia, deprived the ***457** judiciary of any authority to interfere with the application of the law. [FN129] However, this was a bold decision, given the political climate in Peru at the time, a sentiment subsequently expressed in the report of Peru's Truth and Reconciliation Commission released in August **2003**. [FN130]

The courts in Peru have also considered the jurisprudence of the inter-American system in evaluating the practice of using military courts to try human rights violations. In its Interpretive Judgment dated January 3, **2003**, in the case of Marcelino Tineo Silva and Others, [FN131] the Constitutional Tribunal of Peru addressed challenges to certain aspects of Decree Laws 25475, 25659, 25708 and 25880, which comprised anti-terrorist legislation promulgated under the Fujimori government. The Court found, inter alia, that the Peruvian Constitution precluded the legislation at issue from being interpreted to permit military courts to try civilians for terrorism-related crimes, but at most could only permit certain regulations in the Military Code of Justice to be used by ordinary courts and then only in accordance with the minimum guarantees of due process provided for under the Constitution. [FN132] In reaching this conclusion, the Tribunal relied upon the Inter-American Court's decision in the Castillo Petruzzi Case [FN133] as well as the Commission's **2002** Report on Terrorism and Human Rights, [FN134] indicating that it shared the views of the Inter-American Court and Commission that military courts could not be considered independent or impartial for the purpose of trying civilians. [FN135]

The courts in Colombia have also given effect in some degree to the doctrine of the inter-American system relating to accountability for violations of human rights. Both the Supreme Court and the Constitutional Court have adopted the position that military courts cannot try human rights violations, a position strongly asserted within the Inter-American***458** human rights system. [FN136] In so doing, the Colombian courts have not only declared military courts incompetent to entertain proceedings of this nature, but have declared processes that have taken place before military courts to be a nullity and have required the matters concerned to be referred to the civilian authorities for proper investigation. In its seminal decision in its judgment C-358/97 of August 5, 1997, [FN137] the Constitutional Court of Colombia pronounced upon military penal jurisdiction and

indicated, inter alia, that

> [I]n order for an offense to fall within the competence of military penal justice . . . the alleged facts must give rise to an excess or abuse of power within the scope of an activity directly connected with a proper function of the armed forces. Moreover, the connection between the offense and the activity of service must be proximate and direct, and not purely hypothetical or abstract. This means that the excess of authority must take place during the execution of a task that itself constitutes a legitimate advancement of the missions of the Armed Forces and the National Police. If from the beginning the agent has criminal intentions and therefore uses his investiture in order to bring about the alleged facts, the case is part of the ordinary jurisdiction, including those events in which there could exist a certain abstract relation between the purposes of the armed forces and the facts alleged against the accused. . . . [T]he connection between the criminal act and the activity related to the service is severed when the crime acquires an exceptional gravity, such as those that amount to what are known as crimes against humanity. In these circumstances, the case must be conferred to the ordinary justice, given the total contradiction between the crime and the constitutional responsibilities of the armed forces. [FN138]

The Supreme Court of Colombia has followed the same approach. In its March 6, **2003** judgment in the Case of the Riofrío Massacre, [FN139] the Supreme Court relied upon the Constitutional Court judgment C-358/97 and found that the crimes at issue in the case, ***459** namely the October 5, 1993 murder and cover up of 13 defenseless peasants by paramilitaries with the collaboration of members of the National Army, could not be considered to fall within the jurisdiction of military justice as defined by the Constitutional Court. Accordingly, the Supreme Court declared as a nullity a previous decision in the military jurisdiction to close the investigation and remitted the matter to the National Director of Prosecutors to be assigned a corresponding Delegated Prosecutor. [FN140]

More generally, the Constitutional Court of Colombia has held that the recommendations of the Inter-American Commission on Human Rights in the form of its precautionary measures are binding upon the government of Colombia as a matter of domestic constitutional law. Specifically, in its Judgment T-558/03 issued on July 10, **2003**, [FN141] the Constitutional Court found that the precautionary measures adopted by the Commission pursuant to Article 25 of its Rules of Procedure [FN142] are automatically incorporated into the domestic legal order and that Colombia is required to comply with the measures as a function of its international obligations to respect and protect fundamental human rights, including its obligation to protect victims of human rights violations pending fulfillment of its duty to investigate, prosecute and punish those violations. According to the Constitutional Court:

> [f]or the Chamber, the due execution of precautionary measures issued by the IACHR and directed to provide security to victims of or witnesses to violations of human rights or international humanitarian law, must be given effect . . . as there exists a connection***460** between the fundamental rights protected and the threats of harm in which they are found. Without doubt, the protection of life and physical integrity by the authorities, as well as the results of a criminal or disciplinary investigation into those matters, are achieved because the State gives effective protection to the petitioners, that is to say, the guarantee of the rights to truth, justice and reparation depend, to a significant extent, on the effectiveness of the protection

that the State must give to persons who face a special risk, as they are witnesses and victims of this category of crimes. [FN143]

The current demobilization process in Colombia may well provide the next forum for testing the juridical and political impact of the Inter-American human rights system on issues of impunity, to the extent that the supervisory bodies of the system may be called upon to evaluate the terms of any peace agreement, including any amnesties or related provisions. In this respect, the Inter-American Commission has already expressed concerns regarding Law 975 of **2005**, the "Law of Justice and Peace," enacted by the Congress of Colombia on July 25, **2005**, [FN144] which includes mechanisms by which demobilized members of illegal armed groups may receive reduced sentences and other procedural benefits in connection with their responsibility for atrocities committed during the armed conflict. There are concerns that this mechanism may allow sentences that are disproportionate to the gravity of the crimes and might not require complete and reliable confessions in exchange for the procedural or other benefits. [FN145] According to the Commission, the law's provisions fail to establish incentives for a full confession of the truth as to their responsibility in exchange for the generous judicial benefits received. Consequently, the established mechanism does not guarantee that the crimes perpetrated will be duly clarified, and therefore in many cases the facts may not be revealed and the perpetrators will remain unpunished.

The provisions of the law might favor the concealment of other conduct that, once brought to light at a future date, could benefit from the same alternative penalties. The procedural benefits not only reach conduct directly related to the armed conflict, but also can be invoked ***461** regarding the commission of ordinary crimes such as drug trafficking. [FN146]

The foregoing discussion provides only a snapshot of some of the judicial developments in the area of impunity in OAS Member States in recent years. It demonstrates, however, that courts in this region are playing an increasingly proactive and independent role in addressing issues involving accountability for serious violations of human rights, and are drawing considerably upon the instruments and doctrine of the inter-American human rights system in this effort.

B. Political Impact

The work of the inter-American human rights system concerning accountability for serious crimes under international law has also had an impact at the political level in several OAS member states. Much of this influence has taken place through the Commission's authority to conduct on-site visits and prepare country reports, issue press releases, and facilitate friendly settlements of human rights complaints. Political effects also appear to have resulted from the fact that in recent years, eminent individuals connected with the inter-American human rights system have assumed positions within certain governments of Member States with a significant influence upon the human rights policies of those states.

Among the earliest circumstances in which the inter-American system is considered to have had a political impact was the Commission's work during and following the military dictatorship in Argentina during the 1970's. [FN147] In particular, a seventeen-day on-site visit conducted by the Commission in Argentina in 1979 [FN148] together with the release of a country report on the situation of human rights in Argentina in 1980 [FN149] are widely

regarded as having made a significant contribution in ending the military junta's hold on power. The Commission's report concluded that people who had disappeared in Argentina over the previous three years had in fact been arrested by the ***462** country's armed forces, tortured and murdered. [FN150] The report was presented to the OAS General Assembly in 1980 [FN151] and was circulated widely in Argentina, causing damage to the integrity and morale of the government and the armed forces. These developments, together with Argentina's defeat in the Malvinas/Falklands War, set the stage for the government's collapse in 1983. As observed in one commentary published shortly after the fall of the dictatorship,

> [T]he [Commission's] visit and report were of tremendous importance in creating international political pressure on the Argentine government, as well as receptivity to the thousands of political refugees leaving Argentina. Within Argentina, the report was prohibited but circulated clandestinely - it has now been published as 'The Prohibited Report' - and was of great value in awakening many Argentines to a situation many had chosen to ignore. The OAS visit, its report, and the principles of international human rights law upon which they were predicted, thus contributed indirectly to the demise of the Argentine dictatorship in 1983. [FN152]

Similar observations have been made concerning the Commission's country studies in other Member States of the Hemisphere, including its work during the Somoza regime in Nicaragua in the 1970's [FN153] and, as discussed further below, the Commission's activities relating to the Fujimori regime in Peru in the late 1990's.

It is also notable that the Commission's early work in Argentina continues to have resonance. In his submissions to the Argentine Supreme Court in the Julio Hector Simon Case, for example, Argentina's General Prosecutor invoked the Commission's 1980 report and its findings on the commission of forced disappearances in support of ***463** his arguments that such atrocities constituted imprescriptible crimes against humanity binding on Argentina as a matter of jus cogens. He stated:

> [I]n addition, it must be remembered that it was precisely in the context of these complaints [concerning forced or involuntary disappearances] that the Inter-American Commission issued its famous 'Report on the Human Rights Situation Argentina', approved on April 11, 1980, in which it described the institutional context during the period of the former military government, and made express mention of the phenomenon of disappearances and the commission of numerous and grave violations of fundamental human rights recognized in the American Declaration of the Rights and Duties of Man. [FN154]

Moreover, the political impact of the inter-American system in Argentina has extended to the incorporation into government of persons experienced in the work of the inter-American human rights system. For example, following his departure from the Commission in 1997, former Commission Member and President Oscar Fappiano served as the Secretary for Human Rights in the Ministry of Justice, Security and Human Rights of Argentina. Jorge E. Taiana, who was a political prisoner under the military dictatorship and served as the Commission's Executive Secretary from 1997 to **2001**, holds the position of Secretary of Foreign Affairs with the Government of President Nestor Kirschner. A similar dynamic has taken place in Guatemala, where the government of President Berger, elected in **2003**, appointed individuals with experience in the inter-American system to positions having an impact in the area of human rights. Former Commission President Marta Altolaguirre, who

served on the Commission from **2000** to **2004**, presently holds the position of Vice-Minister of Foreign Affairs, and Frank La Rue, a human rights advocate with considerable experience in the inter-American system, was appointed President of the Presidential Commission on Human Rights (COPREDEH), a position previously held by Ms. Altolaguirre.

It is notable in this connection that over the past several years, both Argentina and Guatemala entered into settlements or otherwise acknowledged responsibility in a number of cases before the inter-American system. Argentina settled one complaint before the Commission in **2003**, [FN155] and Guatemala settled three complaints before the ***464** Commission in **2003**[FN156] and one complaint in **2004**. [FN157] Both States have also acknowledged responsibility in several cases before the Inter-American Court, including Argentina's acceptance in **2003** of responsibility in the Belacio Case [FN158] and Guatemala's acceptance of responsibility in the Myrna Mack Case [FN159] in **2003** and the Carpio Nicolle, [FN160] the Plan de Sanchez Massacre, [FN161] and the Molina Thessein [FN162] Cases in **2004**. Of recent significance, on March 4, **2005**, the government of Argentina acknowledged responsibility in the case of the July 18, 1994 attack carried out on the Israeli-Argentine Mutual Association ("AMIA") building in Buenos Aires. In particular, the State acknowledged that it had not complied with its obligation to observe and guarantee the rights under the American Convention in connection with the bombing, in part because "facts were concealed and there was a grave and deliberate failure to comply with the duty to investigate the unlawful act." [FN163] The matter had been the subject of a petition before the Commission filed in 1999, and in August **2001**, the Commission had appointed its then-President, Dean Claudio Grossman, as its observer [FN164] for the criminal trial of four Argentine police officers and a car thief prosecuted in relation to the bombing, in which the defendants were ultimately acquitted on September 2, **2004**. [FN165]

While experience suggests that the amicable settlements of petitions and cases before the Commission and the Court are attributable ***465** to many varied political and legal factors and considerations, [FN166] it is nevertheless likely that the integration into governments of prominent individuals with experience in the inter-American system, some of whom were also victims of the regimes whose conduct is now under scrutiny, has played some role in the progressive evolution of government policy and strategy in this area. [FN167]

In the case of Peru, the impact of the inter-American system had been most notable in connection with the downfall of former President Fujimori and subsequent efforts to ensure accountability for atrocities committed in that country. Following Alberto Fujimori's election as Peru's President in 1990, the Commission and others in the international community became increasingly concerned over the human rights situation in the country, in light of measures taken by the President to consolidate his power by restricted and suspended constitutionally-guaranteed rights and neutralizing the courts and other democratic institutions in the country, ostensibly in the name of the battle against armed dissident groups. [FN168] This led to an escalating struggle between the Government of Peru and the Inter-American Commission and Court, which culminated before the OAS General Assembly at its 30th regular session in Canada in **2000**.

More particularly, between 1992 and **2000** the Commission became increasingly critical of developments in Peru, as reflected in press releases, [FN169] special reports in the Commission's Annual Report, [FN170] and the publication of merits decisions in

individual cases. [FN171] Issues of particular concern to the Commission included prolonged states of emergency, the use of faceless military tribunals to try civilians***466** accused of terrorism-related offenses, and amnesty laws enacted by the government.

Also in response to worrying developments in Peru, the Commission began to refer additional cases to the Inter-American Court, based upon Peru's acceptance of the Court's contentious jurisdiction on January 21 1981. [FN172] Among the cases sent to the Court was that of Jaime Castillo Petruzzi, María Concepción Pincheira Saez, Lautaro Enrique Mellado Saavedra, and Alejandro Astorga Valdés, all of whom had been tried, convicted and sentenced to life imprisonment for the crime of treason (traición a la patria) by a "faceless" military court. On May 30, 1999 the Inter-American Court issued its decision in the Castillo Petruzzi et al. Case in which it declared as incompatible with the American Convention certain aspects of the country's anti-terrorism law, including its practice of trying civilian before faceless military tribunals. [FN173] Peru refused to recognize the Court's decision, however, on the ground that the Plenary Assembly of its Supreme Council of Military Justice found the judgment to be "unenforceable" ("inejecutable"). [FN174] Then, in 1999, the Commission referred to the Inter-American Court two further cases against Peru, the Constitutional Court Case, addressing the removal of three of the seven magistrates of the Constitutional Court of Peru after the Court determined that President Fujimori could not seek a third term in office, and the Ivcher Bronstein Case, involving the revocation by the Peruvian government of the naturalized citizenship of a media owner critical of the Fujimori administration. In response, the government purported to withdraw the country's acceptance of the Inter-American Court's jurisdiction and refused to participate in the proceedings, even after the Inter-American Court had ruled that the country's efforts to withdraw its acceptance of the Court's jurisdiction were invalid. [FN175]

These drastic measures taken by the Fujimori government contributed to rising concerns and criticisms by the Commission and the broader international community on the state of democracy and the ***467** rule of law in Peru. Events further escalated when President Fujimori participated in and won the Presidency in **2000** to serve a third term in office, through elections that were widely viewed as irregular and unfair. Accordingly, the Commission used the occasion of the thirtieth Regular Session of the OAS General Assembly in Windsor, Canada in June **2000** to release its Report on the Human Rights Situation in Peru, [FN176] which was based in large part on an on-site visit conducted by the Commission from November 9-13, 1998. In its report, the Commission expressed particular concern regarding the lack of independence of the judiciary in Peru, the threats and attacks on freedom of expression, and restrictions on the free exercise and enjoyment of political rights. In particular, the Commission concluded that the **2000** general elections could not be called free and fair and "clearly represent[ed] an irregular rupture in the democratic process such as that referred to in Resolution 1080, adopted in 1991 by the General Assembly of the OAS." [FN177] Accordingly, the Commission called for

> a return to the rule of law in Peru, and to the convocation, in a reasonable time, of free, sovereign, fair, and genuine elections that are up to the respective international standards. In those new elections, the rights of Peruvians 'to vote . . . in genuine . . . elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters,' set forth at Article 23 of the American Convention, should be guaranteed. [FN178]

Following the presentation of the Commission's findings in Windsor as well as similarly

critical reports by the Ombudsman of Peru and an OAS Electoral observer mission, the OAS General Assembly adopted Resolution 1753 entitled "Mission of the Chair of the General Assembly and the OAS Secretary General to Peru," [FN179] in which Member States resolved to

> send to Peru, immediately, a Mission comprising the Chair of the General Assembly and the Secretary General of the OAS with the ***468** purpose of exploring, with the Government of Peru and other sectors of the political community, options and recommendations aimed at further strengthening democracy in that country, in particular measures to reform the electoral process, including reform of judicial and constitutional tribunals, as well as strengthening freedom of the press.

This development, among others, led to President Fujimori's resignation in September **2000**, and subsequent departure to Japan and the convocation of new general elections in Peru in the spring of **2001**. It also helped to pave the way to the establishment of Peru's Truth and Reconciliation Commission, which issued its report on August 28, **2003**, in which it found that since 1980, over 69,000 people perished in Peru through such human rights atrocities as mass murder, disappearances and torture, principally at the hands of Shining Path Guerillas and members of the country's armed forces. [FN180]

While the contributions made by the Inter-American Commission to efforts to reestablish the rule of law in Peru are significant in and of themselves, they can also be regarded as having advanced subsequent efforts to combat impunity for atrocities committed in Peru prior to and during the Fujimori regime. In particular, among the first acts taken by the new government in Peru in **2001** was to regularize its relationship with the **Inter**-**AmericanCourt** of **HumanRights**. By Legislative Resolution No. 27401 dated January 18, **2001**, the Peruvian legislature revoked the previous resolution by which the Fujimori government purported to withdraw from the Inter-American Court's jurisdiction and authorized the executive to take "all actions necessary to annul the results that may have arisen from this Legislative Resolution, fully re-establishing the contentious jurisdiction of the **Inter**-**AmericanCourt** of **HumanRights** for the State of Peru." [FN181]

Moreover, on February 19, **2001**, the representatives of the Peruvian government informed the Inter-American Court in the Barrios Altos Case, which had been referred to the Court by the Inter-American Commission on June 8, **2000**, that the Peruvian State "[r]ecogniz[ed] its international responsibility in the instant case, and will therefore initiate a friendly settlement procedure with the Inter-American Commission on Human Rights, and with the petitioners in this case." [FN182] This in turn led to the issuance by the Inter-American Court of its judgment in the Barrios Altos case, in which, as noted ***469** previously, the Court explicitly and unequivocally held that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible." [FN183]

It is also noteworthy that following the fall of the Fujimori regime, Peru, like Argentina and Guatemala, took initiatives to settle numerous complaints and cases before the Inter-American Commission, which included acknowledging responsibility in some cases and seeking to implement Commission recommendations in others. [FN184]

The experience in Peru, like the others canvassed above, suggests that over time, the inter-American human rights system has had a domestic political impact in some Member

States upon efforts to ensure accountability for serious human rights violations and thereby combat impunity in the region. Moreover, these effects, together with the influences upon the judiciary, can be viewed as potentially long-term and enduring, as they have contributed to the consolidation of a culture of democracy and the rule of law within the Member States concerned. In this way, the Inter-American system has helped to empower Member States themselves to be the principal guarantors and defenders of fundamental human rights, a precept central to the functions of the Inter-American human rights treaty bodies and, as discussed below, the International Criminal Court.

## IV. The Relationship Between Human Rights Treaty Bodies and International Criminal Tribunals

One of the novel issues that has emerged from the advance of international criminal tribunals over the past decade involves defining the relationship between these tribunals and the jurisdiction, jurisprudence and procedures of international human rights treaty bodies. Questions concerning the interrelationship between these institutions include the extent to which international criminal tribunals should consider international human rights law in interpreting and applying the crimes under their jurisdiction, how international criminal tribunals and human rights treaty bodies might interact, formally or informally, in order to advance their shared objective to secure accountability for serious violations of international human rights and ***470** humanitarian law, and the manner in which both types of tribunals may interact when they purport to exercise their mandates in respect of the same incident or situation. These issues are particularly pertinent in the context of the International Criminal Court, whose jurisdiction has been accepted in every region in which an international or regional human rights treaty body operates.

Using the inter-American human rights system as a context for addressing these issues, several key similarities, and differences can be identified between the Inter-American Commission and Court on the one hand and the International Criminal Court on the other, which must be taken into account in translating experiences between the two regimes. In particular, both the inter-American treaty bodies and the International Criminal Court are concerned in their work with many of the same atrocities under international law. In this respect, numerous crimes falling within the jurisdiction of criminal tribunals, such as crimes against humanity and war crimes, also encompass, by their nature and by definition, serious violations of human rights falling within the competence of human rights bodies, such as torture and forced disappearances. [FN185] Procedurally, the competence of both types of institutions is complementary to national jurisdictions, in the sense that the international bodies will generally act only when national authorities are unwilling or unable to remedy serious human rights violations. [FN186] In this way, the International Criminal Court and the Inter-American Commission and Court serve to encourage the effective protection of human rights at the domestic level, and indeed function based on the premise that the primary obligation to protect and to ensure respect for fundamental human rights rests with states themselves. [FN187] Most fundamentally, both the International Criminal Court ***471** and the human rights treaty bodies share as a core objective the eradication of impunity for gross violations of human rights, through the prosecution and punishment of those responsible.

At the same time, important distinctions exist in the mandates and functions of each category of tribunal. As noted above, the Inter-American Commission is charged with

determining State responsibility for violations of the rights under the American Convention on Human Rights and other applicable human rights instruments, [FN188] while the ICC has the mandate of determining individual criminal responsibility for the most serious crimes of international concern. Partly as a consequence, the standard of proof and rules of evidence applicable to international criminal tribunals are generally more rigorous than those applied by international human rights bodies. [FN189]

In this context, compelling reasons exist for identifying areas of common purpose and, where appropriate, interaction between the International Criminal Court and the Inter-American human rights treaty bodies. From the perspective of the Inter-American Commission and Court, international criminal tribunals present a new and potentially potent mechanism for advancing their doctrine in the area of accountability. Until the creation of the International Criminal Court, the only avenue for investigating and prosecuting human rights abusers in the Hemisphere was at the domestic level, as neither the Commission nor the Court are empowered to determine issues of individual criminal responsibility. [FN190] Consequently, where domestic ***472** courts were unwilling or unable to investigate, prosecute and punish those individuals responsible for human rights violations and where suspects were not successfully extradited to a third state willing or able to fulfill this function, no other forum was available to achieve compliance with these components of Commission and Court decisions. Rather, the system has had to await the emergence of political and juridical institutions capable of discharging this responsibility.

With the installation of the International Criminal Court, however, another potential avenue exists to give effect to the doctrine of human rights bodies relating to accountability and impunity by placing additional pressure on states to comply with their obligations in this regard, and, where this does not occur, providing an alternative mechanism at the international level capable of investigating, prosecuting and punishing serious crimes under international law. It is notable in this respect that of the ninety-nine countries that are States Parties to the Rome Statute as of May 12, **2005**, [FN191] twenty are also OAS Member States and therefore also subject to the jurisdiction of the Inter-American Commission: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, Guyana, Honduras, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay and Venezuela. [FN192] Moreover, fourteen of these States have accepted the contentious jurisdiction of the Inter-American Court: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Honduras, Panama, Paraguay, Peru, Uruguay, and Venezuela. Accordingly, the availability of the ICC as an alternative forum for criminal prosecutions could well have a significant impact upon the work of the Commission and the Court in many of the states falling within their jurisdiction.

From the perspective of international criminal tribunals, the work of regional and international human rights bodies can provide a rich source of procedural and jurisprudential experience from which to draw, generally and in situations where an international criminal tribunal is investigating a situation or incident that has already been the subject of consideration or analysis by the Inter-American Commission or the Court. Matters on which the International Criminal Court might find the inter-American experience useful include defining the ***473** elements of atrocities that fall within the jurisdiction of both bodies, identifying and evaluating the criteria in determining whether remedies at the national level may be considered available, including the potential impact of amnesties,

statutes of limitations or similar bars to domestic prosecutions, and methods for determining appropriate **reparations** to victims under Article 75 of the Rome Statute. Indeed, examples of this dynamic are already identified as between the Inter-American Commission on Human Rights and the International Criminal Tribunal for the former Yugoslavia. In its July 21, **2000** decision in the case of Anto Furundzija, for example, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in concluding that rape could constitute torture as a violation of the laws or customs of war, relied in part upon an earlier finding by the Inter-American Commission in the case of Mejia v. Peru that rape may constitute a form of torture proscribed under Article 5(2) of the American Convention on Human Rights. [FN193] In a similar vein, appropriate avenues of administrative cooperation between the International Criminal Court and the inter-American treaty bodies can be identified, such as regularized systems for sharing jurisprudence and other pertinent information and convening summits between members and staff of the institutions to discuss issues of common interest and concern.

The dynamic between the International Criminal Court and the Inter-American Court and Commission is less clear in circumstances where both institutions endeavor to exercise their mandates contemporaneously in respect of the same incident or situation. While there do not appear to be any immediate legal barriers to this possibility, procedural issues might arise concerning, for example, the possible application of the rule in the Inter-American system against duplication ***474** of proceedings, [FN194] or whether the International Criminal Court may have authority to request documents and testimony from the human rights institutions and their staff. In addition, given the different standards of proof applied by each tribunal as noted above, the ICC would likely need to exercise prudence in the manner in which it treats conclusions reached by international human rights bodies, particularly when those findings concern matters of fact or evidence.

In summary, it appears that the coexistence of international human rights bodies with functioning and effective international criminal courts may well have a significant impact upon efforts to advance accountability for serious crimes under international law as well as other human rights violations by reinforcing the procedural and substantive aspects of both categories of tribunals and, for the human rights treaty bodies, providing an alternative avenue through which their doctrine against impunity might be given effect.

## V. Conclusion

Recent history suggests that international human rights treaty bodies and their constituents can play a significant role in promoting initiatives to ensure accountability at the domestic level for past human rights violations. Moreover, this dynamic, together with the establishment of the International Criminal Court, may provide an effective two-tiered approach in using international law to fight impunity***475** for future crimes. Through the advisory and contentious jurisdictions of the Inter-American Commission and Court and the possibility of intervention by the International Criminal Court, efforts to investigate and prosecute serious crimes under international law will be pressed and reinforced at the domestic level. Where the willingness or capacity on the part of a state to assume this responsibility does not materialize, however, effective recourse will now potentially be available at the international level through the International Criminal Court mechanism.

These developments did not simply materialize, however, but have resulted from a

long struggle by individuals and groups committed to ensuring true accountability for atrocities committed throughout the Americas. As Victor Abramovich, Executive Director of Argentina's Center for Legal and Social Studies and Member-elect of the Inter-American Commission, recently observed of current efforts to prosecute past crimes in the region, "[w]hat's happening now is not a coincidence, or like some kind of flower that has blossomed overnight. It's a regional process that has taken years to mature." [FN195] As initiatives to achieve accountability continue to unfold in the Western Hemisphere, perhaps the dynamic that has been witnessed between international human rights supervisory bodies and various branches of governments will serve as an inspiration for other regions that face histories of unanswered atrocities.

[FNa1]. The author of this paper, Mr. Brian Tittemore, is a staff member in the General Secretariat of the Organization of American States' Secretariat for the Inter-American Commission on Human Rights. The opinions expressed in this paper are the sole responsibility of the author in the author's personal capacity and are neither to be interpreted as official positions of, nor can they be attributed to, the Inter-American Commission on Human Rights, the General Secretariat of the Organization of American States, or the Organization of American States.

[FN1]. See, e.g., Statute of the Special Court for Sierra Leone, Jan. 16, **2002**, available at http://www.sc-sl.org/scsl-statute.html (establishing a Special Court to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since November 1996, and composed of judges appointed by both the Government of Sierra Leone and the Secretary General of the United Nations).

[FN2]. For the purposes of this discussion, the term "serious crimes under international law" is used to encompass violations of international humanitarian law that are crimes under international law, including grave breaches of the 1949 Geneva Conventions, genocide and crimes against humanity, as well as other violations of internationally protected human rights that constitute crimes under international law and/or that international law requires states to penalize, for example forced disappearances, torture, extrajudicial executions and slavery. See U.N. Econ. & Soc. Council [ECOSO], Commission on Human Rights, Promotion and Protection of Human Rights, P 13, U.N. Doc. E/CN.4/**2005**/102/Add.1 (Feb. 8, **2005**) (prepared by Diane Orentlicher) (hereinafter "Updated Set of Principles on Impunity"). See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15- July 17, 1998, Rome Statute of the International Criminal Court, art. 5, UN Doc. A/CONF.183/9 (July 17, 1998) corrected by the procés-verbaux of November 10, 1998, July 12, 1999, November 30, 1999, May 8, **2000**, January 17, **2001**, and January 16, **2002**, entered into force July 1, **2002** (defining the "most serious crimes of concern to the international community as a whole" within the jurisdiction ratione materiae of the Court to include the crime of genocide, crimes against humanity, war crimes, and the crime of aggression [hereinafter "Rome Statute" ]); **2001** Barrios Altos Case (Chumbipuma Aguierre v. Peru), **2001** Inter-Am. Ct. H.R. (ser. C) No. 75, P 41 (Mar. 14, **2001**) (including among the human rights violations for which responsibility cannot be eliminated through amnesties and similar measures, "serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law").

[FN3]. Theodor Meron, War Crimes Law Comes of Age 297 (1998).

[FN4]. In this context, the Inter-American Court has defined "impunity" as the "total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention." See Paniagua Morales et al. Case (Case of the "Panel Blanca" v. Guatemala), 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, P 173 (Mar. 8, 1998).

[FN5]. For a discussion of the historical evolution of the inter-American system, see Thomas Buergenthal & Dinah Shelton, Protecting Human Rights in the Americas: Cases and Materials 37-44 (4th ed. 1995) (hereinafter "Buergenthal & Shelton"). See also Thomas Buergenthal, The Inter-American System for the Protection of Human Rights, in 2 Human Rights in International Law: Legal and Policy Issues 439 (Theodor Meron, ed., 1984); Tom Farer, The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox, in The Inter-American System of Human Rights 31 (D. Harris and S. Livingstone, eds., 1998).

[FN6]. Charter of the Organization of American States, art. 1, Apr. 30, 1948, 2 U.S.T. 2394 [hereinafter "OAS Charter" ], reprinted in Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System at 233, OEA/Ser.L/V/I.4 rev.9 (May 31, **2004**) (hereinafter "Basic Documents") (stipulating that the OAS is a "regional agency" within the United Nations); U.N. Charter, art. 52, providing that: (1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations (2) The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council (3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council (4) This Article in no way impairs the application of Articles 34 and 35.

[FN7]. The thirty-five member states of the organization include: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, Suriname, Trinidad & Tobago, United States, Uruguay, and Venezuela. Of these, thirty-four are active members; the government of Cuba has been suspended as a member since 1962. See OAS Charter, supra note 6; Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, 21 U.S.T. 607 (entered into force Feb. 27, 1970) [hereinafter "Protocol of Amendment to OAS Charter" ].

[FN8]. See Buergenthal & Shelton, supra note 5, at 38. See also Basic Documents, supra note 6, at 5-7 (citing resolutions adopted by the Eighth International Conference of American States in Lima, Peru in 1938, including the resolution on "Freedom of Association

and Freedom of Expression for Workers" and the "Lima Declaration in Favor of Women's Rights").

[FN9]. See American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, reprinted in Basic Documents, supra note 6, at 19-27 (hereinafter the "American Declaration").

[FN10]. See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, at 9-12 (July 14, 1989) reprinted in 29 I.L.M. 378, 387 (1990); Roach & Pinkerton v. United States, Case 9647, Inter-Am. C.H.R., Res. No. 3/87, OEA/ser.L/V./II.71, doc. 9 rev. 1 PP 46-49 (1987) (explaining the obligation of the United States, as an OAS member, regarding the Inter-American Commission on Human Rights); Juan Raul Garza v. United States, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/ser.L/V/II.111 doc. 20 rev. P 60 (**2001**).

[FN11]. See Statute of the Inter-American Commission on Human Rights, OAS G.A. Res. 447, 9th Sess. (1979), reprinted in Basic Documents, supra note 6, at 137-46 (hereinafter the "Commission's Statute"). Article 20 of the Commission's Statute provides:

> In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18: a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man; b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and, c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

[FN12]. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (hereinafter the "American Convention"), reprinted in Basic Documents, supra note 6, at 29-78. As of September **2005**, twenty-four OAS Member States were parties to this convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Id. at 59.

[FN13]. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador"), opened for signature Nov. 17, 1988, O.A.S.T.S. No. 69, (entered into force Nov. 16, 1999), reprinted in Basic Documents, supra note 6, at 79-92. As of September **2005**, thirteen OAS Member States were parties to this Protocol. Id. at 91-92.

[FN14]. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, reprinted in Basic Documents, supra note 6, at 93. As of September **2005**, eight OAS Member States were parties to this Protocol. Id. at 95.

[FN15]. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, OAS/Ser.L/V/I.4 rev.7, reprinted in Basic Documents, supra note 6, at 97. As of September **2005**, sixteen OAS Member States were parties to this Convention. Id. at 104.

[FN16]. Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, O.A.S.T.S. No. 47, OAS/Ser.L/V/I.4 rev.7 reprinted in Basic Documents, supra note 6, at 107 (hereinafter "Forced Disappearance Convention"). As of September **2005**, twelve OAS Member States had ratified this Convention. Id. at 115.

[FN17]. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, General Assembly of the O.A.S., Doc. OEA/Ser.P AG/doc.3115/94 rev.2, reprinted in Basic Documents, supra note 6, at 117 (hereinafter the "Convention of Belém do Pará"). As of September **2005**, thirty-one OAS Member States had ratified this Convention. Id. at 126.

[FN18]. Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Santiago, Chile (Aug. 12-18, 1959), OAS Off. Rec. OEA/Ser.F/II.5 (Doc. 89 Rev. 2) October 1959 at 10-11.

[FN19]. See, e.g., Statute of the Inter-American Commission on Human Rights, IACHR Basic Documents, August 1963, OEA/Ser.L/V/I.4 Rev. (26 August 1963), Article 9 (b), (c) (authorizing the Commission: "(b) to make recommendations to the Governments of the member shares in general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights; (c) To prepare such studies or reports as it considers advisable in the performance of its duties;"), Art. 11(c) (empowering the Commission to "move to the territory of any American state when it so decides by an absolute majority of cotes and with the consent of the government concerned")."

[FN20]. See Resolution XXII of the Second Special Inter-American Conference in 1965, Rio De Janeiro, Nov. 1965, Final Act, OEA/Ser.C/I.13, 33-35. The Commission first amended its Statute to include the possibility of examining individual petitions and making specific recommendations to Member States relative to those petitions during its 13th Period of Sessions in 1966. See Report on the Work Accomplished by the Inter-American Commission of Human Rights During its Thirteenth Period of Sessions, from April 18 to 28, 1966, Inter-Am. C.H.R., OEA/ser. L./V./II.14, doc. 35, at 26-27 (1966).

[FN21]. OAS Charter, supra note 6, at 10.

[FN22]. Commission's Statute, supra note 11, art. 2; Rules of Procedure of the Inter-American Commission on Human Rights, approved Dec. 4-8, **2000** (hereinafter the "Commission's Rules of Procedure"), reprinted in Basic Documents, supra note 6, at 147-79, art. 1 (3).

[FN23]. Commission's Statute, supra note 11, arts. 3, 6.

[FN24]. OAS Charter, supra note 6, arts. 112, 150.

[FN25]. American Declaration, supra note 9.

[FN26]. American Convention, supra note 12.

[FN27]. Commission's Statute, supra note 11, art. 1 (2) ("For the purposes of the present Statute, human rights are understood to be: (a) The rights set forth in the American Convention on Human Rights, in relation to States Parties thereto; [and] (b) The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states").

[FN28]. Commission's Rules of Procedure, supra note 22.

[FN29]. See, e.g., Protocol of San Salvador, supra note 13, art. 19 (6); Inter-American Convention on Forced Disappearance of Persons, supra note 16, art. XIII; Convention of Belém do Pará, supra note 17, art. 12.

[FN30]. See Commission's Statute, supra note 11, arts. 18-20; Commission's Rules of Procedure, supra note 22, arts. 51-55, 69-74.

[FN31]. See Commission's Rules of Procedure, supra note 22, art. 14 (1).

[FN32]. History of the **Inter-AmericanCourt** of **HumanRights**, http://www.corteidh.or.cr/general_ing/history.html (last visited Apr. 11, **2006**).

[FN33]. American Convention, supra note 12, art. 62 (3). See also Statute of the **Inter-AmericanCourt** of **HumanRights**, G.A. Res. 448, art. 2, O.A.S. G.A. 9th Sess. (Oct. 1979), reprinted in Basic Documents, supra note 6, at 181-91. As of September **2005**, twenty-five OAS Member States had ratified the American Convention. See Basic Documents, supra note 6, at 59. For a discussion of the Court's origins, structure and functions, see Thomas Buergenthal, The **Inter-AmericanCourt** of **HumanRights**, 76 Am. J. Int'l. L. 231, 231-35 (1982); Antonio Cançado-Trindade, The Operation of the **Inter-AmericanCourt** of **HumanRights**, in The Inter-American System of Human Rights 133 (D. Harris and S. Livingstone, eds., 1998).

[FN34]. American Convention, supra note 12, arts. 51(1), 61.

[FN35]. American Convention, supra note 12, art. 68(1) ("The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties").

[FN36]. American Convention, supra note 12, art. 64; Commission's Statute, supra note 11, art. 2; Rules of Procedure of the **Inter-AmericanCourt** of **HumanRights**, approved Nov. 16-25, **2000**, arts. 59-64 (hereinafter "Rules of the Inter-American Court"), reprinted in Basic Documents, supra note 6, at 193-220. For an overview of the Court's advisory jurisdiction, see Thomas Buergenthal, The Inter-American System for the Protection of Human Rights, in 2 Human Rights in International Law: Legal and Policy Issues 439, 467-470 (Theodor Meron, ed., 1984).

[FN37]. See, e.g., Baboeram v. Suriname, Human Rights Committee Communication Nos. 146/1983 and 148-154/1983, at P 16, U.N. Human Rights Committee, 24th Sess., U.N. Doc. CCPR/C/24/D/148/1983 (Apr. 4, 1985) (proclaiming a duty on the part of the State to investigate and bring to justice those responsible for executions); Bautista de Arellana v. Colombia, Human Rights Committee Communication No. 563/1993, at P 8.2, U.N. HRC, 55th Sess. U.N. Doc. CCPR/C/55/D/563/1993 (Nov. 13, 1995) (finding that disciplinary and administrative remedies alone were not adequate and effective to address arbitrary executions and disappearances); U.N. Human Rights Committee, General Comment No. 20: Article 7- Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (Forty-fourth session, 1992), in Office of the U.N. High Commissioner for Human Rights, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7, at 153, P 15 (May 12, **2004**) (stating that amnesties for acts of torture are generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future).

[FN38]. See Commission's Statute, supra note 11, art. 18.

[FN39]. See American Convention, supra note 12, arts. 48(1)(f), 49.

[FN40]. Rules of the Inter-American Court, supra note 36, art. 29.

[FN41]. See, e.g., Ellen Lutz, Responses to Amnesties by the Inter-American System for the Protection of Human Rights, in The Inter-American System of Human Rights 345 (D. Harris and S. Livingstone, eds., 1998); Naomi Roht-Arriaza, Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation and Superior Orders, in Impunity and Human Rights in International Law and Practice 57, 60-62 (Naomi Roht-Arriaza ed., 1995) (hereinafter “Impunity and Human Rights”).

[FN42]. American Convention, supra note 12, art. 1(1) provides: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[FN43]. American Convention, supra note 12, art. 2 provides: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[FN44]. American Convention, supra note 12, art. 8 provides: (1)Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature (2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality,

to the following minimum guarantees: a)the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b)prior notification in detail to the accused of the charges against him; c)adequate time and means for the preparation of his defense; d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e)the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f)the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g)the right not to be compelled to be a witness against himself or to plead guilty; and h)the right to appeal the judgment to a higher court. (3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. (4) An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause. (5) Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

[FN45]. American Convention, supra note 12, art. 25 provides: (1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. (2) The States Parties undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b)to develop the possibilities of judicial remedy; and c) to ensure that the competent authorities shall enforce such remedies when granted).

[FN46]. See, e.g., Velásquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), PP 172, 174 (finding that States Party to the Convention have a duty to organize the government apparatus and all other structures through which government authority is exercised so that they are capable of legally ensuring the free and full exercise of human rights); Bamaca Velásquez Case, **2000** Inter-Am. Ct. H.R., (ser. C) No. 70 (Nov. 25, **2000**), P 210.

[FN47]. See Velásquez Rodríguez Case, supra note 46, PP 173-177; Juan Meneses v. Chile, Case 11.228, Inter-Am. C.H.R., Report No. 34/96, OEA/SER.L.V.II.95 doc. 7 rev. PP 67-69 (1997) (hereinafter “Meneses v. Chile”).

[FN48]. See Velásquez Rodríguez Case, supra note 46, PP 173-177; Meneses v. Chile, supra note 47, PP 72-77; Updated Set of Principles on Impunity, supra note 2, Principle 19; U.N. Commission on Human Rights Resolution **2005**/35, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, U.N. Doc. E/CN.4/RES/**2005**/35, Principle 4 (**2005**) (hereinafter “Basic Principles on the Right to a Remedy and Reparation”).

[FN49]. See Inter-American Commission on Human Rights, OAS, Report on the Demobilization Process in Colombia, OEA/Ser.L/V/II.120 doc. 60 P 20 (Dec. 13, **2004**).

[FN50]. See, e.g., id. P 21; 19 Merchants Case, **2004** Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, **2004**), P 140; Bamaca Velásquez Case, supra note 46, P 174.

[FN51]. See, e.g., Hector Marcial Garay Hermosilla et al. v. Chile, Case 10.843, Inter-Am. C.H.R. Report 36/96, OEA/Ser.L/V/II.95 Doc. 7 rev. P 75 (1997) (finding in respect of Chile's National Truth and Reconciliation Commission that it "was not a judicial body and its work was limited to establishing the identity of the victims whose right to life had been violated. Under the terms of its mandate, the Commission was not empowered to publish the names of those who had committed the crimes, nor to impose any type of sanction on them. For this reason, despite its important role in establishing the facts and granting compensation, the Truth Commission cannot be regarded as an adequate substitute for the judicial process"); Monsignor Oscar Arnulfo Romero and Galdámez v. El Salvador, Case 11.481, Inter-Am. C.H.R., Report 37/00, OEA/Ser.L/V/II.106 doc. 3 rev. P 150 (**2000**) (stating that "[I]t is clear that truth commissions do not take the place of the non-delegable obligation of the State to investigate the violations committed subject to its jurisdiction, to identify the persons responsible, to impose sanctions on them, and to ensure adequate reparation for the victim, all within the imperative need to combat impunity. In the case of El Salvador, the Truth Commission expressly established that its work was not judicial in character, as judicial proceedings were reserved for the Salvadoran courts. Consequently, the Truth Commission lacked jurisdiction to impose sanctions or order the payment of compensation in relation to the facts investigated and established in its Report ") (footnotes omitted).

[FN52]. Loayza Tamayo Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, PP 168, 170 (Nov. 27, 1998).

[FN53]. Paniagua Morales et al. Case, 1998 Inter-Am. Ct. H.R. (ser C) No. 37, P 173 (Mar. 8, 1998).

[FN54]. Inter-American Commission of Human Rights, OAS, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II/102 doc. 9 rev. 1 PP 3-4 (1999).

[FN55]. See id. at chp. V, PP 17, 27-32.

[FN56]. Id. P 20.

[FN57]. Inter-American Commission of Human Rights, OAS, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 doc. 5 rev. 1 corr. PP 230-232 (Oct. 22, **2002**) citing, inter alia, Inter-Am. Commission on Hum. Rts., OAS, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.34 (Oct. 25, 1974); Inter-Am. Commission on Hum. Rts., OAS, Report on the Situation of Human Rights in Uruguay, OEA/Ser.L/V/II.43 (Jan. 31, 1978); Inter-Am. Commission on Hum. Rts., OAS, Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.61 (Oct. 5, 1983). See also Castillo Petruzzi et al. Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52 at 196-97 (May 30, 1999); Updated Set of Principles on Impunity, supra note 2, Principle 29.

[FN58]. See Lucio Parada Cea et al. v, El Salvador, Case 10.480, Inter-Am. C.H.R., Report No. 1/99, OEA/Ser.L/V/II.102 doc. 6 rev. P 151 (1999) (indicating that "the 'right to the truth' is a collective right which allows a society to gain access to information essential to

the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation ....").

[FN59]. Inter-Am. Commission on Hum. Rts., OAS, Annual Report 1985-1986, Chapter 5-Areas in Which Steps Need to Be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, OEA/Ser.L/V/II.68 doc. 8 rev. 1 at pp. 192-93 (1986).

[FN60]. Myrna Mack Chang Case, **2003** Inter-Am. Ct. H.R. (ser. C) No. 101, P 273 (Nov. 25, **2003**).

[FN61]. See, e.g., Bámaca Velásquez Case, supra note 46, P 201; Quinteros v. Uruguay, Human Rights Committee Communication No. 107/1981, at P 16, U.N. Hum. Rts. Comm., 19th Sess., U.N. Doc. CCPR/C/19/D/107/1981 (July 21, 1983).

[FN62]. See, e.g., Myrna Mack Chang Case, supra note 60, P 236; Suarez Rosero Case, 1999 Inter-Am. Ct. H.R., (ser. C) No. 41, at 63 (Jan. 20, 1999); Basic Principles on the Right to a Remedy and Reparation, supra note 48, Principle 19.

[FN63]. See, e.g., Myrna Mack Chang Case, supra note 60, PP 260-67; Suarez Rosero Case, supra note 62, at P 41. Basic Principles on the Right to a Remedy and Reparation, supra note 48, at Principles 15-23 (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition); Updated Set of Principles on Impunity, supra note 2, at Principles 31-38.

[FN64]. Velásquez Rodríguez Case (Compensatory Damages Judgment), 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, P 25 (July 21, 1989); Aloeboetoe et al. Case (**Reparations** Judgment), 1989 Inter-Am. Ct. H.R. (ser. C) No. 15, P 43 (Sept. 10, 1989); Blake Case (**Reparations** Judgment), 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, P 33 (Jan. 22, 1999).

[FN65]. See, e.g., Suárez Rosero Case, 1997 Inter-Am. Ct. H.R., (ser. C) No. 35, P 106 (Nov. 12, 1997); Castillo Petruzzi et al. Case, supra note 57, P 222.

[FN66]. See, e.g., Trujillo Oroza Case, **2002** Inter-Am. Ct. H.R. (ser. C) No. 92, PP 114-117, 141 (Feb. 27, **2002**).

[FN67]. In addition to amnesties, pardons and statutes of limitations, a variety of other measures have been viewed as potentially contributing to impunity by potentially eliminating responsibility for serious crimes under international law, and therefore necessitating prohibitions or restrictions on their use. These measures include the granting of the right of asylum, extradition and the non bis in idem principle, justifications relating to due obedience, superior responsibility, and official status, the effects of legislation on disclosure or repentance, the use of jurisdiction of military courts, and the principles of the irremovability of judges. See Updated Set of Principles on Impunity, supra note 2, at Principles 22-30.

[FN68]. Alicia Consuelo Herrera et al. v. Argentina, Case 10.147, Inter-Am. C.H.R. Report 28/92, OEA/Ser.L/V/II.83 doc. 14 corr. 1 P 32 (1992-93).

[FN69]. See Mendoza v. Uruguay, Case 10.029, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L./V/II.83, doc. 14, corr. 1 P 51 (1992-93).

[FN70]. See Masacre Las Hojas v. El Salvador, Case 10.287, Inter-Am. C.H.R., Report No. 26/92, OEA/Ser.L./V/II.83, doc. 14, corr. 1 (1992-93); Inter-Am. Commission on Hum. Rts., OAS, Report on the Situation of Human Rights in El Salvador, OEA/Ser.L/II.85, doc. 28 rev. at 69-79 (1994).

[FN71]. See, e.g., Garay Hermosilla et al. v. Chile, supra note 51, P 78.

[FN72]. Inter-Am. Commission on Hum. Rts., OAS, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106 doc. 59 rev. PP 215-230 (**2000**).

[FN73]. See, e.g., Parala Cea v. El Salvador, Case 10.480, Inter-Am. C.H.R., Report No. 1/99, OEA/Ser.L./V/II.106, doc. 6 rev. PP 105-58 (1999).

[FN74]. See, e.g., Garay Hermosilla et al. v. Chile, supra note 51, PP 77-78.

[FN75]. Inter-Am. Commission on Hum. Rts., OAS, Report on the Demobilization Process in Colombia, supra note 49, P 26.

[FN76]. Barrios Altos Case, supra note 2. The Barrios Altos case involved the killing and maiming by members of the Peruvian military of 19 civilians in a building in the neighborhood of Lima known as Barrios Altos on November 3, 1991. Id. P 2(a)-(d).

[FN77]. Id. at 82.

[FN78]. Id. P 2(j).

[FN79]. Id. P 2(m).

[FN80]. Id. P 41. See also Myrna Mack Chang Case, supra note, P 276.

[FN81]. Barrios Altos Case, **2002** Inter-Am. Ct. H.R. (ser. C) No. 83, P 18 (Sept. 3, **2001**) (Interpretation of the Judgment on the Merits).

[FN82]. Case of Moiwana Village v. Suriname, **2005** Inter-Am. Ct. H.R. (ser. C) No. 124, P 167 (June 15, **2005**).

[FN83]. Id. P 207; see also Parala Cea v. El Salvador, supra note 3, P 160 (including the Commission's recommendation to "[g]uarantee the petitioners the exercise of the rights guaranteed by the Convention to all citizens, despite what is provided for in the General Amnesty Law for the Consolidation of Peace (decree N$^{o}$ 486). To that end, if need be, it should annul that law ex-tunc." [emphasis added]).

[FN84]. While courts in Member States with common law legal systems have also relied upon the doctrine and jurisprudence of the Inter-American Court and Commission, they have generally used these and other international authorities in order to inform the interpretation of existing rights under the national constitutions. See Reyes v. The Queen

[**2002**] UKPC 11, P 40-43, [**2002**] 2 A.C. 235, 278-280 (appeal taken from Belize) (relying upon the instruments and jurisprudence of the inter-American human rights system to find that the mandatory application of the death penalty in Belize constituted inhuman or degrading punishment or other treatment incompatible with section seven of the Constitution of Belize).

[FN85]. Corte Suprema de Justicia [CSJN], 14/6/**2005**, "Case of Julio Hector Simon / recurso de hecho," No. 17.768 (Arg.), available at http://www.csjn.gov.ar/documentos/cfal2/cons_fallos.jsp (enter "Julio Hector Simon" in the "Partes" box, click "Buscar," and then follow the "VER" hyperlink corresponding to the June 14, **2005** search result (in Spanish) (hereinafter the "Simon Case").

[FN86]. Law No. 23.492 (Dec. 24, 1986), [1986-B] E.D.L.A. 1100-01, translated in 8 Hum. Rts. L.J. 476 (1987).

[FN87]. Law No. 23.521 (June 8, 1987), [1987-A] E.D.L.A. 260-61, translated in 8 Hum. Rts. L.J. 477 (1987).

[FN88]. Simon Case, supra note 85.

[FN89]. Supra note 86, Art. 1

[FN90]. Subsequently, in 1989, then-President Carlos Menem pardoned top commanders who had not been covered by the Due Obedience law. See Human Rights Watch, World Report 1989: Argentina (1989), available at http://www.hrw.org/reports/1989/WR89/Argentin.htm.

[FN91]. For further discussion of amnesty laws in Argentina, see Jaime Malamun-Goti, Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina, in Impunity ahd Human Rights, supra note 41, at 160-170.

[FN92]. Simon Case, supra note 85, at 83 (citing the "Camps Case"). See also Jaime Malamun-Goti, supra note 91, at 162.

[FN93]. See Herrera v. Argentina, Case 10.147, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.L./V/II.83, doc. 14, corr. 1 (1992-93).

[FN94]. See id.

[FN95]. Simon Case, supra note 855, PP 1-4 (The Julio Hector Simon Case involved the kidnapping, torture and disappearance of several members of a group known as "Christians for Liberation" by Mr. Hector Simon and other Argentine military officials in November 1978. When measures were taken to arrest, detain and prosecute the officials, the Full Stop and Due Obedience laws were raised by the defendants to challenge the proceedings).

[FN96]. See id.

[FN97]. Id.

[FN98]. Id. PP 16, 17.

[FN99]. Id. PP 16, 17.

[FN100]. Id.

[FN101]. Simon Case, supra note 855, P 18 (The Julio Hector Simon Case involved the kidnapping, torture and disappearance of several members of a group known as “Christians for Liberation” by Mr. Hector Simon and other Argentine military officials in November 1978. When measures were taken to arrest, detain and prosecute the officials, the Full Stop and Due Obedience laws were raised by the defendants to challenge the proceedings).

[FN102]. Id. P 20.

[FN103]. Id. P 21.

[FN104]. Id. P 23.

[FN105]. Id. P 23.

[FN106]. Id. P 27, citing concurring opinion of Judge Garcia Ramirez.

[FN107]. Simon Case, supra note 855, P 24 (The Julio Hector Simon Case involved the kidnapping, torture and disappearance of several members of a group known as “Christians for Liberation” by Mr. Hector Simon and other Argentine military officials in November 1978. When measures were taken to arrest, detain and prosecute the officials, the Full Stop and Due Obedience laws were raised by the defendants to challenge the proceedings).

[FN108]. Id. P 25.

[FN109]. Id.

[FN110]. Id. P 31 (translation by author).

[FN111]. Id. P 30, citing Ruling: 326:2805 (“Videla, Jorge Rafael”), Ruling 326:4797 (“Astiz, Alfredo Ignacio”), Proceeding A.533.XXXVIII “Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociacion ilicita y otros, causa no. 259” .

[FN112]. Corte Suprema de Justicia [CSJN], 24/8/**2004**, “Case of Enrique Lautaro Arancibia Clavel / recurso de hecho,” No. 259 (Arg.), available at http://www.csjn.gov.ar/documentos/cfal2/cons_fallos.jsp (enter “Enrique Lautaro Arancibia Clavel” in the “Partes” box, click “Buscar,” and then follow the “VER” hyperlink corresponding to the Aug. 24, **2004** search result (in Spanish).

[FN113]. Id.

[FN114]. Id. P 3. This case involved the prosecution in Argentina of an individual alleged to have been involved with the DINA between 1974 and 1978 that committed atrocities against political opponents of the Pinochet regime who were living in exile in Argentina.

[FN115]. Id. PP 33-34.

[FN116]. Velásquez Rodríguez Case, supra note 6.

[FN117]. Barrios Altos Case, supra note 2.

[FN118]. Arancibia Clavel Case (Judgment), supra note 112, P 35.

[FN119]. Id. P 36.

[FN120]. Id. P 36, citing Barrios Altos Case, supra note 2, P 41; Trujilo Oroza v. Bolivia (**Reparations**), **2001** Inter-Am. Ct. H.R. (ser. C) No. 92, P 106 (Feb. 27, **2001**).

[FN121]. Velásquez Rodríguez Case, supra note 46, PP 155-157.

[FN122]. Miguel Angel Sandoval Rodriguez Case, Supreme Court of Chile, Nov. 17, **2004** (hereinafter "Sandoval Rodriguez Case") available at http:// www.derechos.org/nizkor/chile/doc/krassnoff.html.

[FN123]. See id.

[FN124]. Inter-American Convention on Forced Disappearance of Persons, supra note 16, at 101.

[FN125]. Sandoval Rodriguez Case, supra note 122, PP 37-39.

[FN126]. Barrios Altos Case, supra note 2.

[FN127]. See Resolution dated June 16, 1995, Judge Antonia Saquieuray Sanchez (hereinafter "Saquieuray Sanchez Resolution"). See also Juan Zegarra, "Jueza declara inapplicable la ley de amnistía", Diario La Republica, Peru, June 20, 1995

[FN128]. Saquieuray Sanchez Resolution, supra note 1277, at 3 (translation by author).

[FN129]. Barrios Altos Case, supra note 2, P 2(m); Inter-Am. Commission on Hum. Rts., Annual Report 1996, OEA/Ser.L/V/II.95 doc. 7 rev., Chapter V (Peru) (Mar. 14, 1997), availableat http:// www.derechos.org/nizkor/chile/doc/krasswww.oas.org/main/main.asp?sLang=E&sLink=http:www.derechos.org/nizkor/chile/doc/krass// www.oas.org/OASpage/humanrights.htm (last visited Apr. 11, **2006**).

[FN130]. Truth and Reconciliation Commission of Peru, Final Report P 129, n.16 (Aug. 28, **2003**), available at http:// www.cverdad.org.pe/ingles/ifinal/conclusiones.php (last visited Apr. 11, **2006**).

[FN131]. Marcelino Tineo Silva and more than 5,000 citizens, Exp. No. 010-**2002**-AI/TCLIMA (Supreme Court of Peru), January 3, **2003**, available at http:// www.derechos/org/nizkor/peru/doc/sentc03ene03.html (last visited Apr. 11, **2006**).

[FN132]. Id. PP 104-09.

[FN133]. Castillo Petruzzi et al. Case, supra note 57.

[FN134]. Report on Terrorism and Human Rights, supra note 57.

[FN135]. Marcelino Tineo Silvia and more than 5,000 citizens, supra note 131, PP 98-102.

[FN136]. See, e.g., Third Report on the Situation of Human Rights in Colombia, supra note 55, chp. V, PP 17, 27-32; Carlos Molero Coca et al. v. Peru, Case 11.182, Inter-Am C.H.R., Report N° 49/00, OEA/Ser.L/V/II.106 doc. 6 rev. PP 114-128 (1999).

[FN137]. Case No. C-358/97, Judgment (Corte Constitucional de Colombia, Aug. 5, 1997) available at http://www.ramajudicial.gov.co (follow "Jurisprudencia" hyperlink on the left hand column, then follow "Relatoría Corte Constitucional" hyperlink. Then in the box next to "Texto Completo," enter "Sentencia C-358," select 1997 in the pull down menu, and then click "Buscar." Follow the link titled, "c-358-97.rtf" in the search result) (last visited Apr. 11, **2006**).

[FN138]. Id. at 10(a) (translation by author).

[FN139]. Caso de la massacre de Riofrío, Judgment of March 6, **2003** (Supreme Court of Colombia), available at http:// www.derechos.org/nizkor/colombia/doc/riofrio.html (last visited Apr. 11, **2006**).

[FN140]. Id. P 19 and resolution.

[FN141]. Judgment T-558/03, La Sala Novena de Revisión de la Corte Constitucional de Colombia (July 10, **2003**), available at http:// www.ramajudicial.gov.co (follow "Jurisprudencia" hyperlink on the left hand column; then follow "Relatoría Corte Constitucional" hyperlink. In the box next to "Texto Completo," enter "Sentencia T-558," select **2003** in the pull down menu, and then click "Buscar." Follow the link titled, "t-558-03.rtf" in the search result) (last visited Apr. 11, **2006**).

[FN142]. Commission's Rules of Procedure, supra note 22. Article 25 provides: (1) In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons. (2) If the Commission is not in session, the President, or, in his or her absence, one of the Vice-Presidents, shall consult with the other members, through the Executive Secretariat, on the application of the provision in the previous paragraph. If it is not possible to consult within a reasonable period of time under the circumstances, the President or, where appropriate, one of the Vice-President shall take the decision on behalf of the Commission and shall so inform its members. (3) The Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures. (4) The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.

[FN143]. Judgment T-558/03, supra note 1411, Part VI, p. 46.

[FN144]. Ley 975 del 25 de Julio de **2005** "Justicia y Paz," available at http://www.precidencia.gov.co/leyes/index.htm.

[FN145]. See, e.g., id., arts. 3, 17, 30 (applying an alternative sentence of between 5 and 8 years of incarceration to members of demobilized paramilitary groups who provide a "versión libre," or "voluntary statement," of their participation in crimes committed while they belonged to the armed group).

[FN146]. See Press Release, Inter-Am. C.H.R., IACHR Issues Statement Regarding the Adoption of the "Law of Justice and Peace" in Colombia, Press Release No. 26/05 (July 15, **2005**), http:// www.cidh.org/Comunicados/English/**2005**/26.05eng.htm.

[FN147]. For a discussion of the Commission's work on Argentina during this time period, see Farer, supra note 5, at 57-59.

[FN148]. See Inter-Am. Commission on Hum. Rts., OAS, Report on the Situation of Human Rights in Argentina, OEA/Ser. L/V/II.49 doc. 19 corr. 1 Parts A(3), B. (April 11, 1980), available at http:// www.cidh.oas.org/countryrep/Argentina80eng/toc.htm (follow "Introduction" hyperlink; then follow "Background" hyperlink).

[FN149]. Id.

[FN150]. Id. at chp. III(A).

[FN151]. Statement of Tom Farer, Chairman of the IACHR, OAS G.A., 10th sess., Records and Documents, OEA/Ser.P/X.O.2 (13 November 1981), Vol. II, Part II, pp. 79-84.

[FN152]. Emilio Fermin Mignone, Cynthia L. Estlund & Samuel Issacharoff, Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina, 10 Yale J. Int'l L., 118, 120- 121 (1984).

[FN153]. See Inter-Am. Commission on Hum. Rts., OAS, Report on The Situation Of Human Rights in Nicaragua, OEA/Ser. L/V/II.118 doc. 16 rev. 1 (Nov. 17, 1978) (finding the Nicaraguan Government responsible for, inter alia, serious attempts against the right to life and the death and serious abuse, arbitrary detention and other violations of the human rights of peasant groups); Resolution of the XVII Meeting of Consultation, Seventeenth Meeting of Consultation of Ministers of Foreign Affairs, Washington D.C., September 21, 1978, "Resolution", OEA/Ser.F/II.17, Doc. 40/79 rev. 2, June 23, 1979 (recognizing the "inhumane conduct" of the dictatorial regime in Nicaragua as evidenced by the Commission's country report and declaring that the solution to the problem should be arrived at on the basis of, inter alia, "the immediate and definitive replacement of the Somoza regime"); Harris & Livingstone, supra note 5, at 56 (indicating that before his death, Anatasio Somoza cited the Commission report as one of the decisive forces that drove him to resign).

[FN154]. See Simon Case, supra note 85, at 118.

[FN155]. Juan Angel Greco v. Argentina, Case No. 11.804, Inter-Am. C.H.R. Report 91/03,

OEA/Ser.L/V/II.118 doc. 70 rev. 2 (**2003**).

[FN156]. Emilio Tech Pop v. Guatemala (Settlement Report), Case No. 11.312, Inter-Am. C.H.R., Report No. 66/03, OEA/Ser.L/V/II.118 doc. 70 rev. 2 (**2003**); Irma Flaquer v. Guatemala (Settlement Report), Case No. 11.766, Inter-Am. C.H.R., Report No. 67/03, OEA/Ser.L/V/II.118 doc. 70 rev. 2 (**2003**); Community of San Vicente Los Cimientos v. Guatemala, Case No. 11.197, Inter-Am C.H.R., Report No. 68/03, OEA/Ser.L/V/II.118 doc. 70 rev. 2 (**2003**).

[FN157]. Jorge Alberto Rosal Paz v. Guatemala (Settlement Report), Case No. 9168, Inter-Am. C.H.R., Report No. 29/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1 (**2005**).

[FN158]. Bulacio v. Argentina Case, **2003** Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, **2003**).

[FN159]. Myrna Mack Chang Case, supra note 60.

[FN160]. Carpio Nicolle et at. v. Guatemala Case, **2004** Inter-Am. Ct. H.R. (ser. C) No. 117 (Nov. 22, **2004**).

[FN161]. Plan de Sanchez vs. Guatemala Case, **2004** Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, **2004**).

[FN162]. Molina Theissen v. Guatemala Case, **2004** Inter-Am. H.R. (ser. C) No. 106 (May 4, **2004**).

[FN163]. See Press Release, Inter-Am. C.H.R., IACHR Expresses Satisfaction at the Argentine State's Acknowledgment of Liability in the AMIA Case, Press Release No. 5/05 (Mar. 6, **2005**), http:// www.cidh.oas.org/Comunicados/English/**2005**/5.05eng.htm.

[FN164]. See Press Release, Inter-Am. C.H.R, Press Release No 19/01 (Aug. 6, **2001**), http://cidh.oas.org/Comunicados/English/**2001**/Press19-01.htm

[FN165]. See Larry Rohter, 5 Acquitted in '94 Bombing of a Jewish Center in Argentina, N.Y. Times, Sept. 3, **2004**, at A7.

[FN166]. See e.g., Jose Miguel Vivanco & Lisa L. Bhansali, Procedural Shortcomings in the Defense of Human Rights: An Inequality of Arms, in The Inter-American System of Human Rights 421, 432- 435 (D. Harris and S. Livingstone, eds., 1998).

[FN167]. Larry Rohter, After Decades, Nations Focus on Rights Abuses, N.Y. Times, Sept. 1, **2005**, at A4 (Regarding the rise in initiative by Latin American governments to prosecute past human rights abuses, "One factor is clearly generational. Men and women who came of age politically during the height of the abuses in the 1970's are now becoming presidents, judges, cabinet ministers and senators ...").

[FN168]. Inter-Am. Commission on Hum. Rts, OAS, Report on the Situation of Human Rights in Peru, OEA/Ser. L/V/II.83 doc. 31 (Mar. 12, 1993) available at http://cidh.as.org/countryrep/Peru93eng/toc.htm; Second Report on the Situation of

Human Rights in Peru, supra note 72.

[FN169]. See, e.g., Report on the Situation of Human Rights in Peru, supra note 168, at Annex II.

[FN170]. See, e.g., Inter-Am. Commission on Hum. Rts, OAS, Annual Report 1996, OEA/Ser.L/V/II.95 doc. 7, rev., chp. IV (1997).

[FN171]. See, e.g., Chumbivilacas v. Peru, Case 10.559, 1996 Inter-Am. C.H.R., Report No. 1/96, 136 (1996); Fernando Mejia Egocheaga v. Peru, Case 10.970, 1996 Inter-Am. C.H.R., Report No. 5/96, 157 (1996).

[FN172]. For example, in 1995 the Commission referred two cases against Peru to the Inter-American Court: Case 11.154 involving violations of the right to humane treatment and due process suffered by Maria Elena Loayza Tamayo in her trial on charges of terrorism; and Case 10.773 concerning the forced disappearance of Ernesto Rafael Castillo Páez.

[FN173]. Castillo Petruzzi et al. Case, 1999 Inter-Am. Ct. H.R. (ser.C) No. 52, at 209 (May 30, 1999).

[FN174]. See Report on the Situation of Human Rights in Peru, supra note 168; Second Report on the Situation of Human Rights in Peru, supra note 72, P 21.

[FN175]. See Constitutional Court Case (Judgment on Competence), 1999 Inter-Am. Ct. H.R. (ser. C) No. 55 at 51 (Sept. 24, 1999); Ivcher Bronstein Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 54, at 35 (Sept. 24, 1999).

[FN176]. Second Report on the Situation of Human Rights in Peru, supra note 72, P 21.

[FN177]. Second Report on the Situation of Human Rights in Peru, supra note 72, P 70. OAS General Assembly Resolution 1080, adopted in 1991, calls for an automatic and immediate convocation of the OAS Permanent Council “in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government of any of the Organization's member states.” OAS General Assembly Resolution on Representative Democracy, OAS AG/RES. 1080 (XXI-0/91).

[FN178]. Second Report on the Situation of Human Rights in Peru, supra note 72, P 74.

[FN179]. OAS G. A. Resolution AG/RES.1753, Mission of the Chair of the General Assembly and the OAS Secretary General to Peru, OAS Doc. OEA/Ser.P/AG/RES.1753 (XXX-O/00) (June 5, **2000**).

[FN180]. Truth and Reconciliation Commission of Peru, Final Report, supra note 130.

[FN181]. See Barrios Altos Case, supra note 2, P 28.

[FN182]. See id. P 31.

[FN183]. See id. P 41.

[FN184]. See, e.g., Joint Press Release, Inter-Am. C.H.R., (Feb. 22, **2001**), available at http://www.cidh.org/Comunicados/English/**2001**/Peru.htm; Pablo Ignacio Livia Robles v. Peru (Settlement Report), Case No. 12.035, Inter-Am. C.H.R., Report 75/02, OEA/Ser.L/V/II.117 doc. 1 rev. 1 (**2003**); Augusto Alejandro Zúñiga Paz v. Peru (Settlement Report), Case No. 11.149, Inter-Am. C.H.R., Report 70/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (**2003**).

[FN185]. See, e.g., Rome Statute, supra note 2, art. 7 (defining "crimes against humanity" as including murder, torture, rape and enforced disappearance of persons, among other crimes); American Convention, supra note 12, art. 4 (prohibiting the arbitrary deprivation of life), art. 5 (prohibiting torture and other cruel, inhuman or degrading punishment or treatment); Forced Disappearance Convention, supra note 16.

[FN186]. See, e.g., Rome Statute, supra note 2, art. 17(1)(a) (requiring the Court to determine that a case is inadmissible where "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."); American Convention, supra note 12, art. 46(1)(a) (providing that the admission by the Commission of a petition or communication shall require that" the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law").

[FN187]. See, e.g., Rome Statute, supra note 2, Preamble ("[e]mphasizing that the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions"); American Convention, supra note 12, Preamble ("[r]ecognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states") (emphasis added).

[FN188]. See Godinez Cruz Case, 1989 Inter-Am. Ct. H.R., (ser. C) No. 5, P140 (Jan. 20, 1989) (indicating that "[t]he international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the states responsible"); see also Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report 55/97, OEA/Ser.L/V/II.98 doc. 6 rev. PP 197-198 (1998).

[FN189]. See, e.g., Rules of Procedure of the International Criminal Court, Official Journal of the ICC, No. ICC-ASP/1/3 (Articles 63-131), entered into force September 9, **2002**, available at http:// www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf (setting out extensive rules of evidence and procedure for the operation of the Court); Velasquez Rodriquez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, P 127 (July 29, 1988) (observing that neither the American Convention, the Statute of the Court nor its Rules of Procedure speak to the issue of the standards of proof, but that "[n]evertheless,

international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment" [citations]).

[FN190]. Supra note 188, Godinex Cruz Case, 1989 Inter-Amer. Ct. H.R., (ser. C) No. 5, P 140 (Jan. 20, 1989).

[FN191]. For a list of the State Parties to the Rome Statute as of Nov. 15, **2005**, see International Criminal Court, Assembly of States Parties to the Rome Statute, http://www.icc-cpi.int/asp/statesparties.html.

[FN192]. Id.

[FN193]. See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, P 163, n.185, 188 (Dec. 10, 1998) (ICTY), citing Fernando and Raquel Mejia v. Peru, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 doc. 7, at 182-88 (1996). The Inter-American Commission has likewise drawn upon the jurisprudence of the ICTY (International Criminal Tribunal for the former Yugoslavia) in appropriate cases. In its decision in the case of Abella v. Argentina, for example, the Inter-American Commission relied upon the finding by the ICTY Appeals Chamber in the Tadic case that violations of Article 3 entail individual criminal responsibility of the perpetrator(s). Juan Carlos Abella v. Argentina, supra note 188, P 189 and n.32 (citing Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, originally published as Annex to the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 S/25704 (1993), reprinted at 32 I.L.M. 1159; Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Judgment, PP 86-95 (July 15, 1999) (ICTY).

[FN194]. The issue of duplication has already arisen between the International Court of Justice (I.C.J.) and the Inter-American Commission on Human Rights (IACHR), where proceedings relating to the same death row inmates in the United States were instituted before both bodies. The case of Avena and other Mexican Nations v. United States before the I.C.J., which addressed the right to consular assistance under the Vienna Convention on Consular Relations for Mexican nationals on death row in the United States, and was the subject of a judgment by the Court on March 31, **2004**, involved two individuals: Cesar Fierro and Roberto Moreno Ramos, whose circumstances were also the subject of petitions lodged with the IACHR. In finding that the petitions lodged by these individuals were admissible, the Commission found that in light of the fact that only states could be parties to proceedings before the I.C.J., and because the I.C.J. proceeding only addressed compliance with the Vienna Convention on Consular Relations and not violations of individual rights under the American Declaration of the Rights and Duties of Man, the rule against duplication did not apply with respect to the I.C.J. proceeding, as it could "not be said that the same parties are involved in the proceedings before the Commission and the I.C.J., or that the proceedings raise the same legal claims and guarantees." See Case Concerning Avena and other Mexican Nationals (Mexico v. United States), **2004** I.C.J. 128 (Mar. 31), available at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm; César Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report 99/03, OEA/Ser.L/V/II.118 doc. 5 rev. 2 PP 49-59 (**2003**), available at http://www.cidh.org/annualrep/2003eng/USA.11331.htm; Roberto Moreno Ramos V. United

States, Case No. 12.430, Inter-Am. C.H.R., Report No. 61/03, OEA/Ser.L/V/II.118 doc. 5 rev. 2 PP 45-55, available at http://www.cidh.org/annualrep/2003eng/USA.4446.02.htm.

[FN195]. Larry Rohter, Letter From the Americas; After Decades, Nations Focus on Rights Abuses, N.Y. Times, Sept. 1, **2005** at A4.

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Article

# *1 INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS BY AMERICAN INDIAN TRIBES

Klint A. Cowan[FNd1]



The American Indian tribes have a unique status in the law of the United States. They are characterized as sovereigns that predate the formation of the republic and possess inherent powers and immunities. Their powers permit them to create and enforce laws and generally to operate as autonomous governmental entities with executive, legislative, and judicial branches. Tribes enjoy immunity from suit and exemption from federal and state constitutional provisions which protect individual rights. These powers and immunities provide a connection between tribal governments and U.S. international human rights obligations. This Article explores that connection. It examines whether the tribes may breach certain international human rights obligations of the United States, whether tribal violations may incur U.S. international responsibility, and if so, what consequences might result. It constructs an argument that the United States has failed to implement fully its international human rights obligations and that it can be held internationally responsible for tribal violations of human rights. This argument leads to policy recommendations for the United States and tribal governments.

## *2 Introduction

Recent work on international human rights and indigenous peoples focuses on the promotion and protection of "self-determination" and on the development of group rights. [FN1] This work builds upon the significant progress indigenous peoples have made toward the development of collective rights under international law. [FN2] International human rights tribunals have decided cases dealing with the rights of indigenous peoples, [FN3] while individual members of indigenous groups have successfully challenged State [FN4] violations of international human rights. [FN5]*3 The study of indigenous peoples and international law has thus been mostly limited to the development and conceptualization of indigenous groups' (or indigenous individuals') rights against the State. [FN6] This narrow approach to the overlap between international human rights law, municipal law, and indigenous rights neglects potential consequences of individual human rights violations by indigenous groups.

The indigenous peoples of the United States, the American Indian tribes, have

legislative authority, executive departments, police, and prisons. They resemble sub-State units of government, and exercise extensive governmental authority. This governmental status raises several questions about the potential for tribal entities to violate individual human rights as protected by international law binding on the United States. Can the tribes exercise their governmental powers in a manner which violates an asserted human right? Has the United States implemented human rights protections against the tribes? Can tribal conduct constitute a breach of international human rights obligations binding on the United States and, if so, what are the consequences? And perhaps most importantly, is tribal conduct attributable to the United States under international law?

This Article explores these questions, with a principle focus on whether the United States itself could incur international responsibility for human rights violations committed by American Indian tribes. The scope of the Article is thus modest. It does not attempt to engage with normative problems as to whether indigenous peoples or other sub-State entities should be bound by international human rights norms. In fact, because human rights are so often individual rights, tribes and other sub-State entities do not need to be bound by international norms for accountability still to attach. Only one entity, the State, as a subject of international law, may be internationally responsible for violations of those individual rights. [FN7] Under the international law of State responsibility, sub-State ***4** entities cannot themselves be responsible for violations of a State's international human rights obligations. [FN8] The obligations which bind the United States extend to every person within U.S. territory or control, regardless of whether such individuals are tribal members, non-tribal members, or foreign nationals. [FN9] If an individual right is violated and the violation is attributable to the United States, then the United States bears international responsibility for it. These are the presumptions underpinning this work: that the United States is bound by certain conventional and customary international human rights norms and that all individuals within U.S. territory or control hold such basic rights. Although this Article uses language such as “tribal violations of human rights,” strictly speaking these statements refer to a tribal act or omission which breaches an individual right that is protected by international law and that binds the United States. A tribe may violate an individual's internationally protected right because the individual is a bearer of such right, not because the international human right law at issue binds the tribe.

The Article is structured as follows. Part I outlines the status of American Indian tribes in U.S. federal law. It explores their status as sovereigns, defines their governmental powers, and identifies the municipal law doctrine of sovereign immunity. This doctrine becomes particularly relevant in later sections which explore the gaps in U.S. implementation of its international human rights obligations. Part II lays out the relevant human rights obligations binding on the United States and then attempts to show that there are substantive and procedural gaps in the implementation of these obligations. However, these gaps are identified in U.S. reservations and declarations to the international community. Because these obligations are neither exempted from coverage under international instruments nor currently enforced under U.S. federal law, the United States may have left itself vulnerable to international enforcement for alleged violations. The last part of Part II examines the possibility of tribal actions violating an individual's international human rights and identifies certain human rights provisions that are particularly susceptible to tribal violation. Part III discusses the potential remedies available for violations of individual rights under municipal law, including both tribal and federal remedies. It demonstrates that most remedies can only be obtained in a tribal forum and addresses the

implications of this ***5** reality. Part IV completes this examination of accountability, by arguing that international law permits actions of the tribes or of tribal officials to be attributed to the United States and identifying several tribunals with authority to hear a human rights claim against the United States. Finally, Part V concludes by suggesting implementation policies that the United States may choose to adopt to avoid being held internationally responsible for a human rights violation by tribes or tribal officials. As a counter-balance, Part V also identifies means available to tribes to forestall unwanted federal action that might infringe upon their political independence and sovereignty.

## I. Status of American Indian Tribes in Municipal Law

### A. Tribes as Political Communities

American Indian tribes, as acknowledged in the U.S. Constitution, [FN10] are distinct, self-governing political communities with their own legal systems separate from federal or state governments. [FN11] The several hundred tribal governments operating in the continental United States vary in size and complexity and assert authority over a broad diversity of polities and territories. [FN12] Certain California rancherias, for instance, comprise only a few families and acres of land, [FN13] whereas the Navajo Nation, one of the largest tribes, operates as a complex political community whose population approximates Iceland's and whose territorial extent rivals that of the Republic of Ireland. [FN14]

***6** Citizens of tribes are typically referred to as “members,” and most tribes have exclusive authority to define their membership or enrollment. [FN15] Membership in a tribal polity is a political, not a racial or ethnic, classification. [FN16] Although the tribes comprise mainly indigenous individuals descended from pre-Columbian inhabitants of North America, tribes are not necessarily ethnically homogenous. They have been voluntarily and forcibly integrated with others, [FN17] and several tribes historically naturalized non-indigenous peoples, such as escaped or freed African slaves. [FN18] In addition to tribal membership, American Indians born in U.S. territory hold both national and state citizenship. [FN19] Certain tribes whose territory has been severed by the U.S.-Mexican or U.S.-Canadian national borders may enroll members from the non-U.S. side of the boundary, making it possible for some tribal members to be foreign nationals but not others.

### B. Tribal Sovereignty

U.S. municipal law conceptualizes tribal governments as one of three “sovereign” institutions, in addition to federal and state governments. This system regards American Indian tribes as pre-existing entities outside the federal framework. [FN20] Yet even the structural interaction of tribes with the United States government has not been simple. In several respects, United States law categorizes tribes as entities analogous to foreign States rather than regional sub-State entities. [FN21] Notably, until 1871 the federal ***7** government dealt with the tribes through treaties which U.S. courts continue to classify as equivalent to international treaties in municipal law. [FN22]

Each tribe's governmental powers vary depending on its unique treaty history and applicable acts of Congress. To encompass this diversity, and to evaluate effectively the tribal-international human rights law nexus, this Article uses a broad concept of tribal

authority. [FN23] Within this broad category, two general types of American Indian tribes must be distinguished: those recognized by the federal government and those without such recognition. Federal recognition weaves tribes into the fabric of U.S. constitutional law by accommodating certain tribal powers and immunities within municipal law. [FN24] Unrecognized tribes may possess rights normally held by political communities (such as treaty-based hunting or fishing rights) against the United States, but municipal law largely regards tribes without federal recognition as private collective associations rather than as governments with legislative or enforcement jurisdiction. [FN25]

In the U.S. Supreme Court's foundational Indian-law trilogy of cases, [FN26]***8** Chief Justice Marshall articulated a view of tribes as distinct independent political communities with exclusive authority in their territories derived from their original tribal sovereignty. Nonetheless, the Court found that the tribes' comparative weakness and dependence upon the United States required divestiture of external sovereignty: specifically, the tribes' rights to establish relations with foreign States [FN27] and to cede lands to any entity other than the federal government. [FN28] Though the Court disagreed with tribal claims to full independence, the tribes retained internal aspects of sovereignty to govern themselves and others within their territory. [FN29] Municipal law today continues to characterize the tribes' powers as derivative of their sovereign status predating formation of the republic. Their legislative and enforcement jurisdiction is inherent; it does not depend upon federal delegation, though the federal government may delegate additional authority to the tribes. [FN30]

Following this deprivation of external sovereignty, Congress and the courts have steadily eroded tribal powers. [FN31] The federal common law doctrine of congressional plenary power over tribes [FN32] permits Congress to eliminate or reduce tribal powers. The doctrine extends to the point of termination of the U.S.-tribal relationship [FN33] (changing a tribe's status from recognized to unrecognized), although certain tribal powers or immunities may survive this termination. [FN34] One might infer that this congressional power over tribal governments makes tribal sovereignty an illusory doctrine in terms of U.S. municipal law. [FN35] While this may be the case, tribal governments do exercise significant governmental powers, and the official ***9** federal government policy of self-determination has aided development of these governmental powers. [FN36] Federal courts also assert authority to divest tribal powers pursuant to a common-law doctrine that the tribes occupy a dependent position in the hierarchy of American sovereigns: federal courts may thus refuse to recognize tribal powers seen as inconsistent with their status as dependents of the federal government. [FN37]

C. Tribal Sovereign Immunity

The vital component of federal Indian law for purposes of this study is the doctrine of tribal sovereign immunity. Because federal common law conceptualizes tribes as a sort of sovereign, its sovereign immunity doctrine extends to them. [FN38] As the Supreme Court said in Santa Clara Pueblo v. Martinez, “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” [FN39] This immunity shields the tribe, tribal agencies, and tribal officials acting in an official capacity against lawsuits challenging public acts (jure imperii) or commercial acts (jure gestionis) in federal, state, or tribal courts. It is the same doctrine that shields foreign States, the federal government, and state governments from suit. In practice, however,

tribal immunity can be more extensive than that accorded to other governments, because statutory and judicial limitations restricting immunity do not generally apply to the tribes. [FN40] For instance, although the federal and state governments statutorily waive immunity against tort claims, enabling individuals injured by governmental officials to seek compensation, many tribes have not done so. [FN41] This immunity will be explored in greater detail ***10** in the sections that follow. [FN42]

D. Tribal Governmental Powers

Tribes retain legislative and enforcement jurisdiction over their internal affairs. This jurisdiction includes the power to define their polity, [FN43] to create their own form of government, [FN44] to exclude individuals from their lands, [FN45] to make and enforce criminal and civil laws, [FN46] to levy taxes, [FN47] to regulate domestic relations, [FN48] and to decide whether to develop natural resources within their territories. [FN49] Tribal law enforcement officers have authority to stop and investigate non-Indians on tribal lands for violations of state or federal law and may detain and transport alleged offenders to the authorities with adjudicative jurisdiction. [FN50] More fundamentally, the tribes organize their own governmental and political institutions. [FN51] Most model their governments on the United States and create formal branches with partial separation of powers. [FN52] Others have retained traditional forms of government and customary legal systems. Certain pueblos in the southwest United States, for example, retain traditional governments based on unwritten customary law, without a formal court structure, [FN53] while the ***11** Navajo Nation operates a sophisticated judiciary and has an exhaustive tribal code, but no written constitution. [FN54]

Whether a tribal court possesses jurisdiction over a matter often depends upon the nature of the claim, the identity of the claimant or defendant, and where the claim arose. Jurisdiction might lie exclusively in tribal court, might be shared with a federal court, or might lie exclusively in a federal court. [FN55] Where concurrent jurisdiction exists, claimants must exhaust tribal remedies before pursuing a claim in the federal system. [FN56] Tribal courts retain inherent criminal jurisdiction over Indians, but their criminal jurisdiction over non-Indians has been judicially restricted. [FN57]

In Talton v. Mayes, [FN58] the Supreme Court found that the Bill of Rights only applies to the federal and state governments. Because tribes were not subordinate to these governments and were not signatories to the federal constitution, individuals claiming substantive or procedural violations of their rights by Indian tribes were left without a federal remedy. Talton, a non-Indian, had been convicted of the murder of a Cherokee in a Cherokee Nation court. He challenged his conviction in federal court alleging violation of his Fifth Amendment due process rights, because the Cherokee grand jury was not a grand jury within the contemplation of the Fifth Amendment. The Supreme Court rejected his argument and stated that the powers of self-government “enjoyed by the Cherokee Nation existed prior to the constitution” and were not bound by constitutional protections of individual rights. Several subsequent cases extended Talton's holding to other provisions of the Bill of Rights and the Fourteenth Amendment. [FN59]***12** Individuals, whether members or non-members of an American Indian tribe, who alleged violation of their rights by tribal governments were thus permitted to seek remedies solely in tribal fora.

In 1968, Congress enacted the Indian Civil Rights Act [FN60] to mitigate the impact of

Talton and its progeny by granting individual rights against tribal governments similar to those guaranteed in the Bill of Rights and Fourteenth Amendment. [FN61] However, the only remedial provision that Congress included in the Act was the "privilege of the writ of habeas corpus" given to any person in a federal court to "test the legality of his detention by order of an Indian tribe." [FN62] The purpose of the Act was to ensure that individuals are protected from arbitrary acts by tribal governments. But the remedies were restricted because the federal government also wanted to foster tribal self-government and preserve cultural identity. [FN63]

The Indian Civil Rights Act as interpreted by the Martinez decision guarantees significant substantive and procedural rights to individuals ***13** against tribal governments, but it places the remedial mechanisms for such rights in tribal, rather than federal, courts. [FN64] As discussed below in greater detail, claimants may not assert individual rights against a tribe in federal court except in the case of habeas relief or where the tribal judiciary has ruled without subject matter jurisdiction and tribal remedies have been exhausted. [FN65] The gaps between the Act and the Bill of Rights, Fourteenth Amendment, and other civil rights legislation (not applicable to tribes) also leave gaps in the implementation of U.S. international human rights obligations. The failure of federal enforceability of most of the Act's rights-protecting provisions means that tribal courts remain the exclusive forum for allegations of violations of many of these rights. [FN66]

## II. Tribal Violations of International Human Rights Obligations Binding on The United States

### A. International Human Rights Obligations

Myriad human rights instruments bind the United States under international law. Those susceptible to tribal violations include the International Covenant on Civil and Political Rights (ICCPR), [FN67] the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, [FN68] and the International Convention on the Elimination of All Forms of Racial Discrimination. [FN69] Inter-American jurisprudence demonstrates that the American Declaration of the Rights and Duties of Man (American Declaration) [FN70] also binds the United States ***14** under international law. [FN71] Further, tribal law enforcement officials could potentially breach Article 36 of the Vienna Convention on Consular Relations. [FN72] The United States is legally obligated to adopt such laws or other measures as may be required to give effect to the substantive rights recognized in these documents.

### B. U.S. Implementation of its Human Rights Obligations

#### 1. Self-Execution Doctrine

When the Senate ratifies an international human rights convention, it typically enters reservations, declarations, and understandings, which often attempt to restrict U.S. international obligations to the extent they differ from U.S. municipal law. [FN73] Municipal law governs whether statutory implementation is necessary for these instruments and whether judicial enforceability is available. If the Senate declares a treaty non-self-***15** executing, as it has done for each of the human rights conventions discussed herein, the treaty provisions create no private cause of action and can only be enforced when implemented through federal legislation. [FN74] For example, while the ICCPR, CERD, and

CAT, bind the United States under international law, several federal courts have found that they are not self-executing and are therefore not subject to judicial enforcement. [FN75] The United States believes its commitment to comply with these conventions requires no implementing legislation because pre-existing federal, state, and local laws provide sufficient and equivalent protection to individuals. As a legal advisor to the State Department testified before a Senate hearing on whether to ratify the International Convention on the Elimination of All Forms of Racial Discrimination: "As was the case with the earlier [human rights] treaties, existing U.S. law provides extensive protection and remedies. . . . There is thus no need for the establishment of additional causes of action to enforce the requirements of the convention." [FN76] While this may be true with regard to federal and state governments, it is not true with regard to tribal governments.

2. Municipal Enforcement of International Obligations Against Tribal Governments

The Bill of Rights and the Fourteenth Amendment, among other constitutional and statutory provisions, provide broad protection for individual rights that are enforceable in federal and state courts. Most international human rights provisions that bind the United States find expression through the implementation of these municipal laws. Judicial decisions and federal civil rights legislation have created remedies for their violation by government officers. [FN77] Yet these enforcement mechanisms are ***16** inapplicable to tribal governments, creating a gap between municipal law and international human rights obligations of the United States.

Congress's singular attempt to implement human rights protections against the tribes, the Indian Civil Rights Act of 1968, [FN78] contains provisions analogous to those found in the Bill of Rights and provides the only protection (apart from tribal law) for Indians and non-Indians alike against potential tribal violations of U.S. international human rights obligations. Though it became law before U.S. accession to any human rights conventions, the Act reflects several convention provisions. Still, it does not reflect them all, and this is important.

A juxtaposition of the Indian Civil Rights Act and U.S. international human rights obligations reveals substantive discrepancies. For example, article 14 of the ICCPR requires that indigent criminal defendants be provided legal assistance" in any case where the interests of justice so require." [FN79] With regard to Article 14(3), the United Nations Human Rights Committee has held that States must provide legal assistance to the poor at all stages of criminal proceedings. [FN80] Even without the convention, the United States implements this provision through the Constitution's due process clauses, which require the states and federal government to provide counsel to indigent criminal defendants facing confinement. [FN81] Thus, the United States has declared that its municipal law sufficiently implements the ICCPR:

> [T]he United States understands that [article 14(3)] do[es] not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. [FN82]

Contrary to the assumptions in this reservation, the Indian Civil Rights Act fails to achieve implementation against tribal governments because it does not require legal

assistance under any circumstance. Tribes can ***17** prosecute and sentence destitute defendants to one year's imprisonment and a $5,000 fine without providing legal assistance of any kind. [FN83] The tribes may choose to provide legal assistance, but federal law does not require them to do so. This is just one example of numerous substantive gaps between the Indian Civil Rights Act and U.S. international obligations. [FN84]

Domestic acceptance of duplicative tribal-federal criminal prosecutions may be another gap in implementation. In United States v. Lara, [FN85] the Supreme Court considered the application of double jeopardy to dual tribal-federal prosecutions. The case involved a non-member Indian who assaulted a federal officer during an arrest for violation of a tribal exclusion order. [FN86] The defendant pled guilty to the tribal crime of "violence against a policeman" and served ninety days in prison. The federal government subsequently prosecuted him for assaulting a federal official. Because key elements of the tribal and federal crimes were identical, the second prosecution would normally be abandoned to avoid double jeopardy. However, the Court found the offenses to be distinct crimes against separate sovereigns and upheld the federal conviction. [FN87]

Article 14(7) of the ICCPR provides that "[n]o one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted." [FN88] Meanwhile, municipal law treats parallel prosecutions by the state, tribal, and federal governments as offenses against separate sovereigns not barred by the U.S. Constitution's Double Jeopardy Clause. [FN89] The U.S. reservation to Article 14(7) restricts its application to existing municipal law as to the federal government and its "constituent units." [FN90] Since the tribes are not constituent units of the federal system, dual tribal-federal prosecutions for the same offense breach criminal defendants' Article 14(7) rights.

***18** Even where an Indian Civil Rights Act provision reproduces verbatim a constitutional right, tribal interests can justify conflicting treatment under the statute and its federal constitutional predecessors. [FN91] Courts have "correctly sensed that Congress [in passing the Act] did not intend . . . [constitutional principles to] disrupt settled tribal customs and traditions." [FN92] Essentially, although the Indian Civil Rights Act protections may mirror certain constitutional rights, the substantive meaning of these guarantees under tribal governments will diverge from their meaning under state and federal governments. Moreover, because many international human rights obligations find enforcement through U.S. constitutional rights, the Indian Civil Rights Act provisions may develop meanings unreflective of U.S. international human rights obligations even where the Act's provisions superficially correspond to U.S. constitutional rights. [FN93]

3. Analysis of a Self-Executing Treaty with Individual Rights Protections

Municipal practice might fail sufficiently to reflect U.S. international obligations even where a treaty is self-executing. For instance, the United States consistently fails to enforce its consular relations obligations against U.S. states and consequently has been haled before the International Court of Justice (ICJ) several times for state violations of Article 36 of the Vienna Convention on Consular Relations, which requires that an arrested foreign national be notified of his or her right to communicate with his or her consulate and that the consulate be notified upon detainment of a national. [FN94] While federalism concerns and the doctrine of procedural default have prevented domestic enforcement of the Vienna Convention on Consular Relations against U.S. states, potential tribal violations remain ***19**

unexamined.

Federal Indian law scholars and courts assert that the U.S. Supreme Court eliminated tribal criminal jurisdiction over non-Indians in Oliphant v. Suquamish Indian Tribe. [FN95] This holding appears to prevent tribes from breaching Article 36 of the Vienna Convention on Consular Relations. [FN96] Yet there are four areas in which tribes exercise authority, or have some potential to exercise authority, to assert law enforcement jurisdiction over foreign nationals. First, the membership of some border tribes can include Mexican or Canadian nationals. [FN97] U.S. municipal law identifies members of recognized tribes as Indians and thus potentially subjects these foreign nationals to tribal criminal jurisdiction. [FN98] Secondly, though the Court in Oliphant spoke of “non-Indians,” its reasoning applies only to non-Indians who are also U.S. citizens. The Eastern Cherokee Supreme Court in Eastern Cherokee Band of Indians v. Torres exposed this flaw and found that it retains inherent criminal jurisdiction over non-Indian aliens. [FN99] Thirdly, tribal power to exclude individuals from tribal lands includes a power to detain and remove. [FN100] Finally, tribal courts potentially retain criminal contempt power over non-Indians. [FN101] Considering these potential tribal breaches of ***20** U.S. consular obligations, congressional plenary power over the tribes frees the United States from the federalism concerns evident in LaGrand, [FN102] and permits Congress to implement the Vienna Convention on Consular Relations against them.

C. The Potential for Tribal Violations of U.S. International Human Rights Obligations

1. Parallel Case Study

Santa Clara Pueblo v. Martinez [FN103] provides a pellucid illustration of tribal governments' capacity to breach international human rights obligations of the United States. Despite arising prior to U.S. accession to the international human rights covenants, the facts of the case could certainly reappear in a similar case today. Indeed, the tribal law which gave rise to the litigation is still in force. [FN104] As discussed below, an analogous decision by the U.N. Human Rights Committee, Lovelace v. Canada, [FN105] can be used to test the assertion that the law at issue in Martinez, or similar tribal laws, breach provisions of the ICCPR.

2. Santa Clara Pueblo v. Martinez

Julia Martinez, a full-blood member of the Santa Clara Pueblo, married a full-blood member of the Navajo Nation in 1941. The couple had children and raised them within Pueblo jurisdiction as tribal members. The children were included in the cultural and spiritual life of the tribe and spoke the Santa Claran language, Tewa. [FN106] Despite their clear genetic and cultural affinity with the Pueblo, the Pueblo government denied the children tribal membership on the basis of a tribal law which forbade children of Santa Claran mothers and non-Santa Claran fathers to gain membership. The law conversely permitted children of Santa Claran fathers and non-Santa Claran mothers to become tribal members. [FN107]

***21** Because their father was a non-member, the Martinez children could not acquire citizenship in the political community with which they identified most closely. In the ensuing litigation, the Pueblo did not contest the law's discriminatory nature, but rather asserted

that it represented the tribe's patriarchal cultural heritage. [FN108] Martinez sued the Pueblo and Pueblo Governor in federal court to overturn the discriminatory statute as a violation of the Indian Civil Rights Act equal protection clause. [FN109] In a seminal decision, the U.S. Supreme Court found that the Act did not abrogate tribal sovereign immunity and created no federal cause of action (other than a habeas corpus remedy, inapplicable to the case). Although the Court explained that the tribal court is the appropriate forum in which to assert violations of the Act, a tribal court will not necessarily entertain a suit against the tribe, or a tribal official, unless tribal sovereign immunity has been waived, whether by tribal common law or by tribal statute. The Indian Civil Rights Act thus becomes an illusory implementation of U.S. international human rights obligations. [FN110]

A similar federal or state law would have been struck down as a violation of equal protection, [FN111] but since the tribes are not constituent entities of the union, tribal laws cannot violate such constitutional protections. [FN112] Yet aside from breaching established constitutional standards, the discriminatory Pueblo membership law violates several international human rights provisions that bind the United States. It therefore breaches U.S. international obligations and, if attributable to the United States, should result in U.S. international responsibility. [FN113]

The Pueblo statute at issue in Martinez violates international human rights obligations of non-discrimination, equal protection, and effective ***22** remedy under the ICCPR and the American Declaration. The tribal gender discrimination at issue in Martinez also gives rise to additional violations of individual rights guaranteed by the ICCPR, most prominently the denial to Martinez's children of the individual right to partake in minority culture (Article 27) [FN114] and perhaps the right to take part in government (Article 25). The Martinez children lost all benefits of tribal membership and faced several other hardships. Under the Pueblo law, when their mother died, they were ineligible to inherit her property, to use Pueblo property, or to remain on Pueblo lands. As non-members they were ineligible to participate in tribal government and could be excluded from access to their culture, language, and religion.

3. Lovelace v. Canada

The petitioner in Lovelace v. Canada [FN115] challenged a law very similar to the Pueblo law at issue in Martinez. Lovelace, a Maliseet Indian in Canada, lost her tribal membership upon her 1970 marriage to a non-Indian. The Indian Act, a Canadian federal law, terminated the tribal membership of Indian women who marry non-Indians but permitted male Indians who intermarry to retain membership. [FN116] It also made Lovelace's children ineligible for membership. In Lovelace, the U.N. Human Rights Committee recognized that the Indian Act “entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man. . . .” [FN117] These disadvantages were similar to those found in Martinez and included loss of the right to reside or possess lands within the reserve, to inherit possessory interests in reserve land, or to be buried on tribal land. Loss of Indian status also resulted in a divestment of the powers to exercise Indian hunting and fishing rights and to partake in tribal culture and religion. [FN118] The Human Rights Committee did not find Canada responsible for a breach of the ICCPR non-discrimination provisions, but only because the Convention did not enter into force against Canada until six years after the marriage. [FN119] Nevertheless, the Committee found

Lovelace's continuing loss of cultural benefits breached Canada's Article 27 obligations under the ICCPR to guarantee the right of minorities to participate in culture, ***23** language, and religion in community with other group members. Canada has since revised the Indian Act to eliminate gender discrimination and to permit children of women who intermarry to retain tribal membership, but the Human Rights Committee has expressed concern over continuing exclusion of subsequent generations. [FN120]

4. Comparison of the Lovelace and Martinez Holdings

Whereas Canada's discriminatory Indian Act at issue in Lovelace was a federal law, the analogous law at issue in Martinez was a tribal ordinance. Each law deprived minority individuals of their right to partake in culture and religion as protected by international obligations undertaken by the respective host States (Canada and the United States). The laws also had significant effects on property rights and rights of participation in the tribal political community. Lovelace substantiates the contention that the Pueblo ordinance violates ICCPR provisions which bind the United States under international law. As the Human Rights Committee articulated in Lovelace, the Article 27 right of access to minority culture protects those "brought up on a reserve, who have kept ties with their community and wish to maintain these ties. . . ." [FN121] This sphere of protection would surely encompass the Martinez children. These cases demonstrate that the American Indian tribes, even through an exercise of their governmental powers valid under U.S. law, may engage in conduct that violates U.S. international human rights obligations.

5. Other Examples of Tribal Governmental Capacity to Breach U.S. International Obligations

In addition, the traditional tribal punishment of banishment may breach international human rights norms, such as the formulation of individual rights of access to minority culture in Article 27 of the ICCPR or the right to participate in one's government under the CERD. [FN122] Banishment involves expulsion of a member and deprivation of his or her rights to vote, to participate in tribal government, to take part in the tribe's religious and cultural life, to inherit property, to receive tribal payments and social assistance, and to use tribal lands. Banished members have alleged that their tribe imposed the punishment for improper reasons, such as their race or political views. [FN123] In Poodry v. Tonawanda Band of Seneca ***24** Indians, [FN124] for instance, claimants alleged that the tribe convicted them in absentia of treason, on the basis of "actions to overthrow . . . the traditional government of the Tonawanda Band of Seneca Nation," and banished them. Although the Poodry court indicated in dicta that the Indian Civil Rights Act implicitly proscribes banishment, no other cases support this view. [FN125] The Human Rights Committee has defined minority membership as "objective," and it has been suggested that Article 27 not only prevents States from defining minority group membership, but also prevents minority groups themselves from conclusively defining their own membership where such definition denies access to collective attributes protected by the article. [FN126]

Federal and tribal case reports reveal several examples of tribal conduct that arguably breaches U.S. international obligations, even within the limited body of federal jurisprudence under the Indian Civil Rights Act. Tribes have prevented members of African descent from voting or participating in government based on their race, [FN127] in apparent violation of the CERD. [FN128] Traditional Pueblos have reportedly attempted to limit

members' religious freedom. [FN129] Claimants have alleged free speech violations, arbitrary detention and seizure of property, and conduct arguably within the definition of cruel or degrading treatment. [FN130]***25** Conditions in tribal prisons are routinely cited as among the worst in the United States. [FN131] The Human Rights Committee has commented on conditions in U.S. prisons but has not specifically considered tribal detention facilities. [FN132] These cases illustrate the lacuna between U.S. international human rights obligations and municipal implementation against tribal governments.

## III. Domestic Remedies for Tribal Violations

### A. Access to Courts

Whereas the few substantive gaps in implementation of international obligations against the tribes may seem trivial, Martinez gave rise to a deeper flaw in implementation. As previously mentioned, the Court found that the Indian Civil Rights Act - the only federal legislation that obligates tribes to protect individual human rights and derivatively provides human rights protections--permits no federal judicial review of tribal violations other than habeas corpus review for ongoing wrongful detention. [FN133] Thus, an allegation of a tribal human rights violation must be resolved in tribal court, although the Indian Civil Rights Act does not even require the creation of a formal court structure, and tribal courts may find Indian Civil Rights Act claims barred by the tribal sovereign immunity doctrine. [FN134] Under federal law, tribal courts are technically bound to enforce the Indian Civil Rights Act's provisions. However, federal courts cannot review tribal court decisions, so no guarantee exists that the tribe will enforce the Indian Civil Rights Act or, by extension, U.S. international human rights obligations. This is the procedural gap in implementation: individuals have no domestic forum capable of enforcing certain human rights provisions guaranteed in the U.N. Conventions and American Declaration against the tribes.

The Martinez Court also held that the Indian Civil Rights Act creates no private cause of action in federal courts for equitable (declaratory or injunctive) relief against tribal officials and refused to imply congressional intent to create such an action. It reasoned that to do so would undermine the authority of tribal courts and would be contrary to the congressional intention to protect tribal self-government. This decision stands in sharp ***26** contrast to the Court's jurisprudence interpreting civil rights legislation against the states and federal government. [FN135] In these contexts it regularly infers federal causes of action to promote enforcement of civil rights laws. Yet in the tribal context, the tribes' status as separate political communities and the national policy of tribal independence prevents implied causes of action. The Court explained its reluctance to imply federal judicial review, “[W]e have . . . recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and [s]tate governments.” [FN136]

The Martinez judgment also shows that courts treat tribal laws inconsistent with international human rights obligations differently from similarly inconsistent state laws. Where potential conflict arises between a state or local law and a treaty, U.S. courts may interpret the law as consistent with U.S. international obligations. [FN137] This mechanism prevents invocation of the Constitution's Supremacy Clause to declare state law or local law invalid. Even non-self-executing treaties, such as the human rights conventions,

may supersede state law or policy. [FN138] This mechanism fails in the tribal context because federal courts often lack jurisdiction to review tribal laws that may conflict with U.S. international human rights obligations.

Linneen v. Gila River Indian Community, a case from the Ninth Circuit Court of Appeals, exemplifies the lack of federal court jurisdiction to adjudicate claims by those alleging tribal human rights violations. The non-Indian claimants alleged violations amounting to arbitrary detention and degrading treatment. [FN139] Although the non-Indian claimants in Linneen happen to have been U.S. nationals, foreign nationals could find themselves similarly mistreated by tribal law enforcement officials exercising, for example, the tribal right of exclusion or investigation, which could create an international dispute for **reparations** for injuries to aliens. Claimants asserted, inter alia, false imprisonment and unreasonable search and seizure claims against the tribe and a tribal law enforcement officer. ***27** They sought compensation under the Civil Rights Act of 1871, which provides compensation for violations of constitutional rights caused by those acting under color of law. Yet the Linneen court dismissed the claims, holding that the Indian Civil Rights Act creates no federal cause of action and neither the U.S. Constitution nor the Civil Rights Act applies to tribes. Tribal sovereign immunity shielded the officer himself from claims for damages and prevented the claimants bringing an action against the tribe or tribal officer in tribal court. Clearly, the tribe's failure to waive immunity denied the claimants an effective remedy.

The expansive protection afforded tribal officials through the tribal sovereign immunity doctrine raises questions of the efficacy of the rule of law in tribal legal systems. [FN140] The lacuna of coverage of international human rights law in this instance goes unaddressed in legal commentary. Professor Shelton, for example, asserts that the U.S. Supreme Court "has affirmed that the right of access to the courts 'assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights,' such as those recognized in the Civil Rights Act of 1871." [FN141] This conclusion is incorrect in situations of tribal human rights violations. The Indian Civil Rights Act itself purports to protect individual human rights against violations by tribal governments but creates limited access to federal courts and questionable access to tribal courts. [FN142] Tribal sovereign immunity can prevent such access and consequently violate the U.S. international obligation to ensure the availability of effective remedies. [FN143]

B. Substantive Remedies

Even without full implementation of human rights treaties, other common law and statutory mechanisms exist to ensure that individuals alleging human rights violations against federal and state governments have access to tribunals with power to fashion remedies. However, these same mechanisms generally do not provide remedies for tribal violations of individual human rights.

The Human Rights Committee, the Inter-American Commission on Human Rights, and various international claims tribunals have found compensation to be an appropriate remedy for arbitrary deprivations of liberty such as that alleged in Linneen. [FN144] For instance, the U.N. Human Rights Committee has found that where a State violates Article 9 or 14 of the ICCPR it must compensate the victim and "undertake to investigate the ***28** facts, take

appropriate actions, and bring to justice those found responsible for the violations." [FN145] A United States reservation to the ICCPR establishes that the United States "understands the right to compensation . . . to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity." [FN146]

Even the U.S. Supreme Court has recognized that compensation "[from] the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." [FN147] The Court established the common law mechanism for provision of compensation where federal officials violate individual rights in Bivens v. Six Unknown Federal Agents. [FN148] Bivens actions do not extend to state or tribal officers, but Congress statutorily enabled claims for compensation against state officials. [FN149] Professor Shelton views this legislation as an extension of the compensation remedy to "other levels of government." [FN150] The legislation, however, does not extend to tribal officials. U.S. municipal law permits no claims for compensation against tribal law enforcement officers acting in an official capacity unless the tribe itself has waived tribal sovereign immunity. [FN151] Appropriate compensation awarded by domestic tribunals can discharge a State's responsibility for violations of its international obligations, such as its duty not to engage in arbitrary detention and inhuman treatment. [FN152] However, for violations by officials of tribes that have not waived immunity from suit in individual rights, federal courts claim no authority to provide compensation, and the State's responsibility for violation of its international obligations cannot be discharged.

Unlike compensatory relief, equitable remedies are generally available against government officials in the United States to rectify ongoing or imminent governmental violations of individual rights. [FN153] Under U.S. law, tribal sovereign immunity does not protect tribal officials from suit for equitable relief, but the U.S. Supreme Court refused to find an implied federal cause of action for equitable relief against the tribe or tribal officers in the Indian Civil Rights Act: [FN154]

> ***29** [U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [the Indian Civil Rights Act] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers. [FN155]

Further, complications arise under tribal law where the tribe has not waived its immunity from suit in civil rights actions, and tribal courts may thus refuse to adjudicate claims for equitable relief. [FN156] The U.S. Commission on Civil Rights has expressed concern that:

> The barring of all suits against a tribal government without its consent, particularly suits for injunctive or equitable relief under a statute such as the [Indian Civil Rights Act] providing rights against the tribal government, can leave the plaintiff with a feeling of frustration, and often leaves the victim without an impartial tribal forum in which to seek redress under the ICRA or the tribe's own civil rights laws. [FN157] Not only does this failure to provide effective remedies make the plaintiff feel frustrated, it also results in a violation of the U.S. international obligation to provide an effective remedy to those whose human rights tribes may have violated.

While federal remedies are generally unavailable, some tribes do enable their courts to fashion effective remedies. In a claim brought by prisoners under the Indian Civil Rights Act's cruel and unusual punishment clause, for instance, the Colville tribal court found official immunity for equitable relief waived and closed the tribal prison until improvements were made. [FN158] Had tribal prison conditions been severe enough and tribal remedies unavailable, the prisoners may have successfully petitioned a federal court for the writ of habeas corpus, the sole federal remedy available for tribal human rights violations. Congress gave federal courts jurisdiction to issue this "great writ of liberty" in the Indian Civil Rights Act. [FN159] The Act permits a federal judge to protect individuals against arbitrary or wrongful confinement by an American Indian tribe.

***30** A petition for a writ of habeas corpus against tribal detention requires: exhaustion of tribal remedies; a severe restraint of individual liberty; and a violation of the Indian Civil Rights Act's substantive provisions. [FN160] Exhaustion of tribal remedies typically entails an appeal to the tribe's highest court. [FN161] A severe restraint of liberty may include tribal action beyond actual physical detention of the claimant: the Poodry case permitted habeas review of a tribal decision to banish certain members for treason. Subsequent cases, though, appear to have narrowed the scope of habeas review to situations where a claimant is in physical custody or awaiting criminal trial before a tribal court. [FN162] Because the federal court must identify a violation of a substantive provision of the Indian Civil Rights Act before issuing a writ of habeas corpus, [FN163] tribal violations of human rights omitted from the Indian Civil Rights Act, such as the indigent defendant's right to criminal defense counsel, are not cognisable in federal court. [FN164] The habeas remedy thus confines federal review of tribal human rights violations to tribal court or tribal law enforcement actions enumerated in the Indian Civil Rights Act and resulting in ongoing wrongful detention.

Individuals alleging human rights violations have a right to an effective remedy under international law binding on the United States. [FN165] This right includes a procedural right of access to a competent tribunal with power to fashion a remedy and a substantive right to an effective remedy. [FN166] Two problems arise with the domestic remedial regime: tribal sovereign immunity often precludes access to any tribunal, whether federal, state, or tribal, and where a tribal court has power to fashion a remedy, if it declines to do so or its remedy proves ineffective, federal courts lack jurisdiction to review the tribal decision. [FN167] Municipal law leaves the provision of remedies to the tribes, yet it is the United States which may bear international responsibility where tribes violate individual rights and fail to provide effective remedies.

## ***31** IV. Attribution of Tribal Violations to the United States

### A. Tribes as State Organs

"Every internationally wrongful act of a State entails the international responsibility of that State." [FN168] The United States commits an internationally wrongful act, and its international responsibility is engaged, if tribal violations of international human rights obligations are attributable to it. The preceding Parts demonstrate that the tribes may commit acts or omissions that violate the international human rights obligations of the United States. To determine whether a tribal violation incurs U.S. international responsibility requires a further step of examining the principles of attribution under international law.

[FN169] The Iran-U.S. Claims Tribunal has stated that "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State." [FN170] The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) identify several principles of attribution that could be used to attribute tribal human rights violations to the United States. [FN171] Article 4 reiterates the rule of customary international law that attributes to States the conduct of government organs regardless of their position in the State hierarchy or branch of government. The most plausible method of attribution would be to characterize tribes as State organs, given their municipal status as governmental entities and the unity of the State in international law. [FN172]

However, that the tribes' legal systems and political institutions exist largely outside the federal framework would make this characterization of tribes as organs of the federal government conceptually difficult from the ***32** standpoint of U.S. municipal law. Tribes are not federated entities as their exemption from constitutional human rights norms illustrates. United States public law treats federally recognized tribes as separate political communities with autonomous governments invested with inherent powers and immunities.

Attribution of tribal human rights violations to the United States under international law, however, does not depend upon the domestic characterization of tribal powers; reference to municipal law for the status of State organs is insufficient. [FN173] The definition of a State organ is construed broadly in international law. Conduct of an entity exercising public functions, such as a tribal law enforcement agency, is normally attributed to the State even if municipal law regards the institution as an autonomous or independent entity. [FN174] The expansive definition of State organs encompasses sub-State entities analogous to the tribes. For instance, the Franco-Italian Conciliation Commission in the Heirs of the Duc de Guise case attributed conduct of the autonomous region of Sicily to Italy, because the Italian state was responsible for implementation of its international obligations notwithstanding Sicily's status in municipal law. [FN175] Moreover, the ILC Article 4 notes that all governments affirmed that "the State became responsible as a result of '[a]cts or omissions of bodies exercising public functions of a legislative or executive character"' in preparation for the Conference on the Codification of International Law of 1930. [FN176] It cites a long line of cases, beginning with Montijo, which articulate the principle that it is irrelevant for purposes of characterization of an entity as a State organ whether the entity in question is a federated entity or a specific autonomous area. [FN177]

For this reason it would be remarkable if an international tribunal considering the question of attribution of a tribal human rights violation to the United States did not find the tribes to be organs of the United States. After all, the U.S. states--which are federated entities unlike tribes-- function autonomously in their fields of exclusive competence. They exercise inherent governmental powers, as do the tribes, and the International Court of Justice has attributed responsibility to the United States when its federated entities exercise inherent powers, even if the national government lacks authority to compel state compliance with its international obligations. [FN178] Similarly, tribal conduct which breaches U.S. international human rights obligations would naturally be attributable to ***33** the United States, because governmental organs of any type, irrespective of their position within the State, are State organs for purposes of attribution. [FN179]

An international tribunal should have no difficulty extending the general principle that

the State is responsible for the acts of autonomous regions to the tribes as distinct governmental entities within the United States. But could international law directly bind the tribes? Professors Wouters and De Smet [FN180] suggest the ICJ's statement that "the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States" [FN181] means that international law obliges federated entities to comply with the federation's international obligations. They stretch the court's language to conclude that "federated entities themselves could under certain conditions be held to be directly internationally responsible for violations of international law." [FN182] If correct, the tribes would be bound to act in conformity with U.S. international human rights obligations, as a matter of international law.

This obligation is unlikely, however, since neither the tribes nor the states have international legal personality. It is a general principle that the statutory implementation and structuring of international human rights norms, and the specific protection of individuals against violations of these substantive rights, are primarily domestic concerns. [FN183] The ICJ's failure to revisit the responsibility of U.S. states in Case Concerning Avena and Other Mexican Nationals [FN184] indicates that while the U.S. may bear responsibility for tribal human rights violations, it must also decide how best to prevent tribal (and state) violations.

***34** B. Tribes as Entities Exercising Governmental Authority

The conduct of entities enabled by municipal law to perform public functions is also attributable to the State. [FN185] If the tribes were not characterized as State organs for purposes of attribution, tribal human rights violations could still be attributed to the United States under the principle articulated in Article 5 of the Articles on State Responsibility. This principle permits attribution of the conduct of a person or entity which is not a State organ, but which the law of the State empowers to exercise elements of governmental authority, provided the person or entity acts in that capacity in that instance. [FN186] The commentary indicates that this rule of attribution has been applied mainly to parastatal entities and privatized government service providers. The tribes' authority to exercise a wide range of public functions in U.S. municipal law justifies treating them as parastatal entities that exercise governmental authority in place of federal or state organs.

This category is a narrow one, but likely encompasses attribution of tribal human rights violations to the United States. Unlike the preceding principle on the attribution of the conduct of State organs, it requires analysis of municipal law. The conduct to be attributed must be of a public nature and the entity must exercise its power under municipal law. [FN187] Although the source of tribal authority does not generally flow from the basic U.S. law, the Constitution, federal common law and legislation have long recognized tribes as entities empowered to assert their own governmental authority. Tribal public functions include the provision of social services, law enforcement, prisons, and courts. Tribes can also privatize their public functions. So, for example, the conduct of a privatized tribal prison official is attributable to the United States because the official exercises governmental authority. This authority is tribal rather than state or federal but is attributable to the United States because of its public nature.

C. Tribes as Private Entities

It appears the tribes, as governmental entities, satisfy the test for State organs under the international law of State responsibility. Judge Canby, however, has proposed that recent U.S. Supreme Court jurisprudence may ***35** articulate a theory of tribal powers as non-governmental. [FN188] A line of cases implicitly characterizes tribal jurisdiction over non-members as though the jurisdiction derives from a status analogous to private associations or private landowners. [FN189] Private clubs can regulate membership and landowners can establish rules for others on their land. If accepted, this non-governmental view of tribal powers could impact attribution, because international tribunals may look to municipal law for guidance in determining whether an entity operates as a private association or a State organ. [FN190]

An instructive contrast is that between tribal conduct and the conduct of cultural or religious communities such as the Amish. The Amish govern themselves through customary laws, live in isolated communities without modern conveniences, speak their own language, and adhere to a strict religious creed. It is possible for the Amish to breach members' substantive rights under international law, such as the right to education, [FN191] or the right of minorities to partake in the cultural, religious, and linguistic life of the minority community, without judicial sanction. [FN192] Yet Amish communities are neither state organs nor entities exercising governmental authority because they have no public functions or authority. Their conduct is not generally attributable to the United States unless the United States acknowledges or adopts the conduct as its own. [FN193]

Unlike the Amish, the federally recognized tribes have separate legal personality under municipal law as governmental organizations and instrumentalities. [FN194] The United States recognizes the tribes' prescriptive ***36** and enforcement jurisdiction over non-members for the purposes of civil adjudication and exclusion. The few decisions indicating a judicial view of the tribes as private associations cannot overcome the substantial precedent and current practice by which the United States treats tribes as governments. Present law requires the federal government to engage with tribes on a government-to-government basis. [FN195] Further, the U.S. Supreme Court recently held that tribes retain inherent governmental powers over non-member Indian criminal defendants. [FN196] It appears unlikely that an international tribunal would view tribes as governmental entities when exerting authority over Indians, but not when exerting authority over non-Indians. This municipal recognition provides a basis for international treatment of tribes as State organs.

While purely private conduct cannot generally be attributed to a State, [FN197] the United States may be held internationally responsible for private conduct in particular circumstances. The human rights instruments require it to ensure the rights protected to all individuals within its territory. It fails to meet this obligation if it allows private violations to occur with impunity or without fear of retribution. To ensure human rights protections, States must exercise due diligence to prevent private conduct which breaches an individual's human rights and to investigate and punish such violations. [FN198] A State's omission, as a breach of its human rights obligations, must remain analytically distinct from attribution of private conduct, however. [FN199] If State agents control, direct, or approve human rights violations committed by private actors, or decide to allow such violations to continue, the acts are attributable to the State. [FN200] The commentary to Chapter II of the Articles on State Responsibility notes that the different rules of attribution have a “cumulative effect” so that a State may be held internationally responsible for the effects of a private entity's conduct. If the United States fails to take necessary measures to prevent

such effects, it faces the possibility of international responsibility for human rights violations by the Amish, unrecognized tribes, or other private entities or actors. [FN201] If it knew, for example, that an unrecognized tribe had arbitrarily detained and mistreated an individual, but permitted the detention to continue, the tribal conduct would then be attributed to ***37** it. [FN202]

D. Tribal Agents Exceeding Authority

A tribal agent may incur U.S. international responsibility for conduct that violates an individual's human rights even if the agent acts outside his or her sphere of authority or violates tribal or federal law. [FN203] In Linneen, [FN204] the non-Indian claimants asserted that a uniformed tribal law enforcement officer arbitrarily detained them for three to four hours, pointed his gun at their heads, threatened to seize their property and kill their animals, and told them immediately to accept Jesus Christ as their savior, because he was going to kill them and dispose their bodies in the wilderness. Such action by a tribal official violates international prohibitions on arbitrary detention and, possibly, provisions on cruel or inhuman treatment. Tribal sovereign immunity shielded the officer and tribe from suit in tribal and federal court because he was acting in his official capacity at the time. Although such arbitrary detention and mistreatment goes beyond the tribal officer's legitimate powers, this does not affect attribution. [FN205]

The Caire claim demonstrates that such ultra vires actions by tribal public officials are attributable to the United States. In Caire, the tribunal held that the conduct of public officers, even if they act outside their competence, involves the responsibility of the State if the officials act “under cover of their status. . .and use[] means placed at their disposal on account of that status.” [FN206] Whether a tribal official acts in his or her official capacity depends on whether the officer was “cloaked with governmental authority.” [FN207] Tribal police, wardens, and other tribal officials, operate as public officials within tribal territory. The rules of attribution make conduct of such governmental officials attributable to the State, even if such conduct exceeds the officials' authority under tribal or federal law. [FN208]

V. Potential International Remedial Mechanisms

The United States has not accepted the individual petition mechanisms which enable the U.N. human rights monitoring bodies (the Human Rights Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination) to consider individual complaints, to ***38** reach views on the merits, and to recommend remedies. [FN209] Thus, an individual deprived of his or her due process rights or tortured by an American Indian tribe could not bring a petition before the Human Rights Committee or the Committee Against Torture. However, it is possible for the monitoring bodies to address alleged tribal violations of U.S. human rights obligations through the State reporting, inquiry, and inter-State complaint procedures (though the inter-State complaint mechanisms have never been used). [FN210] Until the recent United States withdrawal from the Optional Protocol on compulsory jurisdiction to the Vienna Convention on Consular Relations takes effect, [FN211] the ICJ would also have jurisdiction over disputes if a tribal government were to violate a foreign national's right to consular notification. [FN212] Alternatively, if a tribe interferes with the substantive rights of a foreign national, the injured party's state may seek redress through international dispute resolution mechanisms

and diplomatic pressure.

The regional inter-American human rights regime allows injured individuals or groups to petition the Inter-American Commission on Human Rights. This mechanism extends to violations of the American Declaration, a source of international obligations binding on all Organization of American States (OAS) member states, and therefore permits petitions against the United States, which is not a state party to the American Convention on Human Rights. The United States has objected to the American Declaration's binding character. [FN213] Nevertheless, the Inter-American Commission has several times asserted authority to declare the ***39** United States in breach of its international obligations under the Declaration and to make recommendations on remedial measures. [FN214] The Inter-American Commission has also declared the United States responsible for violations of rules of customary international law and jus cogens norms relative to human rights. [FN215] If the United States fails to comply with recommendations of the Inter-American Commission, the Commission may ratify and publicize its report and submit it to the OAS General Assembly. It continues evaluating measures adopted in respect of its recommendations until compliance is achieved. [FN216]

Exactly which rights individuals possess under this regional system is a matter of some controversy. The revised OAS Charter refers to “fundamental rights,” but does not define the phrase. [FN217] The Inter-American Commission has interpreted it to mean the American Declaration principles read “in light of” current international law, [FN218] which extends its reach beyond the Declaration principles themselves.

This interpretive method has implications for the study of potential tribal human rights violations because it allows the Inter-American Commission to declare responsibility for international obligations beyond those espoused in the Declaration. For instance, the Inter-American Commission has interpreted the Declaration in light of Article 27 of the ICCPR on individual rights to partake in minority culture, which the tribes are in a unique legal position to violate through tribal laws defining membership and the quasi-criminal punishment of tribal banishment. The Inter-American Commission has relied on this ICCPR provision to find violations of American Declaration protections including the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI). [FN219] The Inter-American Commission has also based violations of the Declaration's right to a fair trial and due process of law ***40** provisions (Articles XVIII and XXVI) on U.S. obligations to foreign nationals and their States under the Vienna Convention on Consular Relations. [FN220]

The Inter-American Commission's individual petition mechanism provides one avenue for those alleging human rights violations by the United States to pursue a claim before an international tribunal. The exhaustion of domestic remedies rule applies to Inter-American Commission petitions, but tribal sovereign immunity may preclude pursuit of any tribal or federal remedy. Tribal courts may or may not have jurisdiction over the claim depending on whether the particular tribe limits immunity from suit in cases alleging violations of human rights. Of course, even if the tribal court fashions a remedy it may prove ineffective and permit a challenge at the inter-American level. Even where tribes waive immunity from suit, the doctrine of tribal sovereign immunity also prevents an appeal to federal court, except in cases of ongoing physical custody. This situation permits an injured individual in most human rights cases to overcome the Inter-American Commission's exhaustion of

domestic remedies hurdle by exhausting whatever tribal remedies are made available. Appeals to federal courts should not be required as they generally lack jurisdiction to review human rights claims against the tribes.

In the recent Dann case, the Commission found the United States responsible for violations of international law related to its wrongful taking of Western Shoshone tribal lands. In particular, it concluded that the United States failed to ensure the Danns' American Declaration rights to a fair trial, to property, and to equality before the law. [FN221] The Commission recommended that the United States provide the petitioners with an effective remedy, including adoption of legislative or other measures to ensure respect for their right to property. [FN222] It further recommended that the United States ensure that property rights of indigenous persons are determined in accordance with the rights established in the American Declaration. [FN223] The case marked the first instance of an international human rights body finding the United States responsible for violating human rights specific to an indigenous people. Tribes have heralded Dann as a model for future complaints against the United States to promote tribal interests. Yet tribes may not realize that the Inter-American Commission's individual petition mechanism also permits the Commission to consider claims against the United States for human rights violations by the tribes themselves.

A case such as Linneen, where a tribal official allegedly arbitrarily ***41** detained and mistreated individuals, provides an ideal candidate. If it, or a similar case, were to come before the Inter-American Commission and a tribe had in fact violated individual human rights provisions binding on the United States, the Commission could attribute such conduct to the United States. The Commission could then declare the United States responsible for both the tribal violation and the lack of an effective remedy in the tribal or federal legal systems. The Commission would likely recommend compensation and provision of an effective remedy, and evaluate implementation of its recommendations. [FN224] Tribal human rights violations may arise in other contexts as well. The Linneen claimants were U.S. nationals, but foreign nationals could similarly find themselves subject to mistreatment by a tribal officer potentially creating an international dispute for mistreatment of aliens.

Although no international monitoring body has yet investigated human rights violations by tribal governments, the U.S. Commission for Civil Rights has recommended that Congress establish extensive Indian Civil Rights Act reporting procedures to monitor the need for future amendments. Under its proposal the tribes must annually report the disposition of all Indian Civil Rights Act claims including the alleged violation, the tribal forum in which the complaint was filed, the potential for appeal, and the types of remedies available. [FN225] The reports would enable Congress to monitor the success or shortcomings of the Indian judicial systems, but Congress has not yet mandated such a reporting scheme. Additionally, President Clinton established a body whose mandate included a review of tribal human rights violations, but it has not issued any reports or recommendations. [FN226]

## Conclusion

U.S. federal and state law largely reflects the United States ***42** international human rights obligations and enables the federal and state judiciaries to fashion appropriate remedies where individual rights are violated. The map of American human rights law,

however, contains substantive lacunae in legislative implementation against the American Indian tribes, which have authority to engage in conduct that may constitute a breach of an international human rights obligation of the United States. While the United States represents to the Human Rights Committee that "[t]he Constitution greatly restricts the ability of the government at all levels to infringe on the liberty of its citizens. . .," [FN227] this is simply untrue with respect to tribal governments, which are not bound by the constitutional protections.

Procedural gaps also exist. Although the federal Indian Civil Rights Act of 1968 superficially reflects certain U.S. international human rights obligations, most remedies for violations of the Act are only available in tribal courts. Further, these tribal courts may deny claimants access on the basis of the tribal sovereign immunity doctrine.

Tribal violations of U.S. international human rights obligations are attributable to the United States because the tribes are governmental entities within municipal law, and as such fall under the rubric of State organs. The United States, therefore, commits an internationally wrongful act whenever tribal conduct breaches an individual's substantive rights protected by international law and binding upon the United States. It can thus be held internationally responsible for tribal acts it does not control and for which its judiciary cannot fashion a remedy.

The disjuncture between U.S. international human rights commitments and its domestic implementation against the tribes must be rectified: the United States is bound by international law to adopt measures to give effect to its international human rights obligations. No domestic legal obstacles exist to federal legislation implementing international human rights obligations against the tribes because Congress retains plenary legislative power over them. [FN228] If the United States wishes to correct the gaps identified in its legislative implementation, the Indian Civil Rights Act should be revised to reflect fully international human rights instruments binding on the United States. Furthermore, to protect the United States from international responsibility for acts or omissions of tribal governments, Congress may decide that it is in the best interests of the United States to limit tribal sovereign immunity explicitly in cases where individuals allege human rights violations and to give federal courts the power to review tribal court decisions implicating substantive individual rights. If Congress wishes to protect the United States from being found internationally responsible, the federal courts could also be given the power to fashion remedies, including compensation, for tribal ***43** human rights violations.

The tribes, meanwhile, might avoid or at least discourage such federal intrusion upon their independence by incorporating international human rights obligations into the tribal legal system, and carefully complying with those rights. This might require waiving tribal sovereign immunity for suits against tribal officials alleged to have violated human rights, and enabling tribal courts to develop appropriate remedies for such violations, including compensation, along the lines of federal and state waivers. Otherwise, a case like Linneen may eventually find its way to an international monitoring body and the United States may be found responsible for the tribal conduct. Such a finding would create intense domestic pressure for restrictions on tribal independence and self-government.

Indications are that some tribes have recognized the dilemma. The proposed Blackfoot Nation Constitution, for example, incorporates international human rights protections.

[FN229] Other tribes, such as the Colville Confederated Tribes, have incorporated international law as a source of law in its tribal code. [FN230] These developments should be encouraging for those who desire greater tribal independence, but, unless the tribes remain vigilant and provide effective remedies for alleged human rights violations, the potential exists for more intrusive federal restrictions and oversight.

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[FN1]. See, e.g., S. James Anaya, Indigenous Peoples in International Law (2d ed., **2004**) (detailing the emerging role of indigenous peoples in international law); Harriet Ketley, Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples, 8 Int'l J. Minority & Group Rts. 331 (**2001**) (identifying fora available to indigenous peoples to assert rights against the State); Fergus MacKay, The Rights of Indigenous Peoples in International Law, in Human Rights and the Environment: Conflicting Norms in a Globalizing World (Lubya Zarsky ed., **2003**) (examining the connections between collective rights of indigenous peoples, the environment, and international law).

[FN2]. This progress has come largely through the work of indigenous peoples coming together under the auspices of the United Nations Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues. Through the Working Group, the Draft Declaration on the Rights of Indigenous Peoples, U.N. Comm. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1993/2/29 (Aug. 23, 1993), was developed and the Sub-Commission on Prevention of Discrimination and Protection of Minorities has approved it. U.N. Comm. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, Discrimination Against Indigenous Peoples: Technical Review of the United Nations Draft Declaration of the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994). The International Labor Organization Convention (No. 169) Concerning the Protection of Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991), provides for the protection of indigenous individuals and "peoples." Id. at art. 1.3 (requiring that "peoples" shall not be interpreted as having any implications which may attach to the term under international law). The work of indigenous peoples in the international plane has been directed at preventing violations of indigenous individual or collective rights by States. See generally Anna Meijknecht, Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law 148-68 (**2001**). The governmental nature of the American Indian tribes provides an opportunity to examine potential international consequences of individual rights violations by an indigenous group operating as a sub-State government.

[FN3]. Although declared inadmissible for failure to exhaust domestic remedies, the Cherokee Nation case brought before the Inter-American Commission on Human Rights (IACHR) provides a good example of the types of cases indigenous groups might pursue against States in the international arena. Cherokee Nation v. United States, Case 11.071, Inter-Am. C.H.R., Report No. 6/97, OEA/Ser. L/V/II.a5, doc. 7 (1997).

[FN4]. This Article distinguishes the traditional subjects of public international law, “States,” from the federated political entities of the United States, “states,” by capitalizing the former but not the latter.

[FN5]. See, e.g., Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02/OEA/Ser. L/V/II 717, doc. 1 rev. 1 PP 96-98 (**2001**) (finding the United States internationally responsible for violations of the property rights of the members of the Western Shoshone tribe); Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166 (1981) (declaring Canada responsible for continuing violation of individual rights of aboriginal women and their children); Kitok v. Sweden, Communication No. 197/1985, U.N. Human Rights Comm'n, U.N. Doc. CCPR/C/33/D/197/85 (finding no internationally wrongful act in the denial of an individual's asserted right to herd reindeer).

[FN6]. See, e.g., Curtis G. Berkley, International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples, 5 Harv. Hum. Rts. J. 65 (1992) (maintaining that tribes should use international law in securing a right of self-determination against federal abrogation); Darlene M. Johnston, Native Rights as Collective Rights: A Question of Group Self-Preservation, in The Rights of Minority Cultures 179 (Will Kymlicka ed., 1995) (asserting inadequacies of a liberal conception of individual rights in the protection of indigenous peoples); Ketley, supra note 1 (exploring the procedural difficulties facing indigenous groups as non-State entities in asserting claims in international tribunals); Benedict Kingsbury, Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law, in Peoples' Rights 64 (Phillip Alston ed., **2001**) (refining theory for potential indigenous assertion of collective rights in international law); Benedict Kingsbury, Claims by non-State Groups in International Law, 25 Cornell Int'l L.J. 481 (1992) (developing theory for discourse of groups in international law in claims for self-determination, minority rights, historical sovereignty, and indigenous rights).

[FN7]. See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session (Apr. 23-June 1 & July 2- Aug. 10, **2001**), U.N. GAOR, 56th Sess. Supp. No. 10, at 63-80, U.N. Doc. A/56/10 (**2001**) [hereinafter Articles].

[FN8]. See Dominic McGoldrick, State Responsibility and the International Covenant on Civil and Political Rights, in Issues of State Responsibility before International Judicial Institutions 161 (Malgosia Fitzmaurice & Dan Sarooshi eds., **2004**).

[FN9]. See, e.g., Theodor Schilling, Is the United States Bound by the International Covenant on Civil and Political Rights in Relation to the Occupied Territories? (N.Y.U. School of Law, Global Law Working Paper 08/04, **2004**) (exploring the limits of extraterritorial application of United States international human rights obligations).

[FN10]. U.S. Const. art. I, § 8, cl. 3 (authorizing Congress to regulate commerce with foreign Nations, among the states, and with the Indian tribes); U.S. Const. art. I, § 2, cl. 3 (excluding Indians who are taxed from definition of free persons for purposes of apportionment). Other constitutional provisions which do not mention the tribes explicitly

have recognized further delegated powers of the federal government over Indian tribes. U.S. Const. art. II, § 2, cl. 2 (treaty power); U.S. Const. art. I, §8, cl. 11 (war power); U.S. Const. art. IV, § 3, cl. 2 (power over federal property).

[FN11]. See United States v. Wheeler, 435 U.S. 313, 323-24 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[FN12]. This Article uses "tribal government" to refer to the legislative, executive, administrative, and judicial bodies established under the particular tribal constitution.

[FN13]. For instance, the Buena Vista Rancheria of Me-Wuk Indians, a federally recognized tribe with twelve members, occupies a reservation of approximately 67 acres. See Tiller's Guide to Indian Country 383 (Veronica E. Velarde Tiller ed., **2005**); National Indian Gaming Commission, Buena Vista Rancheria of Me-Wuk Indians Land Determination (June 30, **2005**) available at www.nigc.gov/nigc/documents/land/buenavista_pg1.jsp (last visited Nov. 19, **2005**).

[FN14]. The Navajo Nation comprises approximately 68,909 square kilometers of land while the Irish Republic comprises 68,890 square kilometers. The Navajo Nation's population is approximately 180,462, while Iceland's **2005** population was estimated to be 296,737. Tiller's Guide to Indian Country, supra note 13, at 328; Central Intelligence Agency, The World Factbook **2005**, available at http://www.cia.gov/cia/publications/factbook/geos/ic.html.

[FN15]. Unless limited by treaty or statute, each tribe as a body politic has the power to determine its own membership. See Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218, 222-23 (1897).

[FN16]. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (stating that Indian preference "is political rather than racial in nature").

[FN17]. See Cherokee Intermarriage Cases, 203 U.S. 76;Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) (holding that intertribal agreement established citizenship rights and requirements).

[FN18]. See generally William Katz, Black Indians: A Hidden Heritage (1986); Kenneth Porter, The Black Seminoles (1996). See also Allen v. Cherokee Nation Tribal Council, No. JAT-04-09 (Cherokee March 7, **2006**) (holding that statutory blood quantum requirement for membership in the Nation violates Cherokee Nation constitutional provision extending membership to freedmen) .

[FN19]. 8 U.S.C § 1401(b) (**2000**) (naturalizing Indians born in U.S. territory); U.S. Const. amend. XIV, § 1.

[FN20]. Talton v. Mayes, 163 U.S. 376, 382-84 (1896) (dismissing habeas corpus proceeding against Cherokee Nation high sheriff and holding that Cherokee Nation powers of government do not flow from the federal constitutional arrangement); United States v. Wheeler, 435 U.S. 313 (1978) (stating that tribes possess inherent powers of sovereignty not withdrawn by treaty, act of Congress or by implication, so violation of tribal law by

member constitutes a violation against a sovereign separate from the federal or state governments).

[FN21]. The historical justifications for treatment of the American Indian tribes as sovereigns emerge from the European doctrine of discovery. This doctrine gave the discovering European country title to the lands of non-Christian peoples against all other European powers. This right was subject to an Indian right of occupancy which only the discovering power could acquire through purchase or conquest. The British right to acquire lands in North America passed to the United States after the American Revolution. See Johnson v. M'Intosh, 21 U.S. 543, 571-75 (1823). A distinctly American version of the public international law doctrine, occupatio bellica, has been identified as the root of federal power over tribes. This doctrine refers to a persisting conquered people, such as the French after 1940. Robert Cooter & Wofgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II), 46 Am. J. Comp. L. 287, 295-309 (1998) (characterizing the position of the tribes as analogous to occupatio bellica and developing three phases for the historical deprivation of tribal sovereignty: (1) independence and autonomy; (2) conquest and submission; (3) modern tribal government with dependent sovereignty). It has also been argued that no legal basis exists for the legitimate assertion of U.S. municipal law over the tribes. See, e.g., Robert Odawi Porter, The Inapplicability of American Law to the Indian Nations, 89 Iowa L. Rev. 1595 (**2004**). Laying these historical problems to one side, a summary of United States municipal law vis-à-vis the tribes provides a foundation for examining implementation of international obligations against these unique sub-State governmental entities.

[FN22]. See, e.g., Cheung v. United States, 213 F.3d 82, 89-90 (2d Cir. **2000**) (explaining that Indian treaties are equivalent in status to treaties with foreign nations).

[FN23]. Alaskan and Hawaiian Natives fall outside this description as do tribes whose adjudicative jurisdiction has been compromised by Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588-90 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in 18 and 28 U.S.C.), which extends state jurisdiction to many tribal matters.

[FN24]. One should not confuse this municipal law doctrine of recognition with the general international principle, though the historical status of the tribes as entities capable of treating on the international plane may inform the early development of the municipal recognition doctrine. On the international doctrine of recognition, see Stefan Talmon, Recognition in International Law (**2003**).

[FN25]. Padraic McCoy, The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust through 25 C.F.R. Part 151, 27 Am. Indian L. Rev. 421, 431 (**2002**).

[FN26]. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (explaining that the doctrine of discovery gives the “discovering” European State the sole right to acquire tribal territory through “purchase or conquest”); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (stating that treaties demonstrate tribe is a “state,” a distinct political society separated from others capable of managing its own affairs and governing itself, but not a foreign state); Worcester v. Georgia, 31 U.S. 515 n.2 (1832) (deeming the United States a tribal “protector” in an unequal alliance, yet noting the tribes retain all internal attributes of

sovereignty).

[FN27]. Worcester, 31 U.S. at 559.

[FN28]. M'Intosh, 21 U.S. at 574.

[FN29]. Worcester, 31 U.S. at 559-563.

[FN30]. United States v. Lara, 541 U.S. 193 (**2004**) (holding that congressional authority over Indian affairs includes power to delegate federal authority to the tribes, but congressional act in restoring tribal inherent authority to exercise criminal jurisdiction over non-members was not a delegation of federal power).

[FN31]. See, e.g., Hope M. Babcock, A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered, 2 Utah L. Rev. 443, 483-517 (**2005**).

[FN32]. Talton v. Mayes, 163 U.S. 376, 384 (1896).

[FN33]. Menominee Tribe v. United States, 388 F.2d 998, 1000-01 (Ct. Cl. 1967) (Court of Claims exercising jurisdiction over tribe's claim even though tribe had been terminated by an act of Congress). Congress has abandoned the termination policy, but still has the authority to terminate a tribe if it should choose to do so. See Santa Rosa Band v. Kings County, 532 F.2d 655, 662-63 (9th Cir. 1975).

[FN34]. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) (survival of terminated tribe's treaty hunting and fishing rights).

[FN35]. On the other hand, powerful theoretical arguments against a legitimate source of the plenary power have been made. See Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chicago L. Rev. 671, 687-701 (1989).

[FN36]. J. Kalt & J. Singer, Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule, Joint Occasional Papers on Native Affairs No. **2004**-03 (The Harvard Project on American Indian Economic Development, **2004**) .

[FN37]. See Montana v. United States, 450 U.S. 544, 564 (1981) (holding that the exercise of tribal authority over non-Indian hunting and fishing on fee lands beyond what is necessary to protect self-government or to control internal relations is inconsistent with dependent status of the tribes); Rice v. Rehner, 463 U.S. 713, 726 (1983) (holding that dependent status means state may require liquor licenses for sale of liquor for off-premises consumption in tribal authority).

[FN38]. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (holding that tribes and tribal officers are immune from actions brought by state for collection of state taxes).

[FN39]. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

[FN40]. For a good description of sovereign immunity as it applies to federal and state governments and the limitations placed on these governments which in certain cases do not apply to tribes, see John Duffy, Sovereign Immunity, the Officer Suit, and Entitlement Benefits, 56 U. Chicago L. Rev. 295 (1989).

[FN41]. See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Tech., 523 U.S. 751 (1998) (exercising judicial deference to Congress and declining to abrogate tribal sovereign immunity in a juridical setting); Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1064-65 (10th Cir. 1995) (extraterritorial commercial activity does not strip tribe of its sovereign immunity); U.S. Commission on Civil Rights, The Indian Civil Rights Act: A Report of the U.S. Commission on Civil Rights June 1991 63-67 (1991) [hereinafter Commission Report].

[FN42]. For a comprehensive analysis of the tribal sovereign immunity doctrine, see Andrea Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty, 37 Tulsa L. Rev. 661 (**2002**).

[FN43]. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (holding that a tribe's right to define its own membership is “central to its existence”).

[FN44]. Id. at 62-63.

[FN45]. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

[FN46]. See United States v. Wheeler, 435 U.S. 313 (1978).

[FN47]. See, e.g., Merrion, 455 U.S. at 159 (holding that tribes retain inherent power of taxation as essential aspect of sovereignty); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) (requiring no federal authorization of tribal taxes).

[FN48]. See Fisher v. District Court, 424 U.S. 382 (1976).

[FN49]. See, e.g., United States v. Shoshone Tribe, 304 U.S. 111 (1938); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894).

[FN50]. Duro v. Reina, 495 U.S. 676, 697 (1991) (holding that tribal law enforcement authorities have the power to detain and eject those within tribal territory who disturb public order).

[FN51]. See Santa Clara Pueblo, 436 U.S. at 62-63 (1978); Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343 (1969).

[FN52]. Many tribal governments were reconstituted into tripartite forms pursuant to acts of Congress authorizing tribal governmental reorganization. See Wheeler-Howard Act, June 18, 1934, 48 Stat. 984 (Indian Reorganization Act); Thomas-Rogers Act, June 26, 1936, 49 Stat. 1967, (Oklahoma Indian Welfare Act).

[FN53]. Bradford Morse, Indian Tribal Courts in the United States: A Model for Canada? 11 (1980); 2 National American Indian Court Judges Association, Justice and the American

Indian: The Indian Judiciary and the Concept of Separation of Powers 25, 28 (1974). Over the past few decades, though, the traditional religious courts of some Pueblos have evolved into independent constitutional judiciaries. See, e.g., Statement on Tribal Sovereignty before the Senate Committee on Indian Affairs Oversight Hearing on Tribal Sovereign Immunity (Apr. 7, 1998) (Statement of R. Bernal, Chairman All Indian Pueblo Council), available at http://indian.senate.gov/1998hrgs/0407_rb.htm.

[FN54]. David E. Wilkins, The Navajo Political Experience 101-12 (**2003**); Office of Navajo Government Development, Navajo Nation Government, 15-32 (4th ed., 1998).

[FN55]. See Kevin Meisner, Modern Problems of Criminal Jurisdiction in Indian Country, 17 Am. Indian L. Rev. 175 (1992).

[FN56]. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985).

[FN57]. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (divesting Indian tribes of criminal jurisdiction over non-Indian U.S. citizens, because such jurisdiction would be inconsistent with their dependent status). However, at least one tribal Supreme Court has found this decision did not affect its inherent criminal jurisdiction over foreign nationals. "[T]he sovereign power of inherent jurisdiction of the Eastern Band of Cherokee Indians to try and punish non-Indian aliens of the United States has not been expressly terminated by Treaty, Act of Congress, or specifically prohibited by a binding decision of the Supreme Court of the United States or the United States Court of Appeals for the Fourth Circuit." Eastern Band of Cherokee Indians v. Torres (E. Cherokee Apr. 12, **2005**) Docket no. CR-03-143 [33] (holding that tribal criminal jurisdiction over non-Indian foreign nationals is not inconsistent with status of tribe as a domestic dependent nation); see also Eastern Band of Cherokee Indians v. Chavez CR-03-1039 (E. Cherokee Ct. **2004**) (reaching same result with similar facts).

[FN58]. 163 U.S. 376 (1896) (holding that the Constitution does not apply to tribes because their authority does not derive from the constitution).

[FN59]. See, e.g., Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) (holding that the First Amendment's protection of religious freedom does not apply to regulations passed by Indian nations); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (holding that the due process clause of the Fourteenth Amendment has "no application to actions of Indian tribes, acting as such").

[FN60]. The rights protecting provisions of the Act, found in 25 U.S.C. § 1302, as amended, provide that:

No Indian tribe in exercising powers of self-government shall--(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be

a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (**2000**).

[FN61]. This action was taken pursuant to Congress' plenary power to modify or eliminate the tribes' inherent powers of self-government. See generally Santa Clara Pueblo v. Martinez, 436 U.S. 49 at 57 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); United States v. Kagama, 118 U.S. 375, 379-85 (1886) (recognizing congressional power to make laws which extend into Indian country and reduce the tribes' authority).

[FN62]. 25 U.S.C. § 1303 (**2000**); see also Santa Clara Pueblo, 436 U.S. at 58, 69-71 (rejecting claim that other provisions of the Act necessarily implied a right to a remedy in federal court).

[FN63]. Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation, 507 F.2d 1079, 1082 (8th Cir. 1975).

[FN64]. Proposals to give federal court jurisdiction to hear complaints under the Act have been introduced in Congress. For instance, Senate Bill 517, 101st Cong., 1st Sess. (1989), would have permitted individuals to enter federal court upon a showing that the tribal court failed to be independent or failed to provide certain procedures. See Judith Resnik, Multiple Sovereignties: Indian Tribes, States, and the Federal Government, 79 Judicature 118, 125 n.71 (1995).

[FN65]. See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985) (holding that claims challenging a tribal court's jurisdiction cannot be brought in federal district court until tribal remedies have been exhausted); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18-20 (1987) (requiring exhaustion of tribal remedies where subject matter jurisdiction is challenged in a diversity case and noting that the Indian Civil Rights Act protects non-Indian individuals against unfair treatment in tribal courts).

[FN66]. This is not to suggest that tribal courts are not effective or capable protectors of individual rights. Every legal system has the potential to violate individual rights. For a careful study of several civil rights cases heard in tribal courts, see Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285, 341-53 (1998).

[FN67]. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19,

1966) [hereinafter ICCPR].

[FN68]. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 1465 U.N.T.S. 85 (1984) [hereinafter CAT].

[FN69]. International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195 (Dec. 21, 1965) [hereinafter CERD].

[FN70]. American Declaration of the Rights and Duties of Man, OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/ser. L./ V./I.4 rev. (1948), reprinted in Organization of American States, Handbook of Existing Rules Pertaining to Human Rights, OAS Doc. OEA/ser. L./V./II.23, doc. 21 rev. 5 (1978) and in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser/L/V/II.82 Doc 6 Rev. 1 (1992) 17 [hereinafter American Declaration].

[FN71]. See, e.g., Baby Boy Case (United States), Inter-Am. C.H.R., Resolution 23/81 PP 13-17 (1981) (holding that international obligations of the United States are governed by the OAS Charter; that through the Charter the American Declaration and other human rights instruments gained binding force; and that the Inter-American Commission on Human Rights as the regional organ entrusted with competence to promote human rights has competence to decide whether the United States has violated its obligations under the American Declaration); Roach and Pinkerton v. United States, Case 9467, Inter-Am. C.H.R., Report No. 3/87 P 46-49 (1987) (holding that jus cogens norms, binding on the United States, prohibits execution of children and that the United States was in violation of its obligations under American Declaration as interpreted in light of jus cogens norm); Interpretation of the American Declaration within the Framework of the ACHR, Inter-Am. C.H.R., Advisory Opinion OC-10/89, A/10 35-45 (1989) (holding that the American Declaration is for OAS member States a source of international obligations); Haitian Interdiction (United States), Case 10. 675, Inter-Am. C.H.R., Report No. 51/96, at n.35 (1997) (holding that for OAS member states the Declaration is the text that defines the human rights referred to in the Charter; that Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration; and that, therefore, the American Declaration is for the United States a source of international obligations related to the OAS Charter). See also Thomas Buergenthal, The Revised OAS Charter and the Protection of Human Rights, 69 Am. J. Int'l L. 828 (1975); Douglass, Cassel, Inter-American Human Rights Law: Soft and Hard Law, in Commitment and Compliance 393-418 (Dinah Shelton ed., **2000**).

[FN72]. Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (April 24, 1963).

[FN73]. Only reservations alter a State's responsibility under an international convention, but there may be a question as to whether a particular submission constitutes a reservation or declaration. Reservations operate to exclude a treaty body from exercising its quasi-judicial authority under a human rights treaty. Reservations are permissible so long as the treaty contains no provision to the contrary and they are not “incompatible with the object and the purpose of the treaty.” Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 19(c), 1155 U.N.T.S. 331. Other States parties may, of course, file objections to reservations.

[FN74]. David Weissbrodt, et al., International Human Rights: Law, Policy, and Process 687-89 (3d ed. **2001**); Restatement (Third) of Foreign Relations Law of the United States (1987) § 312 cmt. h.

[FN75]. See United States v. Postal, 589 F.2d 862, 875-77 (5th Cir. 1972); see also Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943) (holding that the Court may look beyond written words of a treaty in determining whether it is self-executing). Factors a court may use in determining whether a treaty is self-executing include the purposes and objectives of the States parties, the existence of domestic procedures and institutions appropriate for direct implementation, availability and feasibility of alternative enforcement mechanisms, and immediate and long-range consequences of self and non-self-execution. See, e.g., People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 97 (9th Cir. 1974).

[FN76]. Statement before the Senate Foreign Relations Committee, Conrad Harper, Legal Advisor to the State Department, 5 Dispatch Mag. 22 (May 11 1994); Weissbrodt et al., supra note 74, at 689.

[FN77]. See, e.g., 42 U.S.C. § 1983 (**2006**) (authorizing damage actions where state officials violate individual rights); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-680; Tucker Act, 28 U.S.C. §§ 1346(a), 1491 (1994) (authorizing damage actions against federal government); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Gomez v. Toledo, 446 U.S. 635, 639 (1980) ("a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees").

[FN78]. 25 U.S.C §§ 1301-41 (**2000**).

[FN79]. ICCPR, supra note 67, art. 14(3)(d).

[FN80]. U.N. Human Rights Committee, Borisenko v. Hungary, P 7.5, U.N. Doc CCPR/C/76/D/852/1999 (**2002**) ("it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation... legal assistance should be available at all stages of criminal proceedings").

[FN81]. Compare Argersinger v. Hamelin, 407 U.S. 25, 37 (1972) with Tom v. Sutton, 533 F.2d 1101, 1104-06 (9th Cir. 1976) (holding that persons subject to imprisonment by tribal courts are not entitled to attorney).

[FN82]. 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992) United States "Reservations, Understandings, Declarations, and Proviso" upon ratification of the ICCPR [hereinafter Reservations]. The Human Rights Committee also views failure to provide competent counsel to indigent criminal defendants violative of the provision. U.N. Human Rights Committee, Concluding Observations: United States, PP 266-304, U.N. Doc CCPR/C/79/Add.50, 288 [hereinafter Concluding Observations].

[FN83]. Indian Civil Rights Act § 1302(7) (**2000**). Should a tribe exceed these penalties, the defendant may challenge his or her detention under the habeas review provision after exhausting tribal remedies. 25 U.S.C. § 1303 (**2000**). Though this mechanism bounds tribal

justice systems with federal review in certain instances, the gap in implementation of U.S. human rights obligations remains.

[FN84]. Other gaps include the absence of a right to vote, a right to participate in government, a right to review by a higher tribunal, and a right to privacy. See 25 U.S.C. § 1302 (**2000**). Such gaps result in violations of specific U.S. international obligations because of the U.S. failure to include the tribes within its reservations or to implement these obligations against tribal governments.

[FN85]. 541 U.S. 193 (**2004**).

[FN86]. Id.

[FN87]. Id.

[FN88]. ICCPR, supra note 67, art. 14(7).

[FN89]. Heath v. Alabama, 474 U.S. 82, 93 (1985) (holding that states are separate sovereigns for purposes of the double jeopardy clause); United States v. Lara, 541 U.S. 193, 197 (**2004**); United States v. Lanza, 260 U.S. 377, 382 (1922) (noting that offense against separate sovereigns does not trigger double jeopardy protection).

[FN90]. Reservations, supra note 82. On tribes not being constituent units, see for example Toledo v. Pueblo de Jemez, 119 F. Supp. 429, 432 (D.N.M. 1954).

[FN91]. Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082-83 (8th Cir. 1975) (holding that rights found in the Indian Civil Rights Act are not coextensive with similar rights in the United States constitution). But see Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (holding that where tribal procedures are identical to those found in Anglo societies, federal constitutional standards may be employed).

[FN92]. Id. (quoting Felix Cohen, Handbook of Federal Indian Law 670 (1982 ed.)); see also Santa Clara Pueblo v. Martinez 436 U.S. 49, 62-72 (1978) (holding that Congress did not intend the ICRA to incorpoarate process principles which disrupt tribal customs).

[FN93]. It must be noted that the United States ostensibly has implemented against tribal governments the preemptory norm of international law prohibiting slavery. The Thirteenth Amendment of the United States Constitution, which bans slavery, applies not only to governmental units of federated entities, but to private actors as well. See, e.g., In re Sah Quah, 31 F. 327 (D. Alaska 1886) (ordering release of an Indian held in slavery according to tribal custom).

[FN94]. See, e.g., LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466 (Judgment of June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), **2004** I.C.J. 12 (Judgment of Mar. 31). In both cases the ICJ found the United States responsible for violations of the Vienna Convention where states had failed to follow its requirements.

[FN95]. 435 U.S. 191 (1978). For an example of a scholarly work proceeding from an assumption that tribes no longer possess criminal jurisdiction over non-Indians, see William

Vetter, A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians, 17 Am. Indian L. Rev. 349 (1992).

[FN96]. Joseph Kalt & Joseph Singer, Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule 17 n.35 (Joint Occasional Papers on Native Affairs No. **2004**-05) ("Tribes have no criminal jurisdiction over non-Indians whatsoever.").

[FN97]. For example, approximately 8,400 Tohono O'odham members are Mexican nationals. Carmen Duarte, Tohono O'odham: Campaign for Citizenship, Nation Divided, Arizona Daily Star, May 31, **2001**, at A1; see also Megan S. Austin, A Culture Divided by the United States-Mexican Border: The Tohono O'odham Claim for Border Crossing Rights, 8 Arizona J. Int'l & Comp. L. 97 (1991).

[FN98]. See, e.g., LaPier v. McCormick, 986 F.2d 303, 304-05 (9th Cir. 1993) (holding that the definition of an Indian for criminal jurisdiction purposes requires enrollment or affiliation with a federally recognized tribe).

[FN99]. Eastern Band of Cherokee Indians v. Torres (E. Cherokee Apr. 12, **2005**) Docket No. CR-03-143, PP 23-25, 28-32 ("In Oliphant, all the authority relied upon (treaties, opinions and statutes) sought to protect the liberty of United States citizens from Indians. The Court was not concerned with the protection of aliens in dealing with Indians. Nor has the United States Supreme Court specifically expressed the protection of aliens as a reason to limit the sovereignty of Indian tribes").

[FN100]. See, e.g., Duro v. Reina, 495 U.S. 676, 697 (1990) ("Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities."). Tribes may also retain the power to arrest non-Indians for purposes of extradition to the proper jurisdiction or to remove them from tribal lands pursuant to the exclusion power. See, e.g., Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975) ("The power of the Papago to exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power.").

[FN101]. Oliphant did not address the criminal contempt power of tribal courts, and the tribes seem to have at least contemplated the exercise of this power. See, e.g., Cherokee Code (Eastern Band of Cherokee Indians) §§ 1-20 to 1-25 (**2001**) (making no distinction between Indians and non-Indians for application of criminal contempt proceedings); White Mountain Apache Judicial Code §§ 1-1(K), 2-20(D) (1998) (contemplating exercise of criminal contempt power over non-Indians with punishments including imprisonment).

[FN102]. LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466 (Judgment of June 27) (holding it to be outside federal competence to interfere in state criminal procedure law).

[FN103]. 436 U.S. 49 (1978).

[FN104]. Bethany R. Berger, Indian Policy and the Imagined Indian Woman 14 Kan. J.L. & Pub. Pol'y 103, 114 (**2004**) (noting that the movement within the Pueblo to change the

membership ordinance has not yet succeeded).

[FN105]. Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166, at P1 (1981).

[FN106]. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 n.5 (1978).

[FN107]. Id. at 52 n.2. The law, enacted by the Santa Clara Pueblo Council, establishes these membership rules:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo. 2.... [C]hildren born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo. 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo. 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

[FN108]. Brief for National Tribal Chairmen's Association as Amicus Curiae, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (No. 76-682) (quoting the Pueblo Governor as saying that the law represented the only way for the Pueblo to protect and preserve its heritage), cited in Berger, supra note 104.

[FN109]. Santa Clara Pueblo, 436 U.S. at 54-55.

[FN110]. See Dubray v. Rosebud Housing Authority, 12 Indian L. Rep. 6015 (Rosebud Sioux Tribal Ct 1985) (ruling that defendant tribal agency had not waived sovereign immunity after federal court had dismissed plaintiffs claim on basis that tribal court was appropriate forum).

[FN111]. Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a state law which discriminated between parental rights based on gender of the parent).

[FN112]. While Congress applied certain rights protecting provisions to the tribes in the Indian Civil Rights Act, suits against the tribe under the Act are barred. See Santa Clara Pueblo, 436 U.S. at 72.

[FN113]. See Articles, supra note 7, at 80-109.

[FN114]. Article 27 of the Covenant states: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” ICCPR, supra note 67. The tribes' status in municipal law and powers to define membership and to exclude, uniquely positions them to violate this United States international obligation to protect individual access to minority culture, religion, and linguistic community.

[FN115]. Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166 (1981).

[FN116]. Id. P 1.

[FN117]. Id. P 7.2.

[FN118]. Id. PP 9.8-17.

[FN119]. Id. at PP 10-12.

[FN120]. Human Rights Committee, Apr. 7, 1999, Concluding Observations: Canada, 19, U.N. Doc. CCPR/C/79/Add.105.

[FN121]. Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166, at P14 (1981).

[FN122]. CERD, supra note 69, art. 5.

[FN123]. See, e.g., Seminole Nation of Oklahoma v. Norton, 223 F.Supp. 2d 122 (D.D.C. **2002**) (involving Seminole Nation's exclusion of Seminoles of African-American descent from voting in tribal election).

[FN124]. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 889 (2d Cir. 1996).

[FN125]. Id. at 895-98.

[FN126]. Kitok v. Sweden, supra note 5 (stating that a Sami decision to deny membership, for purposes of a national law governing herding rights, to an individual already permitted to herd, did not constitute a breach of Article 27 of the ICCPR); Human Rights Committee, Aug. 4, 1994, General Comment 23: The Rights of Minorities, P 5.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5; Sarah Joseph et al., The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary 755-56 (2d ed. **2004**).

[FN127]. The Convention proscribes racial discrimination in the context of civil and political rights. CERD, supra note 69, art. 5.

[FN128]. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1463 (10th Cir. 1989) (involving plaintiffs who were denied their right to participate in tribal elections or tribal government, and their right to tribal services, based on race); Seminole Nation of Oklahoma v. Norton, 223 F.Supp. 2d 122 (D.D.C. **2002**); Davis v. United States, 343 F.3d 1282 (10th Cir. **2003**) (involving plaintiffs who were systematically denied their right to participate in tribal government and right to tribal services, based on race); CERD, supra note 69, art. 5 (providing a right to participate in political community regardless of race). To the extent these cases involve denial of access to tribal cultural events or religious observances, they may also violate the economic and social provisions of the Convention, such as the right to partake in cultural activities.

[FN129]. F. Svensson, Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes, 27 Pol. Stud. 3 (1979) (traditional religious governments allegedly sought to quell tribal member's growing interest in Christianity). It should be remembered that the Indian Civil Rights Act contains no free expression or antiestablishment clause. Thus, even if a tribe has waived its sovereign immunity defence

for alleged Indian Civil Rights Act violations, no standing exists for religious freedom based cases.

[FN130]. Choctaws for Democracy v. Choctaw Council, 5 Okla. Trib. 165 (Choctaw Tribal Ct. 1996) (regulation on the distribution of certain literature); Rorex v. Cherokee Nation, 6 Okla. Trib. 239, 241 (Cherokee J.A.T. 1995) (addressing wrongful expropriation of private property); Kennedy v. Hughes, 60 Fed. Appx. 734 (10th Cir. **2003**) (unreported) (addressing seizure of property); Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. **2002**) (addressing arbitrary detention and degrading treatment).

[FN131]. See, e.g., **2003** U.S. Dep't Justice Jails in Indian Country (**2005**); **2002** U.S. Dep't Justice Jails in Indian Country (**2003**).

[FN132]. Concluding Observations, supra note 82, at 285 (expressing concern "about conditions of detention of persons deprived of liberty in federal or state prisons"). HRC General Comment 21 clarifies that States bear responsibility for all prisons within their territory. Human Rights Committee, General Comment 21 (Forty-fourth Session, 1992), U.N. Doc. HRI/GEN/1/Rev. 7, at 153.

[FN133]. Indian Civil Rights Act, 25 U.S.C. § 1303 (**2000**).

[FN134]. Commission Report, supra note 41, at 63-67.

[FN135]. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978).

[FN136]. Id. at 71.

[FN137]. See Geofroy v. Riggs, 133 U.S. 258 (1890); Asakura v. Seattle, 265 U.S. 332 (1924) (striking down ordinance inconsistent with U.S.-Japan treaty). United States courts tend to interpret acts of Congress as consistent with earlier treaties whether the treaties are self-executing or non-self-executing, because the treaties are binding under international law and upholding an inconsistent statute could place the United States in breach of its international obligations. State or local laws may be preempted by self-executing treaties or interpreted so as not to conflict with international treaties which create binding obligations upon the United States. A non-self-executing treaty would not supersede inconsistent state or local law, but if the courts cannot interpret the state or local law as consistent with U.S. international obligations it would be struck down as a violation of the federal government's delegated authority over foreign affairs.

[FN138]. For discussion of state and local law in the context of non-self-executing treaties, see Restatement (Third) of Foreign Relations Law of the United States, § 115 cmt. e (1987).

[FN139]. Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. **2002**).

[FN140]. Commission Report, supra note 41, at 65.

[FN141]. Dinah Shelton, Remedies in International Human Rights Law 66 (**2000**).

[FN142]. As discussed above, the only access to federal courts is the habeas corpus remedy

provided in 25 U.S.C. § 1303 for wrongful detention. Tribal remedies must first be exhausted.

[FN143]. E.g. ICCPR, supra note 67, art. 3(b).

[FN144]. Shelton, supra note 141, at 118-20.

[FN145]. Id. at 15-16. For an example of a Human Rights Committee statement on the requirement of compensation for arbitrary detention, see Human Rights Committee, Concluding Observations: Uganda U.N. Doc. CCPR/C/80/UGA/**2003** 1 (**2004**) par. 17.

[FN146]. Reservations, supra note 82, understanding 2.

[FN147]. Gomez v. Toledo, 446 U.S. 635, 639 (1980).

[FN148]. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[FN149]. Civil Rights Act of 1871, 42 U.S.C.S. § 1983 (**2000**).

[FN150]. Shelton, supra note 141, at 67.

[FN151]. Commission Report, supra note 41, at 63.

[FN152]. Shelton, supra note 141, at 107

[FN153]. Ex parte Young, 209 U.S. 123 (1908).

[FN154]. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71-72 (1978); David Sloss, Ex Parte Young and Federal Remedies for Human Rights Treaty Violations, 75 Wash. L.R. 1103 (**2000**).

[FN155]. Martinez, 436 U.S., at 71-72.

[FN156]. Dubray v. Rosebud Housing Authority, 12 Indian L. Rep. 6015 (Roseland Seoux Tribal Ct. 1985); Garman v. Fort Belknap Com. Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984) (holding that the fact that tribal legislative body had not waived tribal sovereign immunity "is an act of tribal self-government that this court cannot ignore").

[FN157]. Commission Report, supra note 41, at 64-65.

[FN158]. In re Colville Tribal Jail, 13 Indian L. Rep. 6021 (Colville Ct. Appeal 1986).

[FN159]. Indian Civil Rights Act, 25 U.S.C. § 1303 (**2000**) (providing that any person may test the "legality of his detention by order of an Indian tribe").

[FN160]. See, e.g., Dry v. CFR Court of Indian Offenses for the Choctaw Nation, 168 F.3d 1207 (10th Cir. 1999).

[FN161]. See Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948 (9th Cir. 1998).

[FN162]. See Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 893-94 (2d Cir. 1996); see also Alire v. Jackson, 65 F.Supp. 2d 1124, 1128-29 (D. Ore. 1999) (finding claim of restraint of liberty not "severe" enough for habeas relief); Shenandoah v. Dep. of Interior, 159 F.3d 708, 714 (2d Cir. 1998) ("Habeas relief [under the ICRA] does address more than actual physical custody.").

[FN163]. Red Elk v. Silk, 10 Indian L. Rep. 3109, 3110 (D. Mont. 1983).

[FN164]. Tom v. Sutton, 533 F.2d 1101, 1106 (9th Cir. 1976).

[FN165]. See ICCPR, supra note 67, art. 2(3); CAT supra note 68, art. 14; CERD, supra note 69, art. 6.

[FN166]. See ICCPR, supra note 67, art. 2(3); see also Joseph et al., supra note 126, at 8.

[FN167]. See Commission Report, supra note 41, at 63-67 (citing different tribal waiver policies).

[FN168]. Articles, supra note 7, at 43.

[FN169]. Id. commentary to art. 2, at 71 ("In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons ... which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attiribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State ....").

[FN170]. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 101-02 (1987).

[FN171]. The provisions of the Articles were approved by consensus by the International Law Commission in **2001**, with recommendations to the U.N. General Assembly to consider the possibility of convening an international conference of plenipotentiaries to examine the Draft Articles on Responsibility with a view to adopting a convention on state responsibility for internationally wrongful acts. The U.N. General Assembly noted the Commission's work and annexed the Articles to a resolution in **2001**. See James Crawford, The International Law Commission's Articles on State Responsibility 58-60 (**2002**); G.A. Res. 56/83, U.N. Doc. A/Res/56/58 (Dec. 12, **2001**).

[FN172]. Articles, supra note 7, art. 4.

[FN173]. See id. commentary to article 4, para. 11, at 90.

[FN174]. See id. commentary to ch. II, at 82.

[FN175]. Heirs of the Duc de Guise (France v. Italy), 13 R.I.A.A. 150, 161 (1951), cited in Articles, supra note 7, art. 4 commentary, at 88.

[FN176]. Id.

[FN177]. Id. para. 9, at 89.

[FN178]. LaGrand, **2001** I.C.J. Rep. 466, at P 111 (noting that its previous order "did not create an obligation of result" but that the United States must "take all measures at its disposal" to ensure state compliance.)

[FN179]. Articles, supra note 7, art. 4, at 43.

[FN180]. Jan Wouters & Leen De Smet, The Legal Position of Federal States and Their Federated Entities in International Relations--The Case of Belgium 29 (Leuven Inst. for Int'l Law, Working Paper No. 7 (**2001**)).

[FN181]. LaGrand Case (F.R.G. v. U.S) (Provisional Measures) (Mar. 3, 1999) 1999 I.C.J. Rep. 9, at P 28, stating:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; wheras the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; wheras the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States...

[FN182]. Wouters & De Smet, supra note 180, at 29.

[FN183]. Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 61 (1993).

[FN184]. (Mexico v. U.S.), **2004** I.C.J. 128 (Judgment of Mar. 31).

[FN185]. Articles, supra note 7, at 92-95.

[FN186]. Id.

[FN187]. Articles, supra note 7, at 94 ("Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.")

[FN188]. William Canby, Jr., American Indian Law in a Nutshell 86-87 (4th ed. **2004**). See also Bethany Berger, Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal

Systems, in 16 University of Connecticut School of Law Working Paper Series 1, 34-46 (**2004**).

[FN189]. Montana v. United States, 450 U.S. 544 (1981) (holding there to be no regulatory jurisdiction over non-member hunting and fishing activity on non-member-owned land); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding there to be no prescriptive jurisdiction over non-member-owned land within open area of a reservation); Strate v. A-1 Contractors et al., 520 U.S. 438 (1997) (no adjudicative jurisdiction over tort action between non-members arising from an accident on a state highway easement within a tribal territory); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (**2001**) (holding there to be no power to tax non-Indian activities on non-Indian-owned land within tribal territory); Nevada v. Hicks, 533 U.S. 353 (**2001**) (finding no enforcement jurisdiction over non-Indian officers engaged in investigation for off-reservation crime).

[FN190]. Articles, supra note 7, at 84-92.

[FN191]. American Declaration, supra note 70, at art. XII; Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding Amish withdrawal of children from public school to be constitutional).

[FN192]. ICCPR, supra note 67, art. 27.

[FN193]. Articles, supra note 7, 104, 188.

[FN194]. The unrecognized tribes, like the Amish, cannot be classified as State organs. Municipal law views them as non-governmental entities, and they exercise no prescriptive or enforcement jurisdiction. Whilst these tribes may retain residual governmental powers, they are generally characterized as private entities. Of course, traditional tribal governments may continue to operate, but without U.S. recognition they are no different than private associations in municipal law. Although it is theoretically possible for an unrecognized tribe to violate a member's right to access to minority culture or to deny retained tribal treaty rights to individuals, these breaches are not generally attributable to the United States.

[FN195]. Proclamation No. 7620, 67 Fed. Reg. 67,773 (Nov. 1, **2002**) ("To enhance our efforts to help Indian nations be self-governing, self-supporting, and self-reliant, my Administration will continue to honor tribal sovereignty by working on a government-to-government basis with American Indians ....").

[FN196]. United States v. Lara, 541 U.S. 193 (**2004**).

[FN197]. Articles, supra note 7, at 119-23.

[FN198]. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, P170 (1988).

[FN199]. Id. P166. (holding State responsible for breach of obligation to ensure rights although private act which caused substantive harm was not attributable to the State).

[FN200]. Articles, supra note 7, at 103, 118.

[FN201]. Id. at 84-92.

[FN202]. United States Diplomatic and Consular Staff in Tehran Case (U.S. v. Iran), 1980 I.C.J. 3, PP 67-70 (judgment of May 24).

[FN203]. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, P170 (1988).

[FN204]. Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. **2002**).

[FN205]. ICCPR, supra note 67, at 175; American Declaration, supra note 70, arts. I, XXV.

[FN206]. Articles, supra note 7, commentary to art.7, at 101 (citing 5 R.I.A.A. 516, 531 (1929)).

[FN207]. Petrolane, Inc. v. Islamic Republic of Iran, 27 Iran-U.S. Cl. Trib. Rep. 64, 92 (1991).

[FN208]. Articles, supra note 7, art. 7, at 44.

[FN209]. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 302; CAT, supra note 68, art. 22; CERD, supra note 69, art. 14.

[FN210]. ICCPR, supra note 67, art. 41; CAT, supra note 68, art. 21; CERD, supra note 69, art. 11. Only the CAT includes the inquiry mechanism. CAT, supra note 68, art. 20.

[FN211]. Although the United States withdrawal appears to be effective immediately, the ICJ would likely find a period of notification required. Vienna Convention on the Law of Treaties, supra note 73, art. 56. The United States is not a state party but regards its provisions as declaratory of customary international law. See, e.g., Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301 (2d Cir. **2000**) ("We therefore treat the Vienna Convention as an authoritative guide to the customary international law of treaties."); Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n.40 (11th Cir. 1999), quoting Kreimerman v. Casa Veerkamp S.A. de C.V., 22 F.3d 634, 638 n.9 (5th Cir. 1994) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.").

[FN212]. See, e.g., LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466 (Judgment of June 27), at 514 (holding that the I.C.J. has jurisdiction over Germany's complaints against the United States under the Optional Protocol concerning the Compulsory Settlment of Disputes to the Vienna Convention on Consular Relations when Arizona, a sub-state entity, breached the United States' consular obligations); Avena and Other Mexican Nationals (Mex. v. U.S.), **2004** I.C.J. 12 (Judgment of Mar. 31), PP 153(2)-(6) (rejecting the United States' objection to ICJ jurisdiction and finding the U.S. in breach of its consular relation obligations, although several of the violations were committed by, and under municipal law within the sole power of, state governments).

[FN213]. See Garza v. Lappin, 253 F.3d 918, 924-25 (7th Cir. **2001**); Juan Raul Garza v. United States, Case 12.243, Report No. 52/01, Inter-Am. C.H.R., OEA/ser.L/V/II.111 doc.

20 rev. at 1255 (Apr. 4, **2001**).

[FN214]. See, e.g., Baby Boy Case, supra note 71; Roach and Pinkerton v. United States, Case 9467, Inter-Am. C.H.R., Report No. 3/87 P 46-49 (1987); Salas v. United States, Case 10.573, Inter-Am. C.H.R., Report No. 31/93 (1999).

[FN215]. Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02 PP 43-50 (**2002**).

[FN216]. Rules of Procedure of Inter-Am. Commission on Human Rights, in **2000** Inter-Am. C.H.R. Ann. Rep. 1495, 1511, arts. 45, 46 (amended Oct. 25, **2002** and Oct. 24, **2003**).

[FN217]. 119 U.N.T.S. 3, 2 U.S.T. 2394, Mar. 2, 1948, preamble, arts. 3(l), 12.

[FN218]. The **Inter-AmericanCourt** of **HumanRights** takes into account "the corpus juris gentium of international human rights law" when interpreting the American Declaration. Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02/OEA/Ser. L/V/II 717, doc. 1 rev. 1 PP 96-98 (**2001**).

[FN219]. The Yanomami Case, Case 7615 (Brazil), Inter-Am C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 PP 24, 31 (1985); IACHR 'Report on the Situation on the Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (Nicaragua)' OEA/Ser.L/V/II.62, doc 10 rev. 3 (1983). It has also interpreted the American Convention on Human Rights in light of Article 27 of the International Covenant on Civil and Political Rights. Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1, at 03-04 (1997) .

[FN220]. Villareal v. United States, Case 11.753, Inter-Am. C.H.R., Report No. 52/02 P 5 (**2002**); Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report No. 99/03 P 40 (**2003**).

[FN221]. Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02/OEA/Ser. L/V/II 717, doc. 1 rev. 1 P 172 (**2001**).

[FN222]. Dann, Case No. 11.140, Inter-Am. C.H.R., at P 173(1).

[FN223]. Dann, Case No. 11.140, Inter-Am. C.H.R., at P 173(2).

[FN224]. Whether the United States would ever recognize the authority of the Commission to make such a recommendation, or the legitimacy of such a decision, is, of course, doubtful. The United States communications with the Commission regarding the Dann case and its withdrawal from the Optional Protocol on Compulsory Dispute Resolution to the Vienna Treaty on Consular Relations in response to the International Court of Justice ("ICJ") decisions in LaGrand and Avena demonstrate its unwillingness to recognize or to comply with external decisions regarding its implementation of human rights norms. See, e.g., Response of the Government of the United States, Dann v. United States, Case No. 11.140, Inter-Am. C.H.R., Report No. 53/02 (Oct. 10, **2002**); **2002** Dep't State Dig. U.S. Prac. Int'l L. 367-82 (**2003**) (extensive U.S. response to the Dann final report); Adam Liptak, US Says It Has Withdrawn From World Judicial Body, N.Y. Times, May 10, **2005**, at A16. The tribes,

on the other hand, may be willing to take measures to prevent future findings of U.S. international responsibility, both to prevent U.S. actions which may limit tribal sovereignty and to gain legitimacy as subjects under international law.

[FN225]. Commission Report, supra note 41, at 72-74.

[FN226]. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

[FN227]. HRC Initial Reports of States Parties Due in 1993: United States of America, U.N. Doc. CCPR/C/81/Add.4 (1994), para. 203.

[FN228]. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[FN229]. Blackfoot Nation Const. (Proposed Constitution), arts. 5(2) & 8, cited in Taiawagi Helton, Nation Building in Indian Country: The Blackfoot Constitutional Review, 8 Kan. J.L. & Pub. Pol'y 1, 1 (**2003**).

[FN230]. Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008 (Colville Ct. App. 1995).

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Article

# ***1** INTERIM MEASURES IN INTERNATIONAL HUMAN RIGHTS: EVOLUTION AND HARMONIZATION

Jo M. Pasqualucci [FNa1]



Abstract

In this Article, the Author undertakes a comprehensive study of interim measures ordered in human rights cases before six international enforcement bodies--the International Court of Justice, the European Court of Human Rights, the **Inter-AmericanCourt** of **HumanRights**, the United Nations Human Rights Committee, the United Nations Committee against Torture, and the Inter-American Commission on Human Rights. An order of interim measures may require that the State take positive action, such as providing protection for human rights activists or journalists, or it may call upon the State to refrain from taking action, such as not extraditing a person or delaying the execution of prisoners until their cases have been resolved before the international body. The purpose of interim measures in international human rights law is most often to protect persons involved in a case from urgent danger of ***2** grave and irreparable injury. The Author concludes that the multiple jurisdictions charged with the enforcement of international norms are successfully harmonizing and evolving their treatment of interim measures. In general, States have accepted the decisions of international courts that interim measures are binding on the States that are parties to the applicable treaties. Many States have not yet accepted the view that interim measures specified by international quasi-judicial bodies also are binding on States. The Author argues inter alia that States that have accepted the right of individuals to petition international human rights bodies are bound to respect that petition process by refraining from interfering with the process and by protecting the lives and rights of those involved in the case. Thus, interim measures are implied in the constituent documents that provide for the right of individual petition and must be considered to be binding on States that are parties.

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## ***3** I. Introduction

When the well-known Guatemalan newspaper El Periódico published articles critical of the government, several of the newspaper's investigative reporters and staff received death threats. [FN1] The president of the paper was forced to leave Guatemala after his home was taken over and his family harassed by armed persons who identified themselves as National Police agents. [FN2] Two armed men entered the newspaper facilities, opened fire, and wounded a security agent. [FN3] In response to a complaint of human rights abuse filed with the Inter-American Commission on Human Rights, the Commission ordered the government of Guatemala to take interim measures to protect the director and the technical and administrative staff of the newspaper. [FN4] This immediate step protected the persons in danger during the time-consuming international proceedings.

The overriding importance of interim measures in human rights cases arises from their potential to terminate abuse rather than primarily to compensate the victim or the victim's family after the fact. International proceedings, which typically are not resolved for years, are inadequate in urgent circumstances to protect persons from imminent danger or death. There is, however, one procedural weapon ***4** in the arsenal of international tribunals and other quasi-judicial enforcement bodies that has been effective in saving lives and avoiding irreparable injury: an order to a State to take interim measures.

An order of interim measures may require that the State take positive action, such as providing protection for human rights activists, journalists, or judges who have offended those in power. Conversely, interim measures may call for the State to refrain from taking action, such as not extraditing a person or delaying the execution of prisoners until their cases have been resolved. The purpose of interim measures in international human rights law is most often to protect persons involved in a case from grave and irreparable injury. Thus, in human rights cases, interim measures are not only preventive but are also protective of human rights. [FN5] The authority to order a State to take interim measures is potentially one of the most valuable powers possessed by international tribunals and other enforcement bodies that deal with human rights issues. Their protective function is more important than the compensatory function of a final judgment.

The multiple jurisdictions charged with the enforcement of international norms are successfully harmonizing and evolving their treatment of interim measures. International norms must be interpreted consistently, and procedures must be applied in a similar manner by the various enforcement bodies. Inter-system harmonization may come about when enforcement bodies, although under no obligation to do so, choose to apply the reasoning or holdings of other international bodies or to emulate the practice of other systems. An excellent example is set forth in Mamatkulov and Abdurasulovic v. Turkey, in which the European Court of Human Rights, in determining that interim measures are binding on the parties to the European Convention, made reference to the jurisprudence and rules of the International Court of Justice (ICJ), the **Inter-AmericanCourt** of **HumanRights**, the United Nations Human Rights Committee (U.N. Human Rights Committee), and the United Nations Committee against Torture (U.N. Committee against Torture.) [FN6] The European Court stated in this regard that "the [European] Convention must be interpreted so far as possible ***5** consistently with the other principles of International Law of which it forms a part" [FN7]--an interpretation that advances the goal of inter-state harmonization of international law.

The treatment of interim measures has been harmonized recently by the principal international and regional courts. In well-reasoned decisions, the ICJ, [FN8] the European Court of Human Rights, [FN9] and the **Inter-AmericanCourt** of **HumanRights**[FN10] have held that interim measures are necessary to the effective functioning of the tribunals and, thus, are binding. These decisions largely put to rest a lengthy controversy as to whether an international tribunal's order that a State take interim measures was binding or a mere suggestion to be followed if the State chose to comply. Consensus has not yet been reached on the equally important issue of whether interim measures specified by international quasi-judicial treaty bodies, such as the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights also are binding on States. This Article argues that States that have accepted the right of individuals to petition international human rights bodies are bound to respect that petition process by refraining from interfering with the process and by protecting the lives and rights of those involved in the case. Thus, interim measures are implied in the constituent documents that provide for the right of individual petition and must be considered to be binding on the states parties to the treaties.

The increasing harmonization of the treatment of interim measures in international law may minimize the concerns of some commentators that the growing multiplicity of

international fora could result in inconsistent pronouncements on basic concepts and potentially hamper international law's continuing evolution into a coherent and harmonious body. [FN11] Were the enforcement organs to work in a vacuum without reciprocally recognizing and relying on developments in the other bodies, international law could become splintered and conflicting, and the law would not be truly "international." It is essential that the multiple international organs make an effort to harmonize not only their holdings but also their ***6** practice and procedures. As demonstrated by the harmonized inter-system rulings on interim measures, the multiplicity of international fora can have a positive effect on international law. In a world-wide system in which the tribunals and enforcement bodies look to the interpretations of other fora, the most advanced, well-reasoned decisions are finding acceptance and being adopted by other international bodies, which spurs developing concepts and procedures. [FN12] In this way the important pillars of evolution and harmonization of international law are both being served.

The growing consensus that interim measures must be followed by a State--not solely out of the State's goodwill but rather out of a legal obligation--makes an inroad into the classical theory of international law. The classical or positivist view holds that international law is derived from the voluntary will of the State. [FN13] The State, in most cases, is only bound by international law when it has ceded a particular aspect of its sovereignty by ratifying a treaty or failing to object persistently to an evolving principle of international law. [FN14] If the State ratifies a treaty, the positivist theory provides that the State is only bound to the explicit provisions of the treaty, and that it cannot be held to greater obligations than it has expressly accepted. If the State also accepted the jurisdiction of an international body with the authority to enforce the treaty, the enforcement body must not infringe on any procedural protections afforded the State or assert against it any rights to which the State ***7** has not agreed. In this vein, States have argued that interim measures are not binding on States when the authority to order such measures is not included in the constituent document or when the wording of the constituent document does not appear to be mandatory. [FN15] Nonetheless, the major international tribunals have held that interim measures are essential to the functioning of the tribunal and that States have a legal obligation to comply with interim measures regardless of whether the authority to order them is expressed, inherent, or implied. [FN16]

This development is especially important in human rights law which, comparatively, has only recently been established as a separate branch of international law. International human rights law is an offshoot of traditional international law, which is based on the principle of State sovereignty. [FN17] Human rights law, however, undercuts certain foundational concepts of international law and establishes the supremacy of human rights over the will of the State. The purpose of international human rights law is to protect individuals from the misuse of power by the State or from the State's failure to curb the misuse of power by entities or persons within the State. [FN18] Publicly ordered interim measures by an international body bring attention to bear on abuses as they are happening and often have the effect of curtailing those abuses. In this regard, interim measures have been unexpectedly successful in the limited number of cases in which they have been applied and may have a chilling effect on similar abuses.

This Article represents a comprehensive study of interim measures in multiple international fora including the ICJ, the **Inter-AmericanCourt** of **HumanRights**, the European Court of Human Rights, the U.N. Human Rights Committee, the U.N. Committee

against Torture, and the Inter-American Commission on Human Rights. [FN19] Although these international bodies may use different ***8** terminology to signify interim measures, the concept remains the same. Interim measures may also be designated as "provisional measures," "precautionary measures," "emergency measures," and "conservatory measures." The term "interim measures" will be used in this Article except when the source discussed employs an alternative term. This multi-forum study of interim measures in international human rights law argues that interim measures ordered by any international body to which States have granted the right to receive individual complaints must be considered to be binding. This study will provide governments, non-governmental organizations, and others litigating before international bodies with an understanding of the application of interim measures in appropriate circumstances. It will also inform the enforcement bodies on the treatment of interim measures by the other international tribunals and quasi-judicial bodies. Furthermore, it may encourage the development and harmonization of other substantive rights and procedures in international human rights law.

Part II of this Article discusses interim measures in general. Part III evaluates the authority to order interim measures, including express, inherent, and implied authority. The Author argues that judicial organs have the inherent authority to order interim measures and that quasi-judicial human rights bodies granted the competence to review individual human rights complaints have the implied authority to order interim measures. Part IV delineates the international standards for an order of interim measures: urgency, gravity, and the likelihood of irreparable injury. Part V analyzes whether interim measures should be binding when issued by all international fora that have the right to consider individual petitions. Part VI describes situations in which interim measures are most commonly ordered, including pending State-sponsored executions; extradition; protection of petitioners, witnesses, and human rights activists; protection to allow displaced persons to return home; and medical care for prisoners. Part VII compares the procedures applied by the international bodies when considering provisional measure requests. Part VIII discusses methods of implementation of interim measures, and Part IX evaluates State compliance with interim measures.

## ***9** II. Interim Measures in General

Interim measures traditionally have been ordered to preserve the subject matter of a dispute and, thus, maintain the status quo until a tribunal reaches a judgment on the merits. [FN20] Their primary purpose has been the preservation of the parties' rights pending a court decision. [FN21] Thus, a party may be barred from logging a forest that is the source of contention. On the international plane, interim measures may be ordered by international courts, quasi-judicial bodies, or arbitral bodies. [FN22] The International Court of Justice has stated that the power of the Court to indicate provisional measures "has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings." [FN23] The Permanent Court of International Justice earlier stated that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." [FN24]

In addition to the traditionally preventive role of interim measures, these measures are

fundamentally protective of human rights. [FN25] Although a State has an obligation, erga omnes, to protect ***10** all persons subject to its jurisdiction, international tribunals may order States to take special measures to protect persons who are in immediate danger of suffering irreparable injury. [FN26] A unique aspect of international human rights cases is that individuals involved in the case or even individuals related to those persons may be in danger and, therefore, in need of the protection that can be offered through interim measures. This need results from threats and attempts to intimidate or eliminate complainants, their attorneys, family members, and witnesses who have testified or have been called to testify. Such threats and acts of aggression are intended to interfere with the competence of the enforcement organ to hear all evidence and may be meant to dissuade future complainants from filing cases. The protection of all persons involved preserves the court's ability to consider every aspect of the case and to reach a conclusion based on all the evidence. The enforcement body must have the authority to ensure that physical evidence or subject matter not be injured or destroyed, as well as that same authority with respect to those giving testimonial evidence. In this sense, as in traditional cases, interim measures "prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved." [FN27]

An order that a State take interim measures does not prejudge a decision on the merits. [FN28] After ordering interim measures, the international entity considers the evidence and determines whether the State is liable for a human rights violation. When the U.N. Human Rights Committee requests that a State take interim measures, for instance, it informs the State that its request does not imply that the Committee has made a determination as to the merits of the petition. [FN29] Interim measures simply protect those involved in the pending case.

## ***11** III. Authority to Order Interim Measures

An international enforcement body, whether judicial or quasi-judicial, that is empowered to consider individual complaints of human rights abuse must have the authority to order a State to take interim measures. This authority is essential to fulfill the purpose of human rights treaties: the protection of persons. [FN30] A goal of the enforcement bodies established by the treaties is to afford individual complainants the procedural capability to enforce their rights. Especially in human rights law, "[t]he final result of the international procedure must have some practical relevance for the person concerned." [FN31] To accomplish this goal, the tribunal must have the legal authority to order provisional measures in any case in which there will be immediate and irreparable damage to those involved in the case in any capacity. This power is necessary for the effective functioning of international human rights systems.

### A. Express Authority

The authority to order interim measures may be expressly provided for in the treaty, the constituent document that established the tribunal or enforcement body. When authorization is set forth in the constituent document, there is no question as to the organ's competence to order interim measures. Treaties, such as the Statute of the International Court of Justice, [FN32] the American Convention on Human Rights, [FN33] and the Protocol to the African Charter [FN34] expressly provide for interim measures. The Statute of the ICJ provides that "[t]he Court shall have the power to indicate, if it considers that

circumstances so require, any provisional measures which ought to be ***12** taken to preserve the respective rights of either party." [FN35] The Inter-American Court's authority to order provisional measures, which is provided for in the American Convention on Human Rights, is the broadest in that it not only empowers the Court in particular circumstances to "adopt such provisional measures as it deems pertinent in matters it has under consideration" [FN36] but also authorizes the Court to act at the request of the Inter-American Commission even when a case has not yet been submitted to the Court. [FN37] As such, the Inter-American system of human rights expanded the application of provisional measures and adapted the doctrine and practice of their use to the two-tiered system in the Americas. Likewise, the Protocol to the African Charter on Human and Peoples' Rights, which establishes the African Court, provides that "in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary." [FN38] This provision partially echoes the American Convention.

Most enforcement bodies delineated their authority to order interim measures in their self-drafted rules of procedure, either to remedy the lack of a provision in the underlying treaty or to supplement the broad terms of the treaty. For example, the European Rules of Court contain the sole authority for the adoption of provisional measures in the European human rights system. [FN39] The European Rules provide that a chamber of the Court may "indicate to the party any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." [FN40] The wording of the Rules of Procedure of the U.N. Human Rights Committee is less forceful in that it authorizes the Commission to inform the State of the Commission's "views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation." [FN41] Since States do not ***13** have the right of approval over the rules of procedure drafted by the enforcement organ, they have argued that they should not be bound by interim measures authorized solely by rules of procedure. [FN42] In this vein, Canada argued before the U.N. Committee against Torture that

> [i]t must be observed that Rule 36 [regarding interim measures] has only the status of a rule of procedure drawn up by the Commission. . . . In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties. [FN43]

B. Inherent Authority

The inherent authority of international tribunals to order States to take interim measures is essential to the effective protection of human rights. This inherent authority necessarily derives from the powers accorded an international tribunal. Interim measures are necessary if the tribunal is to exercise its competence effectively. [FN44]

Whether an adjudicatory body has inherent authority to order the State to take interim measures has been a subject of dispute. In relation to the power of the Permanent Court of International Justice, and subsequently the ICJ, experts argued that "[t]he judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, this power to indicate provisional measures which ought to be taken." [FN45] Scholars consider this authority to be a general principle of international law and an inherent part of the judicial function. [FN46] Although inherent power may not be essential

if there is a broadly worded provision granting interim measures in the constituent document, such express authorization may not cover all instances in which measures are ***14** necessary. The organ should not be unduly hampered by the wording of the empowering document; rather, it must have the inherent power to order interim measures whenever they are warranted by the circumstances.

The Inter-American Court decreed its inherent authority to order provisional measures in its first contentious cases. In the Honduran Disappearance cases, the Court based this authority not only on the American Convention, but also on its "character as a judicial body and the powers that derive there from." [FN47] Buergenthal explained that it may have been reliance on its inherited powers that permitted the Inter-American Court to order Honduras to adopt measures to clarify that every person enjoys the right to appear before the Inter-American Commission and Inter-American Court, an instruction which went beyond the strict parameters of the Convention provision. [FN48]

International recognition of the inherent authority of an international tribunal to order interim measures is particularly necessary when interim measures are not authorized in the constituent document that established the enforcement entity. When interim measures are authorized solely by a tribunal's rules of procedure, their inherent nature is essential if the measures are to have force. Thus, for instance, the European Court of Human Rights [FN49] must rely on its inherent authority.

C. Implied Authority

Although there may be no express provision in the constituent document authorizing interim measures, if such measures are necessary for the fulfilment of the object and purpose of the treaty, the authority to issue interim measures is implied in the treaty. [FN50] State parties to a treaty, like parties to a contractual obligation, make a choice of forum when they accept the competence of an international tribunal or quasi-judicial body to adjudicate disputes. If the parties have neglected to include a term in the treaty or contract ***15** that is necessary to its nature and purpose, the forum chosen to settle disputes relating to that agreement shall infer the necessary term. [FN51] Both express and implied terms are obligatory and binding on the parties.

Quasi-judicial bodies such as the U.N. Human Rights Committee, [FN52] the U.N. Committee against Torture, [FN53] and the Inter-American Commission on Human Rights, whose express authority to order interim measures is provided for only in their rules of procedure, must rely on implied authority to order States to take interim measures. The individual complaint procedure authorized by States allows quasi-judicial organs to fulfil the object and purpose of the treaty by considering individual human rights complaints alleging State human rights violations. The right of individuals to file human rights petitions with international bodies is defeated if the petitioner is irreparably harmed before the merits of the petition can be decided. The Inter-American Commission stated in this regard that "in the Commission's view, OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate." [FN54] The U.N. Human Rights Committee explained that interim measures "are essential to the Committee's role under the Protocol." [FN55] The Committee went on to

explain that "[f]louting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol." [FN56] The U.N. Committee against Torture has also stated that "[c]ompliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee." [FN57] The argument that interim measures are essential to ***16** the competence granted to quasi-judicial enforcement bodies by the States and that such measures are, therefore, implied in the underlying treaty is compelling and necessary to the fabric of international law.

## IV. International Standards for Ordering Interim Measures

The standard necessary for an international tribunal or other body to order a State to take interim measures may vary depending on the wording of the instrument authorizing the measures or the jurisprudence of the enforcement body ordering them. In general, the party requesting interim measures must demonstrate urgency and the likelihood of irreparable injury. The Statute of the ICJ is general, empowering the Court to indicate provisional measures "if it considers that circumstances so require." [FN58] The ICJ interprets the phrase "circumstances so require" to mean that there must be urgency and the likelihood of irreparable damage. [FN59] The American Convention authorizes the Court to order provisional measures "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons." [FN60] The practice of the European Court is to order interim measures when there is "imminent danger to the applicant's life or of torture, or inhuman or degrading treatment or punishment." [FN61] If an enforcement body denies a request for provisional measures because the requesting party cannot meet the standards of gravity, urgency, and the likelihood of irreparable damage, that party may make a subsequent request if the circumstances of the case change. [FN62]

### A. Urgency and Gravity

The underlying situation must be sufficiently serious to satisfy the requirement of gravity. The situation must also be urgent in that ***17** the likelihood of irreparable injury is imminent. The ICJ found sufficient gravity and urgency in the Nuclear Tests Cases, in which Australia and New Zealand requested as interim measures that the ICJ order France to cease atmospheric nuclear tests until the Court had issued a judgment. [FN63] Although France had not revealed a date for further nuclear testing, there were reports that it intended to start testing again that year. [FN64] France stated in this regard that it would not agree to stop nuclear testing in the Pacific and that it would continue the testing despite the protests of other States. [FN65] The Court found that there was "an immediate possibility of a further atmospheric test" resulting in urgency and, therefore, ordered the French government to avoid atmospheric nuclear tests that could result in radioactive fallout in Australia and New Zealand. [FN66]

The international body must refuse to order interim measures when the requisite urgency is not demonstrated. In the case Concerning the Arrest Warrant, the ICJ declined to order provisional measures and nullify an arrest warrant because the requesting State, the Congo, had not established that the situation was urgent. [FN67] A domestic Belgian Court had issued an arrest warrant for the Congolese Minister of Foreign Affairs, who was

charged with inciting ethnic violence through radio messages. [FN68] The Congo requested provisional measures arguing that it was necessary and urgent that its Minister of Foreign Affairs be free to travel abroad without fear of arrest. When the Congo restructured its government, however, and shifted the person subject to the arrest warrant to a position that did not require external travel, the Court did not find sufficient urgency to order provisional measures. [FN69]

The Inter-American Court did not find sufficient urgency to order provisional measures to protect a Peruvian human rights activist when Peru had not yet issued a warrant for his arrest. [FN70] In the Chipoco case, the Inter-American Commission requested that the Court order Peru to adopt provisional measures to protect a Peruvian human rights activist, Carlos Chipoco, who had cooperated with the ***18** Commission. [FN71] Following Chipoco's involvement with the Commission, Peru had charged him with the crime of "justification of terrorism against the state," which could result in the loss of Peruvian nationality and twenty years in prison. [FN72] Although Chipoco was in the United States when he was indicted, he could have been tried in abstentia. [FN73] The Inter-American Court refused to adopt provisional measures finding that, since an arrest warrant for the alleged victim had not been issued, the conditions did not exist to justify the adoption of the requested measures. [FN74]

In death penalty cases, when the date of execution is set and approaching, the international body will find that the requisites of gravity, urgency, and the likelihood of irreparable injury have been met. If the date of execution has not been set, the adjudicating body will look at the specific circumstances of the case to determine if execution may be imminent. According to the International Court of Justice, the lack of an execution date "is not per se a circumstance that should preclude the Court from indicating provisional measures." [FN75] The ICJ did order provisional measures to protect some prisoners in the United States, finding that they were "at a risk of execution in the coming months, or possibly even weeks," even though the date of execution had not been set. [FN76] In some States, imminent danger may exist when a person has been tried and sentenced to death, even though the date of the execution is unknown. In Staselovich v. Belarus, counsel for the petitioner explained to the U.N. Human Rights Committee that in Belarus, death sentences are carried out in secret without informing the prisoner or the family in advance of the date. [FN77] In such cases the international human rights body must order interim measures, if called for, when the sentence is handed down.

B. Likelihood of Irreparable Injury

Interim measures are only appropriate when there is a likelihood of irreparable injury. An injury is irreparable when there is no remedy available at law that will adequately compensate for the injury. The ICJ found that there was a likelihood of irreparable injury and, therefore, ordered Iran to take provisional measures in ***19** the case Concerning United States Diplomatic and Consular Staff in Tehran [FN78] after the U.S. Embassy in Tehran had been invaded and U.S. citizens were being held hostage. [FN79] The Court found that the situation "expose[d] the human beings concerned to privation, hardship, anguish, and even danger to life and health and thus to a serious possibility of irreparable harm." [FN80] Likewise, the ICJ found the likelihood of irreparable injury in The Nuclear Test Cases even though there was a lack of ascertainable damage attributable to atmospheric nuclear testing. [FN81] The Court relied on a United Nations study that did not

exclude the possibility that radioactive fallout on Australia and New Zealand could cause irreparable damage. [FN82] Conversely, the ICJ declined to order provisional measures in the case Concerning the Arrest Warrant, holding that there was no possibility of irreparable damage. [FN83] The Congo had requested that the ICJ order Belgium to annul the warrant issued for the arrest of its Minister of Foreign Affairs as a provisional measure because it inflicted irreparable damage on the Congo. [FN84] The arrest warrant, which had been transmitted to other states, could have subjected the Congolese Minister of Foreign Affairs to extradition to Belgium to stand trial when he travelled while representing the Congo. When the person in question became the Congolese Minister of Education, the ICJ determined that the position did not require frequent travel and that, therefore, the Congo would not suffer irreparable damage if the arrest warrant was not immediately annulled. [FN85]

If the potential injury can be compensated by other means, interim measures are not necessary. In the Aegean Sea case, the ICJ refused to order Turkey to cease exploration and scientific research in a continental shelf area that was claimed by both Greece and Turkey. [FN86] The Court reasoned that **reparations** could be made "by appropriate means" for the potential harm cited in the Greek application. [FN87]

***20** V. Binding Nature of Interim Measures

The inter-system harmonization of interim measures can be observed in recent international tribunal holdings that interim measures are binding on States. Decisions by the European Court of Human Rights, the ICJ, and the **Inter-AmericanCourt** of **HumanRights** resolved the long-standing debate of whether interim measures ordered by international tribunals are binding on States or mere suggestions that States could follow out of goodwill. There is currently, however, no international concurrence that interim measures ordered by quasi-judicial bodies are binding.

A. International and Regional Tribunals

It follows that if interim measures are authorized by the treaty and inherent to the judicial duties of international courts, then they must be binding on the parties that have accepted the Court's jurisdiction. The European Court of Human Rights held in Mamatkulov and Abdurasulovic v. Turkey that States must comply with Court-ordered interim measures "and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment." [FN88] In Mamatkulov the European Court informed Turkey that as interim measures it should delay extradition of the applicants pending the Court's decision in the case. [FN89] The applicants, who were members of an Uzbek opposition party, were arrested in Turkey pursuant to international arrest warrants charging them with homicide and a terrorist attack against the President of Uzbekistan. [FN90] The Republic of Uzbekistan requested their extradition. [FN91] The applicants denied the charges and countered that they were political dissidents working for the democratization of their country and that political dissidents were being arrested and subjected to torture in prison in Uzbekistan. [FN92] Although most States voluntarily complied with European Court indications of interim measures, Turkey did not. It extradited the applicants to Uzbekistan, where they were imprisoned and denied access to the attorneys who were representing them before the European Court. [FN93] The European Court, relying on general principles of law and citing the jurisprudence of several international courts and enforcement bodies,

held that Turkey's failure to comply with the Court's indication of ***21** interim measures resulted in a breach of its obligations under the European Convention. [FN94] The Court stated that a State Party must comply with interim measures. [FN95] The Court clarified that when a State ratifies a treaty and accepts the competence or jurisdiction of the tribunal charged with the enforcement of the rights protected in the treaty, the State must comply in good faith not only with the substantive provisions of the treaty but also with its procedural and regulatory provisions. [FN96]

The International Court of Justice held in the LaGrand Case that its order of provisional measures was "binding in character and created a legal obligation" and was "not a mere exhortation." [FN97] In LaGrand, the ICJ held that the United States had not complied with the Court's order of provisional measures when the State did not take adequate steps to delay the execution of a German national. [FN98] The ICJ had ordered the United States to "take all measures at its disposal to ensure that Walter LaGrand [was] not executed pending the final decision" of the ICJ. The United States merely transmitted the ICJ's order to the Governor of Arizona without comment, explanation, or a plea for a temporary stay of execution. [FN99] Moreover, when Germany brought suit in the U.S. Supreme Court to enforce the ICJ order, the U.S. Solicitor General informed the Supreme Court in a brief letter that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief." [FN100] The execution went forward as planned. The ICJ then, for the first time, stated unequivocally that provisional measures are binding on the State. [FN101] In doing so the Court reasoned that the object and purpose of the ICJ Statute and the terms of the article on provisional measures when read in context reveal that

> the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid ***22** prejudice to the rights of the parties as determined by the final judgment of the Court. [FN102]

The ICJ went on to explain that "[t]he contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article." [FN103]

The wording of the ICJ Statute that the Court has the power to "indicate" provisional measures that "ought to be taken" was at one time argued to imply that the Court's adoption of interim measures was a mere suggestion to be complied with out of the goodwill of the State. [FN104] The ICJ clarified that the Statute's preparatory work shows that the French word for "indicate" was chosen rather than the word for "order" because the ICJ had no means to enforce its decisions. [FN105] In LaGrand the Court specified that "the lack of means of execution and the lack of binding force are two different matters." [FN106] The ICJ found that the U.N. Charter requirement that every U.N. member "undertakes to comply with the decision" of the ICJ should be understood to refer to any decision rendered by the Court, including an order that the State take provisional measures. [FN107] The Court further stated that even if the word "decision" were to be interpreted to refer solely to an ICJ judgment in the context of the article, it would not preclude the binding nature of provisional measures. [FN108]

The **Inter-AmericanCourt** of **HumanRights** was the first of the international tribunals explicitly to hold that its provisional measures orders are binding and mandatory.

[FN109] In the Constitutional Court case, in which judges of the Peruvian Constitutional Court had been illegally removed from office, the Inter-American Court held that the American Convention provision "makes it mandatory for the state to adopt the provisional measures ordered by this Tribunal." [FN110] It grounded its decision in "a basic principle of the law of international state responsibility, supported by international jurisprudence, according to which States must fulfil their conventional international obligations in good faith (pacta sunt servanda)." [FN111] In earlier orders ***23** the Inter-American Court had merely implied that its orders of provisional measures were mandatory, stating that "[s]tate parties must not take any action that may frustrate the restitutio in integrum of the rights of the alleged victims." [FN112] That statement, although forceful, did not definitively resolve the issue of whether provisional measures were binding in the Inter-American system. The Court's pronouncement in the Constitutional Court case is unequivocal, permitting no measure of doubt as to the Court's resolution of this question. [FN113]

B. International Quasi-Judicial Bodies

The binding force of interim measures must not be limited solely to tribunals. Even if a quasi-judicial body's decision on the merits of a complaint arguably may not be binding on States, an interim measures order must still have that effect. When contracting States have authorized quasi-judicial treaty bodies to consider individual applications, the States have obligated themselves implicitly not to interfere with the processing of complaints. It would be incompatible with the obligations voluntarily undertaken by the State for it to act or refrain from acting in such a way as to frustrate the consideration of an individual petition. [FN114]

An order that a State take interim measures does not prejudge a decision on the merits. [FN115] It merely prevents destruction of the subject matter of the dispute and protects those involved in bringing the case before an international body. States must comply with orders of interim measures to ensure the effectiveness of final decisions on the merits of the case. [FN116] In many cases, especially those ***24** cases involving the imminent execution of a prisoner, a final judgment that the prisoner's due process rights had been violated and that the prisoner should, therefore, receive a new trial would be meaningless if the prisoner had already been executed.

The State breaches its commitment under the treaty if it ignores an order of interim measures and, thereby, prevents or frustrates the enforcement body from effectively considering an application or complaint. [FN117] The Inter-American Commission on Human Rights, when requesting that the United States take "the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal," [FN118] stated "where such measures are considered essential to preserving the Commission's very mandate under the OAS Charter, the Commission has ruled that OAS member states are subject to an international legal obligation to comply with a request for such measures." [FN119] When the Philippines executed prisoners despite the U.N. Human Rights Committee's order of interim measures to delay the executions, the Committee stated that "a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the ***25** Covenant, or to render examination by the Committee moot and the expression of its views nugatory and futile." [FN120] The U.N. Human Rights Committee also has stated that interim measure orders "are essential to the Committee's

rule under the Protocol" and that a State's failure to comply with interim measures is a separate breach of its treaty obligations. [FN121] The U.N. Committee against Torture cited the State party's obligation to "cooperate with it in good faith" in following orders of provisional measures. It reasoned that "[c]ompliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee." [FN122]

It is necessary to the functioning of quasi-judicial bodies charged with the enforcement of human rights treaties that their orders of interim measures be treated as binding. [FN123] When quasi-judicial organs have responsibility for enforcement, there is often no further recourse to protect the rights of the applicants. For example, there is no tribunal that will reconsider a decision by the U.N. Human Rights Committee or the U.N. Committee against Torture. Even in the Inter-American system, which is two-tiered, recourse to the Court is limited to cases against States that have expressly accepted its jurisdiction. [FN124] The Inter-American Court has attempted to give support to precautionary measures ordered by the Inter-American Commission, by instituting a presumption that Court-ordered provisional measures are necessary when the Commission previously has ordered precautionary measures on its own authority that were ***26** not effective and another threatening event has occurred subsequently. [FN125]

## VI. Circumstances Repeatedly Giving Rise to Interim Measures

Certain factual circumstances, because of their urgent nature and potential for irreparable harm, repeatedly give rise to interim measures on the international plane. These circumstances may involve death penalty cases; extradition or deportation cases wherein the person will be extradited to a State in which he or she will likely face cruel and inhuman treatment or death; threats to those who file petitions or testify against the State in international proceedings; threats or attacks against local human rights organizations, activists, and journalists; threats or attacks against local judges or opposition politicians; protection to allow displaced persons to return to their homes; and requests for medical care to ill prisoners.

### A. Pending State-Sponsored Executions

When a State has scheduled the execution of a prisoner, irreparable danger to life is imminent. The ICJ, Inter-American Commission and Court, European Court of Human Rights, and the U.N. Human Rights Committee have ordered States, as interim measures, to delay executions until proceedings before the international body have been completed and it could be determined if the prisoners' due process rights had been violated. The European Court of Human Rights requested, as an interim measure, that Turkey refrain from carrying out the death penalty in the case of the leader of the Kurdistan Workers' Party until the Court could examine the merits of the prisoner's case. [FN126] Turkey complied with the order and did not execute Abdullah Ocalan. [FN127] The Inter-American Court ordered Trinidad and Tobago to delay the executions of several prisoners on death row until their cases could be considered. [FN128] Although the State executed two of the prisoners, it stayed the executions of the other beneficiaries of the interim measures. [FN129] The ICJ in the LaGrand Case, as described above, ordered the United ***27** States to take provisional measures to protect the life of Walter LaGrand, a German citizen, who was scheduled to be

executed in Arizona on the same day that Germany filed the request with the Court. [FN130] The United States did not comply with the ICJ's order of provisional measures. The majority of cases in which the U.N. Human Rights Committee has requested interim measures have involved petitioners who had been sentenced to death. [FN131]

B. Extradition or Deportment

An international body may order interim measures to delay extradition or deportment when the applicant could be subject to the death penalty or cruel and inhumane treatment in the country to which he is to be deported or in the State that has requested his extradition. [FN132] The European Court of Human Rights, [FN133] the U.N. Human Rights Committee, [FN134] and the U.N. Committee against Torture [FN135] have ordered interim measures to delay extradition or deportation. The greatest number of requests for interim measures in the European system have arisen in attempts to block extradition. [FN136] In the Soering case, the applicant, a German national, faced charges of capital murder in Virginia, and the European Commission requested that the Court indicate as interim measures that the United Kingdom delay the extradition of Soering to the United States while the proceedings were pending before the ***28** European Court. [FN137] Although the Virginia prosecutor intended to seek the death penalty, he assured the United Kingdom that at the time of sentencing the appropriate Virginia authorities would inform the court of the United Kingdom's concern that the death penalty not be imposed or carried out. [FN138] The prosecutor offered no further assurances. [FN139] The United Kingdom complied with the European Court's indication of interim measures and did not extradite the applicant. [FN140] Conversely, Austria extradited a petitioner to the United States before the U.N. Human Rights Committee could address the petitioner's allegation that he would suffer irreparable harm if extradited. The Committee held that in doing so, Austria had breached its obligations under the Optional Protocol. [FN141]

C. Protection of Petitioners, Witnesses, and National Attorneys

Petitioners who file complaints with international bodies alleging State responsibility for human rights abuses and the witnesses and attorneys in those cases are often particularly vulnerable to retaliatory measures by the State. Those who testify about government-sponsored human rights abuses may be labelled “enemies of the State” because their testimony sullies the State's international reputation. In addition, local attorneys who take human rights cases may be as vulnerable to retaliation as their clients. [FN142] Interim measures may be the only effective means of protecting victims, their family members, their attorneys, and witnesses in international human rights cases.

The Inter-American Commission on Human Rights and the **Inter-AmericanCourt** of **HumanRights** have been in the forefront in ordering provisional measures to protect those who petition or testify before international bodies. The Inter-American Court has stated in this regard that “it is the responsibility of the State to adopt security measures to protect all those who are subject to its jurisdiction; this obligation is even more evident as regards those who are involved in proceedings before the supervisory organs of the American ***29** Convention.” [FN143] After witnesses in the Honduran Disappearance Cases had been murdered, the Inter-American Court ordered the Honduran government to take provisional measures to protect all those who had testified or who had been summoned to testify. [FN144] The Court ordered Honduras to

> adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention. [FN145]

The Inter-American Commission granted precautionary measures ordering Colombia to protect the lives of the executive director and attorney of a Colombian human rights organization that had filed several petitions and requests for precautionary measures with the Inter-American Commission. [FN146] The beneficiaries of the measures had received anonymous death threats. [FN147] Likewise, the Commission granted precautionary measures to protect the members of the Comisión Intereclesial de Justicia y Paz, a prominent Columbian human rights organization that had filed petitions of human rights abuses before the Commission. [FN148]

Situations in which the complainants or witnesses are in danger of death or injury may also become problematic in the European system with the influx of additional States, many of which had not been governed by the rule of law. The African Court, when active, will likely confront similar problems.

***30** D. Protection of Human Rights Organizations, Activists, and Journalists

Human rights activists may be threatened or persecuted locally because of their human rights advocacy, and national courts may not have the power to provide adequate protection. [FN149] These cases have been particularly prevalent in the Inter-American human rights system. The Inter-American Commission stated in its **2003** Annual Report that the situation of human rights defenders in Guatemala

> has progressively worsened. In recent years there has been an increase in the number of threats, acts of harassment, searches of headquarters of human rights organizations and homes of human rights defenders, and assaults and assassinations targeting defenders. These actions are part of a pattern of intimidation of human rights defenders, identifiable by the profile of the victims, the methods of intimidation, and the motives behind them. The main goal of this pattern of intimidation against human rights defenders is to prevent effective action by the judicial branch in cases of human rights violations committed during the armed conflict. [FN150]

Guatemala is not the only state in which human rights activists are targeted and in need of the protection that interim measures can offer. In Colombia, the president and attorney for a Colombian human rights organization was assassinated even though the Inter-American Commission had ordered the government to provide him with protection as a precautionary measure. [FN151] The Inter-American Court then ordered Colombia to take provisional measures to protect the other human rights workers in the organization. [FN152] In Mexico, the Inter-American Court ordered provisional measures after Digna Ochoa, a human rights activist and attorney for a Mexican nongovernmental organization, was kidnapped; other members were threatened; and the office of the organization was ransacked. [FN153] The Court ordered Mexico to adopt provisional measures to protect those ***31** working in or visiting the human rights center. [FN154] Although provisional measures have not been consistently successful, in many cases they have been instrumental in ending death threats and preventing future harm to human rights

advocates.

Newspapers, journalists, and television stations that report on official transgressions or that are otherwise critical of the government may be threatened and require interim measures. The Inter-American Commission noted in its **2003** Annual Report that there was an "alarming increase in intimidations against the media" in Guatemala. [FN155] For instance, Guatemalan journalist María de los Ángeles Monzón Paredes and her family were threatened because of her writing on crucial human rights issues. [FN156] As a result the Inter-American Commission ordered the Guatemalan government to take precautionary measures to protect her. [FN157] The Inter-American Court also issued provisional measures to protect the lives and safety of journalists who worked for the Venezuelan television station Radio Caracas Televisión after one journalist was murdered and others had been shot, beaten, or threatened. [FN158] The Inter-American Commission likewise granted precautionary measures and ordered the government of Haiti to protect a journalist and a radio correspondent who had been subjected to death threats. [FN159] Freedom of the press is essential to the protection of human rights, and interim measures may provide one means to protect the lives of journalists who put themselves at risk by writing accounts of human rights abuse.

***32** E. Protection for Local Judges and Opposition Politicians

Local judges who rule against the government or against powerful political factions may have need of the temporary protection offered by internationally mandated interim measures. In the Chunimá Case, two Guatemalan judges who investigated the murders of human rights activists and then issued arrest warrants for the alleged perpetrators were threatened and forced into hiding. [FN160] The Inter-American Court ordered Guatemala to protect the judges as well as the members of the human rights group. [FN161] Likewise, the Inter-American Court ordered provisional measures orders to protect a member of the Peruvian Constitutional Court who had been dismissed and harassed after holding that a law allowing President Fujimori to run for a third term of office was unconstitutional. [FN162] Those measures were lifted when the beneficiary was subsequently reinstated on the Court. [FN163] Similarly, the Inter-American Commission ordered Guatemala to provide protection to the members of the Constitutional Court who received death threats when they were considering the registration of Rios Montt as a presidential candidate. [FN164] In that case, one of the judges had to be airlifted from his home when his building was taken over by Rios Montt sympathizers. [FN165] Intimidation of the judiciary cannot be allowed if human rights are to receive judicial protection. Interim measures may protect judges and also provide negative publicity to curtail the abuses.

Opposition political candidates may also be threatened or murdered, thereby jeopardizing the political process. In the Aleman Lacayo Case, the Inter-American Court originally ordered provisional measures to protect a presidential candidate in Nicaragua whose motorcade had been attacked by heavily armed men. [FN166] The measures were lifted when the beneficiary of the measures was ***33** elected President of Nicaragua. [FN167] Protection of human rights is directly linked to a functioning democracy. Interim measures may be a last resort to end the attempted subversion of the democratic process.

F. Protection to Allow Displaced Persons to Return to Their Homes

Individuals and their families who have received death threats are sometimes forced to flee their homes or even their countries. Human rights bodies have ordered interim measures to allow these people to return safely. The Inter-American Commission and the Inter-American Court have issued orders requiring States to take measures to protect certain persons returning to the State or, when internally displaced, to their homes within a State. In the Peace Community of San Jose de Apartadó case, the Court ordered Colombia to take provisional measures to protect the residents of a community that was being targeted for attempting to maintain its neutrality in the midst of civil conflict. [FN168] Forty-seven of the approximately twelve hundred community members had been murdered in a nine month period. [FN169] The Court not only ordered that the State protect the community but also that it provide the necessary conditions for those who had been forced to leave to be able to return to their homes. [FN170] Also, in the Loayza Tamayo Case, in which Peru had incarcerated and tortured a university professor, the victim sought asylum in Chile when she was released from a Peruvian prison. [FN171] In response to a request on her behalf, the Inter-American Court ordered Peru to take provisional measures to "guarantee to Mrs. Loayza Tamayo the necessary conditions of security for her to be able to return to the country without fear of suffering negative consequences to her physical safety, mental health and moral integrity." [FN172]

In other cases, individuals have been expelled from their countries of residence without due process. In the Haitians and ***34** Dominicans of Haitian Descent in the Dominican Republic case, [FN173] the Dominican Republic was accused of engaging in mass expulsions of persons to Haiti on the basis of skin color. [FN174] The Court ordered the Dominican Republic to permit the immediate return to its territory of certain persons who had been deported to Haiti. [FN175] These orders are more easily administered when the beneficiary is a single person or family rather than a large group.

G. Medical Assistance to Prisoners

Prisoners or their family members, who have filed individual complaints with international enforcement bodies, sometimes ask the international organ to order that the prisoner receive needed medical attention. One of the most common scenarios giving rise to U.N. Human Rights Committee interim measures concerns the alleged victim's health. [FN176] In an early case, the Committee ordered Uruguay to provide medical treatment to a prisoner who had a heart condition. [FN177] The State complied and subsequently reported that the prisoner had undergone surgery. [FN178] In the Cesti Hurtado Case, the Inter-American Court ratified the order of its President that Peru take urgent measures to ensure the physical, psychological, and moral health of the prisoner Cesti Hurtado and provide "adequate medical treatment for his heart problems." [FN179] The Inter-American Commission requested that Mexico take precautionary measures to provide medical care for a seventy-one-year-old diabetic prisoner who was suffering the effects of inadequate treatment. [FN180] Mexico responded that the prisoner was receiving medical care at a hospital ***35** and that the State was studying the possibility of release from prison because of his physical health and age. [FN181] Maintenance of the health of prisoners whose cases are before international tribunals is essential if any remedy granted by that organ is to be meaningful.

## VII. Comparative Procedures

The rules of each enforcement body set forth the procedures that must be followed by the petitioner in requesting interim measures and by the enforcement body in granting them. The Statute, Rules of Procedure, and practice of the ICJ have served as a model for interim measures for other tribunals and enforcement bodies. [FN182]

The urgent nature of requests for interim measures mandates that international bodies have expedited procedures to deal with requests. The U.N. Human Rights Committee realized the need for expedited procedures when its request that Belarus not execute a petitioner was not issued until months after the execution had been carried out. [FN183] The Committee noted

> with regret that, by the time it was in a position to submit its Rule 86 request, the death sentence had already been carried out. The Committee understands and will ensure that cases susceptible of being subject to Rule 86 requests will be processed with the expedition necessary to enable its requests to be complied with. [FN184]

In all instances, the plenary tribunal or committee is the primary body authorized to order a State to take interim measures. If the plenary body is not in session when the request is received, however, a representative?usually the President, the designated Rapporteur, or the other judges?may order the measures. For example, the Rules of the European Court authorize a chamber of the Court or the Court's President to indicate interim measures. [FN185] The Rules of the Inter-American Court specify that

> [i]f the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible, with the other judges, shall call upon the government concerned to adopt urgent measures as may ***36** be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court at its next session. [FN186]

The Rules of the Inter-American Commission, a body which also sits only part-time, provides that its President or, if he or she is not available, one of the Vice-Presidents, shall consult with the other members of the Commission to make the decision. [FN187] The American Convention also authorizes the Commission to request that the Court order a State to take provisional measures even before the Court is seised of a case. [FN188] The Rules of Procedure of the U.N. Committee against Torture more broadly authorize that the Committee, a working group of the Committee, or the Rapporteur for new complaints and interim measures may request that the State take steps to avoid irreparable damage to the victims. [FN189] If the request to the State is not made by the plenary Committee, all Committee members must be informed. [FN190] Provision for immediate consideration of requests for interim measures is essential to their effectiveness in saving lives.

A. Parties Authorized to Petition an International Body to Order Interim Measures

Interim measures can be requested unilaterally by any party to the case or may be ordered by the enforcement body on its own motion. [FN191] Broad access to request interim measures is in keeping with the understanding that few obstacles should be placed in the path of the international body when it is called upon to order interim measures. [FN192] The Rules of the European Court permit parties to the case and “any other person concerned” to request such measures. [FN193] This expansion of the provision could be important when the request is made by a witness who is not also a party to the case. The Inter-American Court has recently expanded its Rules of Procedure to ***37** provide that “[i]n

contentious cases already submitted to the Court, the victims or alleged victims, their next of kin, or their duly accredited representatives, may present a request for provisional measures directly to the Court." [FN194] Parties to the case usually request such measures when they themselves or their family members are in danger.

Most international enforcement bodies are authorized to order interim measures proprio motu without a formal request, thus, in appropriate circumstances, avoiding unnecessary delays. The Rules of the European Court of Human Rights specify that the Court may "of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." [FN195] The Rules of the ICJ provide that the Court may indicate provisional measures proprio motu. [FN196] The ICJ has concluded that based on this authority it is authorized to indicate provisional measures even should one party fail to appear before the Court. [FN197] The ICJ holds that "the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures." [FN198] In the Inter-American system, when the case is before the Inter-American Court, the Court is authorized to order provisional measures on its own motion at any stage of the proceedings. [FN199] If the case is before the Commission and has not yet been referred to the Court, the Court may order provisional measures upon the request of the ***38** Commission. [FN200] The Inter-American Commission can also, on its own initiative, order a State to take precautionary measures. [FN201]

B. Prima Facie Jurisdiction

A court must have jurisdiction over the parties in order to rule on a request for provisional measures. Because of the urgent nature of a request, the ICJ does not require a full hearing that will allow it to fully determine whether it has jurisdiction on the merits. Rather, it will order measures when the applicant establishes a prima facie case for jurisdiction. [FN202] The ICJ has stated in this regard that

> [w]hereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. [FN203]

The U.N. Committee against Torture's Special Rapporteur for New Communications and Interim Measures may request that a State take interim measures even before the Committee has made a decision on admissibility. [FN204]

C. Discretion to Order Interim Measures

International enforcement organs have discretion as to whether to order a State to take interim measures. Requests for interim measures are granted on an ad hoc basis considering all the facts and circumstances of each case. The European Rules of Court provide that the Court "may . . . indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." [FN205] The Inter-American Court's Rules of Procedure further support this discretionary nature by providing that the Court may order any provisional measures that it "deems pertinent." [FN206] Thus, the courts ***39** have discretion to

determine whether they will order interim measures, and if so, what type of measures are justified in a particular situation. The authority to grant interim measures is not limited to those measures requested by a party. The enforcement body may indicate measures that are partially or totally different from those requested, or it may adopt measures which must be taken by the party that made the request. [FN207]

International organs do not order interim measures de rigour. The Inter-American Court has stated that this power of the Court is "an extraordinary instrument, one which becomes necessary in exceptional circumstances." [FN208] It holds that exceptional circumstances are present when there is a prima facie situation of grave and urgent danger. [FN209] The Inter-American Court applies a presumption that provisional measures are called for in cases in which the Inter-American Commission has independently requested that the State take such measures, and the Commission-requested measures have been ineffective. [FN210] The Commission's measures are usually deemed to have been ineffective when there has been another incident in which the beneficiaries of the measures have been further threatened or harmed. [FN211] The ICJ has also characterized its authority to order provisional measures as an "exceptional power." [FN212]

D. Prior Hearing

Some controversy exists as to whether an international body must hold a hearing to consider the views of the State before the issuance of interim measures. Although ordering interim measures without a prior hearing is an extraordinary procedure, international bodies must be authorized to dispense with a hearing when there are overwhelming and compelling reasons for so doing. Historically, the ICJ did not order a State to take provisional measures without first ***40** hearing the arguments of the parties. [FN213] If the Court was not sitting when the request was made, it was convened to allow the parties to present their observations. [FN214] Pending the oral hearing, the President of the Court could call upon the parties to act in such a way as would enable a potential order of provisional measures to be effective. [FN215] In the LaGrand Case, however, in which the beneficiary of the measures was to be executed on the day the ICJ ordered the measures, the ICJ for the first time ordered provisional measures without holding a hearing. [FN216] Judge Schwebel, in a separate opinion, questioned whether the failure to hold a hearing was "consistent with the fundamental rules of the procedural equality of the parties." [FN217]

Especially when courts or enforcement bodies meet on a part-time basis, irreparable damage could be done between sessions. Moreover, it is expensive and time-consuming to immediately convene a tribunal or enforcement body whose members reside in different States. Therefore, some international monitoring bodies have, when necessary, dispensed with a prior hearing or have developed procedures whereby a hearing can take place after the initial order of interim measures. For example, the Rules of the Inter-American Court provide that the Court "may" hold a public hearing but is not obligated to do so. [FN218]

Although there is a valid argument that there is no equality of arms if the monitoring body does not hold a prior hearing to consider a request for interim measures, the problem will only temporarily inconvenience the State and is for the greater good of the individuals involved in the case. Interim measures by their nature must be ordered quickly if they are to be beneficial in most cases. A hearing can be held after provisional measures are ordered to determine if the measures should be revoked.

E. The Period of Effectiveness of Interim Measures

The period of effectiveness of interim measures is specific to the facts and circumstances of each case. While the basic requirements that led to the adoption of interim measures continue to exist, the ***41** measures must be maintained in effect. [FN219] The international body may extend its orders of interim measures when the threat continues to be grave and urgent. The situation calling for interim measures may last for years and, thus, require repeated extensions of interim measures. An example is the Colotenango case in the Inter-American system in which the Inter-American Court initially ordered provisional measures in 1994 to protect persons who had witnessed an attack by Guatemalan civil patrols against unarmed participants in a human rights demonstration. [FN220] The measures were periodically expanded to cover the relatives and attorneys of those witnesses who were also at risk. [FN221] The provisional measures were in effect for over seven years. [FN222]

Orders of interim measures are made for a set period of time. If, during that period or at its conclusion, the international body is convinced that the requirements of extreme gravity and urgency no longer exist, it will lift or refuse to renew the measures. [FN223] In this regard, the Rules of the ICJ provide that upon a party's request for the revocation or modification of provisional measures, the Court will consider the observations of the parties before determining whether a change in the situation justifies the requested revocation or modification of the measures. [FN224] Although the rules of some international judicial and quasi-judicial bodies do not address the termination of interim measure, their jurisprudence may establish the principle. It is in the interest of judicial efficiency that measures that are no longer necessary be withdrawn. Moreover, States are more likely to comply with Court-ordered provisional measures if those measures are terminated when they are no longer warranted.

A court or tribunal will lift interim measures when the circumstances that resulted in the adoption of measures no longer exist or are found never to have existed. In Einhorn v. France, the European Court lifted its order to France to delay the extradition of ***42** Einhorn to the United States upon the assurance that he would receive a new trial in the U.S. and that he would not be subject to the death penalty. [FN225] In Shamayev and 12 Others v. Georgia and Russia, the European Court was persuaded by assurances of the authorities of Georgia and Russia that when the Chechen prisoners were extradited to Russia they would be guaranteed unhindered access to medical treatment, legal counsel, and the European Court. [FN226] The Court, therefore, refused to renew the measures that had required a delay of extradition. [FN227]

The Inter-American Court has lifted provisional measures in a range of circumstances. It lifted provisional measures in the Ivcher Bronstein Case subsequent to Peru's cancellation of arrest warrants, annulment of court proceedings against the victim, and restoration of the alleged victim's Peruvian nationality and shareholder status in a television station. [FN228] In the Suárez Rosero case against Ecuador, the urgent measures initially ordered by the Court's President were lifted by the plenary Court when the beneficiary of the measures was released from prison. [FN229] In the Vogt case, the Court lifted provisional measures protecting a priest in Guatemala because the threat and other acts of harassment had abated and the priest was able to conduct his pastoral

activities unhindered. [FN230] In some instances, provisional measures will be lifted for one or more beneficiaries who declare that they are no longer in need of protection, while they are maintained for the other beneficiaries of the measures. [FN231]

***43** The conclusion of a case will not necessarily result in the lifting of interim measures when the victims and witnesses are still in danger. For example, after the Inter-American Court issued its judgment on **reparations** in the Caballero Delgado and Santana Case, it lifted the provisional measures ordered to protect the witnesses. [FN232] Only days later, the beneficiaries of the measures petitioned the Court to reinstate them at least until the domestic proceedings and investigations ended. [FN233] All parties involved, including the Commission and the State, concurred that the measures should be reinstated, and the Court complied. [FN234] Witnesses in cases before human rights organs may continue to be targeted long after the case has been closed.

The enforcement body may refuse to lift provisional measures when it cannot be verified that the situation that precipitated the request has improved. In the Clemente Teherán et al. Case, the Inter-American Commission lost contact with the members of the indigenous community in Colombia that had initially reported the human rights violations. [FN235] After a prolonged period, the Commission and the State asked the Inter-American Court to terminate the provisional measures. [FN236] The Court refused the request, stating that it did not have sufficient information that the situation that had triggered the initial order of provisional measures had ceased. [FN237] Therefore, the Court stated that "the lifting of the provisional measures is not justified." [FN238] A refusal to lift the measures when the petitioners fail to communicate may minimize State attempts to intimidate petitioners into abandoning their petitions. Conversely, if, as it appears, interim measure requests continue to increase and the duration of provisional measure orders extends for several years, the burden on the enforcement organs, each with a limited staff, threatens to overwhelm human rights systems.

***44** VIII. Oversight of State Implementation of Interim Measures The court or other enforcement body that orders a State to take interim measures will normally oversee State compliance. [FN239] In doing so, it may require that the State and beneficiaries periodically provide information on the effects of the measures taken by the State. In the alternative, the court or enforcement body may request information on the effectiveness of the measures. To this end, the Rules of the ICJ provide that the Court may request relevant information from the parties on any aspect of the implementation of the provisional measures it has ordered. [FN240] Likewise, the European Court "may request information from the parties on any matter connected with the implementation of any interim measure it has indicated." [FN241] Even after the measures are lifted, the situation may require periodic oversight. When the Inter-American Commission petitions the Inter-American Court to lift provisional measures, it generally volunteers to continue to oversee the situation for any future problems. [FN242] Monitoring the effects of interim measures protects the beneficiaries and allows the monitoring body to fine tune both the measures in that case and those that it will order in future cases, so that they will be most effective.

When a State fails to comply with an order of interim measures, some international systems provide for recourse to a political organ. In the United Nations system, any measures indicated by the ICJ must be communicated to the Secretary-General of the United Nations for transmission to the Security Council. [FN243] The Secretary General also

maintains a list of the U.N. Committee against Torture's requests for interim measures. [FN244] In the European system, notice that the Court has indicated interim measures is given to the Committee of Ministers. [FN245] Under the European human rights system, the Committee of Ministers follows up decisions of the Court ***45** to ensure State compliance. The Inter-American Court includes a statement in its annual report to the OAS General Assembly concerning the provisional measures it has ordered in the preceding year and its recommendations as to the appropriate action to be taken when the State has failed to implement the measures. [FN246] Recourse to the OAS General Assembly has not been particularly useful to date because the General Assembly has not had the political will to sanction a State that has not complied with Court-ordered provisional measures. Most recently, the Inter-American Court also has posted information regarding State compliance with provisional measures on its website.

## IX. State Compliance with Interim Measures

State compliance with internationally ordered interim measures varies depending on the type of case, the international body that ordered them, and the State that is subject to the order. States have complied most consistently with interim measures to delay extradition or to protect individuals who have been threatened. Most European Court-ordered interim measures have involved orders to delay extradition or deportation to States where the person could be subject to torture or the death penalty. [FN247] With certain notable exceptions, European States have complied and delayed the extradition or deportation until the case has been resolved in the European human rights system.

State compliance with interim measure orders is sometimes quickly forthcoming. On December 17, **2003**, the Inter-American Commission on Human Rights requested that the State of Paraguay take measures to protect the patients at the state neuro-psychiatric hospital. Reliable information submitted to the Commission described the sanitary and security conditions in which the patients lived to be inhuman and degrading; female patients had been raped, children were confined with adults, youths were kept naked in solitary confinement for years without access to bathrooms, and often there was no medical diagnosis of patient conditions. [FN248] The Commission asked the Paraguayan authorities to take precautionary ***46** measures to protect the mental and physical health of the patients and to establish conditions that complied with international standards. [FN249] In response to the Commission's request, the President of Paraguay and the Minister of Public Health and Social Welfare visited the hospital two weeks later on December 31. [FN250] Following their visit, the director of the hospital was replaced, and an audit and other actions were taken to improve the living conditions of the patients. [FN251]

States may take action to correct a problem before a public hearing on a request for interim measures is held. A positive example arose in the Gallardo Rodríguez Case in which a Mexican general who had criticized abuses of power in the Mexican army had been imprisoned for several years. [FN252] The Inter-American Commission on Human Rights and the United Nations Working Group on Arbitrary Detention had studied the case and had declared his detention to be illegal. [FN253] The President of the Inter-American Court, in conjunction with the other judges, ordered urgent measures to protect General Gallardo Rodríguez and called for a public hearing to be held before the plenary Court. Mexico released the long-time prisoner before the hearing took place. [FN254]

Another impressive instance of government compliance in the Inter-American system occurred at the public hearing on provisional measures in the Chunimá Case. [FN255] Several members of a Guatemalan highland indigenous human rights group had been murdered, but the alleged perpetrators who had bragged about the killings remained free. [FN256] At the public hearing on provisional measures before the Inter-American Court, the Guatemalan government made the surprising announcement that it had arrested the civil patrol leaders, who were allegedly responsible for the assassinations. [FN257]

Although it is difficult to prove that persons were not harmed because a government complied with interim measures ordered for their protection, it is interesting to note the occurrences in the Honduran Disappearance Cases. When two witnesses who had ***47** appeared before the Inter-American Court received death threats, [FN258] the President of the Court requested that the government of Honduras protect those particular witnesses. The government duly informed the Court that it would guarantee their safety as requested. [FN259] Although those named witnesses were not harmed, three other witnesses who had appeared before the Court or who were scheduled to give evidence were subsequently murdered. [FN260]

Compliance with ICJ orders of provisional measures has not been uniform. In the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), the Court granted Nicaragua's request for provisional measures to prevent the United States from continuing to mine Nicaraguan harbours. [FN261] The United States did not comply with the request for provisional measures. In the Case Concerning United States Diplomatic and Consular Staff in Tehran, the ICJ granted the United States request for provisional measures to effect the release of the hostages during the Iranian crisis. [FN262] Iran did not comply with the Court order. A State that does not comply with requests that it take interim measures may risk acquiring the reputation of being a rogue state or a State that considers itself above international law.

In general, States have complied with interim measures requested by the U.N. Human Rights Committee and the U.N. Committee against Torture. [FN263] State parties had complied with more than 100 requests for an interim measures formulated by the U.N. Human Rights Committee before Trinidad and Tobago ignored its order and executed the beneficiary of an interim measures request. [FN264] A Committee member of the U.N. Committee against Torture suggested to the plenary committee, however, that action be taken to combat the “increasing tendency of States to disregard its requests for interim measures during the consideration of cases.” [FN265]

***48** The most common circumstance in which States have failed to comply is when a tribunal issues a measure mandating the delay of the death penalty while the case is being considered by the international forum. In general, the United States and certain Caribbean nations have ignored interim orders in death penalty cases. Trinidad and Tobago executed two prisoners who were covered by Inter-American Court-ordered provisional measures. [FN266] The State did not, however, execute the other beneficiaries of the measures. The United States has not complied with interim measures ordering it to halt executions of prisoners until their cases could be studied by the ICJ or the Inter-American Commission. [FN267]

## X. Conclusion

Interim measures are particularly important in international human rights cases in that they provide for the protection of persons who are in imminent danger of irreparable harm. Those persons may be at risk because they are judges who have ruled against the government, human rights activists who are bringing to light governmental human rights abuses, opposition party leaders, prisoners in need of medical care, persons facing the death penalty who allege that their right to due process was violated, or those who petition for international human rights relief--including their families, attorneys, and witnesses to the case. An international tribunal or enforcement body can order a State as interim measures to take action to protect the persons at risk.

The major international tribunals have harmonized the status of interim measures by declaring that their orders of interim measures are binding on States regardless of whether the authority to order the measures is expressly set forth in the constituent document or is provided for in the self-drafted rules of procedure. Quasi-judicial organs such as the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights have stated that compliance with their orders of ***49** interim measures is essential to the individual petition process, and therefore, failure to comply is a separate violation of the relevant treaty. States have not, however, necessarily accepted that interim measures ordered by quasi-judicial human rights bodies are binding.

Interim measures must be considered to be binding when issued by both international judicial and quasi-judicial bodies. The right of individuals to petition international enforcement organs is a revolutionary step in international human rights law. When States accept the competence of an international enforcement organ to consider individual petitions, they commit themselves to support the petition procedure. The de jure right to petition international bodies must not be nullified by the State's de facto act or failure to act. The right to individual petition is a nullity if the participants in the proceedings have died or can be intimidated into withdrawing a complaint. A State that has accepted the right of individual petition by ratifying the constituent instrument or that has filed a separate declaration of acceptance of competence has bound itself to support that process by complying with any interim measures ordered. It would be incompatible with the obligations voluntarily undertaken by the State for the State to act or refrain from acting in a way that frustrates the consideration of an individual petition. [FN268]

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[FN1]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 42 (Dec. 29, **2003**), available at http://www.cidh.org (describing El Periodico v. Guatemala).

[FN2]. Id.

[FN3]. Id.

[FN4]. Interim measures are termed “precautionary measures” when issued by the Inter-

American Commission on Human Rights.

[FN5]. See, e.g., Peace Community of San José de Apartadó (Colombia), Provisional Measures, Order of June 18, **2002**, Inter-Am. Ct. H.R. (ser. E), P 4 (**2002**), available at http://www.corteidh.or.cr; La Nacíon Newspaper (Costa Rica), Provisional Measures, Order of Dec. 6, **2001**, Inter-Am. Ct. H.R. (ser. E), P 4 (**2001**), available at http://www.corteidh.or.cr; Gallardo Rodriguez (Mexico), Provisional Measures, Order of Dec. 6, **2001**, Inter-Am. Ct. H.R. (ser. E), P 4 (**2001**), available at http://www.corteidh.or.cr.

[FN6]. Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), PP 39-51, available at http:// www.echr.coe.int.

[FN7]. Id. P 99 (citing Al-Adsani v. U.K., [GC], App. No. 35763/97 (Eur. Ct. H.R. **2001** -XI), § 60).

[FN8]. See LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466 (June 27), available at http://www.icj-cij.org.

[FN9]. See Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), PP 39-51.

[FN10]. See Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, **2000**, Inter-Am. Ct. H.R. (ser. E), P 14 (**2000**), available at http:// www.corteidh.or.cr.

[FN11]. See Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals 79 (**2003**). The goal of harmonization could become more elusive because of the proliferation of international tribunals and other enforcement bodies with overlapping jurisdiction.

[FN12]. See Christina Cerna, Do Multiple International Jurisdictions Strengthen or Weaken International Law?: How the Inter-American System for the Protection of Human Rights has Contributed to the Development of International Law, in Jurisdictions Internationales; Complementarite Ou Concurrence? (éditions Bruylant, **2004**) (arguing convincingly that the proliferation of bodies with overlapping jurisdictions has resulted in the cross-fertilization of human rights norms and practices). Cerna states that "a multiplicity of jurisdictions serves as a kind of peer pressure among international adjudicatory human rights bodies. It is an engine for the advancement of the international human rights movement. The more innovative forum tends to push the more conservative forum forward by adopting more aggressive tactics." Id. Cerna's argument is epitomized in the international treatment of interim measures.

[FN13]. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). The Permanent Court of International Justice held in the Lotus Case that:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Id.

[FN14]. See Oscar Schachter, International Law in Theory and Practice 10 (1991) (stating that international law is dependent on “voluntarism” or “consensualism”).

[FN15]. See TPS v. Canada, Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 24th Sess., Annex, U.N. Doc. CAT/C/24/D/99/1997 (**2000**).

[FN16]. See Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**); see also LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466 (June 27); Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, **2000**, Inter-Am. Ct. H.R. (ser. E), P 14 (**2000**), available at http://www.corteidh.or.cr.

[FN17]. See Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1 (1982).

[FN18]. To the extent that international cases heighten awareness of abuses that have already taken place, they may deter similar abuses in the future.

[FN19]. Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex 54 U.N. GAOR Supp. (No. 49), art. 5, U.N. Doc. A/54/49 (Vol. I) (**2000**), entered into force Dec. 22, **2000** (providing for interim measures). Article 5 of the Protocol provides in part that:

1) At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

Id. art. 5.

[FN20]. When interim measures are ordered by domestic courts, the orders generally are directed to the defendant to ensure that the property that is the subject of the dispute is not disposed of prior to the court's decision. In U.S. courts, the approximate equivalent of an order of interim measures is an interlocutory injunction or a preliminary injunction. In Germany, orders to protect assets to allow future writs of execution to be enforced are called “einstweilige Verfügung.” Catherine Kessedjian, Note on Provisional and Protective Measures in Private International Law and Comparative Law, Hague Conference on Private International Law Enforcement of Judgments (Oct. 1998), Prel. Doc. No. 10, at 24. See also Codigo Procesal Civil y Comercial de la Nacion, arts. 195-210 (1987) (Arg.); Codigo de Procedimientos Civiles de Chile, art. 280 (1983) (Chile); Codigo de Procedimientos Civiles de Costa Rica, arts. 449-64 (1987) (Costa Rica); Jerome B. Elkind, Interim Protection, a Functional Approach 26-28 (1981). Interim measures exist in most civil and common law states.

[FN21]. See Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99, 103 (1973).

[FN22]. See Rules of Procedure for Arbitration Proceedings, International Centre for Settlement of Investment Disputes (ICSID), R. 39. The study of interim measures in arbitral

or other trade-related proceedings is beyond the scope of this article.

[FN23]. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Order of Sept. 1993, P 35.

[FN24]. See Electricity Company of Sofia & Bulgaria, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5).

[FN25]. See, e.g., Peace Community of San José de Apartadó (Colombia), Provisional Measures, Order of June 18, **2002**, Inter-Am. Ct. of H.R. (ser. E), P 4 (**2002**); Gallardo Rodriguez (Mexico), Provisional Measures, Order of Feb. 14, **2002**, Inter-Am. Ct. H.R. (ser. E) (**2002**) P 5; La Nacíon Newspaper (Costa Rica), Provisional Measures, Order of Dec. 6, **2001**, Inter-Am. Ct. H.R. (ser. E), P 4 (**2001**). At the drafting conference of the American Convention, Costa Rica proposed that the Court be given the power, common to all world tribunals, to act in serious and urgent situations. Minutes of the Sixth Session of Committee II, Summary Version, November 20, 1969, in Thomas Buergenthal and Robert Norris, 2 Human Rights: The Inter-American System 214 (1993).

[FN26]. See Peace Community of San José de Apartadó (Colombia), Provisional Measures, Order of June 18, **2002**, Inter-Am. Ct. of H.R. (ser. E), P 11 (**2002**).

[FN27]. See LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466, P 102 (June 27).

[FN28]. See Rules of Procedure of the Human Rights Committee, U.N. Human Rights Committee, R. 86, U.N. Doc. CCPR/C/3/Rev.6 (**2001**) [hereinafter UNHRC Rules of Procedure]; see also Rules of Procedure, Committee against Torture, R. 108(2), U.N. Doc. CAT/C/3/Rev.4 [hereinafter Committee against Torture, Rules of Procedure]; The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, supra note 19, art. 5(2).

[FN29]. UNHRC Rules of Procedure, supra note 28, R. 86.

[FN30]. The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75) Advisory Opinion No. OC-2/82, Sept. 24, 1982, Inter-Am. Ct. H.R. (ser. A) No. 2, P 29 (1982), available at http://www.corteidh.or.cr.

[FN31]. Rudolf Bernhardt, Interim Measures of Protection under the European Convention on Human Rights, in Interim Measures Indicated by International Courts 102 (Rudolf Bernhardt ed., 1994).

[FN32]. Statute of the International Court of Justice, art. 41, June 26, 1945, 59 Stat. 1055 [hereinafter Statute of the ICJ].

[FN33]. American Convention on Human Rights, OEA/Ser.K/XVI/I.1, doc. 65 rev. 1, corr. 1, art. 63(2) (Nov. 22, 1969), available at http://www.oas.org [hereinafter American Convention].

[FN34]. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT

(III), art. 27(2) (June 9, 1998), available at http:// www1.umn.edu/humanrts/africa/ (last visited Oct. 1, **2004**) [hereinafter Protocol to the African Charter].

[FN35]. Statute of the ICJ, supra note 32, art. 41. Article 41(2) provides that "[p]ending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." Id. art. 41(2).

[FN36]. American Convention, supra note 33, art. 63(2).

[FN37]. Id. See Jo M. Pasqualucci, The Practice and Procedure of the **Inter-AmericanCourt** of **HumanRights** 293-325 (**2003**).

[FN38]. Protocol to the African Charter, supra note 34, art. 27(a); see also Vincent O. Orlu Nmehielle, The African Human Rights System: Its Laws, Practice, and Institutions 299-300 (**2001**) (supporting the notion that the Court may order provisional measures in extreme circumstances).

[FN39]. Rules of Court, European Court of Human Rights, Nov. **2003**, R. 39, available at http://www.echr.coe.int [hereinafter European Rules of Court].

[FN40]. Id. R. 39(1).

[FN41]. UNHRC Rules of Procedure, supra note 28, R. 86. The Rules of Procedure of the Committee against Torture provide that the Committee may request that the State party "take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations." Committee against Torture, Rules of Procedure, supra note 28, R. 108(1). Finally, the Rules of the Inter-American Commission on Human Rights provide that "[i]n serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons." Rules of Procedure of the Inter-American Commission on Human Rights, entered into force on May 1, **2001**, amended at its 188th regular period of session, held from Oct. 7-24, **2003**, art. 25 [hereinafter Rules of Procedure Inter-Am. Comm'n H.R.].

[FN42]. See TPS v. Canada, Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 24th Sess., Annex, U.N. Doc. CAT/C/24/D/99/1997, P 8.2 (**2000**).

[FN43]. Id.

[FN44]. See Black's Law Dictionary 782 (6th ed. 1990). "Inherent powers" are defined in Black's Law Dictionary as "powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants...." Id.

[FN45]. Elkind, supra note 20, at 162 (quoting Manley Hudson, The Permanent Court of International Justice, 1920-1942; A Treatise 426 (1943)).

[FN46]. Id. (citing Bin Cheng, General Principles of Law as Applied by International Courts

and Tribunals 267-76 (1953).

[FN47]. Godínez Cruz v. Honduras (Merits), Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R., (Ser. C) No. 5, P 47 (1989); Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, P 45 (1988).

[FN48]. See Thomas Buergenthal, Interim Measures in the **Inter-AmericanCourt** of **HumanRights**, in Interim Measures Indicated by International Courts 69, 83-84 (Rudolph Bernhardt ed., 1994) (quoting Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, P 45(2) (1988)).

[FN49]. European Rules of Court, supra note 39, R. 39.

[FN50]. See, e.g., UNIDROIT Principles of International Commercial Contracts 1994, arts. 5.1, 5.2 (stating that contractual obligations may be express or implied and that implied obligations arise from "(1) the nature and purpose of the contract; (2) practices established between the parties and usages; (3) good faith and fair dealing; (4) reasonableness").

[FN51]. See, e.g., Restatement (Second) of the Law of Contracts § 204 (1981) (stating that an omitted term "essential to a determination of their rights and duties" will be supplied by the court).

[FN52]. UNHRC Rules of Procedure, supra note 28, R. 86.

[FN53]. Committee against Torture, Rules of Procedure, supra note 28, R. 108.

[FN54]. Annual Report Case 12.243, Report No. 52/01, Inter-Am. C.H.R., OEA/ser.L./V./II.111, doc. 25, rev. 1255 (**2000**), P 117 (describing Juan Raul Garza (United States).

[FN55]. Piandiong et al., The Philippines, U.N. Human Rights Committee, 17th Sess., Comm. No. 869/1999, P 5.4, U.N. Doc. CCPR/C/70/D/869/1999 (**2000**). See Gine Naldi, Interim Measures in the UN Human Rights Committee, 53 ICLQ 445 (**2004**) (analyzing the binding force of interim measures issued by the UNHRC).

[FN56]. Id.

[FN57]. Views of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, U.N. Committee Against Torture, 21st Sess., Comm. No. 110/1998, P 8, U.N. Doc. CAT/C/21/D/110/1998 (1998).

[FN58]. Statute of the ICJ, supra note 32, art. 41; Leo Gross, The Case Concerning United States Diplomatic Consular Staff in Tehran: Phase of Provisional Measures, 74 Am. J. Int'l L. 395, 406 (1980); see also Jerzy Sztucki, Interim Measures in the Hague Court: An Attempt at Scrutiny 61 (1983).

[FN59]. Arrest Warrant of 11 April **2000** (Congo v. Belg.), **2000** I.C.J. 182, 201 (Dec. 8).

[FN60]. American Convention, supra note 33, art. 63(2).

[FN61]. See Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), P 55.

[FN62]. Rules of Court, International Court of Justice, art. 75(3) (1973) (amended **2003**) [hereinafter I.C.J. Rules of the Court]; Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, 13 (Sept. 11).

[FN63]. See Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99 (1973); Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135 (1973).

[FN64]. Nuclear Tests (Austl v. Fr.) 1973 I.CL.J. 99, 104.

[FN65]. See id.

[FN66]. Id. The ICJ did not find sufficient urgency in non-human-rights cases, when Switzerland requested that the Court order the United States not to sell shares in a company, and the United States had responded that it was not taking action on the shares. Interhandel Case (Switz. v. U.S.), 1957 I.C.J. 122 (Oct. 24).

[FN67]. Arrest Warrant of 11 April **2000** (Congo v. Belg.), **2000** I.C.J. 182, 201-02 (Dec. 8).

[FN68]. Id. at 183.

[FN69]. Id. at 201-02.

[FN70]. Chipoco (Peru), Jan. 27, 1993, Inter-Am. Ct. H.R. (ser. E) res. 1 (1993).

[FN71]. Id. P 1.

[FN72]. Id. PP 1-2.

[FN73]. Id. P 3.

[FN74]. Id. res. 1.

[FN75]. Avena and other Mexican nationals, (Mex. v. U.S.), **2003** I.C.J. 128, P 54 (Feb. 5).

[FN76]. Id. P 55.

[FN77]. Staselovich v. Belarus, U.N. Human Rights Committee, 77th Sess., Comm. No. 887/1999, P 5.1, U.N. Doc. CCPR/C/77/D/887/1999.

[FN78]. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 20-21 (Order of Dec. 15).

[FN79]. Id. at 17-18.

[FN80]. Id. at 20.

[FN81]. See Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 105; Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 141.

[FN82]. Nuclear Tests (Austl. V. Fr.) 1973 I.C.J. 105; Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135, 141.

[FN83]. Arrest Warrant of 11 April **2000** (Congo v. Belg.), **2000** I.C.J. 182, 201 (Dec. 8).

[FN84]. Id.

[FN85]. Id.

[FN86]. Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, 11 (Sept. 11).

[FN87]. Id.

[FN88]. See Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), P 110.

[FN89]. Id. P 109.

[FN90]. Id. PP 13, 19.

[FN91]. Id. PP 14, 19.

[FN92]. Id. PP 17, 23.

[FN93]. Id. PP 26, 28, 32.

[FN94]. Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), P 111. The European Court had previously held in the Cruz Varas case that interim measures ordered by the European Commission were not binding on the parties when there was no specific treaty provision granting such powers. The Court reasoned that the power to order binding interim measures could not be inferred from the Commission's Rules of Procedure. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A), at 36 (1991).

[FN95]. See Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), P 110.

[FN96]. Id. P 109.

[FN97]. See LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466, P 110 (June 27).

[FN98]. Id. P 115.

[FN99]. Id. P 111.

[FN100]. Id. P 112. These responses on the part of the United States were held to be insufficient even considering the limited time in which the government had to act. Id. PP 110-12.

[FN101]. Id. P 112.

[FN102]. Id.

[FN103]. LaGrand Case (F.R.G. v. U.S.), **2000** I.C.J. 466, P 112 (June 27).

[FN104]. See Statute of the I.C.J., supra note 32, art. 41; see also European Rules of Court, supra note 39, R. 39(1); Elkind, supra note 20, at 153-66 (noting different approaches as to whether interim protection is binding).

[FN105]. LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466, P 107 (June 27).

[FN106]. Id.

[FN107]. Id. at 505-06.

[FN108]. Id. at 506.

[FN109]. See Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, **2000**, Inter-Am. Ct. H.R. (ser. E), P 14 (**2000**).

[FN110]. Id.

[FN111]. Id. The principle of pacta sunt servanda has been codified in the Vienna Convention on the Law of Treaties, art. 26, U.N. Doc. A/CONF. 39/27 (1969), entered into force Jan. 27, 1980.

[FN112]. James et al. (Trinidad and Tobago), Provisional Measures, Order of May 27, 1999, Inter-Am. Ct. H.R. (ser. E), P 9 (1999); James et al. (Trinidad and Tobago), Provisional Measures, Order of Aug. 29, 1998, Inter-Am. Ct. H.R. (ser. E), P 7 (1998).

[FN113]. Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, **2000**, Inter-Am. Ct. H.R. (ser. E), P 14 (**2000**). The Inter-American Court's decision that provisional measures are binding is further supported by the wording and location in the American Convention of the provision authorizing provisional measures. The wording of the provisional measures article in the American Convention avoids the controversial term “indicate.” It states that the Court “shall adopt” the measures that it deems pertinent--more forceful phrasing that goes beyond mere suggestion. American Convention, supra note 23, art. 63(2). Article 63(2) of the American Convention is located in the chapter titled “Jurisdiction and Functions,” thus eliminating what was once a potent argument in the ICJ for the nonbinding nature of the measures.

[FN114]. See Piandiong et al. v. Philippines, UNHRC, Decision of Oct. 19, **2000**, Comm. No. 869/1999, P 5.1, U.N. Doc. CCPR/C/70/D/869/1999.

[FN115]. See UNHRC Rules of Procedure, supra note 28, R. 86 (noting that the Committee should inform the state party that its view on interim measures does not imply a determination on the merits of the communication).

[FN116]. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Yuge), Order of Sept. 1993, P 35.

[FN117]. See Piandiong et al. v. Philippines, UNHRC, Decision of Oct. 19, **2000**, Comm. No. 869/1999, PP 5.1-5.2, U.N. Doc. CCPR/C/70/D/869/1999.

[FN118]. Detainees at Guantanamo Bay, Cuba v. U.S., Decision of Mar. 12, **2002**, Inter-Am. Comm. H.R., available at http://www.cidh.oas.org.

[FN119]. Id. (citing Report No. 52/01, Case 55, 12.243, Juan Raul Garza (United States), April 4, **2001**, Inter-Am. C.H.R.). In Garza, the Commission stated:

With respect to the State's submissions on the non-binding nature of the Commission's precautionary measures, the Commission previously expressed in this Report its profound concern regarding the fact that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned persons, despite the fact that those individuals have proceedings pending before the Commission. It is for this reason that in capital cases the Commission requests precautionary measures from states to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Moreover, in the Commission's view, OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate. Particularly in capital cases, the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the state's human rights obligations.

Report No. 52/01, Case 55, 12.243, Juan Raul Garza (United States), April 4, **2001**, Inter-Am. C.H.R.

[FN120]. Piandiong et al. v. Philippines, UNHRC, Decision of Oct. 19, **2000**, Comm. No. 869/1999, P 5.2, U.N. Doc. CCPR/C/70/D/869/1999. In another instance, the Human Rights Committee stated that "[t]he State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected." Weiss v. Austria, U.N. Human Rights Committee, 77th Sess., Comm. No. 1086/**2002**, P11.1.7, U.N. Doc. CCPR/C/77/D/1086/**2002** (**2002**).

[FN121]. See Piandiong et al. v. Philippines, UNHRC Decision of Oct. 19, **2000**, Comm. No. 869/1999, P 5.4, U.N. Doc. CCPR/C/70/D/869/1999.

[FN122]. Cecilia Rosana Núñez Chipana v. Venezuela, Decision of Nov. 10, 1998, Committee

against Torture, Comm. No. 110/1998, P 8, U.N. Doc. CAT/C/21/D/110/1998.

[FN123]. The U.N. Committee on Human Rights, which is charged under the Optional Protocol to the International Covenant on Civil and Political Rights, the U.N. Committee against Torture, charged with enforcement of the rights enshrined in the Convention against Torture and Other Cruel, Inhuman or Other Degrading Treatment or Punishment, and the Inter-American Commission on Human Rights are quasi-judicial organs.

[FN124]. See Piandiong et al. v. Philippines, UNHRC, Judgment of Oct. 19, **2000**, Comm. No. 869/1999, P 5.2, U.N. Doc. CCPR/C/70/D/869/1999; Detainees at Guantanamo Bay, Cuba v. U.S., Judgment of Mar. 12, **2002**, Inter-Am. C. H.R.; Cecilia Rosana Núñez Chipana v. Venezuela, Judgment of Nov. 10, 1998, Committee against Torture, Comm. No. 110/1998, P 8, U.N. Doc. CAT/C/21/D/110/1998.

[FN125]. Digna Ochoa y Plácido et al., Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), P 6 (1999), available at http://www.corteidh.or.cr (last visited Oct. 1, **2004**).

[FN126]. Ocalan v. Turkey, App. No. 4622/99 (Eur. Ct. H.R. **2003** ), P 5, available at http://www.echr.coe.int/ (last visited September 30, **2004**).

[FN127]. .Turkey Commutes Death Penalty on Ocalan, Islam Online (Oct. 3, **2002**), at http://www.islamonline.net/English/News/**2002**-10/03/article23.shtml (last visited Sept. 30, **2004**).

[FN128]. James et al. (Trinidad and Tobago), Provisional Measures, Order of Aug. 16, **2000**, Inter-Am. Ct. H.R. (ser. E), operative P 1 (**2000**).

[FN129]. Id. PP 4, 12.

[FN130]. LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 104, PP 8-9 (Mar. 3), available at http://www.icj-cij.org (last visited October 1, **2004**).

[FN131]. Report by Martin Scheinin, Summary Record of the First Part (public) of the 487th meeting, U.N. Committee Against Torture, 27th Sess., P 2, U.N. Doc. CAT/C/SR.487 (**2003**). See generally Staselovich v. Belarus, U.N. Human Rights Committee, 77th Sess., Comm. No. 887/1999 (**2003**).

[FN132]. See Mamatkulov & Abdurasulovic v. Turkey, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, **2003**), P 55 (noting that requests for interim measures generally concern a person's deportation or extradition to his or her country).

[FN133]. See generally Soering v. U.K., App. No. 14038/88 (Eur. Ct. H.R. July 7, 1989), P 24, available at http://www.echr.coe.int/ (holding that the United Kingdom would violate its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms if it extradited the applicant); Cruz Varas & others v. Sweden, App. No. 15576/89 (Eur. Ct. H.R. Mar. 20, 1991), P 55, available at http://www.echr.coe.int/ (noting that the court granted requests for interim measures in expulsion and extradition cases).

[FN134]. Weiss v. Austria, U.N. Human Rights Committee, 77th Sess., Comm. No. 1086/**2002**, P 1.2, U.N. Doc. CCPR/C/77/D/1086/**2002** (**2002**).

[FN135]. Cecilia Rosana Núñez Chipana v. Venezuela, Decision of Nov. 10, 1998, Committee against Torture, Comm. No. 110/1998, § 8, U.N. Doc. CAT/C/21/D/110/1998.

[FN136]. See generally Thampibillai v. Netherlands, App. No. 61350/00 (Eur. Ct. H.R. Feb. 27, **2004**), available at http://www.echr.coe.int/ (noting that the applicants should not be expelled to Sri Lanka pending the Court's decision); Venkadajalasarma v. Netherlands, App. No. 58510/00 (Eur. Ct. H.R. Feb. 17, **2004**), available at http://www.echr.coe.int/ (noting that the applicants should not be expelled to Sri Lanka pending the Court's decision).

[FN137]. Soering v. U.K., App. No. 14038/88 (Eur. Ct. H.R. July 7, 1989), PP 3, 4.

[FN138]. Id. P 20.

[FN139]. Id.

[FN140]. Id. P 111.

[FN141]. Weiss v. Austria, U.N. Human Rights Committee, 77th Sess., Comm. No. 1086/**2002**, P 10.1, U.N. Doc. CCPR/C/77/D/1086/**2002** (**2002**).

[FN142]. See Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion No. OC-11/90, Aug. 10, 1990, Inter-Am. Ct. H.R (Ser. A) No. 11, P 32 (1990) (noting that complainants have alleged that they were unable to obtain legal help because of a general fear in the legal community).

[FN143]. See Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, **2000**, Inter-Am. Ct. H.R (ser. E), P 9 (**2000**); Digna Ochoa y Plácido et al. (Mexico), Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), P 7 (1999).

[FN144]. Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 1, P 45; Godínez Cruz (Merits), Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5, P 45 (1989).

[FN145]. Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 1, P 45; Godínez Cruz (Merits), Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5, P 45 (1989).

[FN146]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 23 (Dec. 29, **2003**), available at http://www.cidh.org (describing Flórez Schneider et al. v. Colombia).

[FN147]. Id.

[FN148]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 24 (Dec. 29, **2003**),

available at http://www.cidh.org (describing Comisión Intereclesial de Justicia y Paz v. Colombia).

[FN149]. Álvarez et al. (Colombia), Provisional Measures, Order of July 22, 1997, Inter-Am. Court H.R. (ser. E) (1997); Giraldo Cardona et al. (Colombia), Order of Oct. 28, 1996, Inter-Am. Ct. H.R. (ser. E) (1996); Digna Ochoa y Plácido et al. (Mexico), Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E) (1999).

[FN150]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. IV, Guatemala, P 37 (Dec. 29, **2003**), available at http://www.cidh.org,

[FN151]. Giraldo Cardona et al. (Colombia), Provisional Measures, Order of Nov. 27, 1998, Inter-Am. Ct. H.R. (ser. E), res. 1-2 (1998).

[FN152]. Giraldo Cardona et al. (Colombia), Order of Oct. 28, 1996, Inter-Am. Ct. H.R. (ser. E) (1996).

[FN153]. Digna Ochoa y Plácido et al. (Mexico), Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), P 2 (1999).

[FN154]. Id. res. 1-2; see also Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 11 (Dec. 29, **2003**) (describing Jorge Custodio et al. v. Brazil, in which the coordinator of a human rights NGO and his family had been subject to threats because of a report on the torture of prison inmates that resulted in the replacement of prison officials); Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 12 (Dec. 29, **2003**) (discussing Gomes da Silva et al. v. Brazil, in which a member of an NGO against torture had been kidnapped, held for several hours and threatened).

[FN155]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. IV, Guatemala, P 41 (Dec. 29, **2003**).

[FN156]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 39 (Dec. 29, **2003**) (describing María de los Ángeles Monzón Paredes v. Guatemala).

[FN157]. Id.

[FN158]. Luisiana Ríos et al. v. Venezuela, Provisional Measures, Order of Nov. 27, **2002**, Inter-Am. Ct. H.R (ser. E), P 2, operative P 1.

[FN159]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 52 (Dec. 29, **2003**) (describing Liliane Pierre-Paul et al. v. Haiti).

[FN160]. Chunimá Case (Guatemala), Provisional Measures, Order of the President July 15, 1991, Inter-Am. Ct. H.R. (ser. E), P 6 (1991).

[FN161]. Chunimá Case (Guatemala), Provisional Measures, Order of Aug. 1, 1991, Inter-Am. Ct. H.R. (ser. E), PP 1, 2 (1991).

[FN162]. Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, **2000**, Inter-Am. Ct. H.R. (ser. E), P 2, operative P 1 (**2001**).

[FN163]. Constitutional Court (Peru), Provisional Measures, Order of Mar. 14, **2001**, Inter-Am. Ct. H.R. (ser. E), P 3 (**2001**).

[FN164]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 43 (Dec. 29, **2003**) (describing Rodolfo Rohrmorser et al.).

[FN165]. Id.

[FN166]. Aleman Lacayo Case (Nicaragua), Provisional Measures, Order of Feb. 2, 1996, Inter-Am. Ct. H.R (ser. E), P 3 (1996)

[FN167]. Aleman Lacayo Case (Nicaragua), Provisional Measures, Order of Feb. 6, 1997, Inter-Am. Ct. H.R. (ser. E), PP 2, 3 (1997).

[FN168]. Peace Community of San José de Apartadó (Colombia), Provisional Measures, Order of Nov. 24, **2000**, Inter-Am. Ct. of H.R. (ser. E), P 9(c) (**2000**), available at http://www.corteidh.or.cr.

[FN169]. Id. P 2.

[FN170]. Id. P 16; see also Giraldo Cardona. (Colombia), Provisional Measures, Order of Feb. 5, 1997, Inter-Am. Ct. H.R. (ser. E), P 5 (1997), available at www.corteid.or.cr.

[FN171]. Loayza Tamayo Case (Peru), Provisional Measures, Order of Feb. 3, **2001**, Inter-Am. Ct. H.R. (ser. E), P 1(c) (**2001**) available at www.corteid.or.cr.

[FN172]. Id. P 10.

[FN173]. Haitians & Dominicans of Haitian Descent in the Dominican Republic (Dominican Republic), Provisional Measures, Order of Aug. 18, **2000**, Inter-Am. Ct. H.R, available at www.corteid.or.cr.

[FN174]. Id. PP 1-2.

[FN175]. Id. resolution P 4.

[FN176]. P.R. Ghandhi, The Human Rights Committee and the Right of Individual Communication 58 (1998). Alternately, as explained by Martin Scheinin, a member of the Human Rights Committee and Special Rapporteur for New Communications, the Committee may send "a note verbale to the State party [under Rule 91] asking it to provide information; in some cases, the Committee was concerned about a particular fact, for

example the state of health of the incarcerated author of a communication, when it would ask the State party to see to it that the person received proper care." Summary Record of the First Part (public) of the 487th meeting, U.N. Committee Against Torture, 27th Sess., P 2, U.N. Doc. CAT/C/SR.487 (**2003**).

[FN177]. U.N. Human Rights Committee, 15th Sess., Comm. No. 10/1977, PP 1.4, 2, U.N. Doc. CCPR/C/15/D/10/1977 (1982) (describing Alberto Altersor v. Uruguay).

[FN178]. Id. P 5.2.

[FN179]. Cesti Hurtado Case (Peru), Provisional Measures, Order of Sept. 11, 1997, Inter-Am. Ct. H.R. (ser. E), 6, available at http://www.corteid.or.cr.

[FN180]. Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 57 (Dec. 29, **2003**) (describing Mariano Bernal Fragoso v. Mexico).

[FN181]. Id.

[FN182]. See Hector Gros Espiell, El Procedimiento Contencioso Ante la Corte Interamericana de Derechos Humanos [Contentious Procedure Before the **Inter-AmericanCourt** of **HumanRights**], in La Corte Interamericana de Derechos Humanos [The **Inter-AmericanCourt** of **HumanRights**] 67, 73, 83 (Inter-American Institute of Human Rights, n.d.).

[FN183]. U.N. Human Rights Committee, 77th Sess., Comm. No. 887/1999, P 1.2, U.N. Doc. CCPR/C/77/D/887/1999 (**2003**) (describing Staselovich v. Belarus).

[FN184]. Id. P 1.3.

[FN185]. European Rules of Court, supra note 39, R. 39(1).

[FN186]. Rules of Procedure of the **Inter-AmericanCourt** of **HumanRights**, Nov. 24, **2000** partially reformed during its LXI Ordinary Period of Nov. 20-Dec. 4, **2003**, art. 25(5), available at www.corteidh.or.cr [hereinafter Rules of Procedure Inter-Am. Ct.].

[FN187]. Rules of Procedure of the **Inter-AmericanCourt** of **HumanRights**, art. 25(2).

[FN188]. American Convention, supra note 33, art. 63(2).

[FN189]. Committee Against Torture, Rules of Procedure, supra note 28, R. 108(1).

[FN190]. Id. R. 108(3).

[FN191]. See I.C.J. Rules of the Court, supra note 62, arts. 73-75. The beneficiaries of interim measures are generally the individuals who are threatened. Before the ICJ, the official beneficiary of provisional measures is the state that requested them, although

[FN192]. See id. art. 74 (treating a decision on a request for interim measures as a matter

of urgency and providing that a request for provisional measures must be accorded priority over all other cases).

[FN193]. European Rules of Court, supra note 39, R. 39(1).

[FN194]. Rules of Procedure Inter-Am. Ct., supra note 186, art. 25(3).

[FN195]. European Rules of Court, supra note 39, R. 39(1). Rule 39 states:

(1) The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. (2). Notice of these measures shall be given to the Committee of Ministers. (3). The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

Id. R. 39.

[FN196]. I.C.J. Rules of the Court, supra note 62, art. 75(1). In the LaGrand Case, although Germany requested provisional measures, the ICJ stated that it ordered provisional measures proprio motu. LaGrand Case (F.R.G v. U.S.), 1999 I.C.J. 104, PP5, 22, 29 (Mar. 3).

[FN197]. Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99;Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135, 137 (1973); Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, 6 (Sept. 11); Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 13 (Dec. 15).

[FN198]. Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, 6 (Sept. 11).

[FN199]. American Convention, supra note 33, art. 63(2); Rules of Procedure Inter-Am. Ct., supra note 186, art. 25(1).

[FN200]. American Convention, supra note 33, art. 63(2); Rules of Procedure Inter-Am. Ct., supra note 186, art. 25(2).

[FN201]. Rules of Procedure Inter-Am. Comm. H.R., supra note 41, art. 25(1).

[FN202]. Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99, 101, reprinted in 12 I.L.M. 749, 750; Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135, 137.

[FN203]. Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99, 101, reprinted in 12 I.L.M. 749, 750; Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135, 137; see also Fisheries Jurisdiction (F.R.G. v. Ice.), 1972 I.C.J. 30, 33 (Aug. 17).

[FN204]. See Committee Against Torture, Rules of Procedure, supra note 28, R. 108(1); Summary Record of the First Part (public) of the 487th meeting, U.N. Committee Against Torture, 27th Sess., P 4, U.N. Doc. CAT/C/SR.487 (**2003**).

[FN205]. European Rules of Court, supra note 39, R. 39(1).

[FN206]. Rules of Procedure Inter-Am. Ct., supra note 186, art. 25(1).

[FN207]. I.C.J. Rules of the Court, supra note 62, art. 75(2).

At the request of a party, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.... [T]he Court shall afford the parties an opportunity of presenting their subject.

Id. art. 76(1).

[FN208]. Chunimá Case, (Guatemala), Provisional Measures, Order of Aug. 1, 1991, Inter-Am. Ct. H.R. (ser. E), P 6(b) (1991), available at www.corteidh.or.cr.

[FN209]. Digna Ochoa y Plácido et al. (Mexico), Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), P 5 (1999), available at www.corteidh.or.cr.

[FN210]. Id. P 6.

[FN211]. See id.

[FN212]. Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, 11 (Sept. 11).

[FN213]. See La Grand Case (F.R.G. v. U.S.), 1999 I.C.J. 104, P 1 (Mar. 3) (separate opinion of President Schwebel).

[FN214]. I.C.J. Rules of the Court, supra note 62, art. 74(3).

[FN215]. Id. art. 74(4). The term “equality of arms” refers to the procedural equality of the parties.

[FN216]. La Grand Case (F.R.G. v. U.S.), 1999 I.C.J. 104, P 21 (Mar. 3).

[FN217]. Id. P 1 (separate opinion of President Schwebel); see also Michael K. Addo, Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations, 10 Eur. J. Int'l. L. 713, 718-20 (1999) (“The principle of equality of arms is an inherent part of the right to a fair hearing in any litigation, including incidental proceedings before the ICJ.”).

[FN218]. Rules of Procedure Inter-Am. Ct., supra note 186, art 25(7).

[FN219]. Constitutional Court (Peru), Provisional Measures, Order of Mar. 14, **2001**, Inter-Am. Ct. H.R. (ser. E), P 3 (**2001**), available at http:// www.corteidh.or.cr (n.d.).

[FN220]. Colotenango (Guatemala), Provisional Measures, Order of June 24, 1994, Inter-Am. Ct. H.R. (ser. E), P 3, operative P 1 (1994), available at http://www.corteidh.or.cr.

[FN221]. Colotenango (Guatemala), Provisional Measures, Orders of Dec. 1, 1994, Sept. 19, 1997, Feb. 2, **2000**, Inter-Am. Ct. H.R. (ser. E), available at http://www.corteidh.or.cr (expanding interim protection to Mrs. Francisca Sales-Martin).

[FN222]. See Annual Report of the **Inter-AmericanCourt** of **HumanRights**, Inter-Am. Ct. H.R., OEA/Ser.L/V/III.54, doc. 4, P 42 (Feb. 18, **2000**), available at http://www.corteidh.or.cr.

[FN223]. Committee against Torture, Rules of Procedure, supra note 28, R. 108(6)-(7). Rules 108(6) and (7) provide that "[t]he State party may inform the Committee that the reasons for the interim measures have lapsed or present argument why the request for interim measures should be lifted. The Rapporteur, the Committee or the Working Group may withdraw the request for interim measures." Id.

[FN224]. I.C.J. Rules of the Court, supra note 62, art. 76.

[FN225]. Einhorn v. France, App. No. 71555/01 (Eur. Ct. H.R. **2001** ), PP 9-10, 26, available at http://www.echr.coe.int/eng.

[FN226]. Shamayev & 12 Others v. Georgia & Russia, App. No. 36378/02 (Eur. Ct. H.R. **2003** ), available at http://www.echr.coe.int/eng.

[FN227]. Id.

[FN228]. Ivcher Bronstein Case (Peru), Provisional Measures, Order of Mar. 14, **2001**, Inter-Am. Ct. H.R. (ser. E), P 4 (**2001**), available at http:// www.corteidh.or.cr.

[FN229]. Suárez Rosero Case (Ecuador), Provisional Measures, Order of June 28, 1996, Inter-Am. Ct. H.R. (ser. E), P 2, res. (1996), available at http:// www.corteidh.or.cr.

[FN230]. Vogt Case (Guatemala), Provisional Measures, Order of Nov. 11, 1997, Inter-Am. Ct. H.R. (ser. E), P 4 (1997), available at http:// www.corteidh.or.cr (quoting the Commission's brief of October 27, 1997); see also Serech & Saquic Case (Guatemala), Provisional Measures, Order of Sept. 19, 1997, Inter-Am. Ct. of H.R. (ser. E), P 4, res. 1 (1997), available at http:// www.corteidh.or.cr (provisional measures lifted because harassment of protected persons abated); Cesti Hurtado Case (Peru) Provisional Measures, Order of Aug. 14, **2000**, Inter-Am Ct. H.R. (ser. E), PP 8-9, res. 1 (**2000**), available at http://www.corteidh.or.cr (provisional measures lifted because individual was released from prison); Paniagua Morales et al. & Vásquez et al. (Guatemala), Provisional Measures, Order of Nov. 27, 1998, Inter-Am. Ct. H.R. (ser. E) (1998), available at http://www.corteidh.or.cr.

[FN231]. See Giraldo Cardona Case (Colombia), Provisional Measures, Order of June 19, 1998, Inter-Am. Ct. H.R. (ser. E), P 2, res. 1 (1998), available at http://www.corteidh.or.cr (Court lifted provisional measures for two protected persons because one stated that he had received no threats and the other stated that she was out of the country); see also Caballero Delgado & Santana Case (Colombia), Provisional Measures, Order of June 3, 1999, Inter-Am. Ct. H.R. (ser. E), P 4, res. 1 (1999), available at http://www.corteidh.or.cr (provisional measures lifted for two protected persons because neither had received any threats).

[FN232]. Caballero Delgado & Santana Case (Colombia), Provisional Measures, Order of Jan. 31, 1997, Inter-Am. Ct. H.R. (ser. E), PP 1-2, res. 1 (1997), available at

http://www.corteidh.or.cr.

[FN233]. Caballero Delgado & Santana Case (Colombia), Provisional Measures, Order of Apr. 16, 1997, Inter-Am. Ct. H.R. (ser. E), PP 4-6 (1997), available at http://www.corteidh.or.cr.

[FN234]. Id. res. 1.

[FN235]. Clemente Teherán et al. Case (Colombia), Provisional Measures, Order of June 19, 1998, Inter-Am. Ct. H.R (ser. E), P 3 (1998), available at http://www.corteidh.or.cr.

[FN236]. Clemente Teherán et al. Case (Colombia), Provisional Measures, Order of Aug. 12, **2000**, Inter-Am. Ct. H.R. (ser. E), PP 3, 11 (**2000**), available at http://www.corteidh.or.cr.

[FN237]. Id. P 7.

[FN238]. Id.

[FN239]. See Committee Against Torture, Rules of Procedure, supra note 28, R. 108(5) (requiring the CAT Rapporteur for new complaints and interim measures to monitor compliance with the Committee's requests to States). The Inter-American Court generally requests that the Inter-American Commission monitor compliance and report periodically to the Court. See Digna Ochoa y Plácido et al. Case (Mexico) Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), operative P 5 (1999), available at http://www.corteidh.or.cr; Aleman Lacayo Case (Nicaragua), Provisional Measures, Order of Feb. 6, 1997, Inter-Am. Ct. H.R. (ser. E), operative P 3 (1997), available at http://www.corteidh.or.cr.

[FN240]. I.C.J. Rules of the Court, supra note 62, art. 78.

[FN241]. European Rules of Court, supra note 39, R. 39(3).

[FN242]. Serech & Saquic Case (Guatemala), Provisional Measures, Order of Sept. 19, 1997, Inter-Am. Ct. of H.R. (ser. E), P 6 (1997), available at http://www.corteidh.or.cr.

[FN243]. I.C.J. Rules of the Court, supra note 62, art. 77.

[FN244]. Committee against Torture, Rules of Procedure, supra note 28, R. 108(4).

[FN245]. European Rules of Court, supra note 39, R. 39(2).

[FN246]. Rules of Procedure Inter-Am. Ct., supra note 186, art. 25(8).

[FN247]. See Jo M. Pasqualucci, Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law, 26 Vand. J. Transnat'l. L. 803, 820 (1993) (citing Carl A. Norgaard & Hans Christian Kruger, Interim and Conservatory Measures Under the European System of Protection of Human Rights, in Progress in the Spirit of human rights 109, 112 (1988)).

[FN248]. Case 60, Inter-Am. C.H.R. 14, OEA/ser. L./V./II.118, doc. 5 rev. 2, CH III, §C.1, P 60 (**2003**) (describing Jorge Bernal, Julio Cezar Rotely and the patients at the Hospital Neursiquiáfrico).

[FN249]. Id.

[FN250]. Id.

[FN251]. Id.

[FN252]. Gallardo Rodríguez Case (Mexico), Urgent Measures, Resolution of President of Feb. 14, **2002**, Inter-Am. Ct. H.R. (ser. E), P 1.

[FN253]. Id.

[FN254]. See Jorge G. Castañeda, Statements During The Joint Conference With The Secretary of The Interior in Mexico City (Feb. 7, **2002**).

[FN255]. Chunimá Case, (Guatemala), Provisional Measures, Order of Aug. 1, 1991, Inter-Am. Ct. H.R. (ser. E) (1991), available at http:// www.corteidh.or.cr

[FN256]. Id. P 1.

[FN257]. Id. P 8.

[FN258]. Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, P 45 (1988), available at http:// www.corteidh.or.cr (discussing two witnesses before the Inter-American Court who had received threats).

[FN259]. Id.

[FN260]. Id. PP 40-41.

[FN261]. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 500 (May 1984).

[FN262]. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Request for Provisional Measures, 1979 I.C.J. 7 (Dec. 15).

[FN263]. Summary Record of the First Part (public) of the 487th meeting, U.N. Committee Against Torture, 27th Sess., P 5 U.N. Doc. CAT/C/SR.487 (**2003**).

[FN264]. Summary Record of the 1352nd meeting: Trinidad and Tobago, U.N. Human Rights Committee, U.N. Doc. CCPR/C/SR.1352 (1996).

[FN265]. Summary Record of the 435th meeting, U.N. Committee Against Torture, U.N. Doc. CAT/C/SR.435 (**2000**) (noting that El Masry suggested that the States' disregard of the Committee's request was because interim measures are provided for only in the Committee's Rules of Procedure and not in the Convention and, thus, were not binding on

the States).

[FN266]. James et al. (Trinidad and Tobago), Provisional Measures, Order of Aug. 16, **2000**, Inter-Am. Ct. H.R. (ser. E), PP 4, 12 (**2000**). The order required that the State "take all measures to preserve [their] lives" "so as not to hinder the processing of their cases before the Inter-American system." Id.

[FN267]. See LaGrand Case (F.R.G. v. U.S.), **2001** I.C.J. 466, P 34 (Merits) (Judgment June 27); Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 62 (Dec. 29, **2003**) (describing Larry Eugene Moon v. United States); Annual Report of the Inter-American Commission on Human Rights **2003**, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, P 63 (Dec. 29, **2003**) (describing John Elliot v. United States). Both these prisoners were executed despite the order of precautionary measures.

[FN268]. See Piandiong et al. v. Philippines, Judgment of Oct. 19, **2000**, Comm. No. 869/1999, P 5.1, U.N. Doc. CCPR/C/70/D/869/1999.

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United Nations and Regional Human Rights System: Recent Development

# *151 THE RIGHTS OF THE CHILD IN THE CASE LAW OF THE INTER-AMERICANCOURT OF HUMANRIGHTS: RECENT CASES

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## 1. Introduction

The present commentary considers two cases decided in **2004** by the **Inter-AmericanCourt** of **HumanRights** (the Court) concerning the rights of the child as protected by Article 19 of the American Convention on Human Rights (the Convention). [FN1] In the first of these cases the Court takes a nuanced approach to Article 19, incorporating its requirements into the other substantive rights of the Convention rather than examining it in isolation. In the second case the Court considers the torture and extrajudicial execution of two minors during an anti-terrorism campaign in Peru in 1991. This judgment reinforces the State's obligation to respect human rights even when combating terrorism, which is pertinent given the current global 'war' on terror.

## 2. Case Concerning the Children's Rehabilitation Institute[FN2]

The 'Panchito Lopez' Institute near Asuncion, Paraguay was a severely overpopulated and under-resourced government detention centre for minors. [FN3] Considering the general conditions of detention, particular incidents involving injury to, and loss of life by, inmates (resulting from fires and acts of violence) and the inadequacy of local remedies, [FN4] the Court determined that Paraguay had ***152** violated Articles 2 (duty to implement the Convention guarantees), 4(1) (right to life), 5(1), 5(2), 5(6) (right to humane treatment), 8(1) (right to a fair trial), in conjunction with Article 1(1) (duty to respect the Convention rights) and in light of Article 19 (rights of the child); and Article 25(1) (right to judicial protection) in conjunction with Article 1(1) in relation to various inmates of the Institute, [FN5] as well as Article 5(1) with Article 1(1) in relation to their families. [FN6]

The Court accorded Article 19 a parasitic character, considering it in terms of what it added to other Convention rights, rather than as an isolated provision. [FN7] Although this is consistent with its previous approach to Article 19, the Court has, in the past, been less express in adopting this method. [FN8] The Court indicated in the present decision that the parasitic approach taken in this instance might not be applied in future cases. [FN9]

At the outset the Court underlined the importance of the economic and social

dimensions of the rights of the child, particularly in relation to the rights to life (Article 4) and physical integrity (Article 5(1)). [FN10] The Court's incorporation of these considerations meant a wide reading of and holistic approach to these rights, making a separate examination of the issues under Article 26 (the obligation to progressively implement economic, social and cultural rights) unnecessary. [FN11] The Court had express recourse to the United Nations Convention on the Rights of the Child 1989 (CRC), [FN12] and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights 1988 (the 'San Salvador Protocol') [FN13] in interpreting the Convention. [FN14]

The Court made a general note that as detainees are completely subject to State control and unable to realise their basic needs of their own accord, there exists a special relationship between them and the State. As guarantor of their rights, the State must ensure the necessary conditions for a dignified life. [FN15] The Court acknowledged that although the restriction of certain rights (such as ***153** the right to privacy and family life) was inherent in the deprivation of liberty, any such restriction should be kept strictly to the minimum necessary in a democratic society. Furthermore, the restriction of rights which are unconnected to a situation of detention (such as the right to life, personal integrity, religious freedom and due process) is completely unjustifiable. [FN16]

### *A. The Rights to Life and Physical Integrity of Minors*

The Court held that in fulfilling its obligations with respect to the rights to life and physical integrity of detainee minors, the State should assume its position of guarantor with even greater care and responsibility than it must generally. Firstly, the State must conform to the principle of the 'best interests of the child'. [FN17] Secondly, the State must pay particular attention to the quality of life enjoyed by minors while in detention. Referring to Articles 6 and 27 of the CRC; the Committee on the Rights of the Child General Comment 5 on General Measures of Implementation of the Convention on the Rights of the Child of the UN Committee on the Rights of the Child; [FN18] and the UN Rules for the Protection of Juveniles Deprived of their Liberty, [FN19] the Court found that the State, as part of its obligations to secure the rights to life and physical integrity, is obliged to provide for the health and education of minors so as to secure their physical, mental, spiritual, moral, psychological and social development. [FN20]

The Court entered into a preliminary consideration of whether the defendant State had successfully guaranteed a dignified life to both adult and minor detainees at the Institute, examining the general conditions of detention. [FN21] The Institute was seriously overpopulated and under-resourced. [FN22] Inmates were without adequate sanitation, medical, psychological or dental care, and were malnourished. [FN23] Specialised medical treatment was unavailable for those with physical disabilities, mental illnesses and drug addiction problems. [FN24] Inmates had insufficient opportunity to take exercise or engage in recreational activities. [FN25] Due to an inadequate supply, many of them were obliged to share beds, blankets or ***154** mattresses, which facilitated incidences of sexual abuse among them. [FN26] Furthermore, the administration made frequent use of cruel and violent forms of punishment prohibited by Article 5(2), such as isolation, beatings and torture. [FN27]

In so far as it was not demonstrated that all the inmates were tortured, the Court held

that the mere threat of conduct prohibited by Article 5, where that threat is sufficiently real and imminent, may of itself violate Article 5: creating a situation of fear or threatening an individual with torture can, in certain circumstances, constitute inhuman treatment. In the present case the threat of torture was real and imminent, creating a permanent climate of tension and violence which affected the inmates' right to lead a dignified life. [FN28] Similarly, the subhuman and degrading conditions of detention affected the mental health of the inmates, with negative impacts on their psychological development and personal integrity. [FN29]

Until the new Paraguayan Code of Criminal Procedure entered into force in **2000**, preventive detention was a routine, rather than exceptional, measure. Consequently, a large majority of inmates found themselves detained without trial, and were not separated from those who had been already convicted and sentenced to imprisonment. [FN30] This situation contributed to the climate of insecurity, tension and violence in the Institute. [FN31] The accumulation of these circumstances meant that instead of rehabilitation for re-entry into society, inmates were subjected to a daily process of suffering which was partly responsible for the high incidence of re-offending. [FN32] Accordingly, there did not exist conditions permitting detainees to develop their lives in a dignified manner. Rather, they were obliged to live permanently in inhuman and degrading conditions, and exposed to a climate of violence, insecurity, abuse, corruption, mistrust and promiscuity. [FN33] These circumstances, attributable to the State, constituted a violation of Article 5. [FN34]

The Court then moved on to consider whether the general conditions of detention disclosed violations of Articles 4 and 5, specifically in relation to the minors detained in the Institute. The Court held that special measures of protection were necessary to provide for their health and education. This was of particular importance given that minors are at a crucial stage of physical, mental, spiritual, moral, psychological and social development, which can have ***155** consequences for their 'project of life'. [FN35] Minors were not assured the regular medical supervision required to ensure the detainees' normal development. [FN36] While there existed a formal programme of education at the Institute, there were insufficient teachers and resources for its implementation, drastically limiting the opportunities for acquiring a basic education or learning a trade. [FN37] This deficiency was all the more serious since the children in question came from marginalised sections of society, limiting the prospect of their successful re-entry into society or fulfilment of their 'project of life'. [FN38] In light of the general conditions of detention, as well as the particular lack of special measures to ensure adequate healthcare and education, the Court found violations of Articles 4(1) (protection of the right to life), 5(1) (the right to physical, mental and moral integrity), 5(2) (freedom from torture or to cruel, inhuman, or degrading punishment or treatment), and 5(6) (obligation to rehabilitate detainees) in conjunction with Article 1(1), read in the light of Article 19. [FN39] The State had also patently failed in its duties under Article 5(5) (the separation of child and adult detainees) by transferring inmates to adult prisons as a form of punishment. Within these adult prisons the children were not separated from adult detainees, which was damaging to their development and made them vulnerable to abuse. [FN40] The Court's decision could have benefited from an exposition of what measures the State would need in place to satisfy the requirements of Articles 4 and 5, especially with regard to the provision of healthcare and education, since these are relatively undeveloped dimensions of the rights to life and physical integrity. [FN41]

The Court next considered particular instances of death and injury at the Institute over the period in question. During **2000** and **2001** there were three fires resulting in several deaths and injuries among the inmates, the last of which provoked the permanent closure of the Institute. [FN42] It had been well known that the Institute was inadequately equipped (without even fire alarms or extinguishers) and the guards untrained to respond to a fire, despite the fact that inmates ***156** routinely lit fires for cooking and tattooing. [FN43] As guarantor of the rights of the detainees, the State was responsible for introducing measures to prevent critical situations which could endanger the lives of inmates. [FN44] Accordingly, the Court found that the State's failure to prevent the deaths of inmates in these fires amounted to extreme negligence, which violated Article 4(1) in conjunction with Article 1(1), read in the light of Article 19. [FN45] The survivors who were injured in the fires experienced, and continued to experience, intense physical and mental suffering. The burns, injuries and smoke poisoning to which they were subject, whilst in the care of the State, constituted a violation of Articles 5(1) (the right to physical, mental and moral integrity), and 5(2) (freedom from torture or cruel, inhuman, or degrading punishment or treatment) in conjunction with Article 1(1), in the light of Article 19.

The deaths of three inmates formed the basis for further examination by the Court. Two of these died as a result of wounds inflicted during separate incidents of violence between inmates in the young offenders' block of an adult prison, to which they had been transferred from the Institute. [FN46] The third minor died as a result of a gunshot wound inflicted by a State agent at the Institute. [FN47] In relation to the first two inmates, despite the fact that State agents were not implicated in the deaths and that prompt medical assistance was given, the Court found that the State had violated Article 4(1) in conjunction with Article 1(1), read in the light of Article 19, because it had failed to create conditions of detention which limited, as far as possible, the risk of fights between inmates. [FN48] The Court also found a violation of Article 4(1) in respect of the third minor. [FN49]

The Court's judgment leading to these findings under Article 4 are open to criticism. The Court should have offered a more concrete analysis of the first two deaths by considering conditions in the adult prison where the incidents took place. It does not seem appropriate for the Court to rely on its account of conditions in the Institute as the basis for a decision regarding events in another prison. In relation to the third death it made no analysis of the incident beyond the fact that the victim died. There was no enquiry into whether the use of force by the State had been necessary or proportionate. It may be that the Court simply inferred that the use of lethal force was not justified in the circumstances given the propensity of the prison guards to use excessive force. It might be implied that the use of lethal force against detainee minors can never be justified and will always violate Article 4. However, the Court did not make such an indication.

***157** More positively, the relatives, i.e. the parents and siblings, of all those who died or suffered injury were also found to be victims in their own right of violations of Article 5(1), in conjunction with Article 1(1). The Court based its decision on a (sensible) presumption that they would have undergone suffering and a feeling of impotence caused by the cruel conditions of detention; the deaths and injuries themselves; and their efforts to locate their loved ones after the fires. [FN50] However, the Court did not make clear whether the families of those children who were detained, but not killed or injured whilst in detention, were also victims of a violation of Article 5. It would have been consistent with the Court's reasoning earlier in the case-- where it found that the mere existence of a threat

of conduct violating Article 5 could itself constitute inhuman treatment--that these parents and siblings also be considered victims. [FN51]

### *B. The Obligation of the State to Adopt Domestic Measures of Implementation and the Right to a Fair Hearing in Relation to Minors*

Formerly, Paraguayan law subjected all persons from 14 years of age to the criminal jurisdiction of the ordinary courts. It was not until 1998 that a separate criminal procedure was introduced in favour of minors and not until **2001** that a specialised juvenile jurisdiction was developed. [FN52] Drawing on its Advisory Opinion 17 [FN53] and Article 40(3) of the CRC, [FN54] the Court found that Article 8 of the Convention, read in light of Article 19, requires the establishment of a specialised court system and procedure for the implementation of juvenile criminal justice. [FN55] In light of Article 40(3)(b) of the CRC [FN56] and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), [FN57] the Court found that a specialised juvenile jurisdiction should have some flexibility in its powers in relation to minors. Firstly, it should have the ability to adopt non-judicial measures. Secondly, where a judicial process was necessary, the national ***158** court should be able to provide psychological support for the minor during the trial; monitor the manner in which evidence was obtained from the minor; and regulate publicity surrounding the trial. Thirdly, it should have wide powers of discretion over the conduct of all stages of the trial and the administration of the sentence, enabling it to tailor them to the facts of the particular case. Fourthly, the decision-makers in a system of juvenile justice should be specially prepared and trained in the human rights of the child and infant psychology in order to avoid any abuse of discretion and ensure that any measures ordered are suitable and proportionate. [FN58] Such measures were lacking in Paraguayan law until at least **2001**, and, therefore, there had been a violation of Articles 2 and 8(1), in conjunction with Articles 19 and 1(1), in relation to all those detained in the Institute over the period in question. [FN59]

The Court's explanation of the necessary elements of a juvenile justice system is welcome. However, the Court did not engage in any analysis, or examine in any detail, the adequacy of the changes introduced into Paraguayan law after **2001**. [FN60] While the question of Paraguay's reforms may have post-dated the dispute under examination--as the dispute related to a period regulated largely by the old law--the Court could have examined Paraguay's reforms *ex officio*. [FN61] This might avoid a future dispute arising out of the same reforms. Although the Court acknowledged the efforts of Paraguay in reforming its law, it also impliedly acknowledged (in the section of the judgment relating to **reparations**) that the present law was still defective in respect of the State's failure to separate child and adult detainees and sentenced and non-sentenced detainees, and the absence of adequate education, medical and psychological services. [FN62]

### *C. The Right to Personal Liberty*

The Court did not expressly refer to Article 19 in its analysis of Article 7 (right to personal liberty), but it did consider the special measures of protection required by virtue of the vulnerability of minors. [FN63] The Court stated that pre-trial detention, as it was the most severe measure applicable to an accused, should be used as a matter of exception, limited by the presumptions of innocence, necessity and proportionality in a democratic society. [FN64] It must be limited in time to a period which is reasonable and does not go

beyond the continued existence of the circumstances which made it necessary. [FN65] Rather than rely on such circular reasoning, the Court could have explained which factors are relevant to ***159** determining whether pre-trial detention is reasonable and whether Article 7 imposes an upper limit on the length of detention. Where minors are concerned, pre-trial detention should be even more rigorously regulated. The Court continued that measures other than pre-trial detention should be considered, including close supervision, permanent escort, foster care, transfer to an educational institute, as well as care, guidance and supervision orders, counselling, probation, education and vocational training programmes and other alternatives to internment. [FN66] The Court seems to establish its own set of alternatives to detention and then lists those contained in Article 40(4) of the CRC (to which it refers) [FN67] wholesale without regard for the obvious overlap between them. It might have been more helpful for the Court to go into detail and explain the alternatives and their distinguishing features. The Court went on to state that pre-trial detention for minors should conform to Article 37(b) of the CRC, which reads:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. [FN68]

### *D. The Right to Judicial Protection*

In 1993 a non-governmental organisation (the Tekojojá Foundation) sought to complain about the conditions of detention in the Institute (rather than to request the release of any detainees) by way of a generic writ of *habeas corpus*. [FN69] In 1998, the writ was granted in favour of the detainees named therein (all those who had been present in the Institute in 1993 when the writ was sought), and the State was ordered to transfer them to a place of detention which accorded with standards required by human dignity. However, no action was taken by the State. [FN70]

The Court recalled that for a remedy to be effective it must be capable of establishing if a violation has occurred and then provide the necessary remedy. This will not be the case if, as on the facts, the remedy cannot be delivered in time to relieve the violation. [FN71] The delay of five years in the present case patently ***160** exceeded this limit. Furthermore, the late arrival of the remedy made it ineffective for many of those named in the writ who had, in all probability, left the Institute by 1998. There had, therefore, been a violation of Article 25(1), which provides for the right to 'simple and prompt recourse'. [FN72] Additionally, the fact that the order of the Paraguayan Court was not then carried out violated Article 25(2)(c). [FN73]

### *E. Further Comments*

There were three points in the judgment where the Court found that there was evidence of patterns of practice as to suggest the violation of certain Articles, but where it was unable to make a finding of a violation for lack of information specific to particular victims. Firstly, it found that there was clear evidence that the State had violated Articles 5(4) and 5(5) since minor and adult detainees had not been separated, nor those who had been sentenced from those pending trial. [FN74] Despite making no finding of a violation for the reason indicated above, it warned the State to correct this situation immediately.

[FN75] Secondly, it considered that there existed a general pattern of serious delays in trials and deficient legal assistance for minors in pre-trial detention at the Institute, covered by Article 8(2). [FN76] Thirdly, it found that many of the inmates (perhaps over 90 per cent) had been subject to lengthy pre-trial detention, but again there was no information in respect of individual victims, which meant that the Court could not examine whether there existed a violation of Article 7. [FN77] It stated that although it had, in the past, relied on general patterns of behaviour to find violations, these should be accompanied by other specific facts relating to individual victims. [FN78]

It is difficult to find a point of distinction between the cases of possible violations in the context of general patterns of practice which the Court did not take up and others which it did rule upon, given that much of the Court's analysis in the latter cases was impressionistic, lacking consideration of detailed facts, beyond the naming of those detainees who had been killed or injured either in one of the fires or individual acts of violence mentioned above. Indeed, the Court found violations of Articles 4 and 5 on the basis of the general conditions of detention without reference to particular victims. [FN79]

By way of general comment on the Court's judgment in this case, the Court's holistic approach to Articles 4 and 5, through the incorporation of economic and social considerations derived from Article 13 of the San Salvador Protocol. ***161** is to be welcomed. However, it might have been helpful if the Court had made some comments on Article 26 of the Convention (on economic and social rights) to give some substance to this vague provision. The fact that the Court believed Article 26 raised no separate issues from those considered under Articles 4 and 5 at least implies that the requirements of adequate education and healthcare also form part of Article 26 of the Convention and will therefore bind States Parties who are not also party to the San Salvador Protocol.

Following past practice, [FN80] the Court made extensive use of the provisions of the CRC and other non-binding UN instruments to continue to flesh out the meaning of Article 19 of the Convention. From the point of view of human rights protection the Court is performing an admirable role in the protection of the rights of the child, promoting an expansive understanding of Article 19 and complementing the role of the UN Committee on the Rights of the Child. However, States Parties to the Convention might object that the Court is effectively supervising the provisions of the CRC under the guise of Article 19 of the Convention. While all Parties to the Convention are also Parties to the CRC, [FN81] they have only consented to supervision of their obligations by the UN Committee on the Rights of the Child, not the Court.

### 3. The 'Gómez-Paquiyauri Brothers' v Peru[FN82]

Between 1984 and 1993 Peru underwent a period of internal conflict, during which the State systematically carried out extrajudicial executions of suspected 'subversives'. [FN83] In 1991 the Gómez-Paquiyauri brothers (14 and 17 years of age) were seized, tortured and summarily executed by State agents searching for suspected terrorists. [FN84] Their relatives were subsequently harassed by the State. Only some of the State agents responsible were criminally prosecuted and even then they were not properly punished. [FN85] The Court found that Peru had violated Article 4(1) (right to life), [FN86] Article 7 (right to personal liberty), [FN87] Article 5 (right to humane treatment), [FN88] Articles 8 and 25 (right to a fair trial and judicial protection), [FN89] and Article 19 (rights of the

child), [FN90] all in conjunction with Article 1(1) (duty to implement Convention obligations) of the Convention, as well as Articles 1 (duty to punish torture), 6 (duty to prevent and punish ***162** torture), 9 (duty to compensate victims) and 8 (duty to investigate allegations of torture) of the Inter-American Convention to Prevent and Punish Torture ('Torture Convention'), [FN91] in relation to the brothers. Furthermore, the State had violated Article 5, [FN92] Articles 8 and 25, [FN93] and Article 11 (the right to family life), all in conjunction with Article 1(1) in relation to their relatives. [FN94]

### *A. The Right to Personal Liberty in States of Emergency*

The brothers were arrested, tortured and found dead approximately one hour after their arrest. [FN95] The flagrant nature of the acts in question meant that the Court had little to add to its existing case-law on Article 7, [FN96] though it did have occasion to reaffirm the *Bulacio* judgment where it found that in the case of minors the right of a detainee to make contact with a relative on being taken into custody was all the more important and included contact immediately upon arrest in order to be effective. [FN97]

Of greater significance is that the Court stated in its consideration of Article 7 that the existence of a state of emergency could not be invoked in the present case. The Court stated simply that any suspension of Convention guarantees must conform to the strict necessities of the circumstances and not go beyond the limits of the Convention. [FN98] It should be noted that Article 27 of the Convention which governs the suspension of Convention guarantees in situations of emergency does not allow for any derogation from Articles 4 or 5 which protect the right to life and humane treatment and which were obviously violated in the present case. However, it does permit States to derogate from Article 7 on personal liberty. The Court did not consider whether the detention and absence of judicial supervision which resulted from the suspension of Article 7 guarantees were necessary or proportionate in the circumstances existing in Peru at the time. Rather, it seemed to consider that because the torture and execution resulted from the detention and absence of judicial control, the measure of detention without charge or judicial supervision must, in themselves, have been unjustifiable. This would imply that where conduct in a case affects rights which may not be suspended under Article 27, the Court can ignore the existence of a state of emergency as a legally relevant fact altogether. It would have been helpful if the Court could have addressed this question with greater clarity.

### ***163***B. Freedom from Torture*

Reaffirming past case-law, the Court stated that the fact that detention is arbitrary, even if it is brief, is enough to imply without any other evidence that the victim has suffered inhuman and degrading treatment. [FN99] It also reaffirmed the subjective and relative nature of treatment constituting torture, the non-derogable nature of the prohibition of torture--which extends to the so-called 'fight against terrorism'--and its status as a rule of *jus cogens*. [FN100] The mere act of being placed in the boot (trunk) of a police car was enough to violate Article 5. [FN101] In the present case the brothers received physical and mental mistreatment, being hurled to the ground, kicked, stood on, hooded, beaten with rifle butts and shot repeatedly. [FN102] The Court interpreted the definition of torture contained in Article 2 of the Torture Convention widely as the infliction of suffering for whatever ends, which extended in the present case to the systematic use of torture with the objective of intimidating the general population. [FN103] Consequently, the State had

violated Article 5 in conjunction with Article 1(1) of the Convention as well as Articles 1, 6 and 9 of the Torture Convention (the duties to prevent and punish torture and compensate victims). [FN104] The Court did not discuss which particular facts of the case violated Articles 1, 6, and 9 of the Torture Convention. It is submitted that such a discussion is all the more necessary in the case of these Articles, because of the questionable nature of the Court's jurisdiction over violations of the Torture Convention. [FN105]

The Court also found that Article 5 in conjunction with Article 1(1) had been violated in relation to the relatives of the brothers, because of the arbitrary detention of the brothers; the ill-treatment and torture of the brothers; and the portrayal given to the public by the State that the brothers were terrorists killed in an armed confrontation with police. [FN106] These events created a feeling of suffering and impotence in the brothers' close relatives which constituted cruel, inhuman and degrading treatment. [FN107]

****164C. The Right to Life***

The Court stated that the obligation to protect the right to life disclosed special obligations in the case of minors, although it did not elaborate on this. [FN108] The failure of the State to punish the police officers responsible for the killings, in particular the agent who ordered the acts, created a situation of impunity. [FN109] The State is under a duty not only to take measures to prevent, try and punish deprivations of life, but also to prevent extrajudicial executions committed by its agents. [FN110] Drawing on the jurisprudence of the European Court of Human Rights, the Court stated that the right to life, coupled with the State's obligation to implement the Convention, implies a duty to establish domestic procedures to monitor the use of lethal force by State agents as a matter of routine, by way of an effective official investigation. [FN111]

The Court asserted that State-sponsored or -tolerated extrajudicial killings violated a rule of *jus cogens*. However, it did not provide any examination of relevant authorities for this. [FN112] While it is a welcome finding, the absence of any legal reasoning or examination of the sources of international law to substantiate this pronouncement undermines the prestige of the Court as an international judicial institution.

***D. The Right to a Fair Trial and Judicial Protection***

In 1993 the national courts sentenced two of the perpetrators to terms of imprisonment and ordered them to pay compensation to the brothers' family. [FN113] However, the compensation was not paid and by 1994 and 1995, respectively, the two perpetrators had been granted partial liberty and conditional liberty. [FN114] Although the Court would not examine the domestic legislation regarding the granting of such forms of release of prisoners, it did say that the State must ensure that they should be regulated in such a way as to prevent impunity. [FN115] A third State agent, responsible for ordering the killings, had been found guilty but had hitherto evaded custody, despite the fact that he continued to present communications to the domestic courts through his attorney in an attempt to take advantage of amnesty laws and statutes of limitation. [FN116] Furthermore, the State had not investigated the possible existence of other culprits. [FN117]

***165** The aforementioned circumstances had created a situation of impunity. [FN118]

The State was under a duty to conduct *ex officio* a serious, impartial and effective investigation to clarify the facts surrounding the detention, torture and execution of the brothers, and to identify those responsible. [FN119] The failure of the State to conduct such an investigation and punish all those responsible violated Articles 8 and 25 of the Convention in conjunction with Article 1(1) with respect to the brothers and their relatives, and Article 8 of the Torture Convention with respect to the brothers. [FN120]

Most of the issues which the Court examined in relation to Articles 8 and 25 centre around the lack of an investigation by the State and the consequent problem of repetition of the offence and impunity, rather than the inadequacy of the trials which were conducted. Judge Medina Quiroga in her partially dissenting opinion noted that the Court was in the habit of blurring Articles 8 and 25. [FN121] Article 8 sets out the requirements of a fair hearing for an aggrieved person, while Article 25 establishes the right to an effective remedy before national authorities for violations of Convention rights. If the failure to conduct an effective investigation falls under any of these Articles, it surely falls under Article 25 rather than Article 8. However, since the duty to prevent, investigate and punish torture had already been discussed under the Court's consideration of Articles 4 and 5 of the Convention, it would seem more sensible for it not to have repeated its analysis by examining the same failures under Articles 8 and 25 as well.

### *E. The Rights of the Child*

The Court reaffirmed that the measures of protection required by Article 19 of the Convention in favour of minors must be based on the principle of the best interests of the child. [FN122] Noting the widespread ratification of the CRC, the Court concluded that the guarantees embodied therein formed part of the body of international law which it should use to give meaning to Article 19 of the Convention. [FN123] Minors should be treated in accordance with the rules of non-discrimination (Article 2, CRC), as well as respect for the right to life (Article 6, CRC) and the right to humane treatment (Article 37, CRC). [FN124] Consequently, the detention of minors should be an exceptional measure and be as brief as possible; where the alleged victim is a minor a stricter standard will be applied in determining the qualification of mistreatment as torture; and the State must take special measures to ensure that the right to life of minors is secured ***166** (though the Court does not elaborate on these). [FN125] The State's flagrant failure to respect these requirements meant that it had violated Article 19 in relation to the two brothers. [FN126]

### *F. The Right to Family Life*

As noted above, the State attempted to portray the brothers as terrorists, which led to the family being treated with contempt by the public as well as being subject to persecution and discrimination by the authorities. The Court held that this situation violated Article 11 in conjunction with Article 1(1). [FN127]

### *G. Further Comments*

The Court noted that the State's international responsibility for violating the Convention was aggravated on two counts. Firstly, because there existed systematic human rights violations, including extrajudicial executions carried out by State agents, which infringed on a rule of *jus cogens*. Secondly, because the alleged victims were minors.

[FN128] As to the first of these counts, it does not seem to follow that the State's international responsibility for violations towards the victims should be aggravated by virtue of the fact that they took place in the context of a systematic practice of extrajudicial executions committed in respect of other people. A determination of State responsibility based on the existence of widespread or systematic violations where specific victims are not parties to a legal dispute is surely more appropriately dealt with under the function of State reporting or country visits, carried out by the Inter-American Commission on Human Rights.

## 4. Conclusion

In both the cases reviewed, the Court effectively imported provisions of the CRC into the Convention through the back door. It is, of course, desirable for the purposes of harmony and universality in international human rights law for the Court to ensure that its rulings are in keeping with prevailing international standards. Furthermore, the CRC offers any tribunal a rich source of material to draw from when interpreting the rights of the child. Therefore, in the long run, one would expect that the case law of the Court should be consistent with, and build upon, the standards elaborated in the CRC. However, rather than drawing incrementally upon the CRC or offering its own independent interpretation of Article 19 of the Convention, which it can then support by reference to the CRC, ***167** the Court has adopted the custom of simply quoting relevant tracts of the CRC as the starting point for its analysis. It is submitted that there is an important, even if subtle, distinction between employing the CRC to interpret Article 19 and simply asserting that the standards elaborated in the CRC can be implied wholesale into Article 19. The importance of not overtly and directly introducing other international standards through the Convention is this: in a human rights protection system without a specialised enforcement body to supervise the implementation of its judgments, [FN129] the Court should be wary of handing States reasons to question the legal integrity of its decisions.

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[FN1]. These are a welcome supplement to the Court's growing case-law on the rights of the child. See Advisory Opinion OC-17/**2002**, *Legal Status and Human Rights of the Child*, IACtHR Series A 17 (**2002**); 11 IHRR 510 (**2004**), and *Bulacio v Argentina*, IACtHR Series C 100 (**2003**). See also, Butler, 'Recent Advisory Opinions and Contentious Cases of the **Inter-AmericanCourt** of **HumanRights**', (**2004**) 4 *Human Rights Law Review* 125 at 125 and 140.

[FN2]. IACtHR Series C 112 (**2004**). The respondent State was Paraguay.

[FN3]. Ibid. at paras 134.1-134.4.

[FN4]. Ibid. at paras 134.1-134.47.

[FN5]. Ibid. at paras 176, 179, 184, 186, 188, 190, 213, 247 and 251.

[FN6]. Ibid. at para. 193.

[FN7]. Ibid. at para. 147. Article 19 reads: 'Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the

State.'

[FN8]. See, for example, the *Bulacio* case, supra n. 1 at paras 122-38, where it considered the application of Article 7 of the Convention to minors. Article 19 is both a freestanding and parasitic guarantee. See infra n. 126.

[FN9]. *Case Concerning the Children's Rehabilitation Institute*, supra n. 2 at para. 150.

[FN10]. Ibid. at para. 149.

[FN11]. Ibid. at para. 255.

[FN12]. 1577 UNTS 3.

[FN13]. OAS Treaty Series No. 69 (1988).

[FN14]. *Case Concerning the Children's Rehabilitation Institute*, supra n. 2 at para. 148. The Court also made reference to the UN General Assembly Resolution 40/33, UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, A/RES/40/33, and the UN General Assembly Resolution 45/113, UN Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990, A/RES/45/113. See paras 161-3 and 211 of the judgment.

[FN15]. Ibid. at paras 152-3 and 159. As well as its own past case-law, the Court referred to the judgment of the European Court of Human Rights in *Kudla v Poland***2000**-IX 197; (**2002**) 25 EHRR 198 at paras 93-4.

[FN16]. Ibid. at paras 154-5.

[FN17]. The Court's decision might have benefited from a reiterated explanation of this principle. Advisory Opinion 17, supra n. 1 at paras 56-61, explains, with reference to Article 2 of UN General Assembly Resolution 1386 (XIV), UN Declaration on the Rights of the Child, 20 November 1959, and Article 3(1) of the CRC, that in taking measures to ensure the development of the child according to their full potential, and in light of their special needs inherent in their vulnerability, immaturity and inexperience, the fulfilment of the best interests of the child shall constitute the 'primary' or 'paramount' consideration for the State.

[FN18]. 27 November **2003**, CRC/GC/**2003**/5; 11 IHRR 10 (**2004**) at para. 12.

[FN19]. Supra n. 14.

[FN20]. *Case Concerning the Children's Rehabilitation Institute*, supra n. 2 at para. 161.

[FN21]. Ibid. at paras 165-9.

[FN22]. Ibid. at paras 134.1-134.4.

[FN23]. Ibid. at paras 134.5-134.6.

[FN24]. Ibid. at para. 134.7.

[FN25]. Ibid. at para. 134.8.

[FN26]. Ibid. at paras 134.9-134.10.

[FN27]. Ibid. at para. 134.16.

[FN28]. Ibid. at para. 167.

[FN29]. Ibid. at para. 168.

[FN30]. Ibid. at paras 134.18-134.20.

[FN31]. Ibid. at para. 169.

[FN32]. Ibid. at paras 134.24 and 169.

[FN33]. Ibid. at para. 170.

[FN34]. Ibid. at para. 171.

[FN35]. Ibid. at para. 172. The Court considered the requirements of Articles 4 and 19 in the light of the CRC and Article 13 (the right to education) of the San Salvador Protocol.

The concept of 'project of life' or 'life plan' has been explained previously by the Court as 'akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself'. See *Loayza Tamayo v Peru (**Reparations**)* IACtHR Series C 42 (1998); 7 IHRR 136 (**2000**) at para. 148. The Court has also considered this concept in *Villagran-Morales et al. v Guatemala (Street Children) (Merits)* IACtHR Series C 63 (1999); 7 IHRR 1136 (**2000**) at para. 191. See Trindade, 'The Developing Case Law of the **Inter-AmericanCourt** of **HumanRights**', (**2003**) 3 *Human Rights Law Review* 1 at 15.

[FN36]. Ibid. at para. 173.

[FN37]. Ibid. at paras 134.12 and 174.

[FN38]. Ibid. at para. 174.

[FN39]. Ibid. at para. 176.

[FN40]. Ibid. at paras 175 and 190.

[FN41]. Compare the Court's analysis of the requirements of Article 7 in relation to minors in the *Bulacio* case, supra n. 1.

[FN42]. Ibid. at paras 134.29-134.38.

[FN43]. Ibid. at paras 134.32 and 178.

[FN44]. Ibid. at para. 178.

[FN45]. Ibid. at paras 179 and 187.

[FN46]. Ibid. at paras 181-2.

[FN47]. Ibid. at para. 185.

[FN48]. Ibid. at paras 183-4.

[FN49]. Ibid. at para. 186.

[FN50]. Ibid. at paras 191-3.

[FN51]. Ibid. at para. 167.

[FN52]. Ibid. at para. 208.

[FN53]. Supra n. 1.

[FN54]. Article 40(3) reads: 'States parties shall seek to promote the establishment of laws, procedures, authorities, and institutions specifically applicable to children alleged as, accused, or recognized as having infringed the penal law, and, in particular: (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.'

[FN55]. *Case Concerning the Children's Rehabilitation Institute*, supra n. 2 at para. 210.

[FN56]. Supra n. 54.

[FN57]. Supra n. 14. Rules 6.1 and 6.3 of the Beijing Rules were especially noted. Rule 6.1 reads: 'In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.' Rule 6.3 reads: 'Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.'

[FN58]. *Case Concerning the Children's Rehabilitation Institute*, supra n. 2 at para. 211.

[FN59]. Ibid. at para. 212.

[FN60]. Ibid. at paras 134.57 and 214.

[FN61]. The Court itself refers to this faculty at para. 126 of its judgment.

[FN62]. Ibid. at para. 317.

[FN63]. Ibid. at para. 225.

[FN64]. Ibid. at para. 228.

[FN65]. Ibid. at para. 229.

[FN66]. Ibid. at para. 230.

[FN67]. Article 40(4), CRC states: 'A variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'

[FN68]. *Case Concerning the Children's Rehabilitation Institute*, supra n. 2 at para. 231.

[FN69]. Ibid. at para. 134.27. In Paraguay a writ of *habeas corpus* may be used to safeguard the rights of those who are legally detained. See ibid. at para. 243.

[FN70]. ibid. at para. 134.28.

[FN71]. Ibid. at para. 245.

[FN72]. Ibid. at para. 247.

[FN73]. Ibid. at para. 251.

[FN74]. Ibid. at paras 189 and 134.20-134.21.

[FN75]. Ibid. at paras 189, 317 and resolutory para. 11(b).

[FN76]. Ibid. at paras 216-7.

[FN77]. Ibid. at para. 232.

[FN78]. Ibid. at paras 217 and 233.

[FN79]. See text accompanying supra n. 21-41.

[FN80]. Supra n. 1.

[FN81]. See, Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December **2002**, ST/LEG/SER/E/19.

[FN82]. IACtHR, Series C 110 (**2004**).

[FN83]. Ibid. at paras 67(a)-67(c).

[FN84]. Ibid. at para. 67(e).

[FN85]. Ibid. at paras 67(l)-67(r).

[FN86]. Ibid. at para. 133.

[FN87]. Ibid. at para. 100.

[FN88]. Ibid. at para. 117.

[FN89]. Ibid. at para. 156.

[FN90]. Ibid. at para. 173.

[FN91]. Ibid. at paras 117 and 156.

[FN92]. Ibid. at para. 119.

[FN93]. Ibid. at para. 156.

[FN94]. Ibid. at para. 182.

[FN95]. They were also during this brief period not charged or brought before an authority competent to pronounce on the legality of their detention.

[FN96]. Ibid. at paras 87-100.

[FN97]. Ibid. at para. 93. See the *Bulacio* case, supra n. 1.

[FN98]. Ibid. at paras 81 and 86.

[FN99]. Ibid. at para. 108.

[FN100]. Ibid. at paras 111-3.

[FN101]. Ibid. at paras 67(f) and 109.

[FN102]. Ibid. at paras 67(f), 67(g), 67(i) and 110. In its analysis of whether the facts constituted torture the Court did not make specific reference to the fact that the corpses as delivered to the morgue were covered in blood and dirt, with brain matter in their hair, had a broken finger, and their eyes gouged out. Ibid. at para. 67(j).

[FN103]. Ibid. at para. 116.

[FN104]. Ibid. at para. 118.

[FN105]. The Court has routinely asserted jurisdiction to hear allegations of violations of

this instrument despite the absence of such a provision in the treaty itself. See, for example, *Maritza Urrutia v Guatemala*, IACtHR Series C 103 (**2003**) at paras 89-92, as noted in Butler, supra n. 1 at 145-8.

[FN106]. *Gómez-Paquiyauri* case, supra n. 82 at paras 67(k) and 118.

[FN107]. Ibid. at para. 118.

[FN108]. Ibid. at para. 124.

[FN109]. Ibid. at paras 127 and 132.

[FN110]. Ibid. at para. 129.

[FN111]. Ibid. at para. 131, quoting European Court of Human Rights' judgment in *Nachova and Others v Bulgaria* (**2004**) 39 EHRR 37 at para. 116.

[FN112]. Ibid. at para. 128.

[FN113]. Ibid. at paras 67(l)-67(p)(3).

[FN114]. Ibid. at paras 67(r) and 143.

[FN115]. Ibid. at para. 145.

[FN116]. Ibid. at paras 67(p)(4), 140, 147 and 149.

[FN117]. Ibid. at para. 147.

[FN118]. Ibid. at para. 145.

[FN119]. Ibid. at para. 147.

[FN120]. Ibid. at paras 153-6.

[FN121]. See Partially Dissenting Opinion of Judge Cecilia Medina Quiroga, ibid. at para. 3.

[FN122]. Ibid. at paras 163-4.

[FN123]. Ibid. at paras 166-7.

[FN124]. Ibid. at paras 167-9.

[FN125]. Ibid. at paras 169-71.

[FN126]. The Court considered the violation of Article 19 as an isolated provision, rather than parasitically, as in the *Case Concerning the Children's Rehabilitation Institute*, supra n. 2.

[FN127]. Ibid. at paras 67(w)-67(z) and 182.

[FN128]. Ibid. at para. 76.

[FN129]. A function presently carried out, not uncontroversially, by the Court See *Baena Ricardo v Panama*, IACtHR Series C 104 (**2003**); 10 IHRR 130 (**2003**), as discussed in Butler, supra n. 1 at 148-50.

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