

**LEGAL PATHS TO ACCOUNTABILITY FOR  
DICTATORSHIP CRIMES:  
*CHARTING THE LEGAL COURSES IN LATIN AMERICA  
AND THEIR RELEVANCE FOR BRAZIL***

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## I. INTRODUCTION

*“Brazil today lives out another page of hope in its history.”*<sup>1</sup>

- Anonymous, BRAZIL: NEVER AGAIN (Archdiocese of São Paulo, 1985).

Brazil today is an outlier in Latin America. Over 25 years after its transition to democracy, it has not held military dictatorship-era (1964-1985) human rights violators criminally accountable for the grave abuses they perpetrated. The Amnesty Law (*Lei de Anistia*), enacted in 1979, has thus far dissuaded the prosecution of crimes perpetrated by agents of the Brazilian dictatorship, while other questions regarding accountability—such as statutes of limitations—also loom large in legal debates on transitional justice domestically. To date, this impunity has shrouded dictatorship crimes in Brazil and constituted a violation of well-established international law.

Despite this overall picture, recent developments have altered the landscape of impunity in Brazil, highlighting open legal channels toward accountability similar to those travelled by several other major transitional democracies in Latin America. Most notably, in November 2010, the Inter-American Court of Human Rights’ (Inter-American Court) judgment in *Gomes Lund (“Guerrilha do Araguaia”) v. Brazil (“Gomes Lund”)* found that the 1979 Amnesty Law violates Brazil’s obligations under the American Convention on Human Rights (American Convention). The facts of the case center around the military dictatorship’s systematic violations—including enforced disappearances, murder, and torture—perpetrated in the 1970s against, *inter alios*, members of an armed resistance group coordinated by the Communist Party of Brazil.<sup>2</sup> The Court ruled that the Amnesty Law’s provisions “prevent[ing] the investigation and punishment of serious human rights violations . . . lack legal effect, and cannot continue as obstacles” to the investigation and punishment of the dictatorship abuses at issue in that case or of “other serious violations of human rights enshrined in the American Convention which occurred in Brazil.”<sup>3</sup> The Court correspondingly “conclude[d] that the State should effectively conduct a criminal investigation . . . and effectively apply sanctions” with respect to the crimes in *Gomes Lund*. It added that, because the case involved:

gross violations of human rights, and taking into account the nature of the facts and the continued or permanent nature of enforced disappearances, the State may

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<sup>1</sup> “O Brasil vive, hoje, mais uma página de esperança em sua história.” BRASIL: NUNCA MAIS, at Introduction (34<sup>th</sup> ed., Editora Vozes 2005).

<sup>2</sup> See Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶ 325 (Nov. 24, 2010); see also COMISSÃO ESPECIAL SOBRE MORTOS E DESAPARECIDOS POLÍTICOS, DIREITO À MEMÓRIA E À VERDADE 195-271 (2007), available at <http://www.sedh.gov.br/arquivos/livrodireitomemoriaeverdadeid.pdf>.

<sup>3</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at Resuelve ¶ 3 (Nov. 24, 2010).

not apply the Amnesty Law to the benefit of the perpetrators, as well as other analogous provisions, the statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem*, or any other similar exception that excuses responsibility of this obligation.<sup>4</sup>

In this way, the Inter-American Court's landmark *Gomes Lund* decision left no doubts as to Brazil's legal responsibilities to hold state agents who perpetrated human rights violations under the military dictatorship criminally accountable.<sup>5</sup>

Accordingly, following the Inter-American Court's judgment, Brazilian federal prosecutors began taking important steps toward implementing the decision and providing for the effective investigation and prosecution of dictatorship-era human rights crimes.<sup>6</sup> On November 25, 2011, one day after the first anniversary of the *Gomes Lund* decision, a Working Group on Transitional Justice of federal prosecutors, tasked with furthering accountability for the crimes of the dictatorship in order to comply with the Inter-American Court's order, was created within the ambit of the Federal Prosecutors' Office's (*Ministério Público Federal* – MPF) 2<sup>nd</sup> Chamber of Coordination and Review on Criminal Matters and External Control of the Police.<sup>7</sup> On December 9, 2011, the 2<sup>nd</sup> Chamber held a hearing to receive criminal complaints from the victims and family members of victims of dictatorship abuses.<sup>8</sup>

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<sup>4</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at ¶¶ 256, 256(b) (Nov. 24, 2010).

<sup>5</sup> The Court in *Gomes Lund* also articulated the requirement that the state perpetrators of abuses be subjected to civilian rather than military jurisdiction. *Id.* Resuelve ¶ 9. For more on the international legal foundation of this part of the order, see International Human Rights and Conflict Resolution Clinic, Stanford Law School, International Legal Ban on Investigating and Prosecuting Human Rights Violations in Military Jurisdiction (March 13, 2012) (unpublished manuscript, working title).

<sup>6</sup> Indeed, the concluding document of a broad, high-level internal working meeting on the “domestic effects” of the *Gomes Lund* decision, held on February 28, 2011, at the Brazil Federal Prosecutor's Office (*Ministério Público Federal* - MPF), affirmed that “the doubts as to the application of the amnesty law, of statutes of limitations and of retroactivity of *lex gravior* cannot subsist in the Federal Prosecutor's Office after November 24, 2010, date of the issuing of the [*Gomes Lund*] judgment by the [*Inter-American*] Court.” Ministério Público Federal, 2<sup>a</sup> Câmara de Coordenação e Revisão (Matéria Criminal e Controle Externo da Atividade Policial), *Documento n. 1/2011*, at ¶ 20 (March 21, 2011). A later workshop on the issue hosted by organs of the MPF, the Ministry of Justice, and the International Center for Transitional Justice (ICTJ) yielded a final document reaffirming the conclusions of that first meeting and supporting the creation of a working group within the MPF tasked with pursuing accountability for the crimes of the dictatorship generally, not just those at issue in the facts of the *Gomes Lund* case. See Ministério Público Federal, 2<sup>a</sup> Câmara de Coordenação e Revisão (Matéria Criminal e Controle Externo da Atividade Policial), *Documento n. 2/2011*, at ¶ 44 (Oct. 3, 2011).

<sup>7</sup> Ministério Público Federal, 2<sup>a</sup> Câmara de Coordenação e Revisão (Matéria Criminal e Controle Externo da Atividade Policial), *Portaria 2<sup>a</sup> Câmara no. 21*, at 2 (Nov. 25, 2011).

<sup>8</sup> Secretaria de Comunicação, Procuradoria Geral da República, *Em audiência, Câmara Criminal discute crimes ocorridos na ditadura*, NOTÍCIAS, PROCURADORIA GERAL DA REPÚBLICA, MINISTÉRIO PÚBLICO FEDERAL, Dec. 9, 2011, [http://noticias.pgr.mpf.gov.br/noticias/noticias-do-site/copy\\_of\\_criminal/em-audiencia-camara-criminal-discute-crimes-ocorridos-na-ditadura](http://noticias.pgr.mpf.gov.br/noticias/noticias-do-site/copy_of_criminal/em-audiencia-camara-criminal-discute-crimes-ocorridos-na-ditadura).

During 2012, these preliminary measures began to take concrete form in specific actions to initiate and carry out prosecutions. In March of that year, federal prosecutors announced that they would bring charges in a series of cases involving enforced disappearances<sup>9</sup> and other permanent crimes (i.e. offenses whose commission persists over time and thus are ongoing until the relevant conduct ceases). The charges brought have thus far been met with a mixed judicial reception, setting up appellate battles that will likely wind up before Brazil's Supreme Federal Tribunal (*Supremo Tribunal Federal* – STF).

So while Brazil's international obligations have been clarified beyond doubt, some questions remain surrounding the domestic legal paths available for accountability. Most notably, issues regarding the Amnesty Law, statutes of limitations, and an April 2010 decision by the Supreme Federal Tribunal known as *ADPF 153 (Arguição de Descumprimento de Preceito Fundamental 153)*,<sup>10</sup> which dismissed a limited constitutional challenge to the Amnesty Law.<sup>11</sup> In seeking to address these questions, MPF prosecutors have sought out opinions and research on areas of law from outside experts and organizations inside Brazil, as well as from across Latin America (e.g. Argentina and Chile) and beyond (e.g. South Africa and the United States).<sup>12</sup> In this vein, in March 2011, Deputy Assistant Attorney General Raquel Ferreira Dodge, coordinator of the MPF's 2<sup>nd</sup> Chamber of Coordination and Review on Criminal Matters and External Control of the Police, invited the International Human Rights Clinic (“the Clinic”) at Harvard Law School to contribute independent research on the topic of transitional justice in Brazil.<sup>13</sup> This study is the result.

This report begins by outlining the international legal obligation of states under human rights law to investigate and punish serious human rights violations. It delineates the legal milestones taken in certain important post-authoritarian democracies of Latin America—Argentina, Chile, Peru, and Uruguay—as they progressed from impunity toward compliance with the obligation to investigate and punish serious human rights violations committed during their most recent repressive regimes. Third, it presents an analysis of the legal reasoning adopted

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<sup>9</sup> Míriam Leitão, *Justiça de Transição*, O GLOBO, March 6, 2012, <http://oglobo.globo.com/economia/miriam/posts/2012/03/06/justica-de-transicao-434825.asp>.

<sup>10</sup> Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental 153* (April 29, 2010) (Brazil).

<sup>11</sup> For more information on the *ADPF 153* decision, see *infra* § VI.

<sup>12</sup> International contributors have included Vusi Pikoli (South Africa), Pablo Parenti (Argentina), and Pamela Pereira Fernandez (Chile), as well as nationals from various countries representing the U.S.-headquartered International Center for Transitional Justice (Stephanie Morin, Kelen Meregali, Marcie Mersky, and Howard Vaney). Ministério Público Federal, 2<sup>a</sup> Câmara de Coordenação e Revisão (Matéria Criminal e Controle Externo da Atividade Policial), *Documento No. 2/2011*, at ¶ 3 (October 3, 2011).

<sup>13</sup> The International Human Rights Clinic at Harvard Law School is a center for active engagement in human rights within a context of critical reflection. The Clinic fosters coursework and thoughtful legal practice in human rights, and forges cooperative links with organizations promoting social justice and the rule of law around the world. The Clinic works on a range of international human rights and humanitarian law projects on a variety of topics and countries throughout the world, including human rights advocacy regarding violations perpetrated by the United States inside and outside its borders.

by high courts in the region in navigating domestic legal hurdles to accountability in the form of amnesty laws and statutes of limitations. Finally, the study applies international and comparative law to the current transitional justice context in Brazil, demonstrating that the achievement of full criminal accountability for the military dictatorships' abuses is both legally possible and necessary.

The steady progress in Latin America toward prosecutions of the serious human rights violations perpetrated by authoritarian regimes has been the product of a variety of social, political, legal, and other factors. Though evident, it bears asserting that no measure of true accountability in the region would have been possible without the persistent moral pressure exerted by the families of victims, by survivors of abuse, and by various civil society and human rights organizations in each country.<sup>14</sup> Other important factors, of course, included the political will of key state authorities and the acumen of justice systems in collecting evidence from decades-old crimes.<sup>15</sup> The analysis here does not purport to document, assess, or account for these forces. Rather, this paper focuses *narrowly* on international legal norms and the high court decisions of four Latin American states, particularly the legal reasoning relevant to the crossroads at which Brazil currently finds itself. Hence, while this research was undertaken with an awareness that law is limited when it lacks political will, it was also informed by the conviction that law and legal arguments can and should matter, and that the rule of law requires that such grave crimes be duly investigated and punished, no matter how powerful the perpetrators.

The Clinic's research centered on the following questions:

1. What obligations do states have to investigate and punish serious human rights violations, according to international human rights law?<sup>16</sup>

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<sup>14</sup> For example, the landmark *Gomes Lund* decision was the result of efforts by petitioners: the family members of the victims, the Center for Justice and International Law (CEJIL), the *Grupo Tortura Nunca Mais do Rio de Janeiro*, and the *Comissão de Familiares de Mortos e Desaparecidos Políticos do Instituto de Estudos da Violência do Estado*. See Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at ¶ 1 (Nov. 24, 2010).

<sup>15</sup> See, e.g., Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUM. RTS. BRIEF 15, 15-19 (2011).

<sup>16</sup> Though international humanitarian law (IHL) was outside the scope of this study, certain references to IHL, such as the ones made by the Chilean judiciary, were included in this report when they were key to the legal reasoning or history being outlined. A separate study may be warranted on customary and treaty-based IHL as a potential complementary source of international legal obligations requiring Brazil to investigate and punish crimes of the military dictatorship despite domestic legal issues. See, e.g., JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW – VOLUME I: RULES, at Rules 158-161 (2009) (Rule 158: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." Rule 159: "At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons

2. What were legal milestones in the progression of high court rulings on accountability for authoritarian-era serious human rights violations in Chile, Argentina, Peru, and Uruguay?
3. What legal arguments did the high courts of Chile, Argentina, Peru, and Uruguay adopt when considering, *inter alia*, amnesty laws and statutes of limitations that had previously hindered investigations or prosecutions of authoritarian-era serious human rights violations?
4. What legal avenues are available for Brazilian authorities to fulfill the state's international obligation to investigate and punish serious human rights abuses while respecting the decisions and jurisdictions of both the Supreme Federal Tribunal and the Inter-American Court of Human Rights? Specifically, how might they address three domestic legal questions surrounding accountability: the 1979 Amnesty Law, statutes of limitations, and the *ADPF 153* decision?

As the present study shows:

1. International law requires that the effective investigation and punishment of serious human rights violations by the Brazilian dictatorship—such as the ones at issue in the *Gomes Lund* case—not be impeded by domestic amnesty laws, statutes of limitations, or analogous legal barriers.
2. The prolonged impunity for the crimes of authoritarian regimes that once reigned in different jurisdictions in Latin America has steadily given way over the last 15 years to accountability. In Chile, Argentina, Peru, and Uruguay, the justice systems achieved accountability while handling precisely the kinds of domestic

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related to the armed conflict, *with the exception of persons suspected of, accused of or sentenced for war crimes.*” (emphasis added) Rule 160: “Statutes of limitation may not apply to war crimes.” Rule 161: “States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.”), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The four Geneva Conventions were ratified by Brazil in 1957. Similarly, research on International Criminal Law (ICL) other than those sources referenced herein merit further investigation as possible sources of complementary international legal obligations requiring Brazil to prosecute crimes of the military dictatorship despite domestic legal issues. See, e.g., Juan Méndez & Gilma Tatiana Rincón Covelli, International Center for Transitional Justice, *Parecer técnico sobre la naturaleza de los crímenes de lesa humanidad, la imprescriptibilidad de algunos delitos y la prohibición de amnistías* (Sept. 1, 2008).



legal questions, such as amnesty laws and statute of limitations, that are currently the focus of attention in Brazil.

3. The seminal transitional justice cases from the region discussed in this report—drawn from high courts in several Latin American democracies with similar legal foundations (Argentina, Chile, Peru, and Uruguay)—include a variety of applicable and relevant legal concepts for justice officials seeking to fulfill their obligation to lawfully further accountability in Brazil. High courts in Latin America have addressed amnesty laws, statutes of limitations, and other analogous laws and doctrines, sometimes simultaneously. These high courts have adopted two principal lines of reasoning: (1) that under international law, as incorporated into domestic law, amnesty laws and statutes of limitations are inapplicable to domestic crimes that also constituted crimes against humanity; and (2) that amnesty laws and statutes of limitations generally do not prevent the investigation and prosecution of permanent crimes like enforced disappearance (typically prosecuted as kidnapping under domestic criminal law).
4. While the Supreme Federal Tribunal's *ADPF 153* decision (April 2010) upheld the 1979 Amnesty Law with respect to a limited constitutional challenge, that decision left open various paths to full accountability for the crimes of dictatorship agents, including: a) the prosecution of permanent crimes that commenced within the period specified in the Amnesty Law but persisted past the amnesty's end date of August 15, 1979; b) the prosecution of crimes occurring solely after August 15, 1979; and c) the prosecution of all other crimes of dictatorship agents by way of the full internal application of the *Gomes Lund* decision (November 2010) and the legal test for conventionality pursuant to the American Convention, as determined by the Inter-American Court.

In light of the foregoing, the MPF's announced initial focus on prosecuting permanent crimes<sup>17</sup> is legally well-founded and consistent with settled international law, Latin American judicial practice, and the legal paths to accountability followed in neighboring states. However, going beyond the prosecution of permanent crimes to achieve criminal accountability for all serious human rights violations of the Brazilian dictatorship, even while respecting the integrity of the Supreme Federal Tribunal's *ADPF 153* decision, is both possible and necessary under international and domestic law.<sup>18</sup>

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<sup>17</sup> Míriam Leitão, *Justiça de Transição*, O GLOBO, March 6, 2011, <http://oglobo.globo.com/economia/miriam/posts/2012/03/06/justica-de-transicao-434825.asp>.

<sup>18</sup> As described in Section VI, *infra*, the Supreme Federal Tribunal's *ADPF 153* decision can be interpreted in a way that is consistent with the international obligation to ensure full criminal accountability for the serious human rights

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perpetrated by the Brazilian dictatorship. However, as a matter of international law, even a direct conflict with a domestic high court decision or constitutional provision cannot be invoked by a state as an excuse for failing to perform an international obligation. *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”) (signed by Brazil in 1969 and ratified in 2009). *See also* Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶¶ 9-10 (Nov. 24, 2010) (de Figueiredo Caldas, Judge ad hoc, concurring) (citing Inter.-Am. Ct. H.R., “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile*, Ser. C No. 73, at ¶¶ 4, 40 (Feb. 5, 2001) (Cançado Trindade, President, concurring)).

## II. ONGOING IMPUNITY FOR CRIMES OF THE BRAZILIAN DICTATORSHIP<sup>19</sup>

A military coup in 1964 ushered in 21 years of dictatorship in Brazil marked by crimes against humanity: official state policies and practices of widespread and systematic attacks directed against the civilian population—including rape, torture, murder, enforced disappearances, political persecution, and other grave abuses. Despite underreporting, military cover-ups, and a continued lack of full transparency surrounding official archives, it is widely known and officially accepted that the scale of the Brazilian military dictatorship’s crimes was enormous. As recounted by federal prosecutors Eugênia Augusta Gonzaga Fávero and Marlon Weichert, experts on the abuses perpetrated by the Brazilian dictatorship, “it is possible to conclude that at least 30,000 citizens were victims of unlawful detentions and torture by the systematic repression of political dissidence during the Brazilian military dictatorship.”<sup>20</sup> Between 2001 and 2007, a reparations commission (the Amnesty Commission) awarded some form of reparations to 24,560 families for damages sustained as a result of abuses and political persecution. Furthermore, the official Special Commission on the Killed and Disappeared Dissidents recognized over 200 persons as having been killed or forcibly disappeared by the dictatorship.<sup>21</sup> The BRAZIL: NEVER AGAIN study—a human rights report produced anonymously in collaboration with the Archdiocese of São Paulo by secretly copying archives of the Superior Military Tribunal—documented 1,918 cases of torture of political prisoners drawn from files spanning approximately 15 years of the dictatorship.<sup>22</sup> In 2010, the Human Rights Secretariat of the Presidency of the Republic in Brazil released an official volume paying homage to women who had resisted the military regime and been tortured, raped, disappeared, or killed as a result. The book, which documents atrocities perpetrated by dictatorship agents against women, opens by stating that “[t]orture is a crime against humanity” and recognizes that:

[t]he military coup, on April 1, 1964, institutionalized detention, imprisonment and kidnapping, banishment, torture, murder and disappearance, leaving a sinister

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<sup>19</sup> The background recitation of facts in this subsection draws substantially on prior summations of this kind found in Marlon Alberto Weichert & Eugênia Augusta Gonzaga Fávero, Procuradoria da República em São Paulo, Ministério Público Federal, *Ofício No. PR/SP – GABPR12-EAGF-352/2008*, Procedimento No. 1.34.001.008495/2007 (July, 4 2008) (directed to Juan Méndez, ICTJ); James L. Cavallaro & Fernando R. Delgado, *The Paradox of Accountability in Brazil*, in *AFTER OPPRESSION: TRANSITIONAL JUSTICE IN EASTERN EUROPE AND LATIN AMERICA* (Vesselin Popovski & Monica Serrano eds., 2012).

<sup>20</sup> Marlon Alberto Weichert & Eugênia Augusta Gonzaga Fávero, Procuradoria da República em São Paulo, Ministério Público Federal, *Ofício No. PR/SP – GABPR12-EAGF-352/2008*, Procedimento No. 1.34.001.008495/2007 (July, 4 2008) (directed to Juan Méndez, ICTJ). For further information on the abuses of Brazilian dictatorship, see, for example, ELIO GASPARI, *A DITADURA ENVERGONHADA* (2002); ELIO GASPARI, *A DITADURA ESCANCARADA* (2002); ELIO GASPARI, *A DITADURA DERROTADA: O SACERDOTE E O FEITICEIRO* (2003).

<sup>21</sup> See COMISSÃO ESPECIAL SOBRE MORTOS E DESAPARECIDOS POLÍTICOS, *DIREITO À MEMÓRIA E À VERDADE 48* (2007), available at <http://www.sedh.gov.br/arquivos/livrodireitomemoriaeverdadeid.pdf>.

<sup>22</sup> BRAZIL: NUNCA MAIS 22, 87 (34<sup>th</sup> ed., Editora Vozes 2005).

legacy: dead and disappeared dissidents, a legion of countless activists – men and women – jailed and tortured and with their life stories truncated.<sup>23</sup>

Such stark facts led the former President of the ICTJ (now U.N. Special Rapporteur on Torture) Juan Méndez, to conclude in a 2008 expert opinion addressed to MPF prosecutors that the Brazilian dictatorship's crimes constituted crimes against humanity according to the international legal norms that were in force at the start of the dictatorship in 1964.<sup>24</sup> This conclusion is in line with the Inter-American Court's words in *Gomes Lund*, where the Court recognized "the systematic violations of human rights that existed" during the Brazilian dictatorship.<sup>25</sup> Indeed, as the Brazilian Ad Hoc Judge Roberto de Figueiredo Caldas affirmed:

[t]he crimes of enforced disappearance, extrajudicial summary executions, and torture perpetrated by the State to systematically repress the Guerrilha do Araguaia are examples of crimes against humanity. As such, they deserve different treatment, that is, their [prosecution] cannot be prevented by the passage of time, such as statute of limitations or provisions of amnesty norms.<sup>26</sup>

Despite the international obligation to bring the perpetrators of dictatorship-era crimes to justice, the military dictatorship sought to immunize its abusive agents while it still ruled Brazil, driving the 1979 enactment of an amnesty law to benefit not only those politically targeted by the regime, but also the state perpetrators of the persecutions. Though the military dictatorship came to an end in 1985 and a new rights-friendly constitution was promulgated in 1988, to date, agents of the dictatorship have not been held criminally accountable for the serious human rights violations they committed.

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<sup>23</sup> SECRETARIA ESPECIAL DE POLÍTICAS PARA AS MULHERES & SECRETARIA ESPECIAL DOS DIREITOS HUMANOS DA PRESIDÊNCIA DA REPÚBLICA, DIREITO À MEMÓRIA E À VERDADE, LUTA, SUBSTANTIVO FEMININO: MULHERES TORTURADAS, DESAPARECIDAS E MORTAS NA RESISTÊNCIA À DITADURA, at cover, 28 (2010).

<sup>24</sup> Juan Méndez & Gilma Tatiana Rincón Covelli, International Center for Transitional Justice, *Parecer técnico sobre la naturaleza de los crímenes de lesa humanidad, la imprescriptibilidad de algunos delitos y la prohibición de amnistías* 35 (Sept. 1, 2008).

<sup>25</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at ¶ 256(a) (Nov. 24, 2010).

<sup>26</sup> *Id.* ¶ 23 (Roberto de Figueiredo Caldas, Judge ad hoc, concurring).

### III. THE INTERNATIONAL LEGAL OBLIGATION TO INVESTIGATE AND PUNISH SERIOUS HUMAN RIGHTS VIOLATIONS

States have a clearly established international legal obligation to carry out effective investigations into serious violations of human rights and punish those responsible. Under Brazil's international legal obligations, domestic obstacles, such as amnesty laws and statutes of limitations, do not eliminate the state's duty to investigate serious human rights violations committed by dictatorship agents and hold them criminally accountable.

#### A. *State Obligation to Investigate and Punish Serious Human Rights Violations*

International treaties, jurisprudence, organizations, and international law experts have consistently recognized the state obligation to investigate and punish serious human rights violations. This obligation is articulated, *inter alia*, in human rights treaty provisions that: (1) explicitly impose the obligation; (2) establish a right of victims to obtain effective remedies for violations; or (3) impose general obligations on states to secure, ensure, and protect the rights in question.<sup>27</sup> The two main human rights systems to which Brazil belongs, the Inter-American and U.N. systems, both recognize these obligations.

The Inter-American Court of Human Rights has held repeatedly that the American Convention on Human Rights imposes an obligation to investigate and punish violations of

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<sup>27</sup> On the obligation to investigate and punish, see, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 4, 6, 12, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention for the Protection of All Persons from Enforced Disappearance arts. 3, 6, Dec. 20, 2006, U.N. Doc. A/RES/61/177; Inter-American Convention to Prevent and Punish Torture art. 6, Feb. 28, 1987, O.A.S.T.S. No. 67; Inter-American Convention on Forced Disappearance of Persons arts. 1, 3, Mar. 28, 1996, 33 I.L.M. 1367.

On the right to effective remedy, see, for example, Universal Declaration of Human Rights art. 8, Dec. 10, 1948, G.A. Res. 217(III), U.N. Doc A/810 at 71; International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, March 7, 1966, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85; American Convention on Human Rights arts. 8, 25, Nov. 22, 1969, 1144 U.N.T.S. 123; Inter-American Convention to Prevent and Punish Torture art. 8, Feb. 28, 1987, O.A.S.T.S. No. 67; Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention] art. 13, Nov. 4, 1950, 213 U.N.T.S. 222.

On the obligation to secure, ensure, or protect human rights, see, for example, Universal Declaration of Human Rights Preamble Dec. 10, 1948, U.N. Doc A/810 at 71; International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 2, March 7, 1966, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3; American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123; Inter-American Convention to Prevent and Punish Torture art. 1, Feb. 28, 1987, O.A.S.T.S. No. 67; Inter-American Convention on Forced Disappearance of Persons art. 1, June 9, 1994, 33 I.L.M. 1429; Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention] art. 1, Nov. 4, 1950, 213 U.N.T.S. 222. *See also* Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, U.N. Doc. E/C.12/1999/5, at ¶ 15 (May 12, 1999).

Convention rights.<sup>28</sup> The Court has placed special emphasis on this obligation in cases of enforced disappearances,<sup>29</sup> recognizing that the obligation has reached the status of a *jus cogens* (peremptory) norm of international law; this status as a *jus cogens* norm makes it non-derogable, so it should effectively void conflicting laws of lower status.<sup>30</sup>

The Human Rights Committee has interpreted the International Covenant on Civil and Political Rights to require states to investigate all potential violations of rights guaranteed in the Covenant and to punish those responsible.<sup>31</sup> It, too, has given special consideration to the investigation and punishment of enforced disappearances in the context of state repression.<sup>32</sup> The U.N. General Assembly, U.N. Special Rapporteurs Cherif Bassiouni and Theo van Boven, and U.N. Independent Expert Diane Orentlicher similarly have acknowledged that states have an obligation to investigate and punish gross violations of international human rights law.<sup>33</sup>

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<sup>28</sup> Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶ 110 (Sept. 26, 2006). *See also* Inter.-Am. Ct. H.R., *Ituango Massacres v. Colombia*, Ser. C No. 148, at ¶ 299 (July 1, 2006); Inter.-Am. Ct. H.R., “*Mapiripán Massacre*” *v. Colombia*, Ser. C No. 134, at ¶¶ 223, 237 (Sept. 15, 2005); Inter.-Am. Ct. H.R., *Moiwana Community v. Suriname*, Ser. C No. 124, at ¶¶ 145, 147, 203 (June 15, 2005).

<sup>29</sup> *See, e.g.*, Inter.-Am. Ct. H.R., *Godínez-Cruz v. Honduras*. Ser. C No. 5, at ¶¶ 175, 187-88 (Jan. 20, 1989); Inter.-Am. Ct. H.R., *Velásquez Rodríguez v. Honduras*, Ser. C No. 4, at ¶¶ 166, 176 (July 29, 1988).

<sup>30</sup> *See, e.g.*, Inter.-Am. Ct. H.R., *La Cantuta v. Peru*, Ser. C No. 162, at ¶ 157 (Nov. 29, 2006); Inter.-Am. Ct. H.R., *Goiburú et al. v. Paraguay*, Ser. C No. 153, at ¶ 84 (Sept. 22, 2006) (declaring that obligation to investigate and punish crime of enforced disappearance is a *jus cogens* norm).

<sup>31</sup> Hum. Rts. Comm., *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶¶ 15-16 (May 26, 2004). On the obligation to investigate, see Hum. Rts. Comm., *Larrosa Bequiu v. Uruguay*, Comm. No. 88/1981, U.N. Doc. A/38/40 at 180, at ¶ 11.5 (March 25, 1983); Hum. Rts. Comm., *Gilboa v. Uruguay*, Comm. No. 147/1983, U.N. Doc. CCPR/C/OP/2 at 176, at ¶ 7.2 (Nov. 1, 1985). For the obligation to prosecute, see Hum. Rts. Comm., *Amirov v. Russian Federation*, Comm. No. 1447/2006, U.N. Doc. CCPR/C/95/D/1447/2006, at ¶ 11.2 (April 2, 2009); Hum. Rts. Comm., *Felipe and Evelyn Pestaño v. The Philippines*, Comm. No. 1619/2007, CCPR/C/98/D/1619/2007, at ¶ 7.2 (March 23, 2010).

<sup>32</sup> Hum. Rts. Comm., *Celis Laureano v. Peru*, Comm. No. 540/1993, U.N. Doc. A/51/40[VOL.II](SUPP) at 109, at ¶ 8.3 (March 25, 1996); Hum. Rts. Comm., *Herrera Rubio et al. v. Colombia*, Comm. No. 161/1983, U.N. Doc. CCPR/C/OP/2 at 192, at ¶ 10.3 (Nov. 2, 1987) (considering only the obligation to investigate); Hum. Rts. Comm., *Quinteros v. Uruguay*, Comm. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138, at ¶¶ 15-16 (July 21, 1983); Hum. Rts. Comm., *Bleier v. Uruguay*, Comm. 37/1978, U.N. Doc. A/37/40(SUPP) at 130, at ¶ 15 (March 29, 1982); Hum. Rts. Comm., *Dermat Barbato et al. v. Uruguay*, Comm. 84/1981, U.N. Doc. CCPR/C/OP/2 at 112, at ¶ 11 (Oct. 21, 1982).

<sup>33</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Annex, U.N. Doc. A/RES/60/147, art. 4 (March 21, 2006); *see also* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34, at ¶ 4(d), Annex, arts. 4, 5 (Nov. 29, 1985); M. Cherif Bassiouni, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, Annex: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. Doc. E/CN.4/2000/62, art. 3(b) (Jan. 18, 2000); Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur*, U.N. Doc.

The state obligation to investigate abuses has also been recognized by the European Court of Human Rights. In *McCann and Others v. the United Kingdom*, the Court stated that the European Convention on Human Rights requires “some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”<sup>34</sup>

### ***B. Amnesty Laws as Unlawful Barriers to Accountability***

Brazil may not use an amnesty law to evade the obligation to investigate and punish crimes against humanity and other serious human rights violations. International law clearly establishes that amnesty laws are invalid when applied to these abuses, as supported by a broad consensus among international human rights authorities on this point.

Brazil ratified the American Convention and consented to the binding jurisdiction of the Inter-American Court of Human Rights, which has repeatedly held that laws granting amnesty to the perpetrators of serious human rights violations are incompatible with the Convention.<sup>35</sup>

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>36</sup>

Apart from its judgment in *Gomes Lund*,<sup>37</sup> the Court has confirmed this interpretation of the American Convention in *La Cantuta*, which also addressed amnesty laws in Peru; in *Almonacid-*

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E/CN.4/Sub.2/1993/8, at ¶ 137(5) (July 2, 1993); Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, Addendum, U.N. Doc. E/CN.4/2005/102/Add.1, principle 1 (Feb. 8, 2005).

<sup>34</sup> Eur. Ct. H.R., *McCann and Others v. the United Kingdom [GC]*, App. No. 18984/91, at ¶ 161 (Sept. 27, 1995) (but not finding a violation of the right to life); also Eur. Ct. H.R., *Kaya v. Turkey*, App. No. 22729/93, at ¶ 86 (Feb. 19, 1998) (finding a violation of the right to life). See also Eur. Ct. H.R., *Kurt v. Turkey*, App. No. 24276/94, at ¶ 124 (May 25, 1999) (recognizing an obligation to investigate a disappearance); Eur. Ct. H.R., *Assenov and Others v. Bulgaria*, App. No. 24760/94, at ¶ 102 (Oct. 28, 1998) (recognizing an obligation to investigate alleged torture or inhuman or degrading punishment).

<sup>35</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at Resuelve ¶ 30 (Nov. 24, 2010); Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶¶ 114, 119, 122 (Sept. 26, 2006); Inter.-Am. Ct. H.R., *La Cantuta v. Peru*, Ser. C No. 162, at ¶ 152 (Nov. 29, 2006) (in dicta) (citing Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001)); Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 83, at ¶ 18 (Sept. 3, 2001); Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001).

<sup>36</sup> Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001).

<sup>37</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶ 172 (Nov. 24, 2010).

*Arellano*, where it struck down a Chilean amnesty law; and in *Gelman*, which held invalid Uruguay's equivalent to an amnesty law.<sup>38</sup> The Court has found that such amnesty laws violate a state's obligations under the Convention,<sup>39</sup> declaring that such laws have no legal effect<sup>40</sup> and that their mere presence in national legislation can constitute a breach of the Convention.<sup>41</sup> The Court has found amnesties that risk interfering with accountability for human rights abuses to be incompatible with the Convention and therefore null, irrespective of whether they could be properly called "self-amnesties" or negotiated ones.<sup>42</sup>

Additionally, the U.N. human rights treaties to which Brazil is a party do not permit amnesties to bar investigations and prosecutions of serious human rights violations. The U.N. Human Rights Committee has determined that a state cannot "relieve perpetrators from personal responsibility" for human rights violations under the International Covenant on Civil and Political Rights.<sup>43</sup> According to the U.N. Committee Against Torture, amnesty laws that prevent prosecution of torture violate the U.N. Convention Against Torture.<sup>44</sup>

Several U.N. authorities have agreed that amnesties must not bar criminal accountability for serious human rights violations. The Office of the U.N. High Commissioner for Human Rights, "the United Nations system's lead entity on transitional justice," found, for example, that amnesties in post-conflict states generally are incompatible with international law.<sup>45</sup> Louis Joinet, as a member of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that an amnesty must not prevent victims from having access to

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<sup>38</sup> Inter.-Am. Ct. H.R., *Gelman v. Uruguay*, Ser. C No. 221, at ¶ 246 (Feb. 24, 2011); Inter.-Am. Ct. H.R., *La Cantuta v. Peru*, Ser. C No. 162, at ¶ 152 (Nov. 29, 2006) (in dicta) (citing Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001)); Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶¶ 114, 119, 122 (Sept. 26, 2006).

<sup>39</sup> See Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at ¶ 172 (Nov. 24, 2010); Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶¶ 111, 114 (Sept. 26, 2006); Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 83, at ¶ 18 (Sept. 3, 2001).

<sup>40</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at Resuelve ¶ 3 (Nov. 24, 2010); Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶ 119 (Sept. 26, 2006).

<sup>41</sup> See Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at ¶ 173 (Nov. 24, 2010); Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶ 122 (Sept. 26, 2006). *But see* Inter.-Am. Ct. H.R., *La Cantuta v. Peru*, Ser. C No. 162, at ¶¶ 187-89 (Nov. 29, 2006).

<sup>42</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at ¶ 175 (Nov. 24, 2010).

<sup>43</sup> Hum. Rts. Comm., *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶ 18 (May 26, 2004). *See also* Hum. Rts. Comm., *Hugo Rodríguez v. Uruguay*, Comm. No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988, at ¶¶ 12.3, 12.4 (Aug. 9, 1994) (holding that a state has an obligation to investigate torture by the prior regime).

<sup>44</sup> Comm. Against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2, at ¶ 5 (Jan. 24, 2008).

<sup>45</sup> Office of the High Commissioner for Human Rights, *Rule-of-law Tools for Post-Conflict States: Amnesties*, U.N. Doc. HR/PUB/09/1, at v (2009).



an effective remedy for violations.<sup>46</sup> The U.N. Working Group on Enforced or Involuntary Disappearances determined that the Declaration on the Protection of All Persons from Enforced Disappearance in Article 18 prohibits amnesty laws for enforced disappearance.<sup>47</sup>

For its part, the European Court of Human Rights has held that amnesty laws considered abusive under international law are incompatible with the European Convention in relation to acts of torture or ill treatment.<sup>48</sup>

### ***C. Statutes of Limitations as Unlawful Barriers to Accountability***

International law also prohibits Brazil from avoiding its obligation to investigate and punish serious human rights violations committed during the dictatorship by invoking statutes of limitations.

Under the Inter-American Court's authoritative interpretation of the American Convention, which is binding on Brazil, statutes of limitations must not block investigation and punishment of serious human rights violations.<sup>49</sup> The Inter-American Court held in *Barrios Altos* that all "measures designed to eliminate responsibility," including amnesty laws and statutes of limitation, are invalid under the American Convention, which imposes strict obligations to investigate and punish serious human rights violations.<sup>50</sup> The Court in *Almonacid-Arellano* went on to recognize that the prohibition on applying statutes of limitations to crimes against humanity rose to the level of a *jus cogens* norm.<sup>51</sup>

Indeed, customary international law binding on Brazil prohibits the application of statutes of limitations to both war crimes and crimes against humanity. In 1968, the U.N. General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which codified the prohibition on the application of statutes of limitations to war crimes and crimes against humanity, regardless of when the offense

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<sup>46</sup> Louis Joinet, *Final Report, Revised, on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev1, at ¶ 32 (Oct. 2, 1997). The U.N. Office of the High Commissioner for Human Rights has also taken this view. Office of the High Commissioner for Human Rights, *Rule-of-law Tools for Post-Conflict States: Amnesties*, U.N. Doc. HR/PUB/09/1, at v (2009).

<sup>47</sup> United Nations Working Group on Enforced or Involuntary Disappearances, *General Comment on Article 18 of the Declaration*, U.N. Doc. E/CN.4/2006/56, at ¶ 2 (Dec. 27, 2005).

<sup>48</sup> Eur. Ct. H.R., *Ould Dah v. France*, App. No. 13113/03, at 17 (March 17, 2009) ("On ne saurait dès lors remettre en cause l'obligation de poursuivre de tels faits en accordant l'impunité à son auteur par l'adoption d'une loi d'amnistie susceptible d'être qualifiée d'abusives au regard du droit international."); Eur. Ct. H.R., *Abdulsamet Yaman v. Turkey*, App. No. 32446/96, at ¶ 55 (Nov. 2, 2004) (in dicta).

<sup>49</sup> See Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001).

<sup>50</sup> *Id.*

<sup>51</sup> Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶ 153 (Sept. 26, 2006).

was committed, and eliminated any doubt as to the retroactive application of that prohibition.<sup>52</sup> While Brazil has not ratified this convention, in contrast with many of its Latin American neighbors,<sup>53</sup> the International Committee of the Red Cross has recognized that the prohibition codified in the treaty is a norm of customary international law,<sup>54</sup> a status which would render it binding upon Brazil. As the former President of the ICTJ (now U.N. Special Rapporteur on Torture) Juan Méndez concluded in a 2008 expert opinion addressed to federal prosecutors in Brazil: (1) the Brazilian military dictatorship's crimes constituted crimes against humanity according to international legal norms already in force at the start of the dictatorship in 1964; and (2) the prohibition on the application of statutes of limitations to war crimes and crimes against humanity was a recognized principle of international law even before the adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity by the U.N. General Assembly in 1968.<sup>55</sup>

The European Court of Human Rights has ruled that under the European Convention, statutes of limitations are impermissible when applied to crimes such as torture,<sup>56</sup> and the Human Rights Committee has stated that no violation of any right under the International Covenant for Civil and Political Rights may be subject to unreasonably short statutes of limitations.<sup>57</sup>

Lastly, the Inter-American Court has reiterated that states have the obligation to investigate and punish serious human rights violations even when there are other common domestic legal questions apart from amnesty laws and statutes of limitations at issue. The Court has determined that the American Convention does not permit the use of principles such as *ne bis in idem*, the non-retroactivity of criminal law, or *res judicata* to block prosecutions of serious human rights violations. In *La Cantuta*, it applied the holding from *Barrios Altos* directly to Peru's attempt to eliminate responsibility using *ne bis in idem*,<sup>58</sup> while in *Almonacid-Arellano*, it asserted that such uses of statutes of limitations, non-retroactivity of criminal law, or *ne bis in*

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<sup>52</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 26, 1968, 754 U.N.T.S. 73.

<sup>53</sup> Argentina, Bolivia, Costa Rica, Cuba, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay have all ratified the Convention.

<sup>54</sup> See International Committee of the Red Cross, *Rule 160. Statutes of Limitations*, CUSTOMARY IHL DATABASE, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter44\\_rule160](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule160) (last visited Sept. 25, 2012) (specifically addressing customary international law on war crimes but, by strong implication, including crimes against humanity).

<sup>55</sup> Juan Méndez & Gilma Tatiana Rincón Covelli, International Center for Transitional Justice, *Parecer técnico sobre la naturaleza de los crímenes de lesa humanidad, la imprescriptibilidad de algunos delitos y la prohibición de amnistías* 35 (Sept. 1, 2008).

<sup>56</sup> Eur. Ct. H.R., *Abdulsamet Yaman v. Turkey*, App. No. 32446/96, at ¶ 55 (Nov. 2, 2004).

<sup>57</sup> Hum. Rts. Comm., *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶ 18 (May 26, 2004).

<sup>58</sup> Inter.-Am. Ct. H.R., *La Cantuta v. Peru*, Ser. C No. 162, at ¶¶ 152-53 (Nov. 29, 2006).

*idem* are categorically invalid.<sup>59</sup> The *Gelman* decision repeated this view and ordered Uruguay to ensure that these and other similar doctrines not be used to substitute for the amnesty law as bars to accountability.<sup>60</sup>

#### ***D. The Gomes Lund Judgment of the Inter-American Court of Human Rights***

In its recent *Gomes Lund* decision, the Inter-American Court applied the previously mentioned principles of international law in its the analysis of dictatorship-era crimes in Brazil. *Gomes Lund* centered on the enforced disappearance by state agents of 62 members of the Brazilian Communist Party between 1972 and 1974 and the subsequent state failure to investigate and punish those abuses.<sup>61</sup> The Court’s analysis began by emphasizing Brazil’s fundamental obligation under the American Convention to investigate and punish the serious human rights abuses carried out during the dictatorship.<sup>62</sup> The Court then held that amnesty laws for serious human rights violations are incompatible with this obligation, and on these grounds declared the Brazilian Amnesty Law both invalid under the American Convention and legally void.<sup>63</sup> It also established that Brazil must not apply domestic legal provisions to protect from investigation and prosecution the dictatorship agents who committed serious human rights violations like the enforced disappearances described in *Gomes Lund*. Unacceptable legal provisions include “the statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem*, or any other similar exception that excuses responsibility of this obligation . . . .”<sup>64</sup> In finding all such potential domestic barriers to investigations and prosecutions inapplicable, the Court recalled the obligation of states to abide by treaties in good faith (*pacta sunt servanda*) and not to invoke domestic law as an excuse for failing to comply with an international obligation.<sup>65</sup> Finally, it established that all officials in the Brazilian state “are obligated to ensure that the effects of the provisions of the Convention are not reduced by the application of norms that are contrary to its object and purpose and that from the onset lack legal effect.”<sup>66</sup>

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<sup>59</sup> Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶ 151 (Sept. 26, 2006).

<sup>60</sup> See Inter.-Am. Ct. H.R., *Gelman v. Uruguay*, Ser. C No. 221, at ¶ 254 (Feb. 24, 2011).

<sup>61</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶ 121-22 (Nov. 24, 2010).

<sup>62</sup> *Id.* Resuelve ¶¶ 137-40.

<sup>63</sup> *Id.* ¶¶ 147-49, 172-75, Resuelve ¶ 3.

<sup>64</sup> *Id.* ¶¶ 171, 256(b).

<sup>65</sup> *Id.* ¶ 177; see also Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”) (signed by Brazil in 1969 and ratified in 2009).

<sup>66</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶ 176 (Nov. 24, 2010) (“os obriga a zelar para que os efeitos das disposições da Convenção não se vejam enfraquecidos pela aplicação de normas contrárias a seu objeto e finalidade, e que desde o início carecem de efeitos jurídicos.”).

## IV. LEGAL MILESTONES IN ACCOUNTABILITY FOR CRIMES COMMITTED BY AUTHORITARIAN REGIMES IN LATIN AMERICA

This section outlines the jurisprudential progression toward accountability for crimes of authoritarian regimes that was followed by high courts of the major Latin American democracies of Chile, Argentina, Peru, and Uruguay. First, it describes the legal concept of a permanent crime, which has played a prominent role on the road to accountability in Latin America. Second, it lays out a general chronology of high court cases in Chile, Argentina, Peru, and Uruguay that marked seminal jurisprudential breaks with the impunity of the past. Though many legal issues were important to the questions of accountability, the focus of these chronologies is on high court cases addressing amnesties and statutes of limitations.

Judges in each country referenced and applied a related, though diverse, set of international and domestic laws and doctrines when allowing investigations into past atrocities to proceed and when upholding prosecutions despite amnesty laws, statutes of limitations, and other issues. Due to the non-precedential nature of many judicial decisions in Latin America, rulings in given cases occasionally deviated from the overall forward progress and occasionally still do so today in individual instances. However, the overwhelming trend away from impunity and toward accountability in the jurisprudence of the high courts across the region is both remarkable and unmistakable.

### *A. The Concept of a Permanent Crime in the Context of Transitional Justice*

The concept of a permanent crime is of central importance to understanding the legal history of accountability for crimes of authoritarian regimes in Latin America.

In contrast to instantaneous crimes like murder, which occur and are completed at a specific moment in time, permanent crimes are those in which the perpetrator creates and maintains a criminal condition that extends over a period of time, continuing legal injury to an interest protected by the criminal law.<sup>67</sup> For the crime to be permanent, the perpetrator must sustain the criminal state either through action or willful failure to eliminate it. In this sense, a permanent crime is different from a crime of permanent effect, where an instantaneous action has an effect that is extended in time but that is not maintained by the will of the perpetrator. The prototypical permanent crime is kidnapping, where the perpetrator deprives the victim of liberty for a period of time, injuring the criminal law's protection of liberty during that period.<sup>68</sup>

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<sup>67</sup> For instance, the Chilean Supreme Court noted that permanent crimes are those that create an injury to the protected legal interest that is "prolonged in time" (*lesión prolongada en el tiempo*). Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶ 36 (Nov. 17, 2004) (Chile).

<sup>68</sup> For a general discussion of the concept of a permanent crime in legal doctrine, see PAZ LLORIA GARCÍA, *APROXIMACIÓN AL ESTUDIO DEL DELITO PERMANENTE* (2006). While authors differ in the exact formulation of the

As is familiar to many Latin American lawyers, the concept of a permanent crime is widely accepted in penal systems across Latin America. In Argentina, the penal code explicitly references the concept of a permanent crime in the provisions concerning statutes of limitations, acknowledging that the statute of limitations begins to run only at the end of permanent crime.<sup>69</sup> The Uruguayan penal code has a similar provision.<sup>70</sup> In contrast, the Chilean penal code merely states that statutes of limitations begin to run at the time of commission a crime, without specifying what happens in the case of a permanent crime.<sup>71</sup> However, according to jurist José Luis Guzmán Dablora, the widely shared interpretation of Chilean criminal law experts is that statutory limitations begin to run only at the end of a crime's consummation period (*período consumativo*).<sup>72</sup>

In transitional justice contexts, courts have employed the concept of a permanent crime as a domestic legal basis upon which to find that amnesty laws and statutes of limitations did not prevent prosecutions for serious human rights violations. Enforced disappearances, for example, can be and have been prosecuted as ongoing kidnappings, permanent crimes in which the criminal state persists so long as the victim's whereabouts or remains are not found, in that way constituting a continuing a legal harm.<sup>73</sup> Such permanent crimes prosecutions are unimpeded by amnesty laws and statutes of limitations when the ongoing nature of the crimes prevents a finding that the crime has "ceased," thereby stopping statutes of limitations from running and temporally-limited amnesty laws from applying.<sup>74</sup>

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concept, and perhaps none would describe it in exactly these terms, the description in this paragraph captures the general idea of a permanent crime. *See id.* at 11-40.

<sup>69</sup> Cód. Pén., art. 63 (Arg.) ("La prescripción de la acción empezará a correr desde la medianoche del día en que se cometió el delito o, si éste fuese continuo, en que cesó de cometerse.").

<sup>70</sup> COD. PEN., art 119 (Uru.) ("El término empieza a correr . . . para los delitos permanentes desde el día en que cesa la ejecución.").

<sup>71</sup> Cód. PEN., art. 95 (Chile) ("El término de la prescripción empieza a correr desde el día en que se hubiere cometido el delito.").

<sup>72</sup> *See* José Luís Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALICEN 95, 118 (2007) (citing José Luís Guzmán Dalbora, *De la extinción de la responsabilidad penal*, in *TEXTO Y COMENTARIO DEL CÓDIGO PENAL CHILENO*, TOMO I, 433, 470-71 (Politoff Lifschitz *et al* eds., 2002)) ("La permanencia del delito, pues, determina la vigencia de la acción penal, cuyo inicio sólo puede contarse desde el término del período consumativo . . . parecer unánime entre los penalistas chilenos.").

<sup>73</sup> For example, the Chilean Supreme Court referenced a variety of factors—including the fact that a victim had not appeared, news of him had not surfaced, and information about the whereabouts of his remains was unavailable—to uphold a finding that an enforced disappearance, prosecuted as a kidnapping, was an ongoing crime. Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶ 33 (Nov. 17, 2004) (Chile).

<sup>74</sup> *See e.g., id.*; Karinna Fernández Neira, *La Aplicación de la Prescripción Gradual en Casos de Violaciones de Derechos Humanos*, 7(1) ESTUDIOS CONSTITUCIONALES 299, 299 (2009) (citing Corte Suprema de Justicia, Segunda Sala, *Arón Svigilsky*, Rol. No. 3,215-05 (May 30, 2006) (Chile)); José Luís Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*. 18(3) LATEINAMERIKA ANALICEN 95, 118 (2007).

A variety of serious human rights violations committed under authoritarian regimes constitute permanent crimes under domestic law in Latin America. These include the permanent crimes of kidnapping,<sup>75</sup> illegal detention,<sup>76</sup> illicit association (conspiracy),<sup>77</sup> and retaining and concealing a child of less than 10 years of age.<sup>78</sup>

It is noteworthy that, even when the permanent nature of crimes like enforced disappearances has not been legally dispositive, the prosecution of permanent crimes often has been at the forefront of accountability in transitional justice in Latin America. For example, in Argentina, even though the Supreme Court did not rely on the permanent crimes doctrine in declining to apply the amnesty laws, the underlying facts of the seminal 2005 case that affirmed the nullification of the amnesties, *Simón*, involved enforced disappearance (prosecuted as kidnapping).<sup>79</sup> It makes intuitive sense that prosecution of such crimes would have a leading role in transitional justice efforts, as the ongoing and unresolved character of such crimes heightens the sense that justice is not done when impunity reigns.

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<sup>75</sup> See, e.g., Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶ 37 (Nov. 17, 2004) (Chile). Illegal deprivation of liberty is also permanent crime in Argentina that lasts until it becomes known what has happened to the victim. The Argentine penal code criminalizes illegal deprivation of liberty—which includes any act through which one illegally deprives another of liberty—and specifies a complex set of aggravating factors. The Argentine Supreme Court recognized in *Tarnopolsky* that illegal deprivation of liberty is a permanent crime when evaluating and granting a civil claim for damages arising from a disappearance during the dictatorship. Corte Suprema de Justicia de la Nación, *Tarnopolsky, Daniel c/ Estado Nacional y otros s/ proceso de conocimiento*, T. 108. XXXII./T. 71. XXXII., at Considerando ¶ 10 (Aug. 31, 1999) (Arg.).

<sup>76</sup> See, e.g., Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶ 37 (Nov. 17, 2004) (Chile).

<sup>77</sup> In Argentina for example, illicit association is a permanent crime that lasts until the perpetrator ceases to be part of the association. A person commits the crime of illicit association if he “takes part in an association or band of three or more people destined to commit crimes for the mere fact of membership in the association . . .” See CÓD. PÉN., art. 210 (Arg.) (“Será reprimido con prisión o reclusión de tres a diez años, el que tomare parte en una asociación o banda de tres o más personas destinada a cometer delitos por el solo hecho de ser miembro de la asociación. . . para los jefes u organizadores de la asociación el mínimo de la pena será de cinco años de prisión o reclusión.”). The illicit association must be aimed at ongoing criminal activity and not a fixed set of crimes. 2 EDGARDO ALBERTO DONNA, *EL CÓDIGO PENAL Y SU INTERPRETACIÓN EN LA JURISPRUDENCIA, ACTUALIZACIÓN AL 31 DE DICIEMBRE DE 2009* 308 (2010). A person begins to commit the crime of illicit association when he or she joins the illicit association and ceases to commit the crime upon exit from the association. 2 CARLOS CREUS, *DERECHO PENAL PARTE ESPECIAL* 111 (5<sup>th</sup> ed. 1995); see RICARDO C. NUÑEZ, *MANUAL DE DERECHO PENAL ESPECIAL* 358 (2d ed. 1999). The Argentine Supreme Court has implicitly confirmed that illicit association is a permanent crime. See Corte Suprema de Justicia de la Nación, *Ribelli, Juan José y otros s/ extorsión*, C. 1005. XL., at Autos y Vistos (Dec. 23, 2004) (Arg.) (incorporating Procuración General de la Nación, *Ribelli, Juan José y otros s/ extorsión*, C. 1005. XL. (Oct. 25, 2004) (Arg.)).

<sup>78</sup> See, e.g., Corte Suprema de Justicia de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at Considerando (Aug. 24, 2004) (Arg.) (incorporating § IV(3) of Procuración General de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII. (May 23, 2002) (Arg.)).

<sup>79</sup> See Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII, at Considerando ¶¶ 1-4 (June 14, 2005) (Petracchi, Presidente, concurring) (Arg.).

## **B. Chile**

### **1. Legal scheme**

Until the late 1990s, the 1978 Amnesty Law and statutes of limitations in the domestic criminal law presented important obstacles to human rights accountability in Chile.<sup>80</sup> In April 1978, the military dictatorship headed by General Augusto Pinochet enacted Decreto Ley 2,191, also known as the Amnesty Law. The law sought to prevent the prosecution of individuals implicated in criminal acts committed “during the state of siege in force from September 11, 1973, to March 10, 1978.”<sup>81</sup> In 1990, the Supreme Court found that the power to declare amnesty established under Article 44(13) of the 1925 Constitution<sup>82</sup> and Article 60(16) of the 1980 Constitution<sup>83</sup> prevailed over other constitutional norms in place at the time.<sup>84</sup>

From the fall of Chile’s military dictatorship in 1990 until 1998, the Supreme Court of Chile maintained the applicability of the Amnesty Law to the relevant crimes that occurred within its 1973-1978 window.<sup>85</sup> During this period, the Court was generally reluctant to apply international law, including customary international law,<sup>86</sup> even in the face of an appellate-level judgment determining that international law prohibited applying the Amnesty Law and domestic statutory limitations to dictatorship-era human rights violations.<sup>87</sup>

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<sup>80</sup> Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 82 (2012) (“the Supreme Court took a positivistic approach to the 1978 Amnesty Law”).

<sup>81</sup> Decreto Ley 2,191, art. 1 (April 18, 1978) (Chile) (“Concédese amnistía a todas las personas que, en calidad de autores, cómplices o encubridores hayan incurrido en hechos delictuosos, durante la vigencia de la situación de Estado de Sitio, comprendida entre el 11 de Septiembre de 1973 y el 10 de Marzo de 1978, siempre que no se encuentren actualmente sometidas a proceso o condenadas.”).

<sup>82</sup> CONST. CHILE, art. 44(13) (1925) (“Sólo en virtud de una ley se puede . . . conceder indultos generales y amnistías”).

<sup>83</sup> *Id.*, art. 60(16) (“Sólo son materias de ley . . . las que concedan indultos generales y amnistías . . .”).

<sup>84</sup> Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 83 (2012) (citing Corte Suprema de Justicia, *Insunza Bascuñán*, Rol No. 553-78, at ¶¶ 22-23 (Aug. 24, 1990) (Chile) for the finding that CONST. CHILE, arts. 5(2), 73 (1980) did not prohibit the Amnesty Law).

<sup>85</sup> See Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 80-84 (2012); see Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 469-70 (2010).

<sup>86</sup> See José Luíz Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALYSEN 95, 99 (2007); see Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 82-84 (2012).

<sup>87</sup> See Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 471 (2010) (citing Corte de Apelaciones de Santiago, *Uribe Tambley y van Jurick Altamirano*, Rol No. 38,638-94 (Nov. 30, 1994) (Chile)). The Supreme Court rejected the Court of Appeal’s opinion, and the case was eventually decided under military jurisdiction, where the court applied the Amnesty Law. Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la*

## 2. Legal milestones to criminal accountability

The first major shift toward accountability in Chilean Supreme Court (*Corte Suprema de Justicia*) jurisprudence resulted from several substantial changes in the post-transition environment. With Pinochet's resignation as commander-in-chief in March 1998, a line of formal complaints against the former dictator began.<sup>88</sup> Pinochet's October 1998 arrest in London, due to a warrant concerning the murder of Spanish citizens in Chile, produced an effect of undisputed significance in domestic and international legal circles.<sup>89</sup>

Also in 1998, an important shift occurred in the composition of the Supreme Court's Second Penal Chamber, which until 1998 had been effectively controlled by ministers sympathetic to the Amnesty Law.<sup>90</sup> In the month prior to Pinochet's arrest, the Chilean Supreme Court had begun to forge a new jurisprudential path towards accountability<sup>91</sup> with the case of *Poblete Córdova*, where it reasoned in large part by reference to international law.<sup>92</sup> The Court ordered the reopening of a case concerning Córdova's enforced disappearance, finding on several grounds that the Amnesty Law had been unlawfully applied.<sup>93</sup> The Court found that the concept of amnesty, as incorporated into the penal system through Article 93 of the domestic penal code<sup>94</sup> and employed by the Amnesty Law, could only be found to apply with sufficient

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*dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 471 (2010). See also José Luís Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALYSEN 95, 102 (2007).

<sup>88</sup> See Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 474 (2010).

<sup>89</sup> For more on the Pinochet case in the United Kingdom and its significance for Chilean and international law, see NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSITIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005).

<sup>90</sup> Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 472-473 (2010).

<sup>91</sup> *Id.* at 473.

<sup>92</sup> See Corte Suprema de Justicia, Sala Segunda, *Poblete Córdova*, Rol No. 469-98, at Considerando ¶ 9 (Sept. 9, 1998) (Chile), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/883d9745593118a94125671a00380ca9!OpenDocument>; Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 473 (2010). See also Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 Hum. Rts. L. Rev. 79, 84 (2012).

<sup>93</sup> Corte Suprema de Justicia, Sala Segunda, *Poblete Córdova*, Rol No. 469-98, at Considerando ¶ 12 (Sept. 9, 1998) (Chile), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/883d9745593118a94125671a00380ca9!OpenDocument>; Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 84 (2012) (“the [*Poblete Córdova*] Court held that application of the Amnesty Law was unlawful and international law had supremacy in the constitutional system”).

<sup>94</sup> CÓD. PEN., art. 93(3) (Chile) (“La responsabilidad penal se extingue . . . por amnistía, la cual extingue por completo la pena y todos sus efectos.”).



proof of the crimes' circumstances and of the individuals involved.<sup>95</sup> The Court further found that Chile had been in an armed conflict at the time of the commission of the crime, so measures ensuring impunity for offenses perpetrated against the civilian population were prohibited.<sup>96</sup>

*Poblete Córdova* was quickly followed by several other decisions that continued to expand the possibility of investigations into crimes committed during the Pinochet regime. In *Barrios Duque*, the Court annulled an inferior-court decision dismissing a case on grounds that the issue had previously been adjudicated and resolved by applying the Amnesty Law.<sup>97</sup> It found that the military court had improperly relied on *res judicata*, which required common identity between the cases. *Res judicata* was inapplicable because no individual had been prosecuted in the first case.<sup>98</sup> In 1999, in a case called "*Episodio Parral*", the Court overturned an appellate-level judgment that had applied the Amnesty Law to dismiss a prosecution for the kidnapping of 26 people.<sup>99</sup> The Court's judgment was founded on the notion that the crimes, as defined under Articles 141 and 148 of the domestic Penal Code, were permanent crimes that continued past the time period covered by the amnesty.<sup>100</sup>

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<sup>95</sup> Corte Suprema de Justicia, Sala Segunda, *Poblete Córdova*, Rol No. 469-98, at Considerando ¶¶ 6-8 (Sept. 9, 1998) (Chile), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/883d9745593118a94125671a00380ca9!OpenDocument> ("para aplicar la amnistía, debe estar igualmente determinada la persona del delincuente en forma clara e indubitada, única manera de extinguir a su respecto la pena que debiera corresponderle por su participación en los sucesos investigados"). See also Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 473 (2010) (noting that the *Poblete Córdova* court had found that a case could only be dismissed under the amnesty law if it first established the circumstances of the victim's disappearance and the identity of all criminally involved suspects); Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 85-86 (2012). Additionally, the amnesty law itself referred to amnesty for "personas." Corte Suprema de Justicia, Sala Segunda, *Poblete Córdova*, Rol No. 469-98, at Considerando ¶ 7 (Sept. 9, 1998) (Chile).

<sup>96</sup> Corte Suprema de Justicia, Sala Segunda, *Poblete Córdova*, Rol No. 469-98, at Considerando ¶¶ 9-10 (Sept. 9, 1998) (Chile), available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/883d9745593118a94125671a00380ca9!OpenDocument>.

<sup>97</sup> Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 86-87 (2012) (citing Corte Suprema de Justicia, Sala Segunda, *Barrios Duque*, Rol No. 2,097-98 (Dec. 29, 1998) (Chile)).

<sup>98</sup> *Id.* at 87 (citing Corte Suprema de Justicia, Sala Segunda, *Barrios Duque*, Rol No. 2,097-98 (Dec. 29, 1998) (Chile)).

<sup>99</sup> See Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 473-74 (2010) (citing Corte Suprema de Justicia, Sala Segunda, "*Episodio Parral*", Rol No. 248-98 (Jan. 7, 1999) (Chile)).

<sup>100</sup> Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 474 (2010) (citing Corte Suprema de Justicia, Sala Segunda, "*Episodio Parral*", Rol No. 248-98, at Considerando ¶ 7 (Jan. 7, 1999) (Chile)); see also Karinna Fernández Neira, *La aplicación de la prescripción gradual en casos de violaciones de derechos humanos*, 7(1) ESTUDIOS CONSTITUCIONALES 299, 302 (2009) (citing Corte Suprema de Justicia, Sala Segunda, "*Episodio Parral*", Rol No. 248-98, at Considerando ¶¶ 9, 11 (Jan. 7, 1999) (Chile)).

The Court followed these decisions with a reassignment of judicial resources to support investigations into disappearances. In 2001, acting at the behest of the Ministry of Justice, the Court assigned 9 judges to work exclusively on 49 cases of disappeared detainees and designated 51 other judges to give preferential attention to 64 other cases.<sup>101</sup> Under this new judicial configuration, in 2004, the Court upheld the convictions of several former military agents implicated in the 1982 murder of labor union activist Tucapel Jiménez.<sup>102</sup>

However, the crucial turning point occurred in 2004 when the Court upheld a conviction by the Court of Appeals of Santiago (*Corte de Apelaciones de Santiago*) for the 1975 aggravated kidnapping (*secuestro calificado*) of former militant Miguel Ángel Sandoval Rodríguez.<sup>103</sup> In *Sandoval*, the Supreme Court affirmed that the Amnesty Law was not applicable to aggravated kidnapping due to the latter's nature as a permanent crime. According to the Court, the facts failed to satisfy the law's minimum requirement that the end date of the crime be determined, and that the lack of a completed crime during the amnesty period rendered inapplicable the grant of amnesty contemplated by the Amnesty Law.<sup>104</sup> The Court cited the lack of information about Sandoval's whereabouts or the location of his remains as support for its determination that the victim had not appeared as of the expiration date of the Amnesty Law.<sup>105</sup> It also cited the Geneva Conventions of 1949 in supporting its finding that kidnapping was a permanent crime whose prosecution was not barred by domestic amnesty laws.<sup>106</sup> It noted that by ratifying the Geneva Convention, the State of Chile had undertaken on obligations with respect to persons

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<sup>101</sup> Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 475 (2010).

<sup>102</sup> Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 476 (2010) (citing Corte Suprema de Justicia, Sala Segunda, *Tucapel Jimenez*, Rol No. 3,231-03 (Apr. 9, 2004) (Chile)). See also Corte Suprema confirmó por unanimidad condenas en el caso *Tucapel Jimenez*, COOPERATIVA.CL, March 9, 2004, [http://www.cooperativa.cl/p4\\_noticias/site/artic/20040309/pags/20040309134205.html](http://www.cooperativa.cl/p4_noticias/site/artic/20040309/pags/20040309134205.html).

<sup>103</sup> Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶¶ 30-33 (Nov. 17, 2004) (Chile). Commentators have noted that the shift toward accountability has not been uniform. The Supreme Court has at times deviated from the norm established in *Sandoval*. See, e.g., Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 93-94 (2012) (citing Corte Suprema de Justicia, *Binfa Contreras*, Rol No. 4,329-08, at Considerando ¶¶ 4-11 (Jan. 22, 2009) (Chile)); Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 486 (2010).

<sup>104</sup> Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶¶ 30-33 (Nov. 17, 2004) (Chile).

<sup>105</sup> *Id.* Considerando ¶ 30.

<sup>106</sup> *Id.* Considerando ¶ 34-35; Humberto Nogueira Alcalá, *Decreto Ley de Amnistía de 1978 y su armonización con el derecho internacional de los derechos humanos*, 18(2) REVISTA DE DERECHO (VALDIVIA), at 15, 15 n.47 (2005).

affected by armed conflict. Domestic Chilean law could not abrogate rights such as those emanating from the Geneva Conventions, according to the Court's reasoning.<sup>107</sup>

The Court cemented this understanding of a kidnapping's duration in the 2006 case of *Arón Svigilsky*, in which it found that the Amnesty Law was not a bar to the prosecution of a kidnapping whose commission had not ceased.<sup>108</sup> In affirming the trial court conviction on the basis that the crime was ongoing, the Court relied on the view that once it is proved that a kidnapping took place, it is unnecessary to prove its duration, because its continued existence can be deduced from the fact of the kidnapping.<sup>109</sup> Given the ongoing nature of the crime, the Court found that the Amnesty Law and several other legal provisions did not apply to the kidnapping.<sup>110</sup>

At the end of 2006, domestic jurisprudence took another step forward when the Court established the non-applicability of statutory limitations to crimes against humanity in a case involving homicides. This shift occurred in the wake of the Inter-American Court of Human Rights decision in *Almonacid v. Chile*, which held that Chile's Amnesty Law was contrary to international law.<sup>111</sup> In the case of *Vásquez-Superby*, the Court overturned an appellate court judgment that had dismissed the case based on the application of the statute of limitations to the 1973 summary executions of Hugo Vásquez Martínez and Mario Superby Jeldres.<sup>112</sup> It based its

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<sup>107</sup> Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶ 35 (Nov. 17, 2004) (Chile) (“esta Corte Suprema en reiteradas sentencias ha reconocido que la soberanía interna del Estado de Chile reconoce su límite en los derechos que emanan de la naturaleza humana”).

<sup>108</sup> See Corte Suprema de Justicia, Sala Segunda, *Arón Svigilsky*, Rol No. 3,215-05, Considerando ¶ 1 (May 30, 2006) (Chile) (affirming the trial court's conviction on the ground that “el tribunal no ha podido establecer . . . si tal delito [de suceso] cesó de cometerse es decir, si la víctima murió o recuperó su libertad en algún momento posterior” and “la investigación logró probar la iniciación del suceso pero . . . no le ha sido posible acreditar su finalización”). The Court's reasoning also suggests that the statutory limitations period had not begun to run because the crime had not ceased. See also Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 478 (2010).

<sup>109</sup> Corte Suprema de Justicia, Sala Segunda, *Arón Svigilsky*, Rol No. 3,215-05, at Considerando ¶¶ 6-8 (May 30, 2006) (Chile).

<sup>110</sup> See *id.* Considerando ¶¶ 1, 8. According to Fernández Neira, the Court's decision, in focusing entirely on domestic law, reflected “una materia donde existe unanimidad, la permanencia del delito de secuestro.” Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 478 (2010).

<sup>111</sup> Inter.-Am. Ct. H.R., *Almonacid-Arellano et al. v. Chile*, Ser. C No. 154, at ¶¶ 114, 119 (Sept. 26, 2006). See also Marny A. Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 102-03 (2012) (noting that increased international pressure provided a “plausible explanation” for the court's shift).

<sup>112</sup> Corte Suprema de Justicia, Sala Segunda, *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04 (Dec. 13, 2006) (Chile).

judgment on international norms, reports by the Inter-American Commission on Human Rights, and jurisprudence from the Inter-American Court on Human Rights.<sup>113</sup>

## ***C. Argentina***

### **1. Legal scheme**

In 1983, the outgoing Argentine military junta declared a “Law of National Pacification,” more commonly known as the “law of self-amnesty.”<sup>114</sup> After the dictatorship’s fall, the new civilian President Raúl Alfonsín moved to overturn the self-amnesty, resulting in Congress’ repeal of the law at the end of that year.<sup>115</sup> Despite this success, under pressure from the military, President Alfonsín later backed two new “amnesty laws” enacted in Argentina, known as the Full Stop Law (*Ley de Punto Final*), passed in December 1986,<sup>116</sup> and the Due Obedience Law (*Ley de Obediencia Debida*), passed in June 1987.<sup>117</sup> The first aimed to stop all prosecutions by imposing a final deadline after which prosecutions of dictatorship crimes would be effectively barred.<sup>118</sup> The second created a non-rebuttable presumption that mid- and low-ranking military officials had followed their superior’s orders to commit crimes and, for that reason, could not be held accountable for those crimes.<sup>119</sup>

During this period, prosecutions of dictatorship-era human rights violations followed a stop-and-go pattern and were hampered by pro-impunity legislation. Upon taking office in 1983, President Raúl Alfonsín created the National Commission on the Disappeared, which in 1984 published a report entitled “Never Again” (“*Nunca Más*”) documenting the enforced disappearance of nearly 9,000 people and recommending that those responsible be prosecuted.<sup>120</sup> Though the state convicted several former military officers early in the transition to democracy, the passage of the Full Stop and Due Obedience amnesty laws forced the prosecutions to stop.<sup>121</sup> In 1989, newly elected President Carlos Menem erected another barrier to accountability by

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<sup>113</sup> *Id.* Considerando ¶¶ 12, 20, 21, 28.

<sup>114</sup> See Pablo F. Parenti, *The Prosecution of International Crimes in Argentina*, 10 INT’L CRIM. L. REV. 491, 492 (2010) (citing Ley 22,924 (Sept. 22, 1983) (Arg.)).

<sup>115</sup> Ley 23,040 (Dec. 29, 1983) (Arg.); see Pablo F. Parenti, *The Prosecution of International Crimes in Argentina*, 10 INT’L CRIM. L. REV. 491, 492-93 (2010).

<sup>116</sup> Ley 23,492 (Dec. 29, 1986) (Arg.).

<sup>117</sup> Ley 23,521 (June 9, 1987) (Arg.).

<sup>118</sup> See Ley 23,492 (Dec. 29, 1986) (Arg.).

<sup>119</sup> Ley 23,521, art. 1 (June 9, 1987) (Arg.).

<sup>120</sup> See COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, NUNCA MÁS, at Capítulo II, Título Primero (1984), available at <http://www.desaparecidos.org/arg/conadep/nuncamas/>. See also Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 15 (2011).

<sup>121</sup> See Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 16 (2011).

pardoning several dozen high-ranking military officials prosecuted for crimes committed during the military dictatorship.<sup>122</sup> One year later, he pardoned the convicted members of the military juntas.<sup>123</sup>

Legal attitudes toward international law provided another obstacle to the prosecution of serious human rights violations during the Argentine transition. Until 1994, the Supreme Court of Justice in Argentina (*Corte Suprema de Justicia de la Nación*) espoused a dualist theory of international law, positing that international law governed relations between states, while domestic law governed relations between a state and its subjects.<sup>124</sup> Consequently, international norms did not govern the domestic sphere unless they were specifically incorporated into domestic legislation. Furthermore, domestic laws that conflicted with international norms retained supremacy.<sup>125</sup>

## 2. Legal milestones to criminal accountability<sup>126</sup>

In 1994, a series of reforms to the Argentine National Constitution (*Constitución Nacional*) fundamentally changed the bearing of international human rights norms on Argentine jurisprudence.<sup>127</sup> Most significantly, Article 75(22) of the National Constitution was amended to grant treaties with other nations and international organizations supremacy over domestic legislation and to give certain human rights treaties constitutional status.<sup>128</sup> This reform allowed the Supreme Court to later justify its prohibition of the use of statutory limitations for serious human rights violations and its nullification of Argentina's amnesty laws in terms of international legal principles.

In the late-1990s, the Court began to decide a series of cases concerning crimes from the junta-era, using the concept of a permanent crime to expand the potential for legal accountability.

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<sup>122</sup> *Id.* at 16 (citing President Menem's pardons, Decretos 1,002–05 (July 10, 1989) (Arg.)).

<sup>123</sup> *Id.* (citing President Menem's pardons, Decretos 1,002–05 (July 10, 1989) (Arg.)).

<sup>124</sup> Victor Bazán, *El derecho internacional de los derechos humanos desde la óptica de la Corte Suprema de Justicia de Argentina*, 8(2) ESTUDIOS CONSTITUCIONALES 359, 361-62 (2010).

<sup>125</sup> *Id.*

<sup>126</sup> Several case descriptions in this section are based on Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15 (2011).

<sup>127</sup> See Victor Bazán, *El derecho internacional de los derechos humanos desde la óptica de la Corte Suprema de Justicia de Argentina*, 8(2) ESTUDIOS CONSTITUCIONALES 359, 361 (2010) (“La reforma constitucional de 1994 que, fundamentalmente en el ámbito de los derechos humanos, ha provocado un fuerte impacto que conduce a la reinterpretación de determinadas categorías jurídicas en diferentes áreas del derecho público y del derecho privado, y a la re-significación de derechos, principios y valores a la luz del derecho internacional de los derechos humano”).

<sup>128</sup> CONST. ARG., art. 75(22) (1994) (“Los tratados y concordatos tienen jerarquía superior a las leyes”). Article 75(22) also lists several treaties, including the American Convention on Human Rights and the International Pact on Civil and Political Rights, establishing that “in the full force of their provisions, they have constitutional hierarchy”. *Id.* (“en las condiciones de su vigencia, tienen jerarquía constitucional”).

In 1999, the Argentine Supreme Court upheld civil damages for a dictatorship-era disappearance in the case of *Tarnopolsky*.<sup>129</sup> The Court recognized illegal deprivation of liberty as a permanent crime that does not cease until the whereabouts of the victim are established.<sup>130</sup> The 2004 *Jofré* case, which concerned the retention and concealment of a child of less than 10 years, upheld the use of a penalty authorized by a domestic law that had been enacted after the crime had taken place.<sup>131</sup> Accepting the principle that the retention and concealment of the child is a permanent crime, the Court allowed the application of the harsher penalty on the basis that the penalty applicable to a crime is that which is authorized by the penal code in effect at the time when a crime ends, even if it took effect while the crime was ongoing.<sup>132</sup>

On the same day that it decided *Jofré*, the Supreme Court found in *Arancibia Clavel*<sup>133</sup> that the dictatorship-era crimes committed by a former military officer were not subject to the domestic statute of limitations because international law renders domestic statutory limitations inapplicable to crimes against humanity.<sup>134</sup> Enrique Arancibia Clavel was a member of Chile's intelligence service who had been convicted by lower courts of two murders and participation in a criminal organization (the *Dirección de Inteligencia Nacional*) between 1974 and 1978.<sup>135</sup> In upholding Clavel's conviction, noted penal scholar Eugenio Raúl Zaffaroni in a joint opinion with Minister Highton de Nolasco found that the crime of illicit association at issue constituted a

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<sup>129</sup> Corte Suprema de Justicia de la Nación, *Tarnopolsky, Daniel c/ Estado Nacional y otros s/ proceso de conocimiento*, T. 108. XXXII./T. 71. XXXII., at Considerando ¶ 14 (Aug. 31, 1999) (Arg.).

<sup>130</sup> *See id.* Considerando ¶ 10.

<sup>131</sup> Corte Suprema de Justicia de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at Considerando (Aug. 24, 2004) (Arg.) (incorporating §§ IV(2) and IV(3) of Procuración General de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at § IV(3) (May 23, 2002) (Arg.)).

<sup>132</sup> *See id.* (incorporating §§ IV(2) and IV(3) of Procuración General de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at § IV(3) (May 23, 2002) (Arg.) ("La doctrina, en esta materia, ha sostenido que 'si el sujeto persiste en su conducta punible, si sigue adelante con su acción pese a lo que manda la nueva disposición legal, estimamos que deberá aplicársele la ley nueva más severa, que voluntaria y deliberadamente insiste en seguir infringiendo, no pudiendo luego ampararse para mejorar su situación en la circunstancia de que un tramo de la acción delictiva desarrollada la ejecutó bajo una ley más benigna, ya que a pesar de la consecuencia más grave dispuesta por la última norma legal, siguió adelante con su conducta criminal... El autor está en condiciones de adecuar su conducta a las nuevas exigencias normativas... persiste en su acción delictiva pese a conocer la mayor gravedad de ésta, pudiendo desistir de su empeño criminal' . . .") (citing GUILLERMO J. FIERRO, *LA LEY PENAL Y EL DERECHO TRANSITORIO* 222 (1978)).

<sup>133</sup> Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII. (Aug. 24, 2004) (Arg.). Five ministers concurred in the judgment, including Enrique S. Petracchi, Antonio Boggiano, Juan C. Maqueda, Raúl Zaffaroni and Elena Highton de Nolasco. Ministers Augusto Belluscio, Carlos S. Fayt and Adolfo R. Vázquez voted in dissent.

<sup>134</sup> *Id.* Considerando ¶ 34, 38 (Zaffaroni & Highton de Nolasco, Ministros, concurring); *id.* Considerando ¶ 24 (Petracchi, Presidente, concurring); *id.* Considerando ¶¶ 39-40 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 77 (Maqueda, Ministro, concurring). *See also* Victor Bazán, *El derecho internacional de los derechos humanos desde la óptica de la Corte Suprema de Justicia de Argentina*, 8(2) ESTUDIOS CONSTITUCIONALES 359, 381-82 (2010).

<sup>135</sup> Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 16 (2011).

crime against humanity.<sup>136</sup> They determined that statutes of limitations were inapplicable to crimes against humanity under customary international law and *jus cogens* norms as codified in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (“Statutory Limitations Convention”).<sup>137</sup> Although differing in details of reasoning and the source of the norms, the other concurring ministers agreed that international law precluded the domestic application of statutory limitations to the crimes at issue.<sup>138</sup> Consequently, the Court found that the Argentine Penal Code statute of limitations should not have been applied to prevent the prosecution of Clavel’s crimes.<sup>139</sup>

These cases paved the way for the landmark 2005 Supreme Court decision, *Simón*, in which the Court, for the first time, upheld the conviction of a military agent ostensibly protected by the Full Stop and Due Obedience laws.<sup>140</sup> There, the Supreme Court ruled that the prosecution of a member of the Argentinean Federal Police for kidnapping, torture, and forced disappearances from 1978 was not barred because both of the laws were unconstitutional.<sup>141</sup> It also upheld Ley 25,779,<sup>142</sup> in which Congress in 2003 had declared the Full Stop and Due Obedience Laws null and void with retroactive effect.<sup>143</sup>

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<sup>136</sup> Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶ 11 (Aug. 24, 2004) (Zaffaroni & Highton de Nolasco, Ministros, concurring) (Arg.) (“Que, estrictamente, y a partir de las propias definiciones utilizadas por el *a quo* correspondía calificar a la conducta de Arancibia Clavel como undelito de lesa humanidad”).

<sup>137</sup> *Id.* Considerando ¶¶ 12, 28 (Zaffaroni & Highton de Nolasco, Ministros, concurring) (“Que, por otro lado, si lo que estaba en discusión era la imprescriptibilidad de una asociación ilícita cuyo objeto era la comisión de tales crímenes, el instrumento normativo que debía regir la interpretación era la “Convención sobre la Imprescriptibilidad de los Crímenes de Guerra y de los Crímenes de Lesa Humanidad” . . . que adquirió jerarquía constitucional por ley 25.778.”).

<sup>138</sup> *Id.* Considerando ¶ 24 (Petracchi, Presidente, concurring); *id.* Considerando ¶¶ 39-40 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 77 (Maqueda, Ministro, concurring).

<sup>139</sup> *See id.* Considerando ¶ 37-38 (Zaffaroni & Highton de Nolasco, Ministros, concurring) (Arg.); *see id.* Considerando ¶ 24 (Petracchi, Presidente, concurring); *see id.* Considerando ¶¶ 39-40 (Boggiano, Ministro, concurring); *see id.* Considerando ¶ 77 (Maqueda, Ministro, concurring).

<sup>140</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII. (June 14, 2004) (Arg.). Seven magistrates concurred in the judgment. One justice voted in dissent. *See also* Centro de Estudios Legales y Sociales [Cels], *Las leyes de Punto Final y Obediencia Debida son inconstitucionales: Síntesis del fallo de la Corte Suprema de Justicia de la Nación que resuelve la inconstitucionalidad de las leyes del perdón* 2 n.2 (2005), available at [http://www.cels.org.ar/common/documentos/sintesis\\_fallo\\_csjn\\_caso\\_poblete.pdf](http://www.cels.org.ar/common/documentos/sintesis_fallo_csjn_caso_poblete.pdf).

<sup>141</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶ 16, Resuelve ¶¶ 1, 3 (Petracchi, Presidente, concurring) (Arg.); *see id.* Considerando ¶¶ 35-37 (Boggiano, Ministro, concurring); *id.* Considerando ¶¶ 82, Resuelve ¶¶ 1, 3 (Maqueda, Ministro, concurring); *see id.* Considerando ¶ 37, Resuelve ¶¶ 1, 3 (Zaffaroni, Ministro, concurring); *see id.* Considerando ¶¶ 21-22, Resuelve ¶¶ 1, 3 (Lorenzetti, Ministro, concurring); *id.* Considerando ¶ 15, Resuelve (Argibay, Ministra, concurring).

<sup>142</sup> *Id.* Considerando ¶ 34, Resuelve ¶ 2 (Petracchi, Presidente, concurring) (Arg.); *id.* Resuelve ¶ 2 (Maqueda, Ministro, concurring); *id.* Resuelve ¶ 2 (Zaffaroni, Ministro, concurring); *id.* Resuelve ¶ 2 (Highton de Nolasco, Ministra, concurring); *id.* Resuelve ¶ 2 (Lorenzetti, Ministro, concurring). The different opinions in the *Simón* case

The majority of the ministers based their votes on international law, as incorporated into the Argentine Constitution. International human rights norms—including those in Articles 1 and 2 of the American Convention on Human Rights and Article 2 of the International Covenant on Civil and Political Rights—prohibit states from enacting laws that impede the investigation of crimes against humanity and the prosecution of the perpetrators of those crimes. Because the American Convention and International Covenant on Civil and Political Rights were incorporated into the Constitution via Article 75(22),<sup>144</sup> the legislature’s constitutional power to grant an amnesty was limited by these human rights obligations.<sup>145</sup>

According to the votes of the majority, the legislature in passing the amnesty laws had transgressed substantial limitations established by international treaties as interpreted by international courts.<sup>146</sup> Interestingly, although the Argentine Congress had recently passed legislation with intent to nullify the amnesty laws, most of the ministers who voted for nullification did so based on international law, and not on the legislation. Therefore, the nullification of the amnesty laws that resulted in the upholding of convictions for dictatorship crimes in Argentina was ultimately the result of judicial, rather than legislative, action. As a result of the *Simón* ruling, Simón and others prosecuted for criminal conduct during the military dictatorship were convicted and sentenced.<sup>147</sup>

In 2007, the Supreme Court in the case of *Mazzeo* clarified a final remaining legal issue regarding accountability, finding President Menem’s pardon via Decreto 1,002 (1989) to be unconstitutional.<sup>148</sup> According to the Court, the defendants’ crimes, which included murder,

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discuss the issue of whether the Argentine Congress could annul the impunity laws. Although five ministers of the Supreme Court found that Ley 25,779 was valid, they did not all share the same interpretation, nor did they base their decision to overturn the impunity laws on Ley 25,779. Only Minister Zaffaroni found that Ley 25,779 was relevant in the decision to overturn the Full Stop and Due Obedience Laws.

<sup>143</sup> Ley 25,779 declared the Full Stop and Due Obedience laws to be invalid. Ley 25,779, art. 1 (Sept. 3, 2003) (Arg.) (“Decláranse insanablemente nules las Leyes 23.492 y 23.521.”).

<sup>144</sup> CONST. ARG., art. 75(22) (1994) (“Los tratados y concordatos tienen jerarquía superior a las leyes”).

<sup>145</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶ 16 (June 14, 2004) (Petracchi, Presidente, concurring) (Arg.); *see id.* Considerando ¶¶ 10-12, 15 (Boggiano, Ministro, concurring); *see id.* Considerando ¶¶ 58-60 (Maqueda, Ministro, concurring); *id.* Considerando ¶¶ 13-14 (Zaffaroni, Ministro, concurring); *id.* Considerando ¶¶ 17, 21 (Lorenzetti, Ministro, concurring).

<sup>146</sup> *Id.* Considerando ¶ 16 (Petracchi, Presidente, concurring) (Arg.); *see id.* Considerando ¶¶ 33-37 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 82 (Maqueda, Ministro, concurring); *see id.* Considerando ¶ 37 (Zaffaroni, Ministro, concurring); *see id.* Considerando ¶ 22 (Lorenzetti, Ministro, concurring); *id.* Considerando ¶ 15 (Argibay, Ministra, concurring).

<sup>147</sup> Victoria Ginzberg, *Se está empezando a hacer justicia*, PÁGINA 12, Aug. 5, 2006, [www.pagina12.com.ar/diario/elpais/1-71002-2006-08-05](http://www.pagina12.com.ar/diario/elpais/1-71002-2006-08-05).

<sup>148</sup> Corte Suprema de Justicia de la Nación, *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*, M. 2333. XLII., at Considerando ¶ 38 (July 13, 2007) (Arg.) (invalidating Decreto 1,002 (Oct. 6, 1989) (Arg.)). *See also* Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 18 (2011).



kidnapping, torture, and bodily harm, constituted crimes against humanity.<sup>149</sup> The Court concluded that, according to both the American Convention and *jus cogens* norms, Argentina had a constitutional obligation to prosecute the crimes and so the pardon decree was inconsistent with the Constitution.<sup>150</sup>

## **D. Peru**

### **1. Legal scheme**

Multiple amnesty laws were enacted during and after the armed conflict in Peru.<sup>151</sup> Two key amnesties addressed the criminal liability of state agents. First, on June 15, 1995, Congress passed Ley 26,479, granting amnesty to all military, police, and civil officials for acts committed as part of counterterrorism efforts between May 1980 and June 15, 1995.<sup>152</sup> The law prohibited even the mere investigation of amnestied offenses.<sup>153</sup> Second, Ley 26,492, passed on July 2, 1995, clarified the prior amnesty law.<sup>154</sup> The new law claimed that the original amnesty was

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<sup>149</sup> Corte Suprema de Justicia de la Nación, *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*, M. 2333. XLII., at Considerando ¶ 9 (July 13, 2007) (Arg.). See also Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 18 (2011).

<sup>150</sup> Corte Suprema de Justicia de la Nación, *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*, M. 2333. XLII., at Considerando ¶ 10, 38 (July 13, 2007) (Arg.). See also Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 18 (2011); Victor Bazán, *El derecho internacional de los derechos humanos desde la óptica de la Corte Suprema de Justicia de Argentina*, 8(2) ESTUDIOS CONSTITUCIONALES 359, 375 (2010); Guillermo J. Yacobucci, *El juzgamiento de las graves violaciones de los derechos humanos en la Argentina*, in CRIMES DA DITADURA MILITAR 21, 34-36 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>151</sup> The armed conflict lasted from 1980 to 2000. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, INFORME FINAL 54 (2003) (Peru), available at <http://www.cverdad.org.pe/ifinal/zip/TOMO%20I/Primera%20Parte%20EI%20Proceso-Los%20hechos-Las%20v%EDctimas/Seccion%20Primera-Panorama%20General/1.%20PERIODIZACION.zip>. Amnesties included the 1993 Decreto Supremo 015-93-JUS, affirming the so-called Remorse Law (*Ley de arrepentimiento*), and Decreto Ley 25,499, which offered reduced sentences for those willing to commit to ceasing “terrorist” activity. Decreto Supremo 015-93-JUS (May 8, 1993) (Peru); Decreto Ley 25,499 (Dec. 5, 1992) (Peru). A suspect could obtain a complete extinction of criminal responsibility by providing information deemed useful to state counterterrorism efforts. Reglamento de la Ley de Arrepentimiento, arts. 5-7 in Decreto Supremo 015-93-JUS (May 8, 1993) (Peru). In 2001, Congress passed a law granting amnesty for certain “crimes” against the state committed between April 5, 1992 and November 22, 2000, including participation in protests and investigations of state corruption. Military and police personnel received amnesty for their acts as well. However, the law specifically excluded amnesty for human rights violations. Ley 27,534, arts. 1-3 (Oct. 20, 2001) (Peru).

<sup>152</sup> Ley 26,479, art. 1 (June 15, 1995) (Peru). The law also specifically granted amnesty for actions committed on November 13, 1992, the date of an attempted military coup. Ley 26,479, art. 2 (June 15, 1995) (Peru).

<sup>153</sup> Ley 26,479, art. 6 (June 15, 1995) (Peru). However, the amnesty explicitly excluded several offenses: “los delitos de Tráfico Ilícite de Drogas, de Terrorismo y Traición a la Patria regulado por la Ley No. 25659.” Ley 26,479, art. 5 (June 15, 1995) (Peru). Decreto Ley 25,659, an executive decree, was directed towards members of supposed terrorist organizations, and not state actors. Decreto Ley 25,659 (Aug. 13, 1992) (Peru).

<sup>154</sup> Ley 26,492 (July 2, 1995) (Peru).

consistent with the domestic and international rights obligations of the Peruvian state.<sup>155</sup> The law also sought to shield the amnesty from judicial scrutiny, declaring that granting amnesty was the province of the legislature, and that, therefore, the prior amnesty should not be subject to judicial review.<sup>156</sup> The law further declared granting amnesty for the covered offenses to be mandatory.<sup>157</sup>

In 1997, Peru's Constitutional Tribunal (*Tribunal Constitucional*) dismissed a constitutional challenge of these laws. Although it recognized that the legislature's right to issue amnesties was not absolute, the Tribunal considered that it could not review the unconstitutionality because the crimes in question had already been extinguished.<sup>158</sup>

## 2. Legal milestones to criminal accountability

The end of Alberto Fujimori's presidency in 2000 marked the beginning of the path towards criminal prosecutions for state abuses committed under his rule. Fujimori had unsuccessfully attempted to withdraw Peru from Inter-American Court jurisdiction in 1999, following a number of unfavorable decisions.<sup>159</sup> His successor, Valentín Paniagua, sought to repair relations with the Inter-American Court and to work with the Court in future decisions.<sup>160</sup>

Movement towards accountability was spurred in large part by the Inter-American Court's continued attention to impunity in Peru. The Court first declared invalid the Peruvian amnesty laws that barred prosecutions of serious human rights abuses in its landmark 2001 decision *Barrios Altos v. Perú*.<sup>161</sup> The case concerned the impunity enjoyed by the *Grupo Colina*<sup>162</sup> in the Barrios Altos massacre.<sup>163</sup> Specifically, the Inter-American Court found that Ley

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<sup>155</sup> *Id.*, art. 1 (“Entiéndase que la amnistía otorgada por la Ley No. 26479, según lo dispuesto en el inciso 3° del Artículo 139° de la Constitución Política, no constituye interferencia en el ejercicio de la función jurisdiccional ni vulnera el deber del Estado de respetar y garantizar la plena vigencia de los derechos humanos, reconocido por el Artículo 44° de la Constitución Política y, entre otros Tratados sobre la materia, el numeral 1° del Artículo 1° de la Convención Americana sobre Derechos Humanos.”).

<sup>156</sup> *Id.*, art. 2 (“Precísase que dicha amnistía, en cuanto es un derecho de gracia cuya concesión corresponde exclusivamente al Congreso . . . no es revisable en sede judicial”).

<sup>157</sup> *Id.*, art. 3 (“ . . . la amnistía general que se concede es de obligatoria aplicación”). Articles 2 and 3 are intended to constrain judicial review and action.

<sup>158</sup> Tribunal Constitucional, *35 Señores Congresistas v. Arts. No. 1 y 6 de la ley 26479 y contra la ley 26492*, Exp. No. 013-96-I/TC, at Fundamentos ¶¶ 4-10, Falla (April 28, 1997) (Peru).

<sup>159</sup> For further information on Peru's attempts to withdraw from the Court's jurisdiction, see Lisa J. LaPlante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 956-57 (2009).

<sup>160</sup> Lisa J. LaPlante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 957 (2009).

<sup>161</sup> Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75 (March 14, 2001).

<sup>162</sup> The *Grupo Colina* was a group of 38 individuals, assembled by the *Servicio de Inteligencia Nacional*, who carried out enforced disappearances and extrajudicial killings. Lisa J. LaPlante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 946 (2008-2009).

26,479 and Ley 26,492 violated the American Convention, recognizing that the amnesty law and its subsequent clarifying law acted as impermissible obstacles to prosecution.<sup>164</sup> The Court unequivocally stated that amnesties for grave violations of human rights<sup>165</sup> are incompatible with the American Convention.<sup>166</sup> Statutes of limitations were also found to be unacceptable barriers to prosecution for such grave crimes.<sup>167</sup> The decision ordered investigations into the crimes and prosecutions of those responsible.<sup>168</sup> In response to questions raised over the decision's exact meaning, the Court clarified that the holding was not limited to the particular facts of the case, but covered all similar applications of the amnesty law.<sup>169</sup>

Following *Barrios Altos*, progress toward accountability increased domestically, beginning with clarification of the events that transpired during the armed conflict. The Truth and Reconciliation Commission's report was published on August 28, 2003,<sup>170</sup> publicizing rights violations and calling for judicial proceedings and punishment for those responsible.<sup>171</sup>

The Constitutional Tribunal echoed these calls for investigation. In 2004, in *Villegas Namuche*, the Tribunal granted the habeas corpus petition filed on behalf of a forcibly disappeared student and ordered investigation of the disappearance.<sup>172</sup> The Tribunal considered the fact that at the time of the disappearance, in 1992, enforced disappearance was not codified in the Peruvian penal code. It found that enforced disappearance nonetheless violated constitutional guarantees as well as the American Convention on Human Rights and the International Covenant on Civil and Political Rights.<sup>173</sup> In another habeas corpus case, *Collantes*

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<sup>163</sup> The Barrios Altos massacre took place on the evening of November 3, 1991. Members of the *Grupo Colina* arrived in the Barrios Altos neighborhood of Lima, ordered residents gathered at a local fundraiser to lie down on the ground, and then shot indiscriminately at them. Fifteen individuals were killed, and four were seriously injured. Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 2 (March 14, 2001).

<sup>164</sup> *Id.* ¶¶ 41-44.

<sup>165</sup> The Court included "serious violations of human rights such as torture, summary, extralegal, or arbitrary executions, and enforced disappearances" as being ineligible for amnesty. *Id.* ¶ 41 ("las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas").

<sup>166</sup> *Id.* ¶ 41-44. The court specifically cites Amnesty Laws 26,479 and 26,492 as violating the American Convention on Human Rights. *Id.* ¶ 51(4).

<sup>167</sup> *Id.* ¶ 41.

<sup>168</sup> *Id.* ¶ 51(5).

<sup>169</sup> See Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 83, at ¶ 18 (Sept. 3, 2001).

<sup>170</sup> COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, INFORME FINAL (2003) (Peru), available at <http://www.cverdad.org.pe/ifinal/index.php>.

<sup>171</sup> *Id.* § 5.2.2.

<sup>172</sup> Tribunal Constitucional, *Genaro Villegas Namuche*, Exp. No. 2488-2002-HC/TC, at Fallo ¶¶ 1-3 (March 18, 2004) (Peru).

<sup>173</sup> *Id.* Antecedentes, Fundamentos ¶ 4 ("tal situación no justifica de ninguna manera la comisión del delito, ni nos impide considerarlo como un grave atentado contra los derechos humanos, puesto que los derechos contra los que

*Guerra*, the Constitutional Tribunal permitted the prosecution of a 1991 disappearance as a crime of enforced disappearance.<sup>174</sup> The Tribunal found that the prosecution of a disappearance as a crime of enforced disappearance, even though enforced disappearance was only recognized in the domestic penal code after the initial abduction, did not violate the principle of legality because enforced disappearance is a permanent crime.<sup>175</sup>

The Constitutional Tribunal also allowed prosecutions for serious Fujimori-era abuses to proceed despite statute of limitations defenses that were raised. For example, in the *Villegas Namuche* decision, the Tribunal stated that the right to know the truth regarding a disappeared person could not be subject to statutes of limitations.<sup>176</sup> The Tribunal reached this finding on the basis of both international law and Peruvian constitutional law.<sup>177</sup>

Procedural bars to investigation were also judicially condemned in Peru following the *Barrios Altos* decision. One such ruling by the Constitutional Tribunal in 2004, *Portella Nuñez*, involved a member of *Grupo Colina* who filed a habeas corpus petition against a judge for reopening a case against him despite his allegation that due process would be violated.<sup>178</sup> The Tribunal allowed the investigation to proceed, citing domestic and Inter-American jurisprudence for the premise that they could not take any judicial steps in the furtherance of impunity for human rights abuses.<sup>179</sup>

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atenta este ilícito se encuentran protegidos por las Constituciones de 1979 y 1993, así como por instrumentos internacionales suscritos y ratificados por el Peru, como son la Convención Americana de Derechos Humanos y el Pacto Internacional de Derechos Civiles y Políticos.”).

<sup>174</sup> Tribunal Constitucional, *Collins Collantes Guerra*, Exp. No. 0442-2007-HC/TC, at Fundamentos ¶¶ 5-7 (March 30, 2007) (Peru).

<sup>175</sup> *Id.* Fundamentos ¶¶ 5-7.

<sup>176</sup> *Id.* Fundamentos ¶ 9 (“El conocimiento de las circunstancias en que se cometieron las violaciones de los derechos humanos y, en caso de fallecimiento o desaparición, del destino que corrió la víctima por su propia naturaleza, es de carácter imprescriptible”).

<sup>177</sup> *Id.* (“El derecho a la verdad no sólo deriva de las obligaciones internacionales”). In this particular case, the court granted the plaintiff, the sister of the disappeared Villegas Namuche, a habeas corpus petition and ordered an investigation into the disappearance. *Id.* Fallo ¶¶ 1-3.

<sup>178</sup> Tribunal Constitucional, *Aquilino Carlos Portella Nuñez*, Exp. No. 2310-2004-HC/TC, at Fundamentos ¶ 1 (June 21, 2004) (Peru).

<sup>179</sup> *Id.* ¶¶ 4-6 (“En este sentido, la Corte Interamericana de Derechos Humanos ha señalado que la obligación de investigar debe cumplirse con seriedad y no como una simple formalidad condenada de antemano a ser infructuosa. La investigación que desarrolle el Estado, por medio de sus autoridades jurisdiccionales, debe ser asumida como un deber jurídico propio y no como una gestión procesal cualquiera.”). Another case that addressed procedural hurdles during the same time period was *Vera Navarrete*. Tribunal Constitucional, *Gabriel Orlando Vera Navarrete*, Exp. No. 2798-04-HC/TC (Dec. 9, 2004) (Peru). A *Grupo Colina* member filed a suit alleging arbitrary detention. *Id.* Antecedentes. The Tribunal Constitucional found that they had an obligation to investigate, and because of the particular nature of serious human rights violations, the state may not impose procedural barriers that ensure impunity. *Id.* Fundamentos ¶ 18. The Tribunal also reiterated that enforced disappearance is a permanent crime. *Id.* Fundamentos ¶ 22.

The Inter-American Court reviewed the progress made in Peru and addressed continuing impunity in the 2006 *La Cantuta v. Perú* judgment, another case involving actions of the *Grupo Colina*.<sup>180</sup> The Court recognized some advances in Peru with regard to accountability.<sup>181</sup> However, the Court found that as long as amnesty laws were being applied with the effect of barring investigations and prosecutions of serious human rights abuses, Peru was in violation of the American Convention.<sup>182</sup> The Court in *La Cantuta* also quoted *Barrios Altos* for the proposition that statute of limitations cannot be permitted to impede full accountability for such crimes.<sup>183</sup>

Peru's Constitutional Tribunal finally recognized the invalidity of the amnesty laws when applied to serious human rights violations in the *Martin Rivas* judgment.<sup>184</sup> Defendant Santiago Enrique Martin Rivas had been amnestied under the 1995 laws for his actions at La Cantuta University as a member of *Grupo Colina*.<sup>185</sup> However, on October 17, 2001, the *Consejo Supremo de Justicia Militar* reopened the case against him.<sup>186</sup> As a result, Martin Rivas filed a constitutional appeal (*recurso de agravio constitucional*), arguing that any further action in the case against him would violate the principle of *res judicata* (*cosa juzgada*), his right to amnesty, and his due process rights.<sup>187</sup> In arguing for its right to reopen the case, the military prosecutor (*Procurador Público de los Asuntos Judiciales de la Justicia Militar*) noted that Ley 26,479 and Ley 26,492 had been declared incompatible with the American Convention on Human Rights.<sup>188</sup>

The Constitutional Tribunal in *Martin Rivas* found that no constitutional right to amnesty exists, that the amnesty laws were unconstitutional, and that, though *res judicata* was a protected principle, it was not triggered in this case given the *a priori* unconstitutionality of the amnesty laws. First, the Tribunal declared there was no constitutionally protected right to amnesty.<sup>189</sup>

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<sup>180</sup> In this case, on July 18, 1992, members of the *Grupo Colina* kidnapped and disappeared a professor and students at La Cantuta, a Lima university. Inter.-Am. Ct. H.R., *La Cantuta v. Peru*, Ser. C No. 162, at ¶ 2 (Nov. 29, 2006).

<sup>181</sup> For example, the Court mentioned the publication of the Truth and Reconciliation Committee, the attempts to hold former President Fujimori accountable, and state efforts at reparations. *Id.* ¶¶ 80.86, 90, 222-24.

<sup>182</sup> *Id.* ¶ 189.

<sup>183</sup> *Id.* ¶ 152.

<sup>184</sup> Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC (March 2, 2007) (Peru).

<sup>185</sup> See *id.* Antecedentes ¶ 1. Martin Rivas was a major in the Army and one of the directors of *Grupo Colina*. Lisa L. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009).

<sup>186</sup> Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC, at Antecedentes ¶ 1 (March 2, 2007) (Peru).

<sup>187</sup> *Id.* Fundamentos ¶ 1.

<sup>188</sup> *Id.* Fundamentos ¶ 12.

<sup>189</sup> *Id.* Fundamentos ¶ 5 (“El Tribunal aprecia que si bien se ha alegado la afectación de diversos derechos fundamentales –y algunos que no son derechos, como la amnistía–, los agravios expuestos por el recurrente están relacionados esencialmente con la violación del derecho a la cosa juzgada.”).

Second, the Tribunal found that a judgment applying an amnesty law is constitutionally protected under the principle of *res judicata* only if the amnesty law was valid and constitutional.<sup>190</sup> To determine if questions of *res judicata* were even at issue then, the Constitutional Tribunal needed to determine if the amnesty law was constitutional and valid. Third, the Tribunal found the amnesty laws unconstitutional. Central to their analysis was the fact that international law, and specifically Inter-American jurisprudence, must be integrated with domestic law.<sup>191</sup> According to the Tribunal’s reasoning, domestic laws had to be reconciled with the international human rights obligations that the Peruvian state had accepted.<sup>192</sup> The Tribunal recognized that, pursuant to these international obligations, certain crimes, such as those the state attempted to amnesty, cannot be amnestied.<sup>193</sup> The Tribunal both acknowledged the Inter-American judgments voiding the amnesty laws and recognized that Inter-American Court decisions are binding on state parties to the American Convention.<sup>194</sup> Therefore, the Tribunal found that grants of amnesty did not present questions of *res judicata*.<sup>195</sup>

The Constitutional Tribunal in *Martin Rivas* further recognized that its 1997 decision, which declined to overturn the amnesty laws, presented no *res judicata* problem.<sup>196</sup> According to the Tribunal, its prior judgment did not reach the merits—in part due to the understanding at the time that the amnesty laws had already produced the effect of extinguishing criminal responsibility and thus could not be revisited—so it had not necessarily found the amnesty laws constitutional in its earlier decision.<sup>197</sup> The *Martin Rivas* decision ended with a clear rebuke of

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<sup>190</sup> *Id.* Fundamentos ¶¶ 13-16 (March 2, 2007) (Peru) (“Para ello, sin embargo, es preciso que la ley de amnistía no sólo debe ser válida sino también constitucionalmente legítima. Una ley puede ser válida pero no necesariamente legítima desde la perspectiva de la Constitución. Por tanto, la primera cuestión que debe abordarse es la indagación sobre la legitimidad constitucional de una ley de amnistía al amparo de la cual se haya dictado una resolución judicial.”).

<sup>191</sup> *Id.* Fundamentos ¶¶ 36-37.

<sup>192</sup> *Id.* Fundamentos ¶ 38.

<sup>193</sup> *Id.* Fundamentos ¶ 30. The Tribunal cited to *Barrios Altos* for the crimes that must be investigated: “las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas.” *Id.* Fundamentos ¶ 33.

<sup>194</sup> *Id.* Fundamentos ¶ 48.

<sup>195</sup> *Id.* Fundamentos ¶ 50; see also Corte Suprema de Justicia, Sala Penal Especial, *Casos Barrios Altos, La Cantuta y Sótanos SIE*, Exp. No. A.V. 19-2001, at ¶¶ 106-07 (April 7, 2009), available at <http://historico.pj.gob.pe/noticias/noticias.asp?codigo=10410&opcion=detalle>.

<sup>196</sup> Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC, at Fundamentos ¶ 51 (March 2, 2007) (Peru) (examining Tribunal Constitucional, *35 Señores Congresistas v. Arts. No. 1 y 6 de la ley 26479 y contra la ley 26492*, Exp. No. 013-96-I/TC (April 28, 1997) (Peru)).

<sup>197</sup> *Id.*

the amnesty laws: “the tribunal considers the amnesty laws No. 26479 and No. 26492 are null and lack, *ab initio*, legal effect.”<sup>198</sup>

## ***E. Uruguay***

### **1. Legal scheme**

Following the end of the Uruguayan military regime in 1985, the new civilian government under Julio María Sanguinetti passed the Law of the Expiration of the Punitive Intent of the State (*Ley de Caducidad de la Pretensión Punitiva del Estado*) in December 1986. Although the law simply claimed to eliminate the state’s interest in prosecuting dictatorship-era human rights abuses without declaring anyone legally shielded from criminal liability, in effect it declared an amnesty for all crimes that members of the military and police committed with political motives or on official orders during the dictatorship.<sup>199</sup> The law accomplished this effective amnesty by stripping the courts’ jurisdiction to hear cases concerning the relevant crimes except by leave of the executive.<sup>200</sup>

The new law immediately survived two challenges to its validity. On March 2, 1988, several victims of illegal detention and torture during the dictatorship appeared in lower court and were instructed to submit the facts to the executive, per the *Ley de Caducidad*.<sup>201</sup> Instead, they filed an exception of unconstitutionality with the Supreme Court of Uruguay (*Suprema Corte de Justicia*), challenging the *Ley* on a number of grounds, including for violating the separation of powers, due process, and equality. The Supreme Court decided that the law legally constituted an amnesty<sup>202</sup> and declared it constitutional on the grounds that the Constitution explicitly gives the legislature the power to declare an amnesty.<sup>203</sup> It rejected the argument that

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<sup>198</sup> *Id.* Fundamentos ¶ 60 (“El Tribunal considera que las leyes de amnistía N.º 26479 y N.º 26492 son nulas y carecen, *ab initio*, de efectos jurídicos.”). Other judicial decisions enforcing these laws were also found to be without effect. *Id.*

<sup>199</sup> Ley 15,848, art. 1 (Dec. 22, 1986) (Uru.) (“Artículo 1º.- Reconócese que, como consecuencia de la lógica de los hechos originados por el acuerdo celebrado entre partidos políticos y las Fuerzas Armadas en agosto de 1984 y a efecto de concluir la transición hacia la plena vigencia del orden constitucional, ha caducado el ejercicio de la pretensión punitiva del Estado respecto de los delitos cometidos hasta el 1º de marzo de 1985 por funcionarios militares y policiales, equiparados y asimilados por móviles políticos o en ocasión del cumplimiento de sus funciones y en ocasión de acciones ordenadas por los mandos que actuaron durante el período de facto.”).

<sup>200</sup> Ley 15,848, art. 3 (Dec. 22, 1986) (Uru.).

<sup>201</sup> Suprema Corte de Justicia, *D., J.; M., N.; M., F.; M., O.; B., J., Denuncia, Inconstitucionalidad Ley No 15.848, arts. 1, 2, 3 y 4, at Considerando § I* (May 2, 1988) (Uru.), available at <http://www.ccee.edu.uy/ensenian/catderpu/material/15848.PDF>.

<sup>202</sup> *Id.* Considerando § VIII.

<sup>203</sup> *Id.* Considerando §§ VIII, IX.

the law violated the separation of powers by manipulating judicial jurisdiction, arguing that the judiciary is subject to regulation by law.<sup>204</sup>

The second challenge came in the form of a popular referendum to repeal the law. Following a significant effort to obtain the necessary signatures to hold the referendum—an effort that the Sanguinetti government opposed—a popular vote was set for April 16, 1989.<sup>205</sup> The referendum failed, with 53% voting against a repeal of the amnesty and 41% in favor of it.<sup>206</sup>

## 2. Legal milestones to criminal accountability

The amnesty imposed by the *Ley de Caducidad* largely acted as an effective bar to prosecutions of dictatorship abuses for almost 25 years after its passage. A 1992 report from the Inter-American Commission on Human Rights found that the *Ley* violated the American Convention provisions establishing the right to fair trial and to judicial protection,<sup>207</sup> but the state failed to address the problem.<sup>208</sup>

However, in the late 1990s, some judges began investigations into the enforced disappearances of children during the dictatorship.<sup>209</sup> Meanwhile, from 2000 to 2003, the Commission for Peace (*Comisión para la Paz*) investigated dictatorship-era disappearances.<sup>210</sup> Several trial and appellate courts began to hear prosecutions in the first years of the 2000s, some of which resulted in convictions.<sup>211</sup> After President Tabaré Vázquez took office in 2005, he used

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<sup>204</sup> *Id.* Considerando § VIII.

<sup>205</sup> See LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE 173-236 (1988).

<sup>206</sup> See *id.* at 233.

<sup>207</sup> Inter.-Am. Comm. on. Hum. Rts., *Report No. 29/92*, Cases 10,029, 10,036, 10,145, 10,305, 10,372, 10,373, 10,374, and 10,375, at ¶¶ 46, 49 (Oct. 2, 1992).

<sup>208</sup> Gabriel Adriasola, *El proceso uruguayo de la dictadura a la democracia. Luces y sombras del derecho penal de transición en materia de violación a los derechos humanos ante los organismos internacionales*, in CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI 313, 331 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>209</sup> See, e.g., Pablo Galain Palermo, *The Prosecution of International Crimes in Uruguay*, 10 INT'L CRIM. L. REV. 601, 612 (2010) (citing Juzgado Letrado en lo Penal 1°, Sentencia No. 991/2002 (Oct. 18, 2002) (Uru.) (Cavalli, Magistrado)); Elin Skaar, *Legal Development and Human Rights in Uruguay 1985-2002*, 8 HUMAN RIGHTS REVIEW 52, 59-62 (2007); Tribunal de Apelaciones en lo Penal 3°, Sentencia 165/03, Caso 14639, 127 LA JUSTICIA URUGUAYA J-277, J-285 (March 31, 2003) (Uru.).

<sup>210</sup> Daniel Chasquetti, *Uruguay 2006: Éxitos y dilemas del gobierno de izquierda*, 27 REVISTA DE CIENCIA POLÍTICA 249, 261 (2007); Elin Skaar, *Legal Development and Human Rights in Uruguay 1985-2002*, 8 HUMAN RIGHTS REVIEW 52, 61 (2007). See also Comisión para la Paz, *Informe Final de la Comisión para la Paz* (2003) (Uru.), available at [http://www.presidencia.gub.uy/noticias/archivo/2003/abril/Informe\\_final.doc](http://www.presidencia.gub.uy/noticias/archivo/2003/abril/Informe_final.doc).

<sup>211</sup> See, e.g., Pablo Galain Palermo, *The Prosecution of International Crimes in Uruguay*, 10 INT'L CRIM. L. REV. 601, 612 (2010) (citing Juzgado Letrado en lo Penal 1°, Sentencia No. 991/2002 (Oct. 18, 2002) (Uru.) (Cavalli, Magistrado)); Elin Skaar, *Legal Development and Human Rights in Uruguay 1985-2002*, 8 HUMAN RIGHTS REVIEW 52, 62 (2007); Tribunal de Apelaciones en lo Penal 3°, Sentencia 165/03, Caso 14639, 127 LA JUSTICIA URUGUAYA J-277, J-285 (March 31, 2003) (Uru.).



his power under Article 3 of the *Ley de Caducidad* to determine whether it extinguished the state's punitive interest, and allowed criminal investigations to proceed. These investigations led to the conviction and imprisonment of central figures from the military regime.<sup>212</sup> A related measure also manifested the changing attitude toward impunity: the legislature passed Ley 18,026 which added a range of international crimes to the Uruguayan Penal Code and rendered those crimes free from statutes of limitations.<sup>213</sup>

Following these early steps, on October 20, 2009, the Uruguayan Supreme Court definitively rejected the constitutionality of the *Ley de Caducidad* in its *Sabalsagaray* decision. The case concerned a complaint filed by Blanca Stela Sabalsagaray Curtchet to compel an investigation into her sister's 1974 death in military custody.<sup>214</sup> In its opinion, the Court decided that, because the law did not technically institute an amnesty,<sup>215</sup> it violated the separation of powers: the law constituted a legislative intrusion on the judicial function and permitted further interferences by the executive branch.<sup>216</sup> Additionally, the Court determined that the legislature had failed to satisfy the procedural requirements for implementing an amnesty when it passed the *Ley*.<sup>217</sup>

*Sabalsagaray* also established that the *Ley de Caducidad* was unconstitutional because it was incompatible with international law. International human rights conventions are integrated into the Uruguayan Constitution via Article 72 and are a parameter of constitutional control of laws.<sup>218</sup> Based on international sources—including the Inter-American Court decisions in *Barrios Altos*, *La Cantuta*, and *Almonacid Arellano*, as well as the Argentine Supreme Court decision in *Simón*—the Uruguayan Supreme Court found that an amnesty for grave violations of

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<sup>212</sup> Gabriel Adriasola, *El proceso uruguayo de la dictadura a la democracia. Luces y sombras del derecho penal de transición en materia de violación a los derechos humanos ante los organismos internacionales*, in CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI 313, 319 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011); Pablo Galain Palermo, *The Prosecution of International Crimes in Uruguay*, 10 INT'L CRIM. L. REV. 601, 606-07 (2010).

<sup>213</sup> Ley 18,026, art. 7 (Sept. 25, 2006) (Uru.).

<sup>214</sup> Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Resultando §§ 1-2 (Oct. 19, 2009) (Uru.).

<sup>215</sup> *Id.* Considerando § III(2).

<sup>216</sup> *See id.* Considerando §§ III(2), (5). *See also* *Caducidad “afectó muy seriamente las garantías”*, EL PAIS, Oct. 20, 2009, <http://www.elpais.com.uy/091020/pnacio-449148/nacional/caducidad-afecto-muy-seriamente-las-garantias/>.

<sup>217</sup> Suprema Corte de Justicia, 10/19/2009, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(2) (Uru.) (finding that there was insufficient time between failure of a prior attempt to pass an amnesty and the introduction of the *Ley de Caducidad* as well as an insufficient number of votes for an amnesty law).

<sup>218</sup> *Id.* Considerando § III(8).

human rights is incompatible with international human rights law.<sup>219</sup> As a result, the amnesty law was also unconstitutional under the Uruguayan Constitution.<sup>220</sup> It is noteworthy that the Court reached this conclusion in *Sabalsagaray* despite its prior 1988 decision upholding the constitutionality of the amnesty, explicitly indicating its agreement with the dissent in the 1988 case.<sup>221</sup>

Just five days after the Supreme Court rendered this path-breaking decision, the *Ley de Caducidad* was submitted to a plebiscite on whether it should be nullified. As with the 1989 referendum, the proposal was rejected, but this time by a narrower margin, with approximately 48% voting for nullification. Although it was less than the necessary 50%, unlike in 1989, this time a near majority had expressed their desire to eliminate the amnesty.<sup>222</sup>

The Supreme Court followed the plebiscite with two more rulings reaffirming the unconstitutionality of the *Ley de Caducidad*. In the October 2010 *Organización de los Derechos Humanos* decision, the Court summarily confirmed the unconstitutionality of the *Ley de Caducidad*. It made no reference to the recent plebiscite and introduced no new reasoning.<sup>223</sup> Instead, the decision simply stated that it incorporated the terms of the *Sabalsagaray* decision,<sup>224</sup> which had established that the 1989 referendum did not grant the *Ley de Caducidad* any special constitutional status, in part because the referendum addressed only the *Ley*'s repeal.<sup>225</sup> In December 2010, the Supreme Court once again confirmed that the *Ley de Caducidad* was unconstitutional.<sup>226</sup>

These decisions were implicitly affirmed by the Inter-American Court of Human Rights, which, in late February 2011, declared the *Ley de Caducidad* incompatible with the American

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<sup>219</sup> *Id.*

<sup>220</sup> *See id.*

<sup>221</sup> *Id.* Considerando § III(2).

<sup>222</sup> *See Ningún Plebiscito alcanzó mayoría*, EL PAIS, Oct. 26, 2009, <http://www.elpais.com.uy/091026/pnacio-450354/nacional/ningun-plebiscito-alcanzo-mayoria/>.

<sup>223</sup> Suprema Corte de Justicia, *Organización de los Derechos Humanos. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 1,525/2010, Ficha 2-21,986/2006, at Considerando, Falla (Oct. 29, 2010) (Uru.). *See also Nuevo fallo contra la ley de Caducidad*, EL PAIS, Nov. 2, 2011, <http://www.elpais.com.uy/101102/pnacio-525965/nacional/Nuevo-fallo-contra-la-ley-de-Caducidad/>.

<sup>224</sup> Suprema Corte de Justicia, *Organización de los Derechos Humanos. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 1,525/2010, Ficha 2-21,986/2006, at Considerando (Oct. 29, 2010) (Uru.).

<sup>225</sup> Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(3) (Oct. 19, 2009) (Uru.).

<sup>226</sup> Suprema Corte de Justicia, *García Hernández, Amaral y otros. Denuncia. Mandos civiles, militares, jefes de policía y demás involucrados. Excepción de inconstitucionalidad arts. 1, 3 y 4 de la Ley No. 15.848*, Sentencia No. 2,337/2010, Ficha 173-318/2006, at Falla (Dec. 15, 2010) (Uru.).

Convention. In *Gelman v. Uruguay*, the Inter-American Court rejected arguments that approval by a democratic regime and support from a public referendum or plebiscite can legitimate an amnesty law.<sup>227</sup> It found the *Ley de Caducidad* to be without legal effect.<sup>228</sup> It then ordered the Uruguayan state to ensure that the *Ley* could no longer obstruct the investigation and punishment of serious human rights violations.<sup>229</sup> It also ordered Uruguay to ensure that no other domestic legal doctrines, such as statutes of limitations, could impede full criminal accountability for dictatorship abuses.<sup>230</sup>

Following the *Gelman* ruling of the Inter-American Court, on October 27, 2011 the Uruguayan legislature passed Ley 18,831. This law repealed the *Ley de Caducidad*, and reestablished the state's legal intent to prosecute the crimes of the dictatorship. It further declared that statutes of limitations had been tolled during the period in which the *Ley* had impeded prosecutions.<sup>231</sup>

Lower courts had previously determined that statutes of limitations only began to run on March 1, 1985, the date of return to democratic rule, a view that the Supreme Court confirmed in its May 2011 *Gavazzo Pereira* decision.<sup>232</sup> According to legal scholar Gabriel Adriasola, the Uruguayan jurisprudence is clear that “the reason that statutory limitations only began to run when the democratic government came to power is that they cannot be said to have run during the dictatorship because within that institutional context, the judiciary lacked the independence and power to investigate and adjudicate these crimes.”<sup>233</sup> The Supreme Court in *Gavazzo Pereira* also established that a provision in the penal code allowing a one third extension of the statutory

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<sup>227</sup> Inter-Am. Ct. H.R., *Gelman v. Uruguay*, Ser. C No. 221, at ¶ 238 (Feb. 24, 2011).

<sup>228</sup> *Id.* ¶ 246.

<sup>229</sup> *Id.* ¶ 253.

<sup>230</sup> *Id.* ¶ 254. For a general discussion of the *Gelman* decision and its place in the development of Inter-American system jurisprudence, see Mariana Blengio Valdés, *La justicia encrucijada. El caso Gelman*, 173 TRIBUNAL DE ABOGADO, COLEGIO DE ABOGADOS DE URUGUAY 16 (2011); Mariana Blengio Valdés, *Caso Gelman vs. Uruguay*, 39 REVISTA DE DERECHO PÚBLICO, FUNDACIÓN DE CULTURA UNIVERSITARIA 139 (2011).

<sup>231</sup> Ley 18,831, arts. 1, 2 (Nov. 1, 2011) (Uru.) (“Artículo 1º.- Se restablece el pleno ejercicio de la pretensión punitiva del Estado para los delitos cometidos en aplicación del terrorismo de Estado hasta el 1º de marzo de 1985, comprendidos en el artículo 1º de la Ley Nº 15.848, de 22 de diciembre de 1986. . . . Artículo 2º.- No se computará plazo alguno, procesal, de prescripción o de caducidad, en el período comprendido entre el 22 de diciembre de 1986 y la vigencia de esta ley, para los delitos a que refiere el artículo 1º de esta ley.”).

<sup>232</sup> Suprema Corte de Justicia, *Gavazzo Pereira, José N. y otro*, Sentencia No. 1501/2011, Ficha 98-247/2006, at Considerando § III (May 6, 2011) (Uru.), available at [http://www.csjn.gov.ar/dbe/i/news/Sentencias/uyamnistia\\_mayo2011.html](http://www.csjn.gov.ar/dbe/i/news/Sentencias/uyamnistia_mayo2011.html); <http://www.diariolospueblos.com/pdf/sent.pdf>. See also Pablo Galain Palermo, *The Prosecution of International Crimes in Uruguay*, 10 INT’L CRIM. L. REV. 601, 613 (2010).

<sup>233</sup> Gabriel Adriasola, *El proceso uruguayo de la dictadura a la democracia. Luces y sombras del derecho penal de transición en materia de violación a los derechos humanos ante los organismos internacionales*, in CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI 327 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

period when the perpetrator is particularly dangerous could be applied based on the gravity of the crime that had been committed.<sup>234</sup>

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<sup>234</sup> Suprema Corte de Justicia, *Gavazzo Pereira, José N. y otro*, Sentencia No. 1501, Ficha 98-247/2006, at Considerando § III (May 6, 2011) (Uru.), available at [http://www.csjn.gov.ar/dbei/iinews/Sentencias/uyamnistia\\_mayo2011.html](http://www.csjn.gov.ar/dbei/iinews/Sentencias/uyamnistia_mayo2011.html); <http://www.diariolospueblos.com/pdf/sent.pdf>.

## V. LATIN AMERICAN HIGH COURT REASONING CONCERNING AMNESTIES AND STATUTES OF LIMITATIONS FOR CRIMES BY AUTHORITARIAN REGIMES

This section examines high court reasoning in seminal transitional justice cases from Latin America in greater depth than in the general legal chronologies above. The focus here remains on jurisprudence addressing amnesties and statutes of limitations on the path toward accountability for crimes of past authoritarian regimes. By cataloguing the various legal conclusions reached by these courts on these questions, this section aims to serve as a reference for prosecutors and judges working to fulfill their obligation to further accountability in Brazil despite amnesty laws, statutes of limitations, and analogous issues. The abundance of jurisprudence below also demonstrates anew how, since the late 1990s, high courts in Chile, Argentina, Peru, and Uruguay have decidedly progressed toward domestic criminal accountability for human rights violations perpetrated during the region's authoritarian regimes, often through increasing affirmation and application of norms of international law.

These high courts in Latin America have addressed amnesties and statutes of limitations in a transitional justice context by adopting two principal avenues of reasoning: (1) that under international law, as incorporated into domestic law, amnesty laws and statutory limitations were inapplicable to domestic crimes that constituted crimes against humanity or serious human rights violations; and (2) that under the domestic permanent crimes doctrine, amnesty laws and statutes of limitations were inapplicable to permanent crimes—like enforced disappearance (typically prosecuted as kidnapping under domestic criminal law)—due to a lack of completion of the crimes. These two essential strands of reasoning were paramount, though as described below, they were not exclusive and also often incorporated various necessary corollary conclusions on questions involving the principle of legality.

### A. *Jurisprudential Principles Concerning Amnesty Laws*

High courts in Chile, Argentina, Peru and Uruguay have generally ceased allowing amnesty laws to prevent prosecutions of serious human rights violations of authoritarian regimes, as required by international law. In coming to this legal consensus, the courts have referenced both international and domestic law when nullifying amnesties or interpreting them as inapplicable to such crimes, particularly those classified as permanent crimes.

#### 1. **Nullification of domestic amnesty laws for violating legal norms of superior status**

Many courts have voided amnesty laws on the grounds that they are incompatible with legal norms of superior force. The Peruvian Constitutional Tribunal, for example, nullified the

Peruvian amnesty laws in part by applying a judgment of the Inter-American Court.<sup>235</sup> Some courts have found amnesty laws to be in conflict with constitutional principles and thus impermissible under domestic law, while others have based their rulings on obligations incurred by the state through customary international law or treaties, such as the International Covenant on Civil and Political Rights or the American Convention.

***a) On the basis that Inter-American Court of Human Rights judgments are binding domestically***

The Peruvian Constitutional Tribunal in *Martín Rivas* directly applied the Inter-American Court judgments of *Barrios Altos* and *La Cantuta* as one of the bases for finding the two Peruvian amnesty laws unconstitutional. The Tribunal concluded, in line with the Inter-American Court's findings, that amnesty laws are incompatible with the American Convention and lack legal effect.<sup>236</sup> Acknowledging the legislature's constitutional power to issue amnesties, the Tribunal noted that the power is subject to both formal and material limitations.<sup>237</sup> One important limitation is imposed by international human rights treaty obligations, which, when ratified, form part of national law and aid in interpreting constitutionally protected fundamental rights.<sup>238</sup> Article 55 of the Peruvian Constitution incorporates ratified treaties into national law and Disposición Final y Transitoria Cuatro of the Constitution requires constitutional rights to be interpreted in accordance with ratified treaties concerning rights and liberties.<sup>239</sup> Given these constitutional requirements, international and domestic law are to be treated in a coordinated fashion, rather than independently,<sup>240</sup> and thus, domestic tribunals must recognize the legal validity of Inter-American Court decisions.<sup>241</sup> As a result, the Tribunal ruled that the Inter-American Court decisions in *Barrios Altos* and *La Cantuta* were binding on the state and had direct effect in the domestic legal order.<sup>242</sup>

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<sup>235</sup> Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC (March 2, 2007) (Peru).

<sup>236</sup> *Id.* Fundamentos ¶¶ 38-39.

<sup>237</sup> *Id.* Fundamentos ¶ 24.

<sup>238</sup> *Id.* Fundamentos ¶ 28.

<sup>239</sup> CONST. PERU, art. 55, Disposición Final y Transitoria Cuatro (1993).

<sup>240</sup> *See* Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC, at Fundamentos ¶¶ 36-37 (March 2, 2007) (Peru).

<sup>241</sup> *Id.* Fundamentos ¶ 56.

<sup>242</sup> *See id.* Fundamentos ¶¶ 43-50.

***b) On the basis of international legal norms, particularly international human rights treaties in accordance with their authoritative interpretations by international courts***

The Argentine Supreme Court in its *Simón* decision found that the Argentine Final Stop and Due Obedience laws are unconstitutional and lack legal effect because they conflict with international treaties to which Argentina is a party.<sup>243</sup> While the Court's ministers each filed separate opinions, a clear majority agreed on the grounds of the decision. These ministers understood the Argentine Constitution as giving certain human rights norms constitutional status.<sup>244</sup> Article 75(22) establishes that "treaties and conventions have a rank superior to laws" and that specific human rights sources have constitutional rank, including the Universal and American Declarations, the International Covenant on Civil and Political Rights, and the American Convention.<sup>245</sup> On this basis, the ministers concluded that the legislature's constitutional power to grant an amnesty is limited by its human rights obligations, including those contained in such sources.<sup>246</sup> When interpreting the requirements of these obligations, the ministers looked to the jurisprudence of both the Inter-American Court and the Inter-American Commission for guidance.<sup>247</sup>

In *Simón*, the ministers determined that the Argentine amnesty laws were incompatible with constitutionally-ranked international obligations. They examined, among other international judgments, the Inter-American Court's *Barrios Altos* decision (even though Argentina was not the state defendant in the case), which held that amnesty laws for serious human rights violations are incompatible with the American Convention, lack legal effect, and

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<sup>243</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII, at Considerando ¶ 16, Resuelve ¶¶ 1, 3 (June 14, 2004) (Petracchi, Presidente, concurring) (Arg.); see *id.* Considerando ¶¶ 35-37 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 82, Resuelve ¶¶ 1, 3 (Maqueda, Ministro, concurring); see *id.* Considerando ¶ 37, Resuelve ¶¶ 1, 3 (Zaffaroni, Ministro, concurring); see *id.* Considerando ¶¶ 21-22, Resuelve ¶¶ 1, 3 (Lorenzetti, Ministro, concurring); *id.* Considerando ¶ 15, Resuelve (Argibay, Ministra, concurring). While Ley 25,779 attempted to nullify the the Full Stop and Due Obedience laws in 2003, the ministers did not determine that the amnesty laws were invalid on this basis, but instead independently addressed the question of whether the legislature can nullify (as opposed to repeal) a law.

<sup>244</sup> *Id.* Considerando ¶¶ 14-15 (Petracchi, Presidente, concurring); *id.* Considerando ¶ 9 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 58 (Maqueda, Ministro, concurring); *id.* Considerando ¶ 13 (Zaffaroni, Ministro, concurring); *id.* Considerando ¶¶ 17, 21 (Lorenzetti, Ministro, concurring).

<sup>245</sup> CONST. ARG., art. 75(22) (1994) ("Los tratados y concordatos tienen jerarquía superior a las leyes").

<sup>246</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII, at Considerando ¶ 16 (June 14, 2004) (Petracchi, Presidente, concurring) (Arg.); see *id.* Considerando ¶¶ 10-12, 15 (Boggiano, Ministro, concurring); see *id.* Considerando ¶¶ 58-60 (Maqueda, Ministro, concurring); *id.* Considerando ¶¶ 13-14 (Zaffaroni, Ministro, concurring); *id.* Considerando ¶¶ 17, 21 (Lorenzetti, Ministro, concurring).

<sup>247</sup> *Id.* Considerando ¶ 17 (Petracchi, Presidente, concurring); *id.* Considerando ¶¶ 15-26 (Boggiano, Ministro, concurring); *id.* Considerando ¶¶ 73-75 (Maqueda, Ministro, concurring); *id.* Considerando ¶¶ 14 (Zaffaroni, Ministro, concurring); *id.* Considerando ¶ 21 (Lorenzetti, Ministro, concurring).

cannot be barriers to investigation and punishment of those responsible.<sup>248</sup> According to the ministers, the *Barrios Altos* decision has broad reach: *Barrios Altos* applies not only to self-amnesties, but also to amnesties passed by successor governments.<sup>249</sup> Some of the ministers reached this conclusion by reasoning that the fundamental problem with an amnesty is not its source but its material effects on human rights.<sup>250</sup> Interpreting international law on the basis of *Barrios Altos* and other international materials, the majority of the ministers decided that such law establishes substantial limitations on the amnesty power of the Argentine legislature, and that the legislature transgressed these limits in enacting the Full Stop and Due Obedience laws.<sup>251</sup>

For reasons similar to those of the Argentine Court, the Uruguayan Supreme Court declared in *Sabalsagaray* that the *Ley de Caducidad* is invalid under international law, rendering it unconstitutional. According to the Court, in Uruguay the Constitution includes all rights contained in ratified human rights treaties because Article 72 incorporates natural law into the Constitution.<sup>252</sup> Article 72 states that “[t]he enumeration of rights, duties, and guarantees made by the Constitution, does not exclude others that are inherent to the human personality or that derive from the republican form of government.”<sup>253</sup> The Court understood this provision as incorporating into the Constitution the rights contained in the human rights treaties ratified by Uruguay, including the International Covenant on Civil and Political Rights, the American Convention, and the Convention Against Torture.<sup>254</sup> In interpreting the *Ley de Caducidad* in light of these rights, the Uruguayan Court considered, among other sources, the Inter-American Court decisions ruling that amnesty laws are void and incompatible with the Convention if they

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<sup>248</sup> *Id.* Considerando ¶ 23 (Petracchi, Presidente, concurring); *id.* Considerando ¶¶ 18-26 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 73 (Maqueda, Ministro, concurring); *id.* Considerando ¶ 14 (Zaffaroni, Ministro, concurring); *id.* Considerando ¶ 21 (Lorenzetti, Ministro, concurring); *id.* Considerando ¶ 14 (Argibay, Ministra, concurring). President Petracchi in fact cites first to the Inter-American Commission, which had determined that the amnesty laws violate both the American Declaration, art. 18 and the American Convention, arts. 1, 8, 25. *Id.* Considerando ¶ 20 (Petracchi, Presidente, concurring).

<sup>249</sup> *Id.* Considerando ¶ 24 (Petracchi, Presidente, concurring); *see id.* Considerando ¶¶ 21-22 (Boggiano, Ministro, concurring); *see id.* Considerando ¶ 73 (Maqueda, Ministro, concurring); *cf. id.* Considerando ¶ 14 (Zaffaroni, Ministro, concurring); *see id.* Considerando ¶ 21 (Lorenzetti, Ministro, concurring); *see id.* Considerando ¶¶ 14-15 (Argibay, Ministra, concurring).

<sup>250</sup> *See, e.g., id.* Considerando ¶ 24 (Petracchi, Presidente, concurring).

<sup>251</sup> *Id.* Considerando ¶ 16 (Petracchi, Presidente, concurring); *see id.* Considerando ¶¶ 33-37 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 82 (Maqueda, Ministro, concurring); *see id.* Considerando ¶ 37 (Zaffaroni, Ministro, concurring); *see id.* Considerando ¶ 22 (Lorenzetti, Ministro, concurring); *id.* Considerando ¶ 15 (Argibay, Ministra, concurring).

<sup>252</sup> Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(8) (Oct. 19, 2009) (Uru.).

<sup>253</sup> CONST. URU., art. 72 (1997) (“[I]a enumeración de derechos, deberes y garantías hecha por la Constitución, no excluye los otros que son inherentes a la personalidad humana o se derivan de la forma republicana de gobierno.”).

<sup>254</sup> Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(8) (Oct. 19, 2009) (Uru.).



impede the investigation and punishment of grave human rights violations.<sup>255</sup> As a result of its evaluation of international and foreign law, the Uruguayan Supreme Court decided that the *Ley de Caducidad* was invalid, in part because it violated human rights norms.<sup>256</sup>

**c) On independent constitutional grounds**

The Peruvian Constitutional Tribunal determined that Peru's amnesty laws were incompatible with the values contained in the Constitution, apart from any conflict with international law. In *Martín Rivas*, the Tribunal found the amnesty laws to be unconstitutional because they were incompatible with the constitutional objective of guaranteeing and protecting fundamental rights and human dignity,<sup>257</sup> a limitation on the exercise of any constitutional power.<sup>258</sup> Article 1 of the Peruvian Constitution establishes that “[t]he defense of the human person and respect for its dignity are the supreme end of society and the State.”<sup>259</sup> The exercise of the legislative power, including the power to grant an amnesty, is limited by the fact that all laws must be compatible with these values.<sup>260</sup> The two amnesty laws were determined to be part of an implementation of a systematic plan to assure impunity for the crimes against humanity committed in Peru. Finding this plan incompatible with the values articulated in Article 1 of the Constitution, the Tribunal ruled that the legislature lacked the constitutional power to grant the amnesties.<sup>261</sup>

The Uruguayan Supreme Court in *Sabalsagaray* also advanced a purely domestic basis for the unconstitutionality of the *Ley de Caducidad*, but unlike the Peruvian Constitutional Tribunal, it decided that the law suffered from various constitutional defects unrelated to the rights of individuals. Although the Court found that the *Ley de Caducidad* constituted neither an amnesty nor a pardon,<sup>262</sup> it provided arguments premised on the incorrect assumption that the law constituted an amnesty as well as arguments based on the correct finding that it was not.

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<sup>255</sup> *Id.* The Uruguayan Court also considered the Inter-American Commission decision that the *Ley de Caducidad* violates human rights, *id.*, and the Argentine Supreme Court decision that the Full Stop and Due Obedience laws are invalid and unconstitutional because they conflict with human rights of constitutional hierarchy, *id.*

<sup>256</sup> *See id.*

<sup>257</sup> Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC, at Fundamentos ¶ 26 (March 2, 2007) (Peru).

<sup>258</sup> *Id.* Fundamentos ¶¶ 20-24.

<sup>259</sup> CONST. PERU, art. 1 (1993) (“[l]a defensa de la persona humana y el respeto de su dignidad son el fin supremo de la sociedad y del Estado.”).

<sup>260</sup> Tribunal Constitucional, *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC, Fundamentos ¶¶ 56, 59 (March 2, 2007) (Peru).

<sup>261</sup> *Id.* Fundamentos ¶¶ 56-58.

<sup>262</sup> Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(2) (Oct. 19, 2009) (Uru.).

Having ruled that the *Ley de Caducidad* does not constitute an amnesty, the Court determined that it impermissibly upset the constitutionally-mandated separation of powers in the Uruguayan state by allowing the executive and legislative branches to infringe upon the judicial function.<sup>263</sup> First, it noted that, in Uruguay, it is the constitutional function of the courts and not of the political branches to determine whether the state has an interest in prosecuting a given crime.<sup>264</sup> By declaring the prosecutorial interest to be expired in Article 1 of the *Ley de Caducidad*, the legislature had infringed upon the role of the courts.<sup>265</sup> Second, Article 233 of the Uruguayan Constitution assigns exclusively to the Supreme Court and other courts the judicial power,<sup>266</sup> which includes the power to apply the law to a concrete case, such as by deciding whether a person is or is not guilty of a crime.<sup>267</sup> In purporting to assign to the executive the function of determining whether or not the state has an interest in prosecuting a given crime, Article 3 of the *Ley de Caducidad* infringed on the judiciary's function and violated the constitutional separation of powers principle.<sup>268</sup>

*Sabalsagaray* also decided that, even if the *Ley de Caducidad* were incorrectly understood to constitute an amnesty, its enactment would have been in violation of the constitutionally-required procedures to grant amnesties.<sup>269</sup> The legislature enacted the *Ley* in the same legislative period in which it had rejected a different amnesty law, thus violating Article 142 of the Constitution.<sup>270</sup> Nor had the *Ley* received an absolute majority of votes in the *Cámara de Representantes*, in violation of Article 85(14) of the Constitution, which requires amnesty laws to receive an absolute majority in both houses of the legislature.<sup>271</sup>

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<sup>263</sup> The Court also reasoned that, by recognizing a source of legal norms apart from the legislature itself, Article 1 of the *Ley de Caducidad* upset the constitutional requirement that the Asamblea General be the only legislative body. *Id. See also* Ley 15,848, art. 1 (Dec. 22, 1986) (Uru.) (“como consecuencia de la lógica de los hechos originados por el acuerdo celebrado entre partidos políticos y las Fuerzas Armadas en agosto de 1984 y a efecto de concluir la transición hacia la plena vigencia del orden constitucional, ha caducado el ejercicio de la pretensión punitiva del Estado respecto de los delitos cometidos hasta el 1º de marzo de 1985 por funcionarios militares y policiales, equiparados y asimilados por móviles políticos o en ocasión del cumplimiento de sus funciones y en ocasión de acciones ordenadas por los mandos que actuaron durante el período de facto.”).

<sup>264</sup> *See* Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(2) (Oct. 19, 2009) (Uru.).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* Considerando § III(5).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* Considerando § III(2).

<sup>270</sup> *Id. See* CONST. URU., art. 142 (1997) (“Cuando un proyecto hubiese sido desechado al principio por la Cámara a quien la otra se lo remita, quedará sin efecto por entonces, y no podrá ser presentado hasta el siguiente período de la Legislatura.”).

<sup>271</sup> Suprema Corte de Justicia, *Sabalsagaray Curutchet, Blanca Stela. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No 15.848*, Sentencia No. 365/2009, Ficha 97-397/2004, at Considerando § III(2) (Oct. 19,

## 2. Understanding amnesty laws to exclude serious human rights violations

Some courts have circumvented amnesty laws based on a determination that the laws did not apply to certain crimes. Courts have made these decisions for a variety of reasons, the most prominent being that some of the state crimes at issue, such as enforced disappearances, were permanent in that they continued past the period of time covered by the amnesty law and thus were not covered by it. Another reason they have found an amnesty law not applicable was that such laws simply cannot be understood as applying to state crimes that amount to serious human rights violations or crimes against humanity.

### *a) On the basis that permanent crimes extended past the period contemplated by the amnesty*

In *Sandoval*, the Chilean Supreme Court found that permanent crimes, such as kidnapping, may be punished despite an apparently applicable amnesty law if they continued in time beyond the temporal scope of the amnesty. Among the issues addressed in the *Sandoval* decision was whether the Chilean Amnesty Law applied to the 1975 kidnapping and disappearance of Miguel Ángel Sandoval Rodríguez by state agents.

According to the Court, an amnesty law applies to a crime only if it ends during the period covered by the amnesty,<sup>272</sup> and a court can apply the amnesty only if the facts necessary for eligibility have been established.<sup>273</sup> This legal doctrine is principally relevant to permanent crimes, the commission of which is extended in time. A permanent crime, such as kidnapping, is one in which the “criminal act creates a criminal state extended in time, thereby sustaining the injury to the affected legal interest; as a result of this criminal state, both the action and the injury persist.”<sup>274</sup> For kidnappings in particular, the Court determined that the crime has not ceased so long as the victim’s whereabouts remain uncertain.<sup>275</sup>

On these grounds, the Court upheld the conviction for the kidnapping of Sandoval because it was not proven that the victim was dead, that his death occurred, or that the crime had otherwise ended during the period covered by the Amnesty Law.<sup>276</sup> Given that the victim had not appeared, there had been no news of him, and his remains had not been discovered at the time

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2009) (Uru.). See CONST. URU., art. 85(14) (1997) (granting the legislature the power to “acordar amnistías en casos extraordinarios, por mayoría absoluta de votos del total de componentes de cada Cámara.”).

<sup>272</sup> See Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶¶ 30, 33(2), (3) (Nov. 17, 2004) (Chile).

<sup>273</sup> See *id.* Considerando ¶¶ 30-31.

<sup>274</sup> See *id.* Considerando ¶ 31 (“la acción que lo consuma creó un estado delictuoso que se prolongó en el tiempo subsistiendo la lesión del bien jurídico afectado; en él han persistido la acción y el resultado.”).

<sup>275</sup> See *id.* Considerando ¶¶ 31-33.

<sup>276</sup> See *id.* Considerando ¶ 33.

the amnesty period ended, the Court decided that there was no proof that the crime had ended.<sup>277</sup> The Amnesty Law was inapplicable because “the kidnapping continued to be perpetrated when the period of time covered by the cause of extinction of responsibility ended.”<sup>278</sup>

Although the Argentine Supreme Court has not formally employed this reasoning, its analysis in prior cases suggests that it would not apply an amnesty law to an enforced disappearance when the whereabouts of the victim has not been established. In *Tarnopolsky*, a case considering civil damages for a dictatorship-era disappearance,<sup>279</sup> the Court recognized that illegal deprivation of liberty (in this case, effectively an enforced disappearance) is a permanent crime that does not cease until the whereabouts of the victim are established.<sup>280</sup> It justified this stance on the grounds that the lack of knowledge of the whereabouts of the victim impedes knowledge of the magnitude of crime and of its prescription period.<sup>281</sup>

At the same time, the Argentine Supreme Court has recognized that, for the dictatorship-era crimes—like the disappearing of children—that continued well after the return to civilian government, courts could apply penal provisions enacted after the crime began.<sup>282</sup> The Court in *Jofré*, for example, ruled that the penalty applicable to a particular crime is one that is authorized by the penal code in effect at the time of the completion of the crime, even if the law imposing the penalty takes effect while the crime is still ongoing.<sup>283</sup> A likely consequence of *Tarnopolsky*

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.* (“el secuestro continuaba perpetrándose una vez que expiró el periodo de tiempo cubierto por esta causal de extinción de responsabilidad criminal”). The Court has used the permanent crimes doctrine to uphold prosecutions in several other cases. See, e.g., Corte Suprema de Justicia, Sala Segunda, *Arón Svigilsky*, Rol No. 3,215-05, at Vistos ¶ 1 (May 30, 2006) (Chile) (affirming the trial court’s conviction on the ground that “el tribunal no ha podido establecer . . . si tal delito [de secuestro] cesó de cometerse es decir, si la víctima murió o recuperó su libertad en algún momento posterior” and “la investigación logró probar la iniciación del secuestro pero . . . no le ha sido posible acreditar su finalización”).

<sup>279</sup> Corte Suprema de Justicia de la Nación, *Tarnopolsky, Daniel c/ Estado Nacional y otros s/ proceso de conocimiento*, T. 108. XXXII./T. 71. XXXII., at Considerando ¶ 1 (Aug. 31, 1999) (Arg.).

<sup>280</sup> See *id.* Considerando ¶ 10.

<sup>281</sup> *Id.* Considerando ¶ 12 (“En efecto, dado que la privación de la libertad fue seguida por la desaparición de los familiares del actor, quien no tuvo conocimiento o noticia sobre su cautiverio o fallecimiento, esta situación obstaba a la comprensión por el damnificado de la magnitud del daño, y por ende, a la posibilidad de computar el plazo de la prescripción liberatoria del deudor.”).

<sup>282</sup> See Corte Suprema de Justicia de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at Considerando (Aug. 24, 2004) (Arg.) (incorporating §§ IV(2), IV(3) of Procuración General de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at § IV(3) (May 23, 2002) (Arg.)).

<sup>283</sup> See *id.* (incorporating §§ IV(2), IV(3) of Procuración General de la Nación, *Jofré, Teodora s/ denuncia*, J. 46. XXXVII., at § IV(3) (May 23, 2002) (Arg.) (“La doctrina, en esta materia, ha sostenido que ‘si el sujeto persiste en su conducta punible, si sigue adelante con su acción pese a lo que manda la nueva disposición legal, estimamos que deberá aplicársele la ley nueva más severa, que voluntaria y deliberadamente insiste en seguir infringiendo, no pudiendo luego ampararse para mejorar su situación en la circunstancia de que un tramo de la acción delictiva desarrollada la ejecutó bajo una ley más benigna, ya que a pesar de la consecuencia más grave dispuesta por la última norma legal, siguió adelante con su conducta criminal... El autor está en condiciones de adecuar su conducta a las nuevas exigencias normativas... persiste en su acción delictiva pese a conocer la mayor gravedad de ésta,

and *Jofré* is that an amnesty law would not cover a kidnapping where the victim's whereabouts were not established until after the amnesty period, given that amnesty law would not be in effect at the cessation of the crime.

***b) On the basis that the crimes are not subject to amnesty or were not intended to be amnestied***

One of the bases for Argentine Supreme Court Minister Boggiano's decision in *Simón* was that amnesty laws should be interpreted to exclude crimes against humanity. He advanced two reasons to read the Full Stop and Due Obedience laws as excluding crimes against humanity from the scope of the legal protection they purported to grant against prosecution. First, international law clearly establishes that amnesties for serious human rights violations are invalid and Article 75(22) of the Argentine Constitution makes the relevant international treaties domestically applicable.<sup>284</sup> Second, both the Full Stop and Due Obedience laws include provisions that exclude certain serious crimes—such as rape, kidnapping of minors, and extortive appropriation of real property—from the legal protection they purported to grant.<sup>285</sup> Given that international law sharply rejects amnesties for crimes against humanity and that the amnesty laws exclude certain serious crimes, Minister Boggiano found that they should be understood to exclude crimes against humanity as well.<sup>286</sup>

***B. Jurisprudential Principles Concerning Statutes of Limitations and Permanent Crimes***

High courts in Chile, Argentina, Peru, and Uruguay have also generally ceased applying statutes of limitations to serious human rights violations of past authoritarian regimes, as required by international law. In reaching this legal result, courts referenced both international and domestic norms, with several using the concept of a permanent crime.

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pudiendo desistir de su empeño criminal' . . . .") (citing GUILLERMO J. FIERRO, *LA LEY PENAL Y EL DERECHO TRANSITORIO* 222 (1978)); *see also* Corte Suprema de Justicia de la Nación, *Gómez, Francisco s/ denuncia*, G. 523. XXXVII., at Considerando (Aug. 24, 2004) (Arg.) (basing its ruling on the reasoning in *Jofré*). The Supreme Court tacitly confirmed this principle in *Arancibia Clavel*, when it approved of a lower court's application of it. *See* Corte Suprema de Justicia de la Nación, *Arancibia Claval, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶ 4 (Aug. 24, 2004) (Arg.) ("Como fundamento para aplicar el texto actual, tuvo en cuenta que en los delitos permanentes (como la asociación ilícita) la ley aplicable al momento de comisión es la de vigencia al momento del cese de la conducta delictiva . . . .").

<sup>284</sup> *See* Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶¶ 7-22 (June 14, 2004) (Boggiano, Ministro, concurring) (Arg.).

<sup>285</sup> *Id.* Considerando ¶ 33 (Boggiano, Ministro, concurring).

<sup>286</sup> *See id.* Considerando ¶¶ 33-35 (Boggiano, Ministro, concurring).

## 1. Finding that domestic crimes also constituting crimes against humanity under international law are not subject to statutes of limitations

When crimes against humanity were not domestically codified at the time of commission of crimes of authoritarian regimes, prosecutions for those crimes typically have been brought under existing domestic criminal law (e.g. kidnapping, homicide, etc.). Faced with domestic common crimes that also constituted crimes against humanity, high courts in the region have applied international law, specifically, the international ban on the applicability of statutes of limitations to crimes against humanity. Argentine scholar Pablo Parenti used the term “double classification” to describe the effective judicial recognition of such crimes as both (1) common domestic offenses that are prosecutable domestically and (2) crimes against humanity under international law that cannot be time-barred.<sup>287</sup> Through this type of reasoning, high courts in the region have employed *jus cogens* norms, customary international law, and treaty law to find statutes of limitations inapplicable to crimes against humanity prosecuted as regular domestic offenses. Furthermore, courts have determined that the rendering of statutes of limitations inapplicable in such instances does not violate the principle of legality.<sup>288</sup>

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<sup>287</sup> See, e.g., Pablo F. Parenti, *Argentina*, in JURISPRUDENCIA LATINOAMERICANA SOBRE DERECHO PENAL INTERNACIONAL 21, 24 (Kai Ambos, Ezequiel Malarino, & Gisela Elsner eds., 2008) (“El procedimiento de aplicación de la costumbre por los tribunales argentinos puede describirse de modo general como un procedimiento de *doble subsunción* de los hechos. En efecto, las conductas que dan base a la imputación se subsumen, por un lado, en uno o más tipos penales de la legislación argentina y, por otro, se califican de acuerdo con la tipología propia del DPI [Derecho Penal Internacional] —en particular, los crímenes contra la humanidad—, subsunción de la que se deriva la aplicación al caso de la regla de la imprescriptibilidad. Esta doble subsunción de los hechos no necesariamente aparece de modo claro como una *doble subsunción típica*.”).

<sup>288</sup> This finding is crucial because, under the principle of legality established in Article 18 of the Argentine Constitution, retroactive changes to statutory limitations are prohibited. Pablo F. Parenti, *Argentina*, in JURISPRUDENCIA LATINOAMERICANA SOBRE DERECHO PENAL INTERNACIONAL 21, 30-31 (Kai Ambos, Ezequiel Malarino, and Gisela Elsner eds., 2008). The principle of legality, clearly established as a principle element of criminal justice in domestic and international law, incorporates the non-retroactivity guarantees of *nullum crimen, nulla poena sine praevia lege poenali* (no crime, no punishment without prior criminal law).

The International Covenant on Civil and Political Rights codifies these principles as rights under Article 15(1), Dec. 16, 1966, 999 U.N.T.S. 171, which states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 15(2) establishes that this right “shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” International Covenant on Civil and Political Rights art. 15(2), Dec. 16, 1966, 999 U.N.T.S. 171. As explained by the former U.N. Special Rapporteur on Torture, Manfred Nowak, Article 15(2) concerns the retroactivity of criminal law “when the act or omission in question was criminal under customary international law at the time it was committed. This means that war crimes, crimes against peace and humanity, and similar violations of international law, such as slavery and torture, may be punished by States parties to the Covenant by means of retroactive domestic criminal laws.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND

**a) On the basis of customary and *jus cogens* norms of international law**

Courts have found that customary international law prohibits the application of statutes of limitations to crimes against humanity.<sup>289</sup> They have concluded that common crimes that also constitute crimes against humanity under international law cannot be domestically time-barred because the customary or *jus cogens* prohibition on crimes against humanity entails the non-applicability of statutes of limitations and trumps domestic law.<sup>290</sup>

In *Arancibia Clavel*, a majority of the Argentine Supreme Court found that the association to commit crimes against humanity is also a crime against humanity according to the standards of the Rome Statute of the International Criminal Court and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>291</sup> Penal law expert Minister Zaffaroni, along with Ministers Highton, Boggiano, and Maqueda, found that customary or *jus cogens* norms of international law in force at the time of the offense (1974-1978) prohibited the application of statutory limitations to crimes against humanity, eliminating any problem of retroactivity with respect to the prohibition.<sup>292</sup> With President Petracchi's vote that the treaty prohibition applies retroactively, the Court determined that the

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POLITICAL RIGHTS: CCPR COMMENTARY 368 (2nd rev. ed. 2005). The principle of legality is also codified in the American Convention on Human Rights as the freedom from ex post facto laws. American Convention on Human Rights art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>289</sup> See, e.g., Karinna Fernández Neira, *Breve análisis de la jurisprudencia chilena en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8(1) ESTUDIOS CONSTITUCIONALES 467, 479 (2010) (citing Corte Suprema de Justicia, Sala Segunda, *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04, at Considerando ¶ 28 (Dec. 13, 2006) (Chile)); Corte Suprema de Justicia de la Nación, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII, at Considerando ¶ 28, 38 (Aug. 24, 2004) (Arg.) (Zaffaroni & Highton de Nolasco, Ministros, concurring).

<sup>290</sup> See Pablo F. Parenti, Argentina, in JURISPRUDENCIA LATINOAMERICANA SOBRE DERECHO PENAL INTERNACIONAL, 26 (Kai Ambos, Ezequiel Malarino, & Gisela Elsner eds., 2008); Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII, at Considerando ¶ 40 (June 14, 2004) (Boggiano, Ministro, concurring) (Arg.) (“esta Corte juzgó que la calificación de delitos de lesa humanidad está sujeta de los principios del ius cogens del derecho internacional y que no hay prescripción para los delitos de esa laya”).

<sup>291</sup> Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶¶ 11-14 (Aug. 24, 2004) (Zaffaroni & Highton de Nolasco, Ministros, concurring) (Arg.); *id.* Considerando ¶¶ 12-16 (Petracchi, Presidente, concurring); *id.* Considerando ¶¶ 20-21 (Boggiano, Ministro, concurring); *id.* Considerando ¶¶ 47-56 (Maqueda, Ministro, concurring). See also Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 16 (2011).

<sup>292</sup> Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶ 28-33 (Aug. 24, 2004) (Zaffaroni & Highton de Nolasco, Ministros, concurring) (Arg.) (“los hechos por los cuales se a Arancibia Clavel, ya eran imprescriptibles para el internacional al momento de cometerse, con lo cual no condenó derecho se da una aplicación retroactiva de la convención, sino que ésta ya era la regla por costumbre internacional vigente desde la década del '60, a la cual adhería el Estado argentino”); *id.* Considerando ¶¶ 29, 39-40 (Boggiano, Ministro, concurring); see *id.* Considerando ¶¶ 52, 69-71, 77 (Maqueda, Ministro, concurring).

statutory limitations period in Argentina’s Penal Code is displaced by international law and thereby rendered inapplicable.<sup>293</sup>

Chile’s Supreme Court also found that customary international law prohibits the application of statutory limitations to crimes against humanity, referencing the Statutory Limitations Convention, even though Chile has not ratified that treaty. In *Vásquez-Superby*, the Chilean Supreme Court found that even though the Convention was not in force in Chile, the Convention’s rule applied—without violating the principle of legality<sup>294</sup>—because it had enunciated a norm that “was already in effect at that time [of the crimes] as customary international law.”<sup>295</sup> In its “*sentencia de reemplazo*,” the Court found that the unwritten customary international law prohibiting statutory limitations could be applied to dictatorship-era homicides because “in international criminal law, the principle of non-retroactivity cannot be understood in a strictly formal way . . . .”<sup>296</sup>

***b) On the basis of treaties ratified after the crimes began***

Courts have applied international treaty obligations prohibiting the application of statutes of limitations to crimes against humanity even when those treaties were ratified after the crimes at issue took place. Some judges have done so on the basis that the treaties codified previously existing obligations from customary or *jus cogens* norms of international law, while others have done so on the basis that the treaties themselves require retroactive application.

The Argentine Supreme Court has resolved such cases on the basis that a treaty may simply codified an international law prohibition. In the primary reasoning for the Argentine Supreme Court’s *Arancibia Clavel* judgment, penal law expert Minister Zaffaroni and three other

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<sup>293</sup> *Id.* Considerando ¶ 34, 38 (Zaffaroni & Highton de Nolasco, Ministros, concurring); *id.* Considerando ¶ 24 (Petracchi, Presidente, concurring); *id.* Considerando ¶¶ 39-40 (Boggiano, Ministro, concurring); *id.* Considerando ¶ 77 (Maqueda, Ministro, concurring). See also Fabián Raimondo, *Overcoming Domestic Legal Impediments to the Investigation and Prosecution of Human Rights Violations: The Case of Argentina*, 18(2) HUMAN RIGHTS BRIEF 15, 16-17 (2011).

<sup>294</sup> See Corte Suprema de Justicia, Sala Segunda, *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04, at Considerando ¶ 25 (Dec. 13, 2006) (Chile) (“la calificación de homicidio cometido . . . como un crimen de lesa humanidad . . . no se opone al principio de legalidad penal, porque las conductas imputadas ya eran delitos en el derecho nacional –homicidio—y en el derecho internacional”).

<sup>295</sup> *Id.* Considerando ¶ 16 (“[L]a “universalidad” del principio de imprescriptibilidad, predicada en la Preámbulo de la Convención de 1968, es demostrativa del carácter puramente declarativo que el instrumento internacional asigna a esa institución . . . . En otras palabras, la Convención no se limitó a enunciar esta regla, sino que a afirmarla, mediante su positivación, ya que ella operaba ya a la fecha como derecho consuetudinario internacional.”). See also José Luís Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALICEN 95, 108 (2007).

<sup>296</sup> Corte Suprema de Justicia, Sala Segunda, *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04, at Considerando ¶ 7 (Dec. 13, 2006) (Chile) (“. . . en el Derecho internacional penal la irretroactividad no puede ser entendida de un modo estrictamente formal . . . .”). See also José Luís Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALICEN 95, 111 (2007) (citing Corte Suprema de Justicia, Sala Segunda, *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04, at Considerando ¶ 7 (Dec. 13, 2006) (Chile)).



ministers determined that several treaties concerning statutes of limitations ratified after the crimes at issue could be applied.<sup>297</sup> According to Zaffaroni and two others, the application of the principles did not violate the principle of non-retroactivity because a customary international law norm prohibiting the application of statutory limitations was already in place during the military junta.<sup>298</sup> Although Argentina ratified the relevant treaties following the end of the junta, including the Statutory Limitations Convention in 2003, and the American Convention on Human Rights in 1984, on the issue of statutes of limitations, the treaties simply codified either customary or *jus cogens* norms of international law.<sup>299</sup> In *Simón*, Minister Zaffaroni repeated this line of thought in his concurrence, noting that the Statutory Limitations Convention codified a pre-existing *jus cogens* norm against the commission of crimes against humanity that prohibited the application of statutory limitations to crimes against humanity.<sup>300</sup>

Other ministers of the Argentine Supreme Court have found that international treaties require the retroactive application of the ban on statutes of limitations for crimes against humanity. Court President Petracchi in *Arancibia Clavel* took the view that the Statutory Limitations Convention prohibited the application of statutes of limitations to the crimes at issue, even though they took place prior to the Convention's ratification.<sup>301</sup> That is, he found that the Statutory Limitations Convention requires the retroactive application of its prohibition. While Minister Boggiano determined that the ban had existed as a matter of international customary law at the time of the crime, he agreed with President Petracchi that the Statutory Limitations Convention retroactively prohibits the application of statutes of limitations.<sup>302</sup> In the Court's *Simon* decision, President Petracchi repeated this line of reasoning, joined by Minister Argibay

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<sup>297</sup> Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶¶ 28-33 (Aug. 24, 2004) (Zaffaroni & Highton de Nolasco, Ministros, concurring) (Arg.); *id.* Considerando ¶¶ 29-30, 39-40 (Boggiano, Ministro, concurring); *see id.* Considerando ¶¶ 52, 69-71, 77 (Maqueda, Ministro, concurring).

<sup>298</sup> *Id.* Considerando ¶¶ 28-33 (Zaffaroni & Highton de Nolasco, Ministros, concurring) (“[N]o se fuerza la prohibición de irretroactividad de la ley penal, sino que se reafirma un principio instalado por la costumbre internacional, que ya tenía vigencia al tiempo de comisión de los hechos.”); *id.* Considerando ¶¶ 29, 39-40 (Boggiano, Ministro, concurring). *See also* Pablo F. Parenti, *Argentina*, in JURISPRUDENCIA LATINOAMERICANA SOBRE DERECHO PENAL INTERNACIONAL 21, 43 (Kai Ambos, Ezequiel Malarino & Gisela Elsner eds., 2008) (“la costumbre internacional aparece mencionada para negar que la Convención sea una norma *materialmente* retroactiva”).

<sup>299</sup> Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶ 28-33 (Aug. 24, 2004) (Zaffaroni & Highton de Nolasco, Ministros, concurring) (Arg.); *id.* Considerando ¶¶ 29, 39-40 (Boggiano, Ministro, concurring).

<sup>300</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶ 27-28 (June 14, 2004) (Zaffaroni, Ministro, concurring) (Arg.) (“Esta Convención . . . no hace imprescriptibles crímenes que antes eran prescriptibles, sino que se limita a codificar como tratado lo que antes era *ius cogens* en función del derecho internacional público consuetudinario”).

<sup>301</sup> *See* Corte Suprema de Justicia, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A. 533. XXXVIII., at Considerando ¶¶ 22-24 (Petracchi, Presidente, concurring) (Aug. 24, 2004) (Arg.).

<sup>302</sup> *See id.* ¶ 37 (Boggiano, Ministro, concurring).

in her concurring opinion. There, President Petracchi emphasized that the retroactive prohibition on the application of statutes of limitations arises from the Inter-American Human Rights system.<sup>303</sup> Minister Argibay, a criminal law specialist, joined him in acknowledging that treaties impose a retroactive prohibition, but emphasized that the Statutory Limitations Convention in particular “was passed with the manifest intent to have retroactive effect.”<sup>304</sup>

For its part, in finding statutory limitations inapplicable to crimes against humanity, the Chilean Supreme Court in its *sentencia de reemplazo* in *Vásquez-Superby* confirmed that “the prohibition on retroactivity, found in classic penal codes like ours, has progressively lost validity with the growing codification of international crimes, as has happened, in other words, with the international crimes declared to be unreachable by statutory limitations under Article 29 of the International Criminal Court.”<sup>305</sup>

## 2. Applying the concept of a permanent crime

Even when applying statutes of limitations, it is generally understood in Latin America that the statute of limitations for a permanent crime, like an enforced disappearance prosecuted as kidnapping, begins to run at the termination of the commission of the crime, not at the commencement of it.<sup>306</sup> Because of this legal concept, high courts in Latin America have found that the statutes of limitations periods have not yet expired for many crimes committed during

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<sup>303</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶¶ 30-32 (June 14, 2004) (Petracchi, Presidente, concurring) (Arg.).

<sup>304</sup> Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶¶ 16-17 (June 14, 2004) (Argibay, Ministro, concurring) (Arg.) (“Tampoco puede omitirse la aplicación de la Convención sobre Imprescriptibilidad cuando ella es retroactiva, si se tiene en cuenta que fue dictada con la manifiesta intención de tener efecto retroactivo”). See also Pablo F. Parenti, *Argentina*, in JURISPRUDENCIA LATINOAMERICANA SOBRE DERECHO PENAL INTERNACIONAL 21, 45 (Kai Ambos, Ezequiel Malarino & Gisela Elsner eds., 2008) (citing Corte Suprema de Justicia de la Nación, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, S. 1767. XXXVIII., at Considerando ¶ 17 (June 14, 2004) (Argibay, Ministro, concurring) (Arg.)).

<sup>305</sup> Corte Suprema de Justicia, Sala Segunda, *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04, at Considerando ¶ 7 (Dec. 13, 2006) (Chile) (“. . . la prohibición de la retroactividad, predicada en los Códigos penales clásicos, como el nuestro, ha perdido progresivamente vigencia con la creciente codificación de tipos de Derecho penal internacional, como sucede, verbigracia, con los crímenes internacionales declarados imprescriptibles en el artículo 29 del Estatuto de la Corte penal internacional.”). See also José Luíz Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALICEN 95, 111 (2007).

<sup>306</sup> CÓD. PÉN., art. 63 (Arg.) (“La prescripción de la acción empezará a correr desde la medianoche del día en que se cometió el delito o, si éste fuese continuo, en que cesó de cometerse.”); CÓD. PEN., art. 95 (Chile) (“El término de la prescripción empieza a correr desde el día en que se hubiere cometido el delito.”); COD. PEN. art 119 (Uru.) (“El término empieza a correr . . . para los delitos permanentes desde el día en que cesa la ejecución.”). Commentators on Chilean law have interpreted its penal code to require that statutory limitations only begin to run at the end of a crime’s period of execution. José Luíz Guzmán Dalbora, *El tratamiento de los crímenes internacionales en la jurisprudencia chilena: Una cabeza de jano*, 18(3) LATEINAMERIKA ANALICEN 95, 118 (2007) (citing José Luíz Guzmán Dalbora, *De la extinción de la responsabilidad penal*, in TEXTO Y COMENTARIO DEL CÓDIGO PENAL CHILENO, TOMO I 433, 470-71 (Sergio Ortiz Quiroga, Luis Matus Acuña & Jean Pierre eds., 2002)).

authoritarian regimes. Courts have also invoked the permanent crime concept in applying a change in criminal law to the detriment of perpetrators of permanent crimes whose offenses commenced prior to the change and were ongoing when the change occurred.

***a) Allowing prosecutions to proceed on the basis that statutes of limitations for the offenses had not expired***

Latin American high courts have found that permanent crimes like kidnapping only cease when there is knowledge or evidence about the whereabouts or fate of the victim. They have decided that kidnapping-type permanent crimes do not end without a determination of the victim's ultimate fate or whereabouts, and therefore the statutory limitations period do not begin to run.<sup>307</sup>

The *Sandoval* Court in Chile found that for crimes like kidnapping, the statute of limitations could only begin to run from the moment that the victim regained her liberty or the moment that there was information about the location of the victim's remains and manner of death.<sup>308</sup> More recently, in the 2010 case of *Montecinos Alfaro*, the Supreme Court found that because Chilean doctrine classified kidnapping as a permanent crime,<sup>309</sup> the court was obliged to reject the defense's claim that the prosecution was time-barred.<sup>310</sup> It found that the crime could end through the liberation of the victim, the consent of the victim, or the death of the victim.<sup>311</sup>

For its part, the Argentine Supreme Court found in *Tarnopolsky* that the lack of knowledge as to the whereabouts of a victim of illegal deprivation of liberty made it impossible to know the statutory limitations period with certainty, stopping the statute of limitations from running.<sup>312</sup> The crime, the Court reasoned, did not end on the date that the victims were legally found to be dead. Rather, the Court found that the crime of deprivation of liberty does not cease

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<sup>307</sup> See, e.g., Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶¶ 36-37 (Nov. 17, 2004) (Chile); Corte Suprema de Justicia, Sala Segunda, *Montecinos Alfaro*, Rol No. 5,719-10, at Considerando ¶ 9 (Oct. 27, 2010) (Chile); Corte Suprema de Justicia de la Nación, *Tarnopolsky, Daniel c/ Estado Nacional y otros s/ proceso de conocimiento*, T. 108. XXXII./T. 71. XXXII., at Considerando ¶ 10 (Aug. 31, 1999) (Arg.).

<sup>308</sup> See Corte Suprema de Justicia, Sala Segunda, *Sandoval*, Rol No. 517-04, at Considerando ¶ 39 (Nov. 17, 2004) (Chile).

<sup>309</sup> Corte Suprema de Justicia, Sala Segunda, *Montecinos Alfaro*, Rol No. 5,719-10, at Considerando ¶ 5 (Oct. 27, 2010) (Chile) (“el delito de secuestro . . . por sus características, la doctrina lo ha calificado como permanente.”).

<sup>310</sup> See Corte Suprema de Justicia, Sala Segunda, *Montecinos Alfaro*, Rol No. 5,719-10, at Considerando ¶ 5 (Oct. 27, 2010) (Chile) (“el delito de suceso se sigue cometiendo hasta la fecha, por lo que se le dio la calificación de delito permanente, circunstancia que llevó a [los] sentenciadores a rechazar las alegaciones de la defensa . . . a declarar prescrita la acción”).

<sup>311</sup> *Id.* Considerando ¶ 9.

<sup>312</sup> Corte Suprema de Justicia de la Nación, *Tarnopolsky, Daniel c/ Estado Nacional y otros s/ proceso de conocimiento*, T. 108. XXXII./T. 71. XXXII., at Considerando ¶ 12 (Aug. 31, 1999) (Arg.) (“En efecto, dado que la privación de la libertad fue seguida por la desaparición de los familiares del actor, quien no tuvo conocimiento o noticia sobre su cautiverio o fallecimiento, esta situación obstaba a la comprensión por el damnificado de la magnitud del daño, y por ende, a la posibilidad de computar el plazo de la prescripción liberatoria del deudor.”).

until the whereabouts of the victim are established.<sup>313</sup> It justified this stance on the grounds that the lack of knowledge of the whereabouts of the victim impedes knowledge of the magnitude of the crime. The Court rejected the argument that making the end of a crime contingent on knowledge of the victim's whereabouts gives improper control over the crime's cessation to the party opposing the perpetrator in litigation.<sup>314</sup>

***b) Applying changes in the criminal law without violating the principle of legality on the basis that the crime was ongoing***

The Constitutional Tribunal in Peru has used the concept of a permanent crime to permit the application of criminal law changes to armed conflict-era crimes without violating the principle of legality. In *Collantes Guerra*, it approved the prosecution of the 1991 detention and disappearance of several community members as an enforced disappearance. The Tribunal found that the prosecution did not violate the defendant's constitutional rights to "jurisdiction predetermined by law," even though the crime of enforced disappearance was domestically codified only after the commencement of the disappearance in 1991.<sup>315</sup> The Tribunal found that a forced disappearance "must be considered a permanent crime if the fate or whereabouts of the victim have not been established."<sup>316</sup> On the basis of "lack of knowledge about the whereabouts of the victim" in the 1991 detention at issue, the Constitutional Tribunal thus upheld the prosecution of the detention as an imputed enforced disappearance.<sup>317</sup> In this way, it determined that "the application to a permanent crime of a criminal norm that had not been passed before the commission of the crime does not violate the guarantee of *lex praevia* derived from the criminal principle of legality, but instead [is valid] while the crime continues to be committed."<sup>318</sup>

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<sup>313</sup> See *id.* Considerando ¶ 10.

<sup>314</sup> See *id.* Considerando ¶ 13 ("[N]o merece ningún reproche que el curso de la prescripción quede librado a la iniciativa de los interesados pues la causa de la obligación es un acto ilícito de ejecución continuada al que los interesados ponen fin a través de una ficción jurídica de efectos civiles relevantes.").

<sup>315</sup> "[E]l recurrente . . . [a]lega que se ha violado lo establecido en el artículo 139, inciso 3, de la Constitución en el sentido de que ninguna persona puede ser desviada de la jurisdicción determinada por la ley, ni sometida a procedimientos distintos de los previamente establecidos, ni juzgada por órganos jurisdiccionales de excepción ni por comisiones especiales creadas al efecto." Tribunal Constitucional, *Collins Collantes Guerra*, Exp. No. 0442-2007-HC/TC, at Antecedentes (March 30, 2007) (Peru). See also *id.* Fundamentos ¶¶ 6-7.

<sup>316</sup> *Id.* Fundamentos ¶ 6 (citing Tribunal Constitucional, *Villegas Namuche*, Exp. No. 2488-2002-HC/TC (March 18, 2004) (Peru)) ("[el delito de desaparición forzada. . . deberá ser considerado como delito permanente mientras no se establezca el destino o paradero de la víctima.").

<sup>317</sup> See *id.* Fundamentos ¶¶ 6-7 ("la permanencia del [delito], consistente en el desconocimiento del paradero de la víctima, persista . . . la detención que dio origen a la desaparición forzada que se imputa al recurrente . . . no se conoce aún el paradero de las víctimas, por lo que el proceso por delito de desaparición forzada no resulta vulneratorio").

<sup>318</sup> *Id.* Fundamentos ¶ 6 (citing Tribunal Constitucional, *Villegas Namuche*, Exp. No. 2488-2002-HC/TC (March 18, 2004) (Peru)) ("[N]o se vulnera la garantía de la *lex praevia* derivada del Principio de Legalidad Penal en caso de que se aplique a un delito permanente una norma penal que no haya entrado en vigencia antes del comienzo de su ejecución, pero que resulta aplicable mientras el mismo sigue ejecutándose.").

### **3. Finding that the statute of limitations for state crimes did not run during authoritarian rule**

The Uruguayan Supreme Court in *Gavazzo Pereira* found that statutory limitations did not run for any state crimes committed during the dictatorship. Instead, the statutes of limitations were effectively tolled during that period and began to run only upon the return to democracy on March 1, 1985.<sup>319</sup> Additionally, the most severe crimes, such as homicide, are subject to a base statutory period of 20 years in Uruguay, potentially extended by one-third based on the dangerousness of the perpetrator.<sup>320</sup>

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<sup>319</sup> Suprema Corte de Justicia, *Gavazzo Pereira, José N. y otro*, Sentencia No. 1501/2011, Ficha 98-247/2006, at Considerando § III (May 6, 2011) (Uru.), available at [http://www.csjn.gov.ar/dbei/iinews/Sentencias/uyamnistia\\_mayo2011.html](http://www.csjn.gov.ar/dbei/iinews/Sentencias/uyamnistia_mayo2011.html); <http://www.diariolospueblos.com/pdf/sent.pdf>.

<sup>320</sup> See *id.* See also Gabriel Adriasola, *El proceso uruguayo de la dictadura a la democracia. Luces y sombras del derecho penal de transición en materia de violación a los derechos humanos ante los organismos internacionales*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI* 313, 327 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011); Pablo Galain Palermo, *The Prosecution of International Crimes in Uruguay*, 10 INT'L CRIM. L. REV. 601, 613 (2010) (noting that the statutes of limitations began to run on March 1, 1985, the date of the return to democratic rule).

## **VI. THE BRAZILIAN CONSTITUTION AND THE JUDGMENT IN *ADPF 153* CAN AND MUST BE INTERPRETED AS CONSISTENT WITH THE INTERNATIONAL OBLIGATION TO INVESTIGATE AND PUNISH AFFIRMED IN *GOMES LUND***

This report has described how Brazil has an obligation under international law to investigate and punish serious human rights violations and how domestic legal questions, such as amnesty laws and statutes of limitations, cannot justify the state's failure to fulfill its obligations in this transitional justice context. While Brazil faces some legal challenges on the road to accountability, such as the 1979 Amnesty Law, these legal issues in no way distinguish the country from its regional counterparts. In the process of reaching accountability, Argentina, Chile, Uruguay, and Peru also had to reckon with amnesty laws, statutory limitations and other domestic challenges. Given the successes across the region in achieving accountability for authoritarian-era crimes, Brazil has become a regional outlier in its failure to investigate and punish and thus satisfy its international obligations. The case studies from across Latin America show how domestic and international law have been interpreted to be consistent with one another and with the obligation to ensure full accountability for crimes of past authoritarian regimes. The same is both possible and necessary in Brazil.

The prior sections detail international and domestic legal principles that can inform how questions of amnesty laws and statutory limitations surrounding the issue of accountability for dictatorship crimes may be resolved in Brazil. Fundamentally, insofar as it may hinder accountability for dictatorship crimes, the 1979 Amnesty Law is invalid and without effect as a matter of international law and must not be allowed to hinder domestic investigations and prosecutions.<sup>321</sup> Apart from its invalidity under international law, the Amnesty Law, on its own terms, also does not apply to many of the dictatorship's crimes, including permanent crimes such as enforced disappearances that continued after the amnesty period.<sup>322</sup>

Moreover, statutes of limitations cannot present legal obstacles to accountability for dictatorship crimes in Brazil. International law does not permit the application of statutory limitations to the crimes against humanity committed during the Brazilian dictatorship, and comparative jurisprudence shows how domestic courts can respect international law without violating the principle of legality.<sup>323</sup> Furthermore, the statutory limitations periods for many of the serious human rights violations at issue have not even begun to run with respect to certain permanent crimes of the dictatorship. Finally, as the courts found in Uruguay, statutory

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<sup>321</sup> See *supra* § III(B).

<sup>322</sup> See *supra* § IV(A).

<sup>323</sup> See *supra* §§ III(C), V(B). See also Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001); Manfred Nowak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 268 (2nd ed., 2005).

limitations for all dictatorship crimes might be found to have tolled until prosecution were at least effectively possible: at the very least, statutory limitations might not be found to have run during the dictatorship, when the justice system lacked the independence to investigate and punish.<sup>324</sup>

However, though international and comparative contexts provide clear guidance for achieving legal accountability in Brazil, the Brazilian Supreme Federal Tribunal's April 2010 *ADPF 153* decision—which upheld the Amnesty Law's application to state agents despite a challenge based on a limited set of constitutional provisions—might at first glance appear to pose a barrier to accountability. But the existence of *ADPF 153* does not make Brazil unique in Latin America: courts in Chile, Argentina, Peru, and Uruguay applied amnesties for years before reversing course. In Peru, the Constitutional Tribunal had previously dismissed a challenge to the amnesty laws but later nullified them in light of a ruling by the Inter-American Court.<sup>325</sup> In Uruguay, the Supreme Court upheld the constitutionality of the *Ley de Caducidad* in a 1988 decision, but found the law to be unconstitutional in the 2009 *Sabalsagaray* decision.<sup>326</sup>

The Supreme Federal Tribunal has the opportunity to match the example of its peer courts and clarify its *ADPF 153* ruling in light of the later judgment of the Inter-American Court in *Gomes Lund*. The Court's pending analysis of the *embargos de declaração* (requests for interpretations and clarifications of obscurity, contradiction, or omission of key points in the judgment) filed by the Federal Council of the Brazilian Bar Association in the case, means that the *ADPF 153* judgment is not yet final.<sup>327</sup> However, even if the Tribunal decides not to revise its position, *ADPF 153* does not foreclose prosecuting dictatorship crimes in Brazil. The *ADPF 153* decision can be harmonized with *Gomes Lund* in a way that respects both rulings and also allows full accountability for dictatorship crimes in Brazil, as described below.

As this final section discusses, the *ADPF 153* decision can be respected yet still interpreted and applied by the judiciary and by other authorities of the Brazilian state in a way that does not inhibit full accountability for dictatorship crimes in Brazil. The next part will clarify what *ADPF 153* does and does not say while the following part will explain how it leaves legal space to prosecute dictatorship-era crimes.

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<sup>324</sup> See *supra* §§ IV(E), V(B)(2), V(B)(3).

<sup>325</sup> See *supra* § IV(D).

<sup>326</sup> See *supra* § IV(E).

<sup>327</sup> The Brazilian Bar Association's Federal Council (*Conselho Federal da Ordem dos Advogados do Brasil*) filed *embargos de declaração* seeking clarification of *ADPF 153*, and asking the Supreme Federal Tribunal to address the *Gomes Lund* decision. The judgment on the *embargos* is still pending, and the Council has stated that “o presente processo não se encerrou e os votos já proferidos não compõem um julgamento definitivo . . . .”

### A. *The Supreme Federal Tribunal's Decision in ADPF 153*

In April 2010, the Tribunal ruled against a Brazilian Bar Association Federal Council petition that challenged the Amnesty Law's applicability to state agents who committed certain common crimes during the dictatorship (the ADPF 153 decision). Specifically, the Tribunal's Rapporteur, with whom a majority of ministers concurred,<sup>328</sup> decided that the challenged interpretation of the Amnesty Law did not violate fundamental constitutional precepts of (1) equality before the law in matters of security, (2) the right to receive information from public bodies, (3) republicanism and democracy, and (4) human dignity.<sup>329</sup>

Notably, in analyzing the Rapporteur's majority opinion, it is evident that the Supreme Federal Tribunal did *not* decide at least three key issues in *ADPF 153*:

- First, the *ADPF 153* decision did *not* decide whether the Amnesty Law applies to permanent crimes that commenced during the time period covered by the Amnesty Law but continued beyond that period's end date of August 15, 1979.<sup>330</sup>
- Second, the *ADPF 153* decision did *not* decide whether the Amnesty Law is compatible with other fundamental constitutional precepts, including the "supremacy of human rights" in international relations contained in Article 4(II) and the prohibition on torture in Article 5(III).<sup>331</sup>
- Third, the *ADPF 153* decision did *not* decide whether the Amnesty Law is compatible with all applicable international law, including the American Convention (notably, the Tribunal did not yet have the benefit of the Inter-American Court's November 2010 *Gomes Lund* decision for this purpose).

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<sup>328</sup> Our analysis here focuses on the Rapporteur's opinion, in light of the fact that the formal decision adopted by the Supreme Federal Tribunal in *ADPF 153* found against the petition of the Brazilian Bar Association's Federal Council "in the terms of the Rapporteur's vote." See Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental 153*, at ¶¶ 15-24 (April 29, 2010) (Grau, Ministro, Relator) (Brazil) ("Decisão: Prosseguindo no julgamento, o Tribunal, por maioria, julgou improcedente a argüição, nos termos do voto do Relator, vencidos os Senhores Ministros Ricardo Lewandowski, que lhe dava parcial provimento nos termos de seu voto, e Ayres Britto, que a julgava parcialmente procedente para excluir da anistia os crimes previstos no artigo 5º, inciso XLIII, da Constituição. Votou o Presidente, Ministro Cezar Peluso. Ausentes o Senhor Ministro Joaquim Barbosa, licenciado, e o Senhor Ministro Dias Toffoli, impedido na ADPF nº 153-DF. Plenário, 29.04.2010.").

<sup>329</sup> See *id.*

<sup>330</sup> See *id.* ¶ 7 (Grau, Ministro, Relator) ("Ora, como a anistia foi concedida a todos que cometeram determinados crimes 'no período compreendido entre 02 de setembro de 1961 e 15 de agosto de 1979,' não alcançou crimes praticados após 15 de agosto de 1979 [= praticados entre essa data e 1985].") (citing Lei 6,683, art. 1 (Aug. 28, 1979)).

<sup>331</sup> CONST. BRAZIL, art. 4(II) (1988) ("[a] República Federativa do Brasil rege-se nas suas relações internacionais pelos seguintes princípios: . . . prevalência dos direitos humanos"); *id.* art. 5(III) ("ninguém será submetido a torturanem a tratamento desumano ou degradante").



## ***B. Legal Avenues Open to Prosecutions for Dictatorship Crimes in Brazil***

In light of what the Supreme Federal Tribunal actually did and did not decide in *ADPF 153*, and given the limited scope of its ruling, there is ample room for investigation and prosecution of the serious human rights violations committed by Brazilian dictatorship agents to proceed on the basis of, *inter alia*, the following rationales:

### **1. Permanent crimes are prosecutable**

Following the concept of a permanent crime and its application to transitional justice in Latin America, a Brazilian court should not apply an amnesty law to a permanent crime whose commission persisted past the amnesty period. Permanent crimes that continue past the end date contemplated by the Amnesty Law (August 15, 1979) are clearly not covered by that temporally-limited law. Prosecutions of these crimes are also not generally barred by statute of limitations, because it is clearly established in the Brazilian criminal code that statutes of limitations only begin to run when the crime has ended.<sup>332</sup> The Supreme Federal Tribunal has already applied this interpretation in transitional justice contexts when allowing for the extradition of accused perpetrators of enforced disappearances.<sup>333</sup> Furthermore, the Tribunal has already established that if a harsher law is enacted after the commencement of a permanent crime but before its

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<sup>332</sup> COD. PEN., art. 111(III) (Brazil) (“[a] prescrição, antes de transitar em julgado a sentença final, começa a correr . . . nos crimes permanentes, do dia em que cessou a permanência”). In this sense, Brazil shares the legal foundations that made the permanent crimes approach to dictatorship-era human rights violations possible in Chile and in Argentina. For example, like the Argentine Penal Code, COD. PEN., art. 63 (Arg.), the Brazilian Penal Code specifically makes reference to permanent crimes and establishes that statutes of limitations only begin to run when the crime has ended.

<sup>333</sup> According to Minister Lewandowski, with respect to an enforced disappearances prosecuted as a kidnapping under domestic law, “the statute of limitations will only begin to run” when the corpse is found. Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental 153*, at ¶¶ 104-05 (April 29, 2010) (Lewandowski, Ministro, dissenting) (Brazil) (“que o crime de sequestro possivelmente seguido de homicídios, tem caráter permanente. Ou seja, o resultado delituoso se protraí-se no tempo, enquanto a vítima estiver privada de sua liberdade ou seus restos mortais não forem encontrados. Isso quer dizer que os respectivos prazos prescricionais somente começam a fluir a partir desses marcos temporais.”). *See also* Supremo Tribunal Federal, *Extradição 974-0 República Argentina*, at 45 (Sept. 11, 2008) (Peluso, Ministro, concurring) (Brazil) (“[P]ara que seja admitida a prescrição, seja tanto para efeitos civis, com para efeitos penais, a presunção da morte tem de ser objeto de uma sentença, que, entre outras coisas deve fixar a data provável do falecimento, porque sem tal sentença permanece sempre a dúvida.”); Brief for Procuradoria Geral da República at ¶¶ 19-20, Supremo Tribunal Federal, *Extradição 974-0 República Argentina* (Sept. 11, 2008) (Brazil) (“Em relação ao sequestro não há que se falar em prescrição, pois se trata de crime permanente tanto no Brasil como na Argentina. Nesse caso, o resultado delituoso se protraí no tempo enquanto a vítima estiver privada de sua liberdade e o prazo prescricional só terá início após a interrupção da ação do agente. . . . A despeito do tempo decorrido, não se pode afirmar que estejam mortas porque seus corpos jamais foram encontrados, de modo que ainda subsiste a ação perpetrada pelo extraditando.”).

completion, it may be applied to that crime.<sup>334</sup> Thus, it has already resolved questions regarding the principle of legality that might be faced in prosecuting permanent crimes of the dictatorship.

In the context of Brazil, the permanent crimes approach may permit at least three types of dictatorship crimes to be tried: kidnapping (*seqüestro*), conspiracy (*quadrilha*), and hiding a corpse (*ocultação de cadáver*). These types of crimes will be discussed in turn.

**a) Enforced disappearances (seqüestro)**

Chilean and Argentine court decisions provide a useful model for prosecuting kidnappings committed during the dictatorship. As in Chile and Argentina, the Brazilian penal code at the time codified kidnapping,<sup>335</sup> considered to be a permanent crime.<sup>336</sup>

The Chilean and Argentine Supreme Courts have considered such kidnappings to end only when the victim's whereabouts become known.<sup>337</sup> The Chilean Court reached this conclusion reasoning that, in the absence of this information, the crime could have lasted sufficiently long that it would not be subject to either the amnesty or statutes of limitations bars.<sup>338</sup> The Argentine Court similarly noted that it could not determine the magnitude of the crime or if the statute of limitations had run without knowledge of the victim's whereabouts.<sup>339</sup> The Peruvian Constitutional Tribunal also found that an enforced disappearance must be considered an ongoing permanent crime until the whereabouts of a victim are established.<sup>340</sup>

The Brazilian Supreme Federal Tribunal too has already acknowledged that kidnapping is a permanent crime. In his *ADPF 153* dissenting opinion, Minister Lewandowski referenced his own majority decision in the 2008 case *Extradition 974-0 Argentina*, classifying as a permanent crime a kidnapping that had occurred over thirty years before without any sign of the victims being found. He reiterated, "kidnapping, possibly followed by murder, has a permanent character . . . the criminal effect extends over time, so long as the victim remains deprived of

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<sup>334</sup> Supremo Tribunal Federal, *Lei Penal Mais Grave – Aplicabilidade – Crime Continuado ou Crime Permanente – Vigência e Anterioridade*, Súmula No. 711 (Sept. 29, 2003) (Brazil) ("A lei penal mais grave aplica-se ao crime continuado ou ao crime permanente, se a sua vigência é anterior à cessação da continuidade ou da permanência.").

<sup>335</sup> COD. PEN., art. 148 (Brazil) ("Privar alguém de sua liberdade, mediante seqüestro ou cárcere privado . . ."); *id.* art. 159 ("Seqüestrar pessoa com o fim de obter, para si ou para outrem, qualquer vantagem, como condição ou preço do resgate...").

<sup>336</sup> *See supra* § IV(A). *See also, e.g.*, Cleber Rogério Masson, *Prescrição Penal – Compatibilidade entre o Direito de Punir e a Dignidade da Pessoa Humana*, 4 REVISTA JURIDICA LOGOS, SÃO PAULO 77, 92-93 (2008).

<sup>337</sup> *See* Corte Suprema de Justicia, Segunda Sala, *Sandoval*, Rol No. 517-04, at Considerando ¶¶ 31-33 (Nov. 17, 2004) (Chile).

<sup>338</sup> *See id.* Considerando ¶¶ 31-33, 37.

<sup>339</sup> *See* Corte Suprema de Justicia de la Nación, *Tarnopolsky, Daniel c/ Estado Nacional y otros s/ proceso de conocimiento*, T. 108. XXXII./T. 71. XXXII., at Considerando ¶¶ 10, 11 (Aug. 31, 1999) (Arg.).

<sup>340</sup> Tribunal Constitucional, *Genaro Villegas Namuche*, Exp. No. 2488-2002-HC/TC, at Considerando ¶ 26 (March 18, 2004) (Peru).

liberty or his or her remains are not found. This means that corresponding statutory limitations only begin to run within that temporal framework.”<sup>341</sup>

**b) Conspiracy (quadrilha)**

Brazil criminalizes conspiracy (*quadrilha* or *bando*) in Article 288 of its penal code, which establishes that it is unlawful to form a group of more than three people for the purpose of committing crimes.<sup>342</sup> The crime is understood to be permanent, with the execution persisting so long as a person is part of the criminal group. During the period of military dictatorship, the regime engaged in widespread and systematic attacks directed against the civilian population in Brazil, including serious human rights violations such as murder, enforced disappearances, rape, torture, arbitrary detention, and political persecution.<sup>343</sup> Following the return to civilian rule, officials of the former regime who continued their association to conceal or otherwise ensure impunity for their crimes would be subject to prosecution for the permanent crime of conspiracy (*quadrilha*). Such a crime may be ongoing if, for instance, officials continued to plan and commit offenses related to a cover-up, such as obstruction of justice (*fraude procesual*), perjury (*falso testemunho*), and witness intimidation (*coação no curso do processo*).<sup>344</sup>

**c) Hiding of corpses (ocultação de cadáver)**

The Brazilian penal code in Article 211 criminalizes the hiding of a corpse.<sup>345</sup> This could

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<sup>341</sup> See Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental 153*, at ¶¶ 103-04 (April 29, 2010) (Lewandowski, Ministro, dissenting) (Brazil) (“Recordo, ademais, que esta Suprema Corte decidiu, na Extradicação 974 . . . , que o crime de sequestro possivelmente seguido de homicídios, tem caráter permanente. Ou seja, o resultado delituoso se protraí-se no tempo, enquanto a vítima estiver privada de sua liberdade ou seus restos mortais não forem encontrados. Isso quer dizer que os respectivos prazos prescricionais somente começam a fluir a partir desses marcos temporais.”). See also Supremo Tribunal Federal, *Extradicação 974-0 República Argentina*, at ¶ 21 (Sept. 11, 2008) (Lewandowski, Ministro) (Brazil) (“ . . . embora tenham passado mais de trinta e oito anos do ato imputado ao extraditando, as vítimas até hoje não apareceram, nem tampouco os respectivos corpos, razão pela qual não se pode cogitar, por ora, de homicídio. Esses sequestros podem, em tese, ainda subsistir. Portanto estamos diante de um crime de caráter permanente.”); Supremo Tribunal Federal, *Extradicação 1.150 República Argentina*, at ¶ 6 (May 19, 2011) (Ementa) (Brazil) (“Crime de seqüestro qualificado: de natureza permanente, prazo prescricional começa a fluir a partir da cessação da permanência e não da data do início do seqüestro.”).

<sup>342</sup> COD. PEN., art. 288 (Brazil) (“Associarem-se mais de três pessoas, em quadrilha ou bando, para o fim de cometer crimes . . .”).

<sup>343</sup> See *supra* § II.

<sup>344</sup> COD. PEN., art. 347 (Brazil) (“Fraude procesual . . . Inovar artificialmente, na pendência de processo civil ou administrativo, o estado de lugar, de coisa ou de pessoa, com o fim de induzir a erro o juiz ou o perito: Parágrafo único - Se a inovação se destina a produzir efeito em processo penal, ainda que não iniciado, as penas aplicam-se em dobro.”); *id.* art. 342 (“Falso testemunho ou falsa perícia . . . Fazer afirmação falsa, ou negar ou calar a verdade como testemunha, perito, contador, tradutor ou intérprete em processo judicial, ou administrativo, inquérito policial, ou em juízo arbitral”); *id.* art. 344 (“Coação no curso do processo . . . Usar de violência ou grave ameaça, com o fim de favorecer interesse próprio ou alheio, contra autoridade, parte, ou qualquer outra pessoa que funciona ou é chamada a intervir em processo judicial, policial ou administrativo, ou em juízo arbitral”).

<sup>345</sup> COD. PEN., art. 211 (Brazil) (“Destruição, subtração ou ocultação de cadáver . . . Destruir, subtrair ou ocultar cadáver ou parte dele”).

and should be considered a permanent crime, given the overlap with disappearances: the conduct of hiding and the injury to an interest protected by criminal law persist until the corpse is actually found or revealed.

## **2. Crimes occurring after August 15, 1979 are prosecutable**

Apart from particular permanent crimes that potentially continued long after the end of the dictatorship, other crimes may be prosecutable if not covered by the Amnesty Law. Because the Amnesty Law only covers the period of time from September 2, 1961, until August 15, 1979, any crime committed by state agents after August 15, 1979, is clearly not subject to the Amnesty Law. The Rapporteur in his *ADPF 153* opinion stated that the Amnesty Law is limited to this time period and, “did not reach crimes committed after August 15, 1979.”<sup>346</sup>

## **3. Conventionality review of the Amnesty Law renders all crimes of the Brazilian dictatorship prosecutable**

Finally, when considering the Amnesty Law, the Supreme Federal Tribunal did not address whether the law is invalid on the grounds that it is incompatible with the American Convention as authoritatively interpreted by the Inter-American Court in *Gomes Lund*. The American Convention takes precedence over the Amnesty Law: (1) because it is a superior legal norm within Brazilian domestic law; (2) because it is a norm subsequent to the Amnesty Law, therefore taking precedence; and (3) because international law requires fulfillment of all treaty obligations. As Brazilian legal scholar André de Carvalho Ramos explains, the Brazilian Amnesty Law must survive a test of both constitutionality under the Brazilian Constitution, and conventionality under the American Convention in order to be validly applied.<sup>347</sup> However, the *Gomes Lund* decision made clear that the Amnesty Law fails the conventionality test and thus “lack[s] legal effect.”<sup>348</sup> In other words, it is null.

### ***a) Requirement of conventionality control of the Amnesty Law with respect to the American Convention on Human Rights***

There are a number of reasons why the Amnesty Law is valid only if compatible with the American Convention on Human Rights. The Supreme Federal Tribunal has previously found

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<sup>346</sup> See Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental 153*, at ¶ 7 (April 29, 2010) (Grau, Ministro, Relator) (Brazil) (“Ora, como a anistia foi concedida a todos que cometeram determinados crimes ‘no período compreendido entre 02 de setembro de 1961 e 15 de agosto de 1979,’ não alcançou crimes praticados após 15 de agosto de 1979 [= praticados entre essa data e 1985].”).

<sup>347</sup> See André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI 174*, 216-219 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>348</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at Resuelve ¶ 3 (Nov. 24, 2010). (“The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect . . .”).

that, as a human rights treaty that Brazil has ratified and incorporated into its law, the American Convention has supra-legal status and is a parameter against which to test the validity of ordinary laws.<sup>349</sup> Laws are valid only if they do not conflict with a hierarchically superior norm, such as the Constitution and the various international human rights treaties with supra-legal status. In part because of this supra-legal status, such human rights treaties constitute parameters of review for the legality of infra-constitutional legislation.

Additionally, the ratified American Convention supersedes prior inconsistent laws in Brazil, including the Amnesty Law. Brazil accepts the fundamental legal principle of *lex posterior derogat legi priori*, according to which the more recent law should prevail when inconsistent with a previous law. Since Brazil's accession to the American Convention and its acceptance of the Inter-American Court's jurisdiction<sup>350</sup> post-date the Amnesty Law, the American Convention is a criterion for the validity of the Amnesty Law.

Finally, from the perspective of international law, it is clear that a state cannot invoke domestic law, not even constitutional provisions, as an excuse for failure to fulfill its international obligations.<sup>351</sup> In the particular context of human rights, the former Brazilian judge of the Inter-American Court, Cançado Trindade, declared that human rights treaties:

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<sup>349</sup> The Supreme Federal Tribunal currently accepts that international human rights treaties, when approved by less than three-fifths of each chamber of the legislature, have only supra-legal status—that is they are technically inferior to the constitution but supreme over infra-constitutional law, such as regular laws like the Amnesty Law. This position reflects the majority view in a 2008 Supreme Federal Tribunal decision involving the civil imprisonment of a debtor, which was allowed by the Constitution, CONST. BRAZIL art. 5(LVII) (1988), but prohibited by the American Convention, art. 7, Nov. 22, 1969, 1144 U.N.T.S. 123, which only allows civil sanctions for failure to pay debts. The ministers agreed that the debtor's prison was illegal, but on different grounds. Minister Celso de Mello defended the view that international human rights treaties should be considered to have constitutional status based on Article 5, Paragraph 2 of the Constitution, which says that “[t]he rights and guarantees expressed in this Constitution do not exclude others deriving from . . . the international treaties to which the Federative Republic of Brazil is a party . . .” Supremo Tribunal Federal, *Recurso Extraordinário 466.343-1 São Paulo*, at 1144, 1234-1237 (March 12, 2008) (Celso de Mello, Ministro, concurring) (Brazil). However, the majority view was the one defended by Minister Gilmar Mendes, who found that international human rights treaties as having a supra-legal status. He argued that Article 5, Paragraph 3 of the Constitution demonstrates that the intention of the legislature was to give constitutional status only to treaties that were approved by a three-fifths vote of each house, which is the same procedure for approving constitutional amendment. Since the American Convention was not approved by this qualifying majority, he concluded that it lacks constitutional status and should be regarded as being inferior to the Constitution. Nevertheless, he acknowledged that human rights treaties should not have the same hierarchy as other laws due to their unique nature and purpose. Consequently, on his view, international human rights treaties are inferior to the Constitution but superior to all infra-constitutional legislation. For these reasons, the court struck down the part of Article 5(LXVII) permitting debtor's prisons. See Supremo Tribunal Federal, *Recurso Extraordinário 466.343-1 São Paulo*, at 1144, 1160-1161 (March 12, 2008) (Mendes, Ministro, concurring) (Brazil).

<sup>350</sup> Brazil formally deposited its accession letter to the American Convention in September 25, 1992, authorized by Executive Decree No. 678 (Nov. 6, 1992) (Brazil). It recognized the jurisdiction of the Inter-American Court of Human Rights in 1998, approved by Decreto Legislativo 89 (Dec. 3, 1998) and authorized by Decreto Executivo 4,463 (Nov. 8, 2002).

<sup>351</sup> Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”) (signed by Brazil in 1969 and

were conceived and adopted on the basis of the assumption that the domestic legal orders ought to be harmonized with the conventional provisions, and not *vice versa* . . . . [I]t cannot be legitimately expected, that such conventional provisions be ‘adapted’ or subordinated to the solutions of constitutional law or of internal public law, which vary from country to country. The American Convention, as well as other human rights treaties, seek, *a contrario sensu*, to have in the domestic law of the States Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws . . . which do not conform to its standards of protection.<sup>352</sup>

For these reasons, it is clear that a domestic law like the Amnesty Law is invalid when confronted with an inconsistent human rights treaty, and, in particular, the American Convention.

***b) Supreme Federal Tribunal enforcement of the American Convention on Human Rights as authoritatively interpreted by the Inter-American Court of Human Rights***

The Supreme Federal Tribunal is the guardian of the Brazilian Constitution and has the final word over the constitutionality of all domestic legal norms.<sup>353</sup> Just as the Supreme Federal Tribunal is the ultimate arbiter of the Constitution, at the international level, the Inter-American Court is the authoritative interpreter of the American Convention and has the power to determine conventionality. There is no hierarchy between the courts, as each has a different function. In order to be valid, a domestic law, such as the Amnesty Law, must be compatible with both the Constitution and the Convention. Scholar André de Carvalho Ramos describes this interplay between the courts as the theory of double control (*teoria do duplo controle*), recognizing that Supreme Federal Tribunal and the Inter-American Court are two separate courts with different competences.<sup>354</sup>

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ratified in 2009). *See also supra* § III.

<sup>352</sup> Inter.-Am. Ct. H.R., *Olmedo Bustos and others v. Chile* (“*The Last Temptation of Christ*”), Ser. C No. 73, at ¶¶ 13-14 (Feb. 5, 2001) (Cañado Trindade, President, concurring).

<sup>353</sup> CONST. BRAZIL, art. 102 (1988) (“Compete ao Supremo Tribunal Federal, precipuamente, a guarda da Constituição, cabendo-lhe . . . .”); *See* André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI 174, 219* (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>354</sup> *See* André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI 174, 216-219* (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

Brazil recognized the competence of the Inter-American Court to interpret the American Convention when it accepted the jurisdiction of the Court in 1998.<sup>355</sup> As scholar Carvalho also notes, Brazil expressed its support for such an international tribunal<sup>356</sup> via Article 7 of the Act of Transitory Constitutional Provisions, which establishes that “Brazil shall strive for the creation of an international court of human rights.”<sup>357</sup> For these reasons, the Tribunal must accept as definitive the Inter-American Court’s interpretation of the American Convention, just as the Tribunal has the final word on the interpretation of the Brazilian Constitution.

Accordingly, when the STF looks at *conventionality*, that is, whether the Amnesty Law is compatible with the American Convention—and hence valid—the Tribunal must defer to the Inter-American Court’s interpretation of the Convention. Hence, as the Supreme Federal Tribunal conducts its authoritative interpretations of Brazilian law, it must do so taking into account Brazil’s binding international treaties as authoritatively interpreted by international bodies.<sup>358</sup> The Tribunal has readily performed conventionality control in the past, *inter alia*, in a 2008 decision involving the issue of debtor’s prison, where the Tribunal found that a constitutional provision allowing for such a detention was inapplicable in light of the ban in the American Convention.<sup>359</sup>

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<sup>355</sup> Department of International Law, Organization of American States, *American Convention on Human Rights*, MULTILATERAL TREATIES, <http://www.oas.org/juridico/spanish/firmas/b-32.html> (last visited Sept. 26, 2012).

<sup>356</sup> André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI* 174, 217 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>357</sup> CONST. BRAZIL, art. 7, Atos das Disposições Constitucionais Transitórias (1988) (“O Brasil propugnará pela formação de um tribunal internacional dos direitos humanos”). See André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI* 174, 216-219 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>358</sup> See André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI* 174, 219 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

<sup>359</sup> CONST BRAZIL art. 5(LVII) (1988) (“LXVII - não haverá prisão civil por dívida, salvo a do responsável pelo inadimplemento voluntário e inescusável de obrigação alimentícia e a do depositário infiel”); American Convention on Human Rights art. 7(7), Nov. 22, 1969, 1144 U.N.T.S. 123 (“Right to Personal Liberty: No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.”). See also *supra* note 349. Scholar Carvalho maintains that local judges should also control the conventionality of domestic laws and regulations, but only in accordance with the guidelines set by the Inter-American Court. He argues that it is not enough to grant international human rights treaties to a supra legal status; local judges must accept and adopt the interpretation of the Inter-American Court. See André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI* 174, 216-219 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011).

Today, the Inter-American Court's *Gomes Lund* decision provides the authoritative interpretation of the American Convention on the issue of the Amnesty Law in Brazil. Although when the Tribunal issued the *ADPF 153* decision, the Inter-American Court had not definitively spoken on the compatibility of the Amnesty Law with the American Convention, it now has clearly resolved the correct understanding with respect to the treaty. Thus, in order for the Supreme Federal Tribunal not to intrude upon the Inter-American Court's jurisdiction—just as that Court does not intrude upon the Tribunal's competency by, for instance, purporting to decide a constitutional question in Brazil—the Tribunal can and should take the step of applying the American Convention to the Amnesty Law as authoritatively interpreted in *Gomes Lund*.

In sum, Brazil's domestic laws can be considered valid only if they survive tests of both constitutionality and conventionality. Despite having passed a limited review of constitutionality in early 2010, the Brazilian Amnesty Law has already failed the conventionality test, having been found to be incompatible with the American Convention later than same year. Thus, even if the Amnesty Law was found to be constitutional, it was subsequently found to not be conventional, and therefore must be declared null in the Brazilian domestic legal order. The Amnesty Law thus should not survive renewed scrutiny by the STF.

### ***C. Obligations of the Brazilian State to Effectively Investigate and Punish Crimes of the Brazilian Dictatorship in light of Gomes Lund***

Not only is the Amnesty Law not valid within the Brazilian domestic legal order, but also Brazil's international legal obligations make it incumbent on all actors in the Brazilian state, including prosecutors and judges, to eliminate barriers to prosecuting serious human rights violations from the dictatorship. In declaring the Amnesty Law to be incompatible with the American Convention, the Inter-American Court issued a binding order to the Brazilian state that the law must not bar the prosecutions of state agents who committed serious human rights violations during the military dictatorship. The Brazilian state must comply with this order because Brazil voluntarily agreed to be bound by the Court's jurisdiction and orders under the Convention and state compliance with international duties is required by a fundamental international law principle: *pacta sunt servanda*.<sup>360</sup> The American Convention on Human Rights and the Inter-American Court's decision in *Gomes Lund* impose obligations on all parts of the Brazilian state, including the executive, legislative, and branches with respect to the obligation to

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<sup>360</sup> See American Convention on Human Rights art. 68(1), Nov. 22, 1969, 1144 U.N.T.S. 123 (“The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”); Department of International Law, Organization of American States, *American Convention on Human Rights*, MULTILATERAL TREATIES, <http://www.oas.org/juridico/spanish/firmas/b-32.html> (last visited Sept. 26, 2012); Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶¶ 121-22 (Nov. 24, 2010); Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”) (signed by Brazil in 1969 and ratified in 2009).



investigate and punish serious human rights violations.<sup>361</sup> Accordingly, non-compliance with the *Gomes Lund* ruling and non-compliance with the American Convention by any of the branches or other state organs entails a violation of international obligations by Brazil.

A wide variety of state organs must act to ensure compliance with Brazil's international obligations. The *Ministerio Público* has the primary obligation of carrying out the required investigations and prosecutions of enforced disappearances and all other serious human rights violations committed by the military dictatorship. While beginning by prosecuting permanent crimes, as was announced in March 2012,<sup>362</sup> makes legal and strategic sense, the obligation to prosecute extends to all serious human rights violations perpetrated by the military dictatorship. The executive branch, which includes the armed forces and other security and police forces, must help carry out the investigations, cooperate with them, and refrain from impeding compliance with Brazil's treaty obligations. The legislative branch must repeal the Amnesty Law, as its mere existence in legislation is a violation of the American Convention, even though, legally, it should pose no further impediment to accountability.<sup>363</sup> Finally, the judiciary has the essential obligation of interpreting the law in a way that permits the full application of the American Convention to attain accountability for the grave crimes of the dictatorship: neither the Amnesty Law, nor statutory limitations, nor *ADPF 153* can be legally construed as a bar to prosecutions for such crimes.<sup>364</sup> As noted above, it is possible to interpret domestic law to allow full criminal accountability for all serious human rights violations of the dictatorship era without disrespecting the *ADPF 153* decision or the jurisdiction of the Supreme Federal Tribunal.

#### ***D. Obligation to Achieve Full Accountability for Crimes of the Brazilian Dictatorship***

The *Gomes Lund* decision represents an important and promising opportunity to begin at last to hold criminally accountable those responsible for dictatorship-era abuses in Brazil, as neighboring countries in Latin America have done. A failure to comply with the American Convention and the Inter-American Court's *Gomes Lund* decision would demonstrate that Brazil

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<sup>361</sup> Under international law, "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . ." Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* art. 4(1), U.N. Doc. A/56/10 (2001).

<sup>362</sup> See Míriam Leitão, *Justiça de Transição*, O GLOBO, March 6, 2012, <http://oglobo.globo.com/economia/miriam/posts/2012/03/06/justica-de-transicao-434825.asp>.

<sup>363</sup> In September 2011, a bill was presented to revise the Amnesty Law, but it was rejected in the house's foreign relations committee. Agência Estado, *Câmara rejeita proposta para mudar Lei da Anistia*, R7 NOTÍCIAS, Sept. 29, 2011, <http://noticias.r7.com/brasil/noticias/camara-rejeita-proposta-para-mudar-lei-da-anistia-20110929.html>. In contrast, the Uruguayan congress, in response to the *Gelman* Inter-American Court ruling (*see supra* § IV(E)), complied with the obligation to repeal the amnesty law and also asserted that all statutes of limitations had tolled during the dictatorship. It did so despite the failure of two past popular votes to eliminate the *Ley de Caducidad*.

<sup>364</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Ser. C No. 219, at Resuelve ¶ 3 (Nov. 24, 2010); Inter.-Am. Ct. H.R., *Barrios Altos v. Peru*, Ser. C No. 75, at ¶ 41 (March 14, 2001).

is not committed to observing international law and the decisions of the Inter-American Court of Human Rights, cementing its position as a regional outlier. Brazil should not be a state that complies with only the international laws, agreements, and judgments that it finds convenient.<sup>365</sup> All parts of the Brazilian state must act to eliminate any remaining domestic legal barriers to fulfilling the obligation to investigate and punish and to achieving full accountability and transitional justice for the crimes of the Brazilian dictatorship. As Brazilian judge Roberto de Figueredo Caldas stated in the *Gomes Lund* decision:

It is necessary to surpass exacerbated positivism, for only that will usher in a new era of respect for the rights of the individual, helping to end the cycle of impunity in Brazil. It is necessary to show that Justice acts equally in the punishment of anyone who practices grave crimes against humanity, so that the imperatives of Law and Justice always serve to demonstrate that such cruel and inhuman practices must never be repeated, never be forgotten, and at all times, will be punished.<sup>366</sup>

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<sup>365</sup> André de Carvalho Ramos, *Crimes da ditadura militar: a ADPF 153 e a Corte Interamericana de Direitos Humanos*, in *CRIMES DA DITADURA MILITAR: UMA ANÁLISE À LUZ DA JURISPRUDÊNCIA ATUAL DA CORTE INTERAMERICANA DE DIREITOS HUMANOS: ARGENTINA, BRASIL, CHILE, URUGUAI* 174, 214 (Luiz Flávio Gomes & Valerio de Oliveira Mazzuoli eds., 2011). See also Deisy Ventura, *A interpretação judicial da Lei de Anistia brasileira e o direito internacional* 15-16 (Amnesty in the Age of Accountability: Brazil in Comparative and International Perspective, Conference, University of Oxford, 2010), available at <http://educarparaomundo.files.wordpress.com/2010/11/ventura-oxford-07-11-2010.pdf>.

<sup>366</sup> Inter.-Am. Ct. H.R., *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Ser. C No. 219, at ¶ 31 (Nov. 24, 2010) (de Figueredo Caldas, Judge ad hoc, concurring) (edited translation).

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