Catching up with the Past: Recent Decisions of the Inter-American Court of Human Rights Addressing Gross Human Rights Violations Perpetrated during the 1970-1980s

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1. Introduction

In recent judgments, the Inter-American Court of Human Rights (hereinafter 'Inter-American Court' or 'Court') has decided cases involving gross violations of human rights perpetrated during periods of political violence in El Salvador, Chile and Paraguay during the 1970s and 1980s. The first case, *Serrano Cruz Sisters*,\(^1\) involved the capture and subsequent disappearance of two minor sisters during the internal armed conflict in El Salvador. The second case, *Almonacid-Arellano et al.*,\(^2\) was related to the extrajudicial execution of a political dissident during the Pinochet military dictatorship in Chile and the subsequent application of an amnesty law to the alleged perpetrators of the crime. The third case, *Goiburú et al.*,\(^3\) involved the forced disappearance of

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four political opponents of the military regime of General Stroessner in Paraguay, who were arrested and later disappeared within the framework of 'Operation Condor'. The facts in these cases transpired before El Salvador, Chile and Paraguay had accepted the compulsory jurisdiction of the Court. Following the practice of other States that had faced similar political turmoil, these three States incorporated temporal limitations in their declarations of acceptance of jurisdiction to exclude from the Court's jurisdiction gross human rights violations perpetrated during violent political times. Though the scope of the limitations asserted by the three States is different, the Court found that some of the facts involved in those cases fell within its jurisdiction.

Although prior to these judgments the Court had heard other cases involving gross human rights violations perpetrated before the respondent State had ratified the American Convention on Human Rights 1969 ('American Convention' or 'Convention') and/or recognised the compulsory jurisdiction of this tribunal, the cases under analysis present special issues regarding the jurisdiction rationae temporis of the Court. First, the scope of the temporal limitations asserted by El Salvador and Chile raise problems of interpretation that were never addressed by the Court in its case law before. Second, though the Court considered forced disappearances as continuous violations for purposes of jurisdiction in other decisions, the Court had not established the point at which the crime of forced disappearance crystallised as an autonomous human rights violation by States. Furthermore, the three cases under analysis were decided within a short time span, which leaves room for comparisons to be drawn among the judgments in those cases. Finally, the three selected cases involve other issues that are relevant for the current evolution of international human rights law, such as the notion of crimes against humanity and the obligation to punish the perpetrators of such crimes, the scope of the duty to investigate when the alleged perpetrators are residing outside the jurisdiction of the concerned State and the nature of the crime of forced disappearance.

For background purposes, this article will provide first a short account of the facts of the cases. Second, it will analyse the decisions in regard to the
jurisdiction _rationae temporis_ of the Court. Third, it will review the Court's determination that certain human rights violations constitute crimes against humanity and the implications of this characterisation. Next, the article will explore the Court's holding that the obligation to investigate crimes against humanity entails a duty to request the extradition of the alleged perpetrators who reside outside the State's jurisdiction. Finally, the article will review the Court's decision that forced disappearances became an autonomous human rights violation in international human rights law enforceable as such, even before the existing treaties on this crime were adopted.

2. Facts of the Cases

The facts in the _Serrano Cruz Sisters_ case transpired during the internal armed conflict that affected El Salvador from 1980 to 1991. Sisters Ernestina and Erlinda Serrano Cruz ('Serrano Cruz sisters'), who were seven and three years old respectively, were allegedly captured, kidnapped and disappeared by members of the Batallón Atlacatl of the Salvadoran army on or after 2 June 1982, during a military operation known as the 'Cleansing Operation' or 'May Stampede' that took place in San Antonio de La Cruz, Chalatenango Department, from 27 May to 9 June 1982. As a result of the May Stampede, the Serrano Cruz family fled their home to save their lives. María Victoria Cruz Franco, the Serrano Cruz sisters' mother, and one of her sons were the only family members who successfully crossed the military fence to another town, Manaquil. The rest of the family joined a group to traverse the mountains toward safety in 'Los Alvarengás. They spent three days on the journey with very little food and water, often hiding for safety. The Serrano Cruz sisters were accompanied by their father, Dionisio Serrano and their siblings, Enrique Serrano Cruz and Suyapa Serrano Cruz, who carried her six-month old baby. Suyapa chose to divert from the path the rest of the family took because she did not want to attract attention to the group with her crying baby. At the insistence of the Serrano Cruz sisters, Dionisio and Enrique went to search for water at a canyon. Left alone, the girls began to cry and were found by El Salvador military troops. The whereabouts of the Serrano Cruz sisters remain unknown 25 years after they were allegedly captured by state officials.

Maria Victoria was unable to bring a complaint before the Chalatenango Trial Court until 30 April 1993, because she was living with Suyapa in a Honduran refugee camp and the events took place during a time period in which El Salvador's judicial system was not in operation. On 13 November 1995, Maria Victoria brought a _habeas corpus_ claim before the Salvadoran Constitutional Supreme Court of Justice, but that court dismissed her claim since it was not the proper court to investigate the whereabouts of
the girls. The criminal investigation into their disappearance has failed to estab-
lish the fate of the Serrano Cruz sisters.

Almonacid-Arellano et al. involved the death of Luis Almonacid-Arellano, an
elementary school teacher, member of the Chilean Communist Party and union
leader who was murdered by members of the police following his arrest at his home on 16 September 1973. These events transpired in the city of Rancagua, Chile, a few days after a coup d'état overthrew President Allende, and were carried out as part of the wide repression unleashed by the Pinochet military dictatorship against alleged opponents to the new regime. Although a criminal investigation was opened as a result of the murder of Mr Almonacid-Arellano in 1973, the case was ultimately dismissed in September 1974 without ever having identified or punished the perpetrators. On 18 April 1978, the de facto government passed Decree Law No. 2191 ('Amnesty Law') granting amnesty to perpetrators of criminal acts carried out from 11 September 1973 until 10 March 1978. Some criminal acts were excluded from the application of the Amnesty Law.

In 1992, the victim's wife requested the reopening of the case and brought
charges against the two alleged perpetrators before the First Criminal Court of
Rancagua. In September 1996, the Second Military Court of Santiago requested
the First Criminal Court decline to exercise jurisdiction over the case on the basis
that, at the time of the murder, the two alleged perpetrators were on active duty
under military jurisdiction. Moreover, the Military Court stated that, when Mr
Almonacid-Arellano was killed, there was in effect a state of emergency, which
should be construed as a state or time of war; thus, the military court had jur-
sisdiction over the investigation of his murder. In December 1996, the Supreme
Court of Chile confirmed the transfer of jurisdiction from the civilian courts to
the military courts. In January 1997, the military courts ordered the dismissal
and closing of the investigation, applying the Amnesty Law, which was con-
firmed by the Court-Martial. A motion for review filed with the Supreme Court
was dismissed on the grounds that it was time-barred.

In recent years, several bills have been submitted to amend or repeal the
Amnesty Law, but it was still in force at the time the Court issued its judgment
on this case. However, there have been several cases since 1998 in which the
Chilean courts have not applied the amnesty law.

7 Decree Law No. 2191 states:

Section 1 – Amnesty shall be granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11 1973 to March 10 1978, provided they are not currently subject to legal proceedings or have been already sentenced.

Section 2 – Amnesty shall be further granted to those individuals who, to the date of this Decree Law, have been sentenced by military courts, after September 11 1973.

8 For example, robbery aggravated by violence or intimidation, rape and embezzlement were excluded from the application of the Amnesty Law.
Lastly, Goiburú et al. concerned the detention, torture and subsequent disappearance of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro and brothers Rodolfo Feliciano and Benjamín de Jesús Ramírez Villalba (‘Ramírez Villalba brothers’), who were political dissidents during the Alfredo Stroessner Matiauda dictatorship. The victims were subjected to forced disappearance by Paraguayan authorities with the support of Argentine security forces, within the framework of ‘Operation Condor’. The Stroessner dictatorship, lasting from 1954 to 1989, was responsible for the systematic practice of arbitrary detention, prolonged imprisonment without trial, torture and cruel, inhuman and degrading treatment, death during torture and the political assassination of individuals who were said to be “subversive” or against the regime.9 The respondent State’s actions in this case occurred within the context of Operation Condor, as revealed by the Terror Files.10 The Court described Operation Condor as the ‘code name given to the alliance of the security forces and intelligence services of the Southern Cone dictatorships in their repression of and fight against individuals designated “subversive elements”’:11 The operation involved ‘clandestine coordination between the “security forces and military personnel and intelligence services” of the region.’12 In Paraguay, Operation Condor was led by the Department of Military Intelligence.

Goiburú Giménez, Mancuello Bareiro and the Ramírez Villalba brothers were all disappeared as part of a practice ‘in which agents of the Paraguayan State illegally detained, maintained incommunicado, tortured and disappeared individuals whose political activities were opposed to General Stroessner’s regime or who were identified as his enemies’.13 Goiburú was a doctor, a Colorado Party member and founder of an opposition party against Stroessner. While living and practicing his profession in Argentina, Goiburú was arbitrarily detained by Argentine security forces on 9 February 1977, under Operation Condor, handed over to Paraguayan officials who transferred him to the Asunción Police Investigations Department where he was held incommunicado, tortured and then disappeared. Mancuello Bareiro was a Paraguayan citizen detained on 25 November 1974, with his wife and baby, as they passed through Paraguayan customs on his return from Argentina, where he was studying engineering. On 25 November 1974, Paraguay similarly detained Benjamín Ramírez Villalba on his way to Paraguay from Argentina and detained his brother, Rodolfo, in Asunción. The State accused Mancuello Bareiro and the Ramírez Villalba brothers of conspiring to kill Stroessner in a terrorist group allegedly led by Goiburú. The three men were detained in several government offices, including the Investigations Department, where they were

9 Goiburú et al., supra n. 3 at para. 61.3.
10 Ibid. at paras 61.6–61.7.
11 Ibid. at para. 61.6.
12 Ibid.
13 Ibid. at para. 61.14.
detained for 22 months, tortured, held incommunicado and later disappeared. The criminal proceedings for all the victims only resulted in judgments against violators who were subsequently granted parole, already deceased, not extradited from other countries or remained in the system due to continuing proceedings. The respondent State acknowledged its international responsibility for the forced disappearance of the four victims in this case.

3. Jurisdiction Rationae Temporis

The three cases analysed in this article raised issues regarding the jurisdiction rationae temporis of the Court with respect to facts that transpired before the respondent States recognised the Court's compulsory jurisdiction.

Before moving onto an analysis of the different aspects of these cases, it is relevant to explore briefly the special characteristics of the contentious jurisdiction of the Court and how this tribunal has been shaping its power to assert that jurisdiction in recent years. The scope of the contentious jurisdiction of the Court is established in Article 62 of the American Convention and provides the power of the Court to interpret and apply the provisions of the American Convention. States may submit a unilateral declaration accepting the jurisdiction of the Court upon ratification of the Convention or at a subsequent time. Once a declaration is made it cannot be withdrawn. In the cases of Ivcher-Bronstein v Peru and Constitutional Court v Peru, related

14 Article 62, Convention provides:

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

15 The Court has consistently recognised the optional nature of the acceptance of its compulsory jurisdiction. In Cantos v Argentina, Preliminary Objections, IACHR Series C 85 (2001); 11 IHRR 434 (2004) at para. 34, the Court stated that 'it is evident from the text of the Convention that a State may be a party to it and accept or reject the obligatory jurisdiction of the Court. Article 62 of the Convention uses the verb 'may' to signify that acceptance of the jurisdiction is optional'. See also Alfonso Martin del Campo Dodd v Mexico, Preliminary Objections, IACHR Series C 113 (2004); 14 IHRR 425 (2007) at para. 68.

16 Ivcher-Bronstein v Peru, Competence, IACHR Series C 54 (1999); and Constitutional Court v Peru Competence, IACHR Series C 55 (1999); 7 IHRR 751 (2000).
to the attempted withdrawal from the jurisdiction of the Court by the Fujimori regime ruling Peru at the time, the Court concluded that there is no provision in the American Convention that allows States that have accepted its compulsory jurisdiction to withdraw such acceptance.\(^{17}\) Thus, 'the only avenue [that a] State has to disengage itself from the Court's binding contentious jurisdiction is to denounce the Convention as a whole',\(^{18}\) as provided by Article 78 of the American Convention.\(^{19}\) Moreover, the Court held that Article 62 authorises States to restrict their acceptance to its jurisdiction only on the basis of the limitations expressly stipulated in that provision, namely: (1) on condition of reciprocity; (2) for a specific period of time; and (3) for specific cases.\(^{20}\) Arguably, other non-stipulated limitations are not authorised by the Convention and therefore invalid. Because of the special nature of the American Convention as a human rights treaty, the international resolution of human rights cases under this instrument cannot be assimilated to the settlement of inter-State disputes at the International Court of Justice. Thus, no analogy can be drawn from State practice under the Statute of the International Court of Justice, particularly with regard to States' wide discretion to insert limitations to their acceptance of jurisdiction.\(^{21}\)

The Court has also asserted its inherent power to review whether limitations inserted into a State's acceptance of its compulsory jurisdiction are compatible with the Convention and thereby valid.\(^{22}\) In making this analysis, the Court must consider the object and purpose of the Convention as a human rights treaty.\(^{23}\) Moreover, it must ensure that Article 62, which is essential to the effectiveness of the international protection mechanism, 'be interpreted and applied so that the guarantee it establishes is truly practical and effective, bearing in mind the special nature of human rights treaties and their collective implementation'.\(^{24}\) Lastly, the Court has constantly reiterated that

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17 Ivcher-Bronstein, ibid. at para. 39; and Constitutional Court, ibid. at para. 38.
18 Ivcher-Bronstein, ibid. at para. 40; and Constitutional Court, ibid. at para. 39.
19 Article 78, Convention provides:

1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

20 Ivcher-Bronstein, supra n. 16 at para. 36; and Constitutional Court, supra n. 16 at para. 35.
21 Ivcher-Bronstein, ibid. at paras 47–48; and Constitutional Court, ibid. at paras 46–47.
22 Ivcher-Bronstein, Competence, ibid. at para. 34; and Constitutional Court, Competence, ibid. at para. 33. See also, Constantine et al. v Trinidad and Tobago, Preliminary Objections, IACHR Series C 82 (2001); 10 HRR 1068 (2003) at para. 69.
23 Ivcher-Bronstein, ibid. at para. 46; and Constitutional Court, ibid. at para. 45.
24 Ivcher-Bronstein, ibid. at para. 37; and Constitutional Court, ibid. at para. 36.
limitations to a declaration of acceptance to its contentious jurisdiction are not technically the same as reservations to multilateral treaties; they are only limitations, which appear to carry different legal consequences from reservations.

In that context, for a number of years there was uncertainty regarding the validity of temporal limitations which restricted the jurisdiction of the Court to facts that occurred after the State's declaration of acceptance. These types of limitations appeared not to fall within the authorised restrictions identified by the Court. In the Serrano Cruz Sisters Case, however, the Court concluded that these temporal limitations are valid because they fall within the language of Article 62 authorising States to restrict their acceptance for a 'specific period of time'. The Court reiterated this conclusion in Almonacid-Arellano et al. This holding is consistent with the Court's position regarding the scope of its jurisdiction rationae temporis. In general, the Court has stated that the principle of non-retroactivity enshrined in Article 28 of the Vienna Convention on the Law of Treaties 1969 applies to the determination of its jurisdiction to hear a case, even if a State has not inserted a temporal restriction to its declaration of acceptance. According to that principle, the Court is prevented from reviewing facts or acts that preceded a State's acceptance of its compulsory jurisdiction. The only exception to this principle is the existence of continuous or permanent violations that continue in time even if they commenced before a State's acceptance of the compulsory jurisdiction of the Court.

In the three cases under analysis in this article, the respondent States—El Salvador, Paraguay, and Chile—inserted temporal limitations in their declarations of acceptance to exclude from the Court's consideration facts that transpired during periods of political turmoil in those countries—internal armed conflict in El Salvador and repressive military dictatorships in Paraguay and Chile. The scope of the restrictions in these three cases, however, was different and consequently had different implications for the outcomes of these cases. In the case of El Salvador, the restriction excluded facts and legal acts that

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25 Cantos, supra n. 15 at para. 34; and Alfonso Martin del Campo Dodd, supra n. 15 at para. 68.
26 In Serrano Cruz Sisters, supra n. 1 at para. 61, the Court stated: "Recognition of the jurisdiction of the Court... is a unilateral act of each State, qualified by the terms of the American Convention as a whole and, therefore, not subject to reservations. Although some legal doctrine speaks of "reservations" to the recognition of the international court's jurisdiction, in fact this refers to limitations to the recognition of that jurisdiction and not technically to reservations to a multilateral treaty;"
27 Ibid. at para. 73.
28 Almonacid-Arellano et al., supra n. 2 at para. 44.
29 Jean and Bosico Children v Dominican Republic IACtHR Series C 130 (2005); 14 IHRR 724 (2007) at para. 104.
30 Nogueira de Carvalho et al. v Brazil IACtHR Series C 161 (2006) at para. 43.
31 Jean and Bosico Children, supra n. 29 at paras 105–6; Moiwana Community, supra n. 6 at paras 38–39; and Nogueira de Carvalho, ibid. at paras 44–45.
occurred before the State's acceptance of the Court's jurisdiction and those which commenced before that critical date, even if they continued after the State's acceptance.\textsuperscript{32} Since the alleged capture of the Serrano Cruz Sisters occurred before the acceptance of the Court's jurisdiction, the State contended that this tribunal lacked jurisdiction to review the facts of the case. Additionally, the State argued that even if the Court considered the facts in this case as continuous and permanent violations—forced disappearances—it would still lack jurisdiction to hear the case because the alleged disappearances commenced before El Salvador's acceptance of the compulsory jurisdiction of this tribunal. Next, the State argued that the suffering of the minors' next of kin as well as the alleged failure to investigate, prosecute and punish the perpetrators were related to the forced disappearances and therefore remained excluded from the jurisdiction of the Court because they were not independent facts. Likewise, the criminal investigation instigated by the sisters' mother was opened in 1993, before El Salvador recognised the jurisdiction of the Court. Ultimately, the State argued that the restriction was a valid reservation since the other State Parties to the American Convention had not objected to it after being notified of its submission.

Petitioners and the Inter-American Commission on Human Rights ('Inter-American Commission' or 'Commission'), on the other hand, contended that the limitation asserted by El Salvador was incompatible with the object and purpose of the American Convention because it prevented the Court from reviewing crimes against humanity perpetrated in that country, such as forced disappearances. Alternatively, they argued that even if the restriction was considered valid, the Court still had jurisdiction to review independent violations that had occurred after El Salvador's acceptance of the Court's jurisdiction, especially those related to the failure to afford access to justice and judicial protection to victims and their next of kin.

In response to the State's arguments, the Court reiterated that limitations incorporated into declarations of acceptance of its compulsory jurisdiction are not reservations. Thus, it held that the fact that other States have not challenged the restriction introduced by El Salvador did not prevent this tribunal

\textsuperscript{32} El Salvador's declaration reads as follows:

I The Government of El Salvador accepts as binding ipso facto and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights, in accordance with the provisions of Article 62 of the American Convention on Human Rights, or 'Pact of San Jose'.

II The Government of El Salvador, when recognizing this jurisdiction, places on record that its recognition is for an indefinite period, on the condition of reciprocity, and with the reservation that the cases in which it accepts the jurisdiction include only and exclusively subsequent juridical facts and acts or juridical facts and acts which commence subsequent to the date of deposit of this Declaration of Recognition . . . .
from examining the compatibility of such a limitation with the American Convention. The Court concluded that in this case the temporal limitation inserted by El Salvador was valid in accordance with the stipulations of Article 62 of the American Convention and the principle of non-retroactivity set out in Article 28 of the Vienna Convention on the Law of Treaties 1969.\(^3\)

In its holding, the Court failed to consider the argument made by the petitioners regarding the incompatibility of El Salvador's limitation with the object and purpose of the Convention. The Court only stated that, unlike another case in which it had found the State's limitation invalid because it subordinated the application of the Convention to the domestic jurisdiction, El Salvador's limitation permitted the Court to assess if the facts of a particular case fall within its jurisdiction.\(^3\) In conclusion, the Court found that the facts related to the alleged capture or disappearance of the Serrano Cruz sisters were excluded from its jurisdiction. The Court, however, found jurisdiction to review additional independent facts related to the judicial proceedings initiated to investigate the disappearance of the minors, which started after El Salvador's acceptance of the jurisdiction of the Court. These independent facts included a *habeas corpus* petition, the Supreme Court's rejection of the petition, as well as certain measures adopted in the criminal investigation which intended to obstruct and delay the proceedings. Ultimately, the Court in its decision on the merits found that these facts resulted in a breach of the rights to judicial protection and a fair trial, protected by Articles 8(1) and 25, in relation to 1(1) of the American Convention.\(^5\)

In the case of Chile, the language of the restriction was very similar to El Salvador's. It stated that Chile grants jurisdiction to the Court in regard 'only to events which were subsequent to' the date on which the declaration was deposited (21 August 1990) 'or, in any case, to events which started after March 11, 1990'. Unlike the Serrano Cruz Sisters Case where the human rights violation involved was a forced disappearance, that is to say, a continuous and permanent violation, in *Almonacid-Arellano*, the victim was illegally arrested and later arbitrarily deprived of his life. Thus, neither the Commission nor the petitioners argued that the Court had jurisdiction to deal with the detention and death of the victim. Both the Commission and the petitioners

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\(^3\) 1155 UNTS 331.

\(^4\) The Court referred to the *Constantine et al.*, supra n. 22 at para. 79, in which it held that the limitation inserted by Trinidad and Tobago to its acceptance of the jurisdiction of the Court was general in scope and subordinated the application of the American Convention to the domestic legislation as interpreted by the domestic courts. The declaration of Trinidad and Tobago read '[T]he Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights... only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.'

\(^5\) *Serrano-Cruz Sisters v El Salvador* IACtHR Series C 120 (2005).
focused instead on the violations that occurred subsequent to Chile's acceptance of the Court's compulsory jurisdiction, particularly the specific and independent violations arising out of the denial of justice. The State challenged those assertions by arguing that the Court lacked jurisdiction over the criminal investigation because it is 'a single and ongoing unity which is permanent in time'\textsuperscript{36} that cannot be divided or separated which started immediately after the murder of Mr Almonacid-Arellano in September 1973. In response to this argument, the Court noted that during the course of a proceeding separate facts might occur which constitute specific and independent violations arising from denial of justice.\textsuperscript{37} Thus, the Court concluded that it had jurisdiction to hear certain facts related to the criminal investigation which occurred subsequent to Chile's declaration of acceptance, in particular those related to the transfer of the case to the military courts and the application of the Amnesty Law to this case by the military courts. The Court also asserted its jurisdiction to review whether keeping the Amnesty Law in force after the State ratified the Convention and recognised the Court's jurisdiction breached the duty to adjust domestic legislation to the provisions of the Convention enshrined in Article 2. Ultimately, the Court found that the enforcement of the Amnesty Law violated the right to judicial protection and a fair trial, as well as the duty to adjust domestic legislation to the Convention.

Paraguay's declaration of recognition of the Court's jurisdiction also included a temporal limitation.\textsuperscript{38} Unlike the El Salvador and Chile restrictions, however, this limitation only prevented the Court from reviewing facts that occurred before the State's acceptance of this tribunal's jurisdiction. Thus, violations of a continuous or permanent nature, such as forced disappearances, can in principle be heard by the Court. In \textit{Goiburú et al.}, Paraguay partially acknowledged international responsibility for the facts that transpired in this case and acquiesced to the jurisdiction of the Court on the basis of the continuous and permanent nature of the forced disappearances perpetrated against the victims. The State acknowledged that the basis of the Court's jurisdiction arose from the American Convention and the Inter-American Convention on Forced Disappearances of Persons 1994\textsuperscript{39} ('Convention on Forced Disappearances'), ratified by Paraguay on 26 November 1996. Notwithstanding the acknowledgment of the State regarding its responsibility for the forced disappearances and the failure to provide judicial protection within a reasonable time, the Court decided that the gravity of the facts and the need to establish the

\textsuperscript{36} \textit{Almonacid-Arellano et al.}, supra n. 2 at para. 39.
\textsuperscript{37} Ibid. at para. 48.
\textsuperscript{38} Paraguay's declaration stated that it recognised the jurisdiction of the Inter-American Court of Human Rights 'for an indefinite period of time and which should be interpreted in accordance with the principles of International Law in the sense that this recognition refers expressly to acts that occurred after the deposit of this instrument and only for cases in which there exists reciprocity' [emphasis added].
\textsuperscript{39} (1994) 33 ILM 1539.
truth with regard to 'Operation Condor' compelled the tribunal to include a chapter detailing the facts that transpired in this case. Additionally, the Court found violations to the rights to humane treatment of the victims' next of kin and to judicial protection and a fair trial, protected by Articles 5, 25 and 8 of the American Convention, in relation to the general duty to ensure established in Article 1 (1).

4. Crimes Against Humanity

In Almonacid-Arellano, the Court found for the first time that certain crimes committed in the context of a generalised and systematic attack against civilians amount to crimes against humanity and therefore impose upon the State a duty to investigate, prosecute and punish the perpetrators. This obligation cannot be overridden by the application of amnesty laws or similar domestic provisions excluding criminal liability for the perpetrators. The Court held similarly in Miguel Castro-Castro Prison and in La Cantuta.

The Court concluded that the extrajudicial execution of Mr Almonacid-Arellano was part of a generalised and systematic practice by the military authorities in Chile to attack sectors of the civilian population considered opponents to the regime and thus constituted a crime against humanity. The Court reasoned that murder was considered a crime against humanity in the Charter of the Nuremberg Tribunal 1945, even if at the time a war nexus was required. The scope of crimes against humanity and the binding nature under international law of the principles recognised by the Charter of the Nuremberg Tribunal and its judgments were subsequently confirmed by UN General Assembly Resolution 95(I) and by the International Law Commission, which in 1950 formulated the Principles of International

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40 In previous cases, the Court has stated that the practice of forced disappearances constituted a crime against humanity. However, the Court has never made a reasoned analysis finding a human rights violation under the Convention a crime against humanity and the implications of that determination. In Gómez Palomino v Peru IACtHR Series C 136 (2005) at para. 92, note 66, for example, the Court indicated in a footnote that the Convention on Forced Disappearances considers the practice of forced disappearances a crime against humanity. Additionally, the Court in Serrano Cruz Sisters, supra n. 1 at para. 103, and Goiburú, supra n. 3 at para. 82, held that a forced disappearance that is part of a pattern or practice of disappearances constitutes a crime against humanity. Finally, though the Inter-American Commission and the petitioners argued that the extrajudicial executions perpetrated against members of an indigenous community in Plan de Sánchez Massacre, supra n. 6 at para. 51, constituted genocide, the Court refused to rule on that matter stating that it lacked jurisdiction rationae materiae. The Court, however, found that the massacre was part of a pattern of committing these kinds of acts and therefore involved an aggravated international responsibility for the State.

43 82 UNTS 279.
44 GA Res. 95(I), 11 December 1946.
Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Moreover, the Court acknowledged that subsequent international practice has defined crimes against humanity as certain inhuman acts, including murder, committed in a context of a generalised or systematic attack against civilians, perpetrated both during peace and in war time. Ultimately, the Court concluded that this international law rule was binding upon States by the time Mr Almonacid-Arellano was killed by state officials in September 1973. Since the murder of the victim was perpetrated within a framework of generalised and systematic repression, which resulted in the execution and disappearance of more than 3,000 victims, Mr Almonacid-Arellano's deprivation of life constituted a crime against humanity under international law.

Second, the Court concluded that the prohibition of crimes against humanity has attained the level of *jus cogens* and, consequently, there is an obligation to punish such crimes pursuant to general principles of international law. In the case of the American Convention, the duty to investigate, prosecute and punish the perpetrators of crimes against humanity arises out of Article 1(1). As a consequence of this obligation, "[s]tates must prevent, investigate and punish all violations of the rights recognised by the Convention and, at the same time, guarantee the reinstatement, if possible, of the violated rights, and as the case may be, the reparation of the damage caused due to the violation of human rights." The Court stated that it is apparent from international practice and its own case law, especially the *Barrios Altos Case*, that the adoption and enforcement of amnesty laws prevents compliance with the duty to punish the perpetrators of crimes against humanity and, as a result, amnesty laws are not applicable to crimes under current international law.

Next, the Court found that the Chilean Amnesty Law granted amnesty to perpetrators of certain crimes against humanity, including murder, and therefore was incompatible with the obligations arising out of the American Convention and engaged the international responsibility of the State. Moreover, the Court stated that, given its nature, the Amnesty Law 'does not have any legal effect and cannot remain as an obstacle for the investigation of the facts inherent to the instant case, or for the identification and punishment of those responsible thereof.'

Finally, it concluded that under the duty arising out of Article 2, which imposes a legislative obligation to revise any domestic laws or practices that are in breach of the American Convention, the State must repeal the Amnesty Law.

46 *Almonacid-Arellano*, supra n. 2 at para. 110.
47 *Barrios-Altos v Peru* IACtHR Series C 75 (2001); 10 IHRR 487 (2003).
48 Although not a part of the case under analysis, the Court also considered that the Chilean Amnesty Law could not be applied to prevent the investigation of other crimes against humanity such as forced disappearance and torture.
49 *Almonacid-Arellano*, supra n. 2 at para. 119.
The Court acknowledged that the law was a self-amnesty passed by a military regime to prevent the prosecution of its members; however, it concluded that since the ratification of the American Convention in 1990 the State had kept the Amnesty Law in force in absolute breach of Convention rights. Even if the Amnesty Law had not been applied by domestic courts in recent times, keeping it in force as a part of the State's legislation was contrary to the wording and spirit of the Convention and thereby a breach of Article 2.

The Court indicated that when the legislative power fails to set aside laws that are contrary to the American Convention, the judiciary still must respect the duty to 'ensure' arising out of Article 1(1). Domestic courts must ensure that domestic laws and practices are in compliance with the American Convention. To avoid engaging the international responsibility of the State, domestic courts must ensure that those laws and practices are not in breach of the Convention, in which case they must refrain from enforcing them. In accomplishing that control, domestic courts must take into account both the Convention and the case law of the Court when interpreting the scope of the provisions of that treaty. In the case under analysis, the domestic courts failed to provide such control and applied the Amnesty Law, which had the effect of closing the investigation; consequently, the trial and punishment of the perpetrators of Mr Almonacid-Arellano's murder was not pursued. As a result, the victims' rights to judicial protection and a fair trial protected by Articles 8 and 25 of the American Convention were violated. Similarly, the State failed to respect the general obligation enshrined in Article 1(1), according to which the State must investigate, identify and punish the perpetrators of human rights violations. This is especially important in cases which involve the perpetration of crimes against humanity. The Court also found that the transfer of the case to military jurisdiction constituted an additional violation of Article 8(1) since the State failed to afford the victims their right to be heard by a competent, independent and impartial tribunal.

As part of the reparations, the Court ordered the State to ensure that the Amnesty Law be left without legal effect so that it does not continue to hinder the investigation of Mr Almonacid-Arellano's murder or other similar violations of human rights perpetrated in Chile during the military regime. Additionally, it ordered the State to set aside any judgments issued by the military courts in violation of rights protected by the American Convention and refer the investigation to a civilian court, which should identify the perpetrators of the victim's murder and apply the appropriate sanctions. The Court held that the State cannot invoke the application of a statute of limitations, the principle of non-retroactivity of criminal laws, or the *ne bis in idem* (double jeopardy) principle to avoid pursuing a criminal investigation. First, crimes against humanity are neither susceptible to the application of amnesty laws nor subject to a statute of limitations. Though Chile has not ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes
Against Humanity 1968, which provides that crimes against humanity are not subject to a statute of limitations, this principle has become a *jus cogens* norm which must be respected by that State as an imperative rule of international law. Second, the *ne bis in idem* principle is not an absolute one and can consequently be restricted under certain circumstances, including: (1) when the court that heard the case and decided on a dismissal or acquittal of the alleged perpetrators intended to shield the persons charged from criminal responsibility; (2) when the criminal proceedings were not conducted independently, impartially or in accordance with due process principles; or (3) when there was no actual intention of bringing the alleged perpetrators to justice. In those cases, according to the Court, the judgment rendered produces an “apparent” or “fraudulent” *res judicata*. Moreover, in cases in which new information is made available regarding the identity of perpetrators of crimes against humanity, the investigations must be reopened, even if the case ended with an acquittal of those perpetrators. The Court held that ‘the dictates of justice, the rights of the victims and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle’. In *Almonacid-Arellano*, two of the stated conditions were met. First, the investigation was not carried out by an independent and impartial tribunal. Second, an amnesty law was applied with the intention of excluding the criminal responsibility of the perpetrators of the victim’s murder. Thus, the Court found that the State could not argue that the application of a statute of limitations or the principles of non-retroactivity of criminal laws or *ne bis in idem* justified the failure to prosecute and punish the perpetrators of the victim’s murder.

5. **Extradition and the Principle *Au Dedede Au Punire***

Another interesting development in the case law of the Inter-American Court with regard to the duty to investigate crimes against humanity is analysed in *Goiburú et al.* In that case, the Court found that the duty to investigate crimes against humanity, such as forced disappearance, includes the obligation to request the extradition of alleged perpetrators who are not within the jurisdiction of the State. In *Goiburú et al.*, at least two of the alleged perpetrators, General Alfredo Stroessner, former President of Paraguay, and Sabino Augusto Montanaro, former Minister of Interior, were granted asylum in Brazil and Honduras respectively. On several occasions, the victims’ next of kin requested that Paraguay ask for the extradition of Stroessner and

50 754 UNTS 73.
51 *Almonacid-Arellano*, supra n. 2 at para. 154.
52 Ibid.
Montanaro, to no avail. Although the courts in charge of the criminal investigation requested the Ministry of Foreign Affairs to proceed with the extradition request, at the time of the Court's decision it was unclear if the State had done so. Moreover, as the Court acknowledged, former President Stroessner passed away in Brazil on 16 August 2006. The Court also noted that there was no evidence of criminal investigations initiated in Brazil or Honduras to prosecute Stroessner and Montanaro for the alleged perpetration of crimes against humanity.

The Court held that, given the nature of the crimes involved in Goiburú et al and the corresponding obligation under international law to punish the perpetrators of those human rights violations, Article 1(1) of the American Convention imposed upon Paraguay a 'compulsory obligation to have requested the extradition of the accused promptly and with due diligence'.\footnote{Goiburú et al., supra n. 3 at para. 130.} Lack of extradition treaties with the States where the alleged perpetrators of crimes against humanity are residing should not prevent the State from proceeding with the request. According to the Court, access to justice is a \emph{jus cogens} norm and, as such, creates an \emph{erga omnes} obligation upon States to cooperate in ensuring that these crimes do not remain unpunished. Furthermore, the State Parties to the American Convention cannot grant protection to those accused of crimes against humanity. On the contrary,

the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case in their territory.\footnote{Ibid. at para. 132.}

As part of the reparations, the Court ordered Paraguay to remove all the \emph{de facto} and \emph{de jure} obstacles that have impeded the criminal investigation of the alleged perpetrators of the victims' forced disappearances. The State was also ordered to expedite the criminal investigation by requesting the extradition of Mr Montanaro and completing the proceedings in this case. In addition,

Paraguay and the other States Parties to the Convention should collaborate to eliminate the impunity of the violations committed in this case by the prosecution and, if applicable, punishment of those responsible and should collaborate in good faith either through the extradition of those responsible for the facts or by prosecuting them on their own territory.\footnote{Ibid. at para. 192, operative para. 5.}
6. The Prohibition of Forced Disappearances in International Law

In *Serrano Cruz Sisters* and *Goiburú et al.*, the Court asserted that 'forced disappearance' as an autonomous and continuous human rights violation under international law developed in the 1970's. Although the Court had characterised a forced disappearance as a multiple and continuous violation of several rights in other cases before these decisions, it was not apparent in the existing case law at what point this autonomous human rights violation became enforceable against States, considering that the existing international treaties and declarations on this crime were only adopted in the early 1990's and most recently in 2006.

In *Serrano Cruz Sisters*, El Salvador challenged the characterisation of the alleged capture and subsequent disappearance of the minor victims as a forced disappearance, defined as a continuous and permanent human rights violation of multiple rights. The State argued that if the Court accepted this characterisation it would be applying retroactively a definition that was adopted internationally in the UN Declaration on the Protection of All Persons From Enforced Disappearances and the Inter-American Convention on Forced Disappearances to facts that occurred in 1982, in violation of the principles of non-retroactivity of the law and the principle of legality. The Court concluded that even if the UN Declaration and the Convention on Forced Disappearances were only adopted in the 1990's, there has been since the 1970's enough State practice reflected in the universal and regional human rights mechanisms considering forced disappearance as an autonomous, continuing and permanent crime involving multiple violations of several rights. Moreover, State practice also showed that a pattern of forced disappearances was considered a crime against humanity at that time. Finally, the Court concluded that since a forced disappearance involved the violation of several fundamental rights protected by the American Convention, including the rights to liberty, humane treatment and life, it was not necessary that a State had ratified the Convention on Forced Disappearances for the Court to find that State internationally responsible for the perpetration of such forced disappearance. Ultimately, the Court found that it lacked jurisdiction *rationae temporis* to hear the facts surrounding the forced disappearance, but in its reasoning made clear that forced disappearances had

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57 The United Nations Declaration on the Protection of All Persons from Enforced Disappearances GA Res. 47/113, 18 December 1992, A/RES/47/133; and the Inter-American Convention on Forced Disappearances were adopted in 1992 and 1994, respectively.

58 The International Convention for the Protection of All Persons from Enforced Disappearance was adopted in 2006; see GA Res. 61/177, 20 December 2006, A/RES/61/177; 14 IHRR 582 (2007).
been outlawed in international law before treaties prohibiting this crime were adopted.

The conclusion of the Court in *Serrano Cruz Sisters* was reaffirmed by Paraguay when it acknowledged that the facts that transpired in the *Goiburú et al. Case* were forced disappearances even though they were perpetrated in the 1970's. Paraguay asserted that forced disappearances constitute a continuous violation of multiple human rights and thereby accepted that the Court had jurisdiction to hear the facts of this case. The Court stated that Paraguay's acknowledgment of international responsibility contributed 'to strengthening a perception of the international community and, in particular the inter-American System, that recognises the gravity and the continuing and permanent and autonomous nature of the crime of forced disappearances of persons'. Additionally, the Court reiterated that the perpetration of a forced disappearance as part of a pattern or practice constitutes a crime against humanity. The Court concluded that, considering the gravity of the crime and the nature of the rights violated, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish the perpetrators has attained *jus cogens* status.

Both in *Serrano Cruz Sisters* and in *Goiburú et al.*, the Court reasserted that a practice of forced disappearances tolerated by the State involves aggravated international responsibility of that State. In *Goiburú et al.*, for example, the Court found that because the victims' disappearance was the result of a systematic practice of illegal detentions, torture, and forced disappearances carried out within the framework of 'Operation Condor', a criminal inter-state organisation that practiced 'State terrorism' at an inter-State level, it entailed an aggravated responsibility of that State.

7. Conclusion

At the time the facts in the three analysed cases transpired, it was never thought that they could eventually be reviewed by the Inter-American Court. Indeed, when the three respondent States recognised the compulsory jurisdiction of the Court and inserted temporal limitations to their acceptance of that jurisdiction, they acted upon the understanding that the temporal limitations were sufficient to shield them from being brought before the Court to account for gross human rights violations perpetrated before their acceptance of the Court's jurisdiction. The decisions adopted in *Serrano Cruz Sisters, Almonacid-Arellano et al.* and *Goiburú et al.* however, show the

59 *Goiburú et al.*, supra n. 3 at para. 81.
60 The Court had ruled similarly in *Molina Theissen v Guatemala Reparations*, IACtHR Series C 108; 13 IHRR 1017 (2006) at para. 41, which involved the forced disappearance of a minor during the international armed conflict that affected Guatemala in the 1980's.
willingness of international tribunals such as the Inter-American Court to assert jurisdiction, at least in regard to certain acts committed in the past that would otherwise attract absolute impunity. The cases also show the dilemmas faced by this tribunal when having to weigh the plight of thousands of victims in internal armed conflicts such as El Salvador against rigid limitations set by a state to its consent to the jurisdiction *rationae temporis* of the Court.

Finally, the cases analysed indicate the Court’s tendency to interpret the obligations arising under the American Convention in light of other developments of international law, such as the notion of crimes against humanity, the principle *au dedede au punire*, and the autonomous nature of forced disappearances. It is important to stress that the decisions of the Court are not made in a political vacuum, as many countries in the region that faced gross human rights violations have made bold moves to prosecute the perpetrators of those heinous crimes. However, it is worth recognising that the Inter-American Court, through its decisions, is contributing to the establishment of the truth and a certain sense of accountability in those States in which victims have not yet been able to find justice and judicial protection.