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### Inter-American System

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### III INTER-AMERICAN SYSTEM

CLAUDIA MARTIN\*

During the period covered by this report, the Inter-American Court on Human Rights (hereinafter the 'Court') issued the following judgments on the merits and reparations: *Chitay Nech et al. v. Guatemala*; *Manuel Cepeda Vargas v. Colombia*; *Xákmok Kásek Indigenous Community v. Paraguay*; *Fernández Ortega et al. v. Mexico*; *Rosendo Cantú et al. v. Mexico*; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*; *Vélez Loor v. Panama*; *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil*; *Cabrera García and Montiel Flores v. Mexico*; *Gelman v. Uruguay*; *Salvador Chiriboga v. Ecuador*; *Abrill Alosilla et al. v. Peru*; *Vera Vera et v Ecuador*; *Chocrón Chocrón v Venezuela*; *Mejía Idrovo v Ecuador*; *Torres Millacura et al v Argentina*; *Grande v Argentina*; *Contreras et al v El Salvador* and *López Mendoza v Venezuela*.

The present report first analyses the Court's judgments in *Fernández Ortega et al.*<sup>1</sup> and *Rosendo Cantú et al.*<sup>2</sup> because the factual situations as well as the legal discussion on whether rape constitutes an act of torture under the American Convention on Human Rights (hereinafter 'Convention') in both cases are similar. The Court also addresses the inappropriateness of using the military justice system in cases of human rights violations. Second, this report reviews the facts and conclusions in *Gomes Lund*,<sup>3</sup> a case involving the legality of Brazil's amnesty law.

The full texts of the decisions found in this report may be found on the Court's website at [www.corteidh.or.cr](http://www.corteidh.or.cr).

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<sup>1</sup> I/A Court HR, *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Series C no 215, 30 August 2010.

<sup>2</sup> I/A Court HR, *Rosendo Cantú et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Series C no. 216, 31 August 2010.

<sup>3</sup> I/A Court HR, *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil*, Merits, Reparations, and Costs, Series C no 219, 24 November 2010.

## 1. THE USE OF RAPE AS AN ACT OF TORTURE AGAINST MEXICO'S INDIGENOUS WOMEN IN *FERNÁNDEZ ORTEGA ET AL.* AND *ROSENDO CANTÚ ET AL.*

For the first time, in *Fernández Ortega et al.* and *Rosendo Cantú et al.*, the Court unequivocally found rape may constitute an act of torture. The Inter-American system had previously addressed human rights violations involving rape on four separate occasions.

First, in *Raquel Martin de Mejia v. Peru*, the issue before the Inter-American Commission on Human Rights (hereinafter 'Commission') was whether Peru was responsible for breaching the right to privacy (Article 11) and the right to humane treatment (Article 5) in connection with Article 1(1) of the American Convention on Human Rights ('Convention') after Raquel Martin de Mejia was raped by Peruvian military personnel.<sup>4</sup>

The Commission held that international law and practice established that sexual assaults committed by security forces were a violation of the human right to physical and mental integrity. The Commission based its conclusions on several provisions of international humanitarian law, specifically Articles 27 and 147 of the Fourth Geneva Convention of 1949 ('GC'), Article 76 of Additional Protocol I to the GC, Common Article 3 of the GC and Article 4(2) of Additional Protocol II to the GC. Also, it referred to Article 5 of the Statute of the International Tribunal for the former Yugoslavia that considers rape practiced on a systematic and large scale a crime against humanity to support the characterisation of rape as torture.

The Commission found that even if Article 5 of the Convention does not specify the acts that constitute torture, the definition provided in Article 2 of the Inter-American Convention to Prevent and Punish Torture ('Torture Convention') provided an appropriate framework to assess whether certain acts can be characterised as such under the Convention. In light of that definition, the Commission concluded that to be characterised as torture, acts must meet compliance with three elements. First, "it must be an intentional act through which physical and mental pain and suffering is inflicted on a person."<sup>5</sup> Second, "it must be committed with a purpose."<sup>6</sup> Lastly, "it must be committed by a public official or by a private person acting at the instigation of the former."<sup>7</sup>

The Commission further found that rape fitted within the first element in that it is both physical and mental abuse perpetrated through violence. Real suffering was often the result. Regarding the second element, Raquel Mejia was raped to intimidate

<sup>4</sup> IACHR, *Raquel Martin de Mejia v Peru*, Report 5/96, Case 10,970, 1 March 1996, Annual Report of the Inter-American Commission on Human Rights 1996.

<sup>5</sup> *Ibidem* at 19.

<sup>6</sup> *Idem*.

<sup>7</sup> *Idem*.

and punish her for her husband's involvement in alleged anti-government activities. Moreover, one of the purposes named in the Torture Convention was personal punishment and intimidation. Thus, Raquel Mejia's rape met the second element of torture. As for the third element, the act must be committed by a public official or at the instigation of a public official. In this case, the man who raped Raquel Mejia was a security forces member, and, therefore, the third and final element of torture was satisfied. Ultimately, the Commission found that the rape of Raquel Mejia constitutes torture under Article 5 of the Convention and a violation of her privacy, honour, and dignity under Article 11 of that treaty.<sup>8</sup>

Second, Haiti's 1995 Country Report<sup>9</sup> detailed the violence against women and sexual abuse in that state. The Country Report found that many acts of sexual abuse were committed by members of the Haitian army, the police, or the armed civilian auxiliaries with tolerance or even authorisation from the state. The Country Report indicated this was a violation of Articles 5 and 11 of the Convention. Moreover, the Commission considered that rape in this context could be torture under Article 5(2) of the Convention because it is a brutal demonstration of discrimination against women. Rape as a weapon of terror could also be a crime against humanity if used in this way.

Third, the Court addressed the issue of whether there was a violation under Article 5 of the Convention for the first time in *Loayza-Tamayo v. Peru*.<sup>10</sup> Maria Elena Loayza was accused of terrorism and kept in preventive detention without access to a court for more than ten days. During Maria Elena Loayza-Tamayo's interrogation at the hands of Peruvian officials, she testified that she was repeatedly raped. However, the Court found that the rape of Ms. Loayza-Tamayo "could not be substantiated" and thus the Court did not take up or rule on this issue.<sup>11</sup> Nevertheless, the Court found there were other violations under the right to be free of cruel, inhuman, or degrading treatment (Article 5) of Convention over the other actions committed against Ms. Loayza-Tamayo during her confinement.

Finally, in *Miguel Castro-Castro Prison v. Peru*,<sup>12</sup> the Court for the first time incorporated a gender perspective into the analysis of human rights violations perpetrated against women inmates in a Peruvian prison. After the Peruvian Government carried an attack against several pavilions of a prison where persons accused of terrorism were held, a number of injured women prisoners were transferred to hospitals for treatment. Some of these inmates were stripped of their clothing once they arrived at the hospital and forced to remain naked for a prolonged period of

<sup>8</sup> *Ibidem* at 20; 27.

<sup>9</sup> Inter-American Commission on Human Rights, *Country Report on Haiti, 1995*, available at: [www.cidh.oas.org/countryrep/EnHa95/EngHaiti.htm](http://www.cidh.oas.org/countryrep/EnHa95/EngHaiti.htm).

<sup>10</sup> I/A Court HR, *Loayza-Tamayo v. Peru*, Merits, Series C no 33, 17 September 1997.

<sup>11</sup> *Ibidem* at para. 58.

<sup>12</sup> I/A Court HR, *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Series C no 160, 25 November 2006.

time while they were watched by state agents. This situation implied a violation of their right to personal dignity. The Court concluded that in the case of the six injured female inmates, this treatment – forcing them to remain naked, covered only by a sheet, while being surrounded and observed by armed men – additionally constituted sexual violence. This situation was aggravated by the fact that the women were not allowed to clean themselves, and, when using the restroom, were in the company of armed men who pointed at them with weapons. In addition, the Court found that at least one of the female inmates was subjected to a finger vaginal inspection carried out by several hooded men at the same time and in a very abrupt manner. This situation constituted rape, defined as any “act of vaginal or anal penetration, without the victim’s consent, through the use of other parts of the aggressor’s body, as well as oral penetration with the virile member.”<sup>13</sup> The Court concluded that the rape constituted torture in violation of Article 5 of the Convention.

In *Fernández Ortega et al.* and *Rosendo Cantú et al.*, the Court further scrutinised Article 5 of the Convention in the context of using rape as an act of torture against Mexico’s indigenous women. The facts of both cases transpired in a context of increased military presence in the state of Guerrero as part of a strategy to fight against organised crime, particularly the drug trade. Between 1997 and 2004, there were six complaints on rape perpetrated by members of the armed forces against indigenous women in that state. All the complaints were investigated by the military jurisdiction, but none of the alleged perpetrators were ever punished for those crimes.

Inés Fernández Ortega was twenty-five years old when the facts of her case occurred. She was a member of the indigenous group, the Me’phaa, in the state of Guerrero, Mexico and spoke no Spanish. In March 2002, while Mexican soldiers came to her home looking for her husband, one armed soldier held Mrs. Fernández Ortega’s hands, forced her to lie down on the floor, and raped her while two onlookers observed her assault. Mrs. Fernández Ortega went to a hospital to receive medical services after her assault, but the hospital was later unable to produce the medical evidence from her gynaecological exam.

Mrs. Fernández Ortega’s first attempt to report the rape to the Public Prosecutor of the Common Jurisdiction of the Judicial District of Allende was denied because it involved the military and because “[an agent at the Public Prosecutor’s Office] did not have time to receive the complaint.”<sup>14</sup> Shortly thereafter, she was successfully able to file a complaint with the local Public Prosecution Service after the Inspector General of the Guerrero Human Rights Commission intervened. Her case was then transferred to the Military Prosecution Service after the civilian system declined jurisdiction because it involved military personnel. Like what happened with Mrs.

<sup>13</sup> *Ibidem* at para. 310.

<sup>14</sup> I/A Court HR, *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 2, at para. 85.

Cantú's case, Mrs. Fernández Ortega's request that her case be heard in the civilian court system was denied.

Mrs. Rosendo Cantú was seventeen years old at the time the events in her case took place. She was an indigenous woman from the same Me'phaa community in the state of Guerrero, Mexico and did not speak Spanish. On February 16, 2002 she walked to a local stream near her home to wash clothes. Eight armed soldiers and one civilian stopped to question her about a list of names. She responded that she did not know the people on the list. One soldier hit her in the stomach causing her to fall on the ground and briefly lose consciousness. When she awoke, another soldier grabbed her by the hair and told her they would kill her along with all the people in her community if she did not answer their questions. Shortly afterwards, the soldiers scratched her face, knocked her down, and two soldiers raped her while the others looked on.

Two days after her attack, Mrs. Rosendo Cantú went to a health care clinic in the nearby Caxitepec for her head injuries, but apparently did not report to the doctor that she had been raped. Eight days after that, on February 26, 2002, she walked eight hours to a hospital in Ayutla de los Libres, one of the municipalities of Guerrero. While there, she received treatment for her abdominal pain but told the physician her injuries were caused by a piece of falling wood.<sup>15</sup> The next day Mrs. Rosendo Cantú filed a complaint against members of the Mexican army for human rights violations before the National Human Rights Commission. Consequently, the Commission launched a preliminary investigation. On March 7, 2002 the Mexican League for the Defense of Human Rights brought a claim over Mrs. Rosendo Cantú's case to the Guerrero Commission for the Defense of Human Rights. The claim alleged acts of torture, injury, and rape committed by the Mexican army.

On March 8, 2002, the Inspector General of the Human Rights Commission of Guerrero heard statements by Mrs. Rosendo Cantú and her husband. The Inspector General also discovered that no criminal complaint over Mrs. Rosendo Cantú's rape had been filed. The Inspector General then sent a communication to the Public Prosecutor's Office of Allende to start a preliminary investigation into the rape. On the same day, Mrs. Rosendo Cantú went to the Public Prosecutor's Office of Allende to file a criminal complaint. However, "they did not want to relieve the complaint... and that she had been instructed by her superior to not take in the complaint."<sup>16</sup> Nevertheless, the Inspector General insisted the complaint be taken. On March 12, 2002, Mrs. Rosendo Cantú was examined by a female doctor at the Ayutla Hospital who requested several tests. Finally, on March 19, 2002, she was examined by a doctor within the Prosecutor's Office at Tlapa de Comonfort.

Two months after the victim filed her complaint with the Allende's Public Prosecutor Office, Mexico's military justice system assumed control over the investigation. Mrs.

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<sup>15</sup> *Idem.*

<sup>16</sup> I/A Court HR, *Rosendo Cantú et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 3, at para. 78.

Rosendo Cantú appealed to have the civilian Public Prosecution Service investigate her case, and not the Military Prosecution Service. Nevertheless, her appeal was denied. The military system's investigation into Mrs. Rosendo Cantú's case was open for two years and inactive for another three. There have been no further attempts in either the civilian or military system to identify or punish those responsible for raping Mrs. Rosendo Cantú.

In Mrs. Fernández Ortega's case, the Commission found Mexico violated the right to humane treatment and personal integrity (Article 5), right to a fair trial and judicial guarantees (Article 8), and right to judicial protection (Article 25) of the Convention in relation to the general obligations to respect and ensure human rights established in Article 1(1). The Commission also found violations of the right to privacy (Article 11), violation of Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ('Violence against Women Convention'), and violations of Articles 1, 6, and 8 of the Torture Convention. In particular, the Commission noted Mexico's international responsibility over the "rape and torture" of Mrs. Fernández Ortega, the "lack of due diligence in the investigation and punishment of the authors [of the rape]," the "failure to make adequate reparations," and the use of the military justice system to prosecute human rights violations.<sup>17</sup> The Commission made similar findings in Mrs. Rosendo Cantú's case but added more on the difficulties of indigenous women in finding adequate healthcare. Notably, Mexico asked the Court to dismiss the charges alleging torture in Mrs. Rosendo Cantú's case.

According to the Commission, the rapes of Mrs. Fernández Ortega and Mrs. Rosendo Cantú constituted an act of torture because the three elements of torture were met in this case: 1) it was an intentional act; 2) that caused severe suffering; and 3) committed with an end or purpose. The representatives on behalf of Mrs. Fernández Ortega agreed and asked the Court to declare Mexico responsible for violating Article 5(2) of the Convention, Article 7(b) of the Violence against Women Convention, and Articles 1, 6, and 8 of the Torture Convention.

Mexico responded with preliminary objections in Mrs. Fernández Ortega and Mrs. Rosendo Cantú's cases based on a lack of jurisdiction to determine violations of the Violence against Women Convention. However, at the public hearing, the state withdrew this objection. The state also asked the Court to reject the violations under the Convention and other international human rights instruments. Notably, in Mrs. Fernández Ortega's case, Mexico partially acknowledged its international responsibility for the absence of specialised medical care owed to Mrs. Fernández Ortega as well as the destruction of evidence taken at her gynaecological exam, which were violations under Article 8(1) of the Convention. The state also acknowledged it had not practiced due diligence regarding the rape's investigation, which are violations

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<sup>17</sup> I/A Court HR, *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 2, at para. 2.

under Articles 8(1) and 25 of the Convention. Regarding Mrs. Rosendo Cantú the state further acknowledged a violation of Article 19 owing to her status as a minor and the corresponding rights of a child because she was seventeen when she was raped.

The state did not acknowledge its responsibility for the rapes of Mrs. Fernández Ortega or Mrs. Rosendo Cantú, that the rapes constituted an act of torture, or the inappropriateness of using the military system of justice to investigate and prosecute human rights violations. Mexico's position was that the representatives on behalf of Mrs. Fernández Ortega and Mrs. Rosendo Cantú could not prove the rape was committed by agents of the state, and thus the state was not internationally responsible.<sup>18</sup>

The Court found there was sufficient evidence to prove Mrs. Fernández Ortega and Mrs. Rosendo Cantú were raped through direct and circumstantial evidence, including their own testimony and evidence there was military in the area the day both victims were attacked. The Court held in line with its prior conclusions in *Miguel Castro-Castro Prison v. Peru* that rape was a paradigmatic form of violence against women whose consequences extend beyond the individual victim. Moreover, in determining whether the facts in both cases constituted torture, the Court looked to the definition of torture in the Torture Convention and prior case law, in particular the standards developed in *Bueno Alves v. Argentina*.<sup>19</sup> Article 2 of the Torture Convention defines torture as mistreatment that is: 1) intentional; 2) causes severe physical or mental suffering; and 3) is committed with any objective or purpose.

The rapes of Mrs. Fernández Ortega and Mrs. Rosendo Cantú were acts of torture because the Court found all three elements were present. First, it was intentional because one of the attackers took Mrs. Fernández Ortega's hands, forced her to lie down, and raped her in front of two observers. Second, there was severe physical or mental suffering. The Court considered subjective factors like the action itself, the duration, the method used, as well as the mental effects, age, gender, physical condition, and status of the victim in making its determination. In Mrs. Fernández Ortega's case, while there was no evidence of physical injuries, she testified she was in pain after her assault. Moreover, torture can be committed by physical violence as well as by moral and mental suffering imposed on the victim. Victims of rape often experience serious psychological and social consequences. In Mrs. Fernández Ortega's case, she was especially vulnerable as an indigenous woman as well as the fact two other armed military personnel watched her rape. Therefore, the Court found ample evidence of moral and psychological suffering in this case. Lastly, the rape of Mrs. Fernández Ortega's was committed for a purpose. Here, the soldiers were questioning the victim about her husband's location. When they did not get the answer they wanted, one soldier raped her. The Court's analysis of Mrs. Rosendo Cantú's rape constituting an act of torture was nearly identical. Therefore, the Court found the rapes in these

<sup>18</sup> *Ibidem* at para. 5.

<sup>19</sup> I/A Court HR, *Bueno Alves v. Argentina*, Merits, Reparations, and Costs, Series C no 164, 11 May 2007.

cases were torture under Article 5(2) of the Convention and Article 2 of the Torture Convention.

The Court found further violations of the victim's personal integrity, personal dignity, and private life in Articles 5(2), Article 11(1) and Article 11(2) of the Convention as well as violations of Article 1, 2, and 6 of the Torture Convention, and Article 7(a) of the Violence against Women Convention. Lastly, Mrs. Fernández Ortega and Mrs. Rosendo Cantú's next of kin, including Mrs. Fernández Ortega's husband and both of the victims' children, also suffered violations under Article 5(1) of the Convention resulting from the victims' rapes and the subsequent impunity and lack of investigation into the facts of these cases.

Regarding the state's use of the military system of justice in investigating and prosecuting human rights violations, Mexico argued that the military justice system was competent, independent, and impartial and therefore could hear cases of this nature. The state also focused on Mrs. Fernández Ortega's arguable failure to cooperate with the military system of justice in her case. Moreover, the state argued the rights to judicial guarantees and judicial protection have not been violated because Mrs. Fernández Ortega and Mrs. Rosendo Cantú's rapes were still in the investigation stage and had not been yet reviewed on the substance.

The Court first reiterated its prior holding in *Radilla Pacheco v Mexico*<sup>20</sup> where this Tribunal concluded that the application of military jurisdiction must be exceptional and restricted only to the prosecution of acts of military service that affect the sphere of the military order. Human rights violations of grave nature such as a forced disappearance can never be characterised as an act of military service and, therefore, the perpetrators of such crimes must be investigated and prosecuted by ordinary courts. In *Fernández Ortega and Rosendo Cantú*, the Court held that a victim's rape perpetrated by military personnel did not bear any relationship to the military discipline or mission, but affected the rights of individuals protected under domestic criminal law and human rights law. Thus, as the rape perpetrated in the present cases constituted human rights violations the cases had to be excluded from the military jurisdiction. Second, the Court concluded that the guarantees in Article 8(1) do not apply only to judges or in the trial stage of the proceedings. The investigation stage was also subject to Article 8(1). Thus, the deprivation of the victims from having access to the ordinary courts in the present case constituted a breach of the obligations arising out of Articles 8, 25, and 1(1) of the Convention. Moreover, Mexico's military law, specifically Article 57 of the Code of Military Justice, which extended jurisdiction to all crimes committed by active soldiers regardless of the nature of the crime and the individual affected was not compatible with the principles of due process enshrined in the Convention and, in consequence, constituted an additional violation of Article 2 of that treaty. Lastly, there was a violation of Article 25(1) of the Convention owing

<sup>20</sup> I/A Court HR, *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Series C no 209, 23 November 2009.

to the fact there was not an appropriate remedy allowing Mrs. Fernández Ortega or Mrs. Rosendo Cantú to challenge the competency of the military system of justice to hear their cases.

The Court ordered that Mexico pay pecuniary and non-pecuniary reparations and reimburse expenses incurred in the litigation of the cases to the victims and their next of kin. The Court also ordered Mexico to investigate the rapes of both women with due diligence, to reform the Code of Military Justice limiting the scope of military jurisdiction in human rights abuse cases of civilians, to provide medical and psychological treatment to the victims and their next of kin, award scholarships to Mrs. Rosendo Cantú and both victims' children so that they can pursue additional studies, to develop a protocol to effectively investigate acts of sexual violence and to allocate resources and establish mechanisms of prevention and protection for indigenous women and girls, amongst other measures.

On 15 May 2011, the Court rejected the requests for interpretation of certain aspects of the judgments on the merits and reparations in both cases, submitted by Mexico on the basis of Article 67 of the American Convention.

## 2. THE CASE OF *GOMES LUND ET. AL. ("GUERRILHA DO ARAGUAIA") V. BRAZIL: THE INVALIDATION OF BRAZIL'S AMNESTY LAW*

In *Gomes Lund*<sup>21</sup>, the Court heard another case involving broad amnesty laws passed during a time of great political, military, and social upheaval. In two previous cases, *Barrios Altos v. Peru*<sup>22</sup> and *Almonacid-Arellano et al. v. Chile*,<sup>23</sup> the Court held laws granting amnesty to gross violations of human rights are not tolerated under international law. The reasoning set forth in these two cases was that amnesty provisions are inherently incompatible with the spirit and aim of the Convention in that they fail to hold those accused of human rights violations responsible for their conduct and prevent victims from having the violations of their human rights redressed. In *Almonacid-Arellano et al. v. Chile*, the Court found the murder of the victim was a crime against humanity, and thus was a gross violation of human rights. In *Gomes Lund*, the Court found forced disappearances constitute gross violations of human rights for purposes of determining an amnesty law's validity. In the same vein, the Commission has also developed an extensive body of case law regarding the

<sup>21</sup> I/A Court HR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 3.

<sup>22</sup> I/A Court HR, *Barrios Altos v. Peru*, Merits, Series C no 75, 14 March 2001.

<sup>23</sup> I/A Court HR, *Almonacid Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Series C no 154, 26 September 2006.

incompatibility of amnesty laws in Argentina,<sup>24</sup> Chile,<sup>25</sup> El Salvador,<sup>26</sup> Peru<sup>27</sup> and Uruguay.<sup>28</sup>

The *Guerrilha do Araguaia* was a resistance movement within the members of the Communist Party of Brazil in the 1970s during the military dictatorship in Brazil, which lasted from 1964–1985. Between 1972 and 1975, the Brazilian Army launched a campaign to eradicate them. Initially, the members of the armed forces involved in the operation had orders not to kill or subject to forced disappearance those who were detained for their participation in the guerrilla group. Later, however, the policy was changed and the armed forces received orders to eliminate those who were captured and to bury them in the jungle.

Brazil passed its Amnesty Law in 1979. The Amnesty Law absolved all those who committed human rights violations and other crimes between 2 September 1961 and 15 August 1979. As a result of its application those responsible for the forced disappearance of the members of the *Guerrilha do Araguaia* had not been investigated, prosecuted, or punished. On April 29, 2010, the Federal Supreme Court of Brazil affirmed the legality of the Amnesty Law in a seven-to-two vote. The Federal Supreme Court reasoned that it was not within their power to change the text of the Amnesty Law. Moreover, after it was integrated into the Constitution of 1988, the law's validity "is unquestionable."<sup>29</sup> The Federal Supreme Court's decision did not discuss Brazil's international legal obligations.<sup>30</sup>

Brazil became a party to the American Convention in 1995 and recognised the Court's contentious jurisdiction in 1998. In 1995, Brazil passed Law No. 9.140/95 where the state recognised its responsibility for the forced disappearance of 136 persons during the dictatorship, including 60 members of the *Guerrilha de Araguaia*. This law also created a Special Commission to continue the process of identifying individuals whose murder or disappearance for political reasons had not been included in the initial list of victims. Also, the law established the payment of reparations to benefit the victim's next of kin. Between 1980 and 2006, the victim's next of kin, the Special Commission, and other governmental entities carried out thirteen visits to

<sup>24</sup> I/A Comm H.R., *Alicia Consuelo Herrera et al v. Argentina*, Report 28/92, Cases 10147, 10181, 10262, 10309 and 10311, 2 October 1992, Annual Report of the Inter-American Commission on Human Rights 1992–1993.

<sup>25</sup> See, *inter alia*, IA Comm. HR, *Hector Garay Hermsilla et al v Chile*, Report 36/96, Case 10,843, October 15, 1996, Annual Report of the Inter-American Commission on Human Rights 1996.

<sup>26</sup> See, *inter alia*, IA Comm. HR, *Ignacio Ellacuría et al v. El Salvador*, Report No 136/99, Case 10,488, December 22, 1999, Annual Report of the Inter-American Commission on Human Rights 1999.

<sup>27</sup> See, *inter alia*, IA Comm. HR, *Americo Zabala Martinez v Peru*, Report No 44/00, Case 10,820, April 13, 2000, Annual Report of the Inter-American Commission on Human Rights 1999.

<sup>28</sup> IA Comm. HR, *Hugo Leonardo de los Santos Mendoza et al. v. Uruguay*, Report 29/92, Cases 10,029, 10,036, 10,145, 10,305, 10,372, 10,373, 10,374 and 10,375, October 2, 1992, Annual Report of the Inter-American Commission on Human Rights 1992–1993.

<sup>29</sup> I/A Court HR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 3, at para. 136.

<sup>30</sup> *Ibidem* at para. 177.

the Araguaia region to locate and identify the victims' remains. By the time the Court adopted the present judgment, however, only the remains of four of the victims had been apparently recovered.

The two most important issues raised in the present judgment were the forced disappearance of the members of the *Guerrilha de Araguaia* and the incompatibility of Brazil's Amnesty Law of 1979 with the Convention, particularly Articles 1(1), 2, 8(1), and 25 of that treaty.

The Commission and the victims' representatives claimed that the facts in the present case occurred in the framework of a practice of forced disappearance in which members of the Brazilian armed forces used their official position and state resources to disappear all the members of the *Guerrilha de Araguaia*. All the evidence regarding their murder was hidden and the perpetrators refused to give information regarding the whereabouts and fate of the victims. Despite the acknowledgment of Brazil at the domestic jurisdiction of the victims' murders and the reparations afforded to their next of kin, after more than 35 years the truth about what transpired to them remained uncertain. Thus, the Commission and the representatives claimed that Brazil was responsible for the violation of Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the American Convention, in relation to Article 1(1) (obligation to respect rights) of that treaty. Brazil did not contest these allegations.

The Court found proven that the disappearance of 62 members of the *Guerrilha de Araguaia* was attributable to Brazil as a result of the participation of state agents in the detention, torture, and alleged murder of those victims between 1972 and 1974. Until the adoption of the present judgment, the remains of only two of those victims had been identified. Also, this Tribunal reiterated that the forced disappearance of persons has a permanent character and entails the continuous violation of several rights until the victim is located or the remains are found. Ultimately, as it is established practiced, the Court held that Brazil was responsible for the violation of Articles 3, 4, 5, 7 and 1(1) of the Convention to the detriment of the victims established as such in the present case.

Next, the Commission argued that the investigation and punishment of the perpetrators of the victims' forced disappearances was prevented due to the application of the 1979 Amnesty Law. It claimed that this is contrary to obligations set forth in Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the Convention. Furthermore, no domestic law such as amnesties or statutes of limitation can prevent a state from complying with its international obligations, especially when dealing with serious violations of human rights. Thus, according to the Commission, Brazil violated Articles 8(1) and 25 in relation to Articles 1(1) and 2 (domestic legal effects) of the Convention. The representatives of the victims agreed but added that Brazil also failed to codify forced disappearances as a crime in its domestic law, which is a further violation under Article 2.

Brazil stressed that the Court recognise the Amnesty Law was passed in its specific context. Moreover, Brazil argued that the principle of legality and non-retroactivity enshrined in Article 9 of the Convention constitutes one of the most important due process rights and a constitutional right under Brazil's Constitution that cannot be abolished. Moreover, the state argued that even the Inter-American Convention on Forced Disappearance of Persons envisions in Article VII that this crime can be subjected to a statute of limitations. Also, Brazil claimed that the codification of crimes against humanity occurred only with the adoption of the Rome Statute creating the International Criminal Court and that international custom cannot be a source that creates criminal law because it is uncertain. The state further argued that the rights in the Convention should be viewed through the principle of proportionality. According to Brazil, there was an apparent conflict between the guarantees of non-repetition to which the victims are entitled and the principles of legality and non-retroactivity that must be ensured to the alleged perpetrators. Thus, the best way to respect Article 9 was to consider the domestic measures Brazil has already taken as sufficient in meeting its international responsibility. Lastly, Brazil noted the fact the 1979 Amnesty Law did not apply to only political or military figures and crimes, but it was also designed to exclude those who were on the other side of the political spectrum.

The Court continued its consistent jurisprudence in *Barrios Altos v. Peru* and *Almonacid-Arellano et al. v. Chile* and concluded that amnesty laws cannot be granted to crimes involving gross violations of human rights. Forced disappearances were gross violations of human rights, and therefore Brazil cannot ignore its duty under Article 1(1) of the Convention to investigate, prosecute, and punish due to its Amnesty Law. To bolster its opinion, the Court noted similar findings regarding amnesty provisions in various United Nations bodies, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers of the Courts of Cambodia, the European and African systems, as well as judgments from the highest courts in several countries of the region, including Argentina, Chile, Uruguay and Peru.

The failure to investigate and punish the perpetrators of the victims' forced disappearances prevented their next of kin from their right to access to court under Article 8(1) of the Convention and to an effective remedy under Article 25 of the same treaty. Furthermore, once Brazil ratified the Convention, the state was under a duty to adjust domestic laws and practices to make them compatible with the rights and principles upheld by that treaty. Brazil's failure to do so breached the general obligation provided by Article 2 of the Convention. Ultimately, the Court concluded that Brazil's Amnesty Law lacked legal effects for purposes of preventing the prosecution of those responsible for the victims' forced disappearances in the present case or to investigate other gross human rights violations that occurred in Brazil at the time covered by that law. As it has done in prior cases,<sup>31</sup> the Court placed the burden upon domestic courts

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<sup>31</sup> I/A Court HR, *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, *supra* note 24, at paras. 124–128.

and called upon them to exercise a so-called “conventionality control” to ensure that Brazil’s international obligations under the Convention are enforced in the context of domestic cases. According to the Court, the duty of all state organs to uphold the international obligations to which Brazil has voluntarily consented is based on the principle of good faith enshrined in Article 27 of the Vienna Convention on the Law of Treaties.

Regarding Brazil’s arguments on the principles of legality and retroactivity, the Court reiterated that the crime of forced disappearances is on-going in nature and its criminal effects do not cease until the victim is located and the identity is established. Thus, in the present case, there was no retroactive application of the crime of forced disappearances and the duty to investigate resulting from its perpetration. Finally, the Court rejected Brazil’s arguments regarding the need to strike a balance between the interests of the victims and those of the perpetrators by concluding that when making that assessment the state failed to consider the victims’ rights under Article 8 and 25.

As for reparations, the Court ordered Brazil to investigate, prosecute, and punish those responsible for the victim’s forced disappearance and make all efforts to determine their location and identify their remains. Brazil must also provide medical and psychological treatment to the victim’s next of kin, publish selected excerpts of the present judgment, acknowledge its international responsibility publically, develop training programs for those in the hierarchical levels of the Armed Forces, and adopt new legislation improving access to information in the hands of the state, among others. Regarding the payment of pecuniary damages, the Court acknowledged that the majority of the victims had received reasonable compensation by the state under Law 9140/95. With respect to those victims whose next of kin had not claimed reparations, the Court ordered Brazil to make the appropriate reparations within six months by following the same procedures applied to the other victims. Furthermore, the Court awarded non-pecuniary damages to compensate for the suffering experienced by the victim’s next of kin. Finally, the Court ordered the reimbursement of the costs and expenses incurred in the litigation of the present case.

It is worth noting that on 24 February 2011 the Court adopted a judgment in *Gelman v Uruguay*<sup>32</sup> in which it found that the Amnesty Law in Uruguay (known as the ‘Caducidad Law’) was also incompatible with the Convention. In future submissions, we will cover the relevant aspects of this judgment, which also involved the characterisation of the illegal appropriation of minors as a forced disappearance of persons.

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<sup>32</sup> I/A Court HR, *Gelman v. Uruguay*, Merits and Reparations, Series C no 221, 24 February 2011.