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COMMENTS

ON THE CASE *SANTIAGO BRYSÓN DE LA BARRA ET AL* (ON CRIMES AGAINST HUMANITY)

AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT

OF PERU

by

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I. Introductory note and theoretical framework

Definition of "Crime against Humanity"

The concept of "crime against humanity" is part of what the doctrine, as well as legislation and case law, have considered as international crimes. While the word crime is considered comparable to the one of offense, the first is preferred to refer to serious misconduct, according to its etymological origin.[1]

Internationally, the category of crimes against humanity has been recognized since the last century, among others, by establishing it in the Statute of the International Military Tribunal in order to refer to "murder, extermination, enslavement, deportation and other inhumane acts against the civilian population, before or during the war, or to persecutions on political, racial or religious grounds".[2] However, it is possible to find this concept at an earlier date, in the context of the First World War and with different meaning.

The expression "crimes against (*lesa*) humanity" denotes the idea that who is aggrieved or offended by the crime, given the grave and abhorrent nature of it, is the humanity as a whole. It derives from the Latin "*laesae, laesus*" meaning to offend, hit, hurt, injure, harm. "*Lesa*" is an adjective meaning "injured".[3] Humanity, from Latin *humanitas*, is the set of all human beings.[4] It should be emphasized that the meaning of "*lesa humanidad* (against humanity)" seeks to emphasize the severity of the crime, indicating that it is not against an individual but the entire human species. In this sense, crimes against humanity, according to Doudou Thiam, in the work to complete the Rome Statute, could be conceived in a triple sense: cruelty to human existence, degradation of human dignity and the destruction of human culture, which allows us to understand that crime against humanity becomes simply 'crime against all mankind'.

The *Convention on the Prevention and Punishment of the Crime of Genocide* (UN, December 9, 1948) has acknowledged categorically the existence of crimes of international law and the obligation of countries to prevent and punish them, in peacetime and wartime. In the aforementioned agreement the crime of genocide was defined as any of the following acts committed intentionally in order to destroy a national, ethnic, racial or religious group, totally or partially, as a) by massacre, eliminating group members, b) by severe damage of the physical or mental integrity of the group members, c) by deliberately subjecting the group to conditions of life calculated to bring about their complete or partial physical destruction, d) imposing means to prevent giving birth within the group and e) by forcibly relocating children of the group to another group.

The crime of genocide as part of international crimes is in the Rome Statute of the International Criminal Court (July 17, 1998) for Crimes against Humanity, War Crimes and the Crime of Aggression. This new type, built-in article 5 of the Rome Statute, accounts for the evolution of international crimes, whose nature can be deduced from the statement that the jurisdiction of the International Criminal Court "shall be limited to crimes of the most severe concern to the international community as a whole."

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[1] Voces "Crimen" y "Crímenes internacionales", *Enciclopedia jurídica mexicana,* 2ª ed., México, Porrúa, UNAM, 2004, t. II, pp. 677-678.
[2] Ibidem, p. 678.
[3] It is applied as an adjective to the injured item, as a complement to “crime” or “offense” as in crimes against the homeland, against majesty or against humanity. *Vid. María Moliner, Diccionario del uso del Español,* 2nd edition, Madrid, Gredos, 2006, t. II, p. 172
[4] Ibidem, t. I, p. 1514

According to the Rome Statute Article 7, "the term **'crime against humanity'** applies to any of the following acts when committed as part of a general or systematic attack against any civilians with knowledge of the attack: a) Assassination; b) Extermination; c) Slavery d) Deportation or Forcible Transfer of civilians; e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) Torture; g) Rape, Sex slavery, Forced Prostitution, Pregnancy and Sterilization, or other Sexual Violence of comparable degree of severity; h) Persecution against any group or identifiable collectivity based on political, racial, nationalistic , ethnic, cultural, religious or gender reasons as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law in relation to any aforementioned act of this paragraph or any crime within the jurisdiction of the Court; i) Forced vanishing of persons; j) The crime of apartheid and k) Other inhumane acts of similar character to intentionally cause great suffering or to threaten physical integrity or mental health. "

As can be seen, the idea derived from the Rome Statute and reiterated by the doctrine emphasizes the fact that crimes against humanity threaten the human species based on social, political, racial, religious or cultural motives without the necessity of focusing on a social class.

Although it is not considered as such, some authors conceive crimes against humanity as crimes of State since they are committed by inhumane conduct of State authorities or private individuals instigated or tolerated by the authorities. That fact made the doctrine of criminal law refer to these crimes as under the concept of Roxin.

As to the features that identify crimes against humanity it is to highlight that the generating actions are generalized and systematic. And as to the author of such acts, they may be perpetrated by State authorities or private individuals acting on instigation of said authorities or with their tolerance, support or complicity. The passive part of crimes against humanity is all civilian population or in part, where the motives of such crimes may be social, political, economic, racial, religious or cultural.

In Peru, for example, the ordinary legislator incorporated a section with the title *"Crimes against Humanity"* into the Penal Code through Law 26926 in February, 1998. There, the different types of genocide, forced vanishing and torture are regulated. Thus, they have been added to Codes of other Latin American countries.

In Spain, the Organic Law 10/1995 of November 23, Criminal Code, picked up a title about "Crimes against the International Community" whose chapter II bis was called "Crimes against Humanity" wherein Article 607 bis gives the following details:

I. Any person who commits the acts described in the following section as part of a generalized or systematic attack against the civilian population or a part of it is guilty of crimes against humanity.

Anyhow, such acts would be considered crimes against humanity:

1. Because the victim is member of a persecuted group or collective for political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized impermissible under international law.
2. In the context of an institutionalized regime of systematic oppression and domination by one racial group over one or more racial groups and with the intention of maintaining that regime.

II. Those guilty of crimes against humanity will be punished:

1. With the penalty of imprisonment of 15 to 20 years if they caused the death of any person.
   The higher penalty is to apply if the crime happened under any of the circumstances provided by Article 139.
2. With prison sentence of 12 to 15 years for rape, and 4 to 6 years for any another form of sexual assault.
3. With imprisonment of 12 to 15 years for any injuries by Article 149 and 8 to 12 years for submitting people to living conditions that endanger life, harm health seriously or produce some of the injuries by Article 150.Imprisonment of 4 to 8 years applies in any case of injuries by Article 147.
4. With the imprisonment of 8 to 12 years for deportation or forced transfer without grounds permitted under international law of one or more persons to another State or location by expulsion or other coercive acts.
5. With the prison sentence of 6 to 8 years for forced pregnancy with the intention of affecting the ethnic composition of the population, subject to the penalty applicable, where appropriate, for other crimes.
6. With the penalty of imprisonment of 12 to 15 years for apprehension of a person and the refusal of acknowledging that deprivation of freedom or of not giving an account of the fate or whereabouts of the detainee.
7. With the imprisonment of 8 to 12 years for apprehension and deprivation of liberty in violation of international standards on detention. The penalty is lower in grade when the arrest lasts less than two weeks.
8. With the penalty of 4 to 8 years in prison for severe torture on persons of their custody or under their control, and the imprisonment of 2 to 6 years for less severe torture.
   For the purposes of this article, torture means subjecting a person to physical or mental suffering.
   The penalty imposed in this issue does not affect penalties corresponding to any other crimes committed against the victim.
9. With the penalty of imprisonment from 4 to 8 years for conduct related to prostitution referred to in
   Article 187.1, and with 6 to 8 years in cases provided for in Article 188.1.The penalty is 6 to 8 years for moving people from one place to another for the purpose of sexual exploitation, using violence, intimidation or deception, or for abuse of a position of superiority, the need or vulnerability of the victim. When the conduct referred to in the preceding paragraph and Article 188.1 is committed on minors or handicapped, the punishments are higher in degree.
10. With the penalty of imprisonment from 4 to 8 years for subjecting or keeping a person in slavery. This penalty does not affect other penalties for crimes against the victim.
    Slavery means the status of the person over which another person exercises some or even all of the attributes of property rights, as buying, selling, lending or bartering.

Definition of "forced disappearance"

The Crimes against Humanity has recognized different types. One of them is the forced disappearance of persons.

With regard to the jurisdiction of the International Criminal Court, Article 7.2.i) of the Rome Statute states that **"forced disappearance of persons"** means the arrest, detention or kidnapping of persons by a State or a political organization, or with their authorization, support or acquiescence, accompanied by a refusal to report on the deprivation of liberty or to give information on the fate or whereabouts of those persons in order to intentionally remove their legal protection for a prolonged period . Similarly, the elements of that type

have been brought forth on a regional basis, such as the *Inter-American Convention on the Forced Disappearance of Persons*,[5] in its second article says that "forced disappearance is considered the deprivation of liberty to one or more persons, in whatever way, perpetrated by state agents or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by lack of information or a refusal to acknowledge that deprivation of freedom or of information on the whereabouts of the person, thereby impeding the exercise of legal remedies and appropriate procedural guarantees. "[6]

The Peruvian Criminal Code classifies forced disappearance in Article 320, as following: [7]

Article 320.-Proven Disappearance The official or public servant who deprives a person of their liberty by ordering or carrying out actions to cause their disappearance, duly proven, shall be punished by imprisonment for no less than fifteen years and disqualification under Article 36 paragraph 1) and 2).

Similarly, in the case of Spain, a similar figure to that of the disappearance is recognized, but it is incorporated as a variation of the crime against humanity. Article 607 a), paragraph 2, point 6 states:

> 2. Those guilty of crimes against humanity will be punished: [...]
>
> 6. With the penalty of imprisonment of 12 to 15 years for the detention of any person or refusal to acknowledge that deprivation of liberty or to give an account of the fate or whereabouts of the detainee.

Are there statutory limitations to crimes against humanity?

The statutory limitations in criminal law are the legal institutions through which the expiration of persecution of crimes happens by reason of the passage of time. Crimes against humanity have the special characteristic of non-applicability of statutory limitations, which means persecution at all times.

This principle was recognized early by the UN under the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal* (1946) and reaffirmed in the *Convention on the Applicability of Statutory Limitations to War Crimes and to Crimes against Humanity* (1970).[8] However, it should be noted that the scope of this principle was referred to acts that do not necessarily correspond with the current type of crimes against humanity.

The *Declaration on the Protection of All Persons from Forced Disappearance* [9] incorporates an additional element of the statutory limitations to such crimes, to be noted in Article 17:

> 1. Any act of forced disappearance shall be considered a continuing offense during the ongoing hiding of the fate and whereabouts of the disappeared person and until the clarification of facts.

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[5] Adopted in Belém do Pará, Brasil, 9 June, 1994 in the 24th ordinary period of sessions of the General Assembly of the Organization of American States.

[6] This Convention is closely following the *Declaration on the protection of All Persons of Forced Disappearance* whose preamble reads "Deeply concerned about the fact that forced disappearance is going on, often persistently, i.e. that persons are arrested, transferred against their will or that those persons are deprived of liberty in any form by government agents of any sector or level, by organized groups or individuals that act on behalf of the government or with its direct or indirect support, authorization and acquiescence followed the act of disclosure of the fate or whereabouts of those persons, of admission that they are deprived of liberty thus taking away their legal protection.

[7] Incorporated in February of 1998 by Act 26926 under title *"Crimes against Humanity"*

[8] Citation: *Digesto se Jurisprudencia sobre crímenes de derecho internacional*, Washington, United States of America, Foundation for the Appropriate Legal Process, 2009, p. 297.

[9] 47/133 Resolution was approved by the General Assembly of the United Nations Organization, 18 December, 1992.

> 2. When the remedies under Article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statutory limitations to acts of forced disappearance expire until the restoration of those resources.
> 3. Statutory limitations to acts of forced disappearance shall be substantial and commensurate with the extreme seriousness of the offense.

Later, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[10] (2005), specifically noted:

> 6. Where so provided in an applicable treaty or contained in other international legal obligations, the gross violations of international human rights do not prescribe nor the serious violations of international humanitarian law as crimes under international law.
>
> 7. The national rules on the statutory limitations to other types of violations that do not constitute a crime under international law, including the prescription of civil claims and other procedures, should not be restrictive in excess.

The Rome Statute states in Article 29 through the establishment of the general principles of criminal law applicable in matters of its jurisdiction on the applicability of the statutory limitations and prescribes the following: "The crimes within the jurisdiction of the Court shall not be applicable of statutory limitations. "It can be said that internationally the general rule is the non-applicability of statutory limitations to the so-called crimes against humanity. At the national level there is a different situation.

Ruth A. Kok has warned after the review of the legislation in several countries that:[11]

> ... in the countries of the neo-Roman tradition, and within Latin American countries, the general rule is the statutory limitations. As a result, only on those non-applicability of statutory limitations is applied on those for whom an applicable standard exists in the legal system that had determined it that way.

In general, to the overall principle of Statutory Limitations Latin American countries have responded in three ways in the pursuit to overcome such principle linked to legal certainty:

a) In the cases of those considered permanent offenses, such as the forced disappearance of persons, it has been argued that the prescription cannot begin to run until the assessment of the whereabouts of the victim;
b) In other cases, it was said that it is not before evidence of the effectiveness of all exhaustible judicial remedies is proven when the calculation of the statutory limitations can initiate.
c) Some countries, based on their own constitutional rules regarding the reception of international law, have determined the existence of the principle of non-applicability of statutory limitations as a rule of customary law precedent to the commission of crimes, thus facing the argument of retroactive law enforcement.

Case of Peru: the *Writ of habeas corpus promoted by Máximo Humberto Cáceda Pedemonte* states the following*:* [12]

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[10] 60/147 Resolution was approved by the General Assambly of the United Nations Organization, 16 December, 2005.
[11] Ruth A. Kok, *Statutory limitation in International Criminal Law,* The Netherlands, TMC Asser Press, 2007, TMC Asser Press, 2007, citation: *Digesto de jurisprudencia latinoamericana,* p. 299.
[12] Resolution was made by the Constitutional Tribunal of Peru on April 17, 2002. Citation: *Digesto de jurisprudencia latinoamericana de derecho internacional,* pages 301-302.

> From an overall view point, the statutory limitations are the legal institution through which, over time, the person acquires rights or is freed from obligations. And, from the criminal perspective, they are a cause for extinction of criminal liability based on the effects of time on human events or waiver of the State to the *ius punendi* on the grounds that the time erases the effects of the infringement, when just memory of the society exists of it. That is, by the means of statutory limitations the punitive power of the State is restricted, since it expires the possibility of investigating a crime and the responsibility of its suspect or suspects.
> In other words, in a fundamental rule based on the principle *pro homine* the substantive criminal law gives the prosecution a preventive and re-socializing function in which the State self-limits its punitive power taking in account the need of removing all legal uncertainty and the difficulty to punish someone who has lived in honesty for a period, after a time, thus consecrating the principle of legal certainty. The Penal Code recognizes the statutory limitations as one of the events of termination of criminal proceedings.
>
> Thus, the law considers a number of reasons that allow the termination of criminal prosecution, under which the State self-limits its punitive power: it can be by natural causes (death of the offender), criteria for peacemaking or social conflict resolution based on legal certainty (*res iudicata* or statutory limitations) and reasons of social politics or of State (amnesty).

The Peruvian Penal Code rules for the statute of limitations to prosecution are the following:

- The statute of limitations to crime sentencing runs out in a time equal to the maximum penalty provided by Criminal Code for deprivation of liberty (Art. 80)
- The statutory limitations shall not be longer than twenty years. Criminal prosecution expires after thirty years in the case of life sentence. (Art. 80)
- The limitation periods shall be reduced to half when the offender was under twenty-one or over sixty-five years old at the time of the offense. (Art. 81)
- However, penal proceedings run out of time in any case when the time passed exceeds one half of the normal period of the statute of limitations. (Art. 83)

Article 89 of the Peruvian Penal Code deals with amnesty and pardon noting that amnesty law eliminates the offense referred to legally and involves the according perpetual silence. Additionally, the pardon removes the imposed penalty.
Article 91 of the penal code provides the defendant's right to waive the criminal statute of limitations.

Latin American Cases of Non-Applicability of the Statute of Limitations

Argentina, *complaint filed on behalf of the Government of Chile (Enrique Lautaro Arancibia Clavel),* decided by the Supreme Court of Chile, August 24, 2004: [13]

> [T]he exception to [the] rule [of the statute of limitations to prosecution or sentencing] is set for those acts that constitute crimes against humanity since they are assumptions that have not ceased to be experienced by the whole society given the magnitude and significance of the concerns. This means that they not only remain present for the society on a national but also at an international level.

[13] Citation: *Digesto de jurisprudencia latinoamericana sobre crímenes de derecho internacional*, p. 305.

> It continues in the same vein that "both, 'crimes against humanity' as well as traditionally so-called 'war crimes' are crimes against the 'law of nations' which the global community is committed to eradicate."
>
> [T]he grounds for the Non-Applicability of the statute of limitations to the actions emerges above all from the fact that crimes against humanity are generally committed by Criminal Body agencies themselves operating outside the control of criminal law, i.e. escaping from control and legal restraint. The forced disappearance of persons in our country has been committed by the security body or armed forces operating in judicial functions as the worst Nazi crimes committed the Gestapo (*Geheime Staatspolizei* or Secret Police of Nazi Germany) and the Stalinist KGB (Committee for State Security) was a police force. It is not very reasonable to pretend legitimization of genocidal power by a limited exercise of the very same power with supposed preventive effect.
>
> That is why is not reasonably sustainable to guarantee an expiry term to criminal proceedings by the passage of time in crimes of this nature.

Chile*, Case of Molco de Choshuenco (Paulino Flores Rivas and others)*, decided by the Criminal Chamber of the Supreme Court on December 13, 2006:[14]

> [O]ne of the consequences of this internal war status is the application of the rules of International Humanitarian Law, mainly from the Geneva Conventions of 1949, ratified by Chile through the Supreme Decree 732 (Foreign Affairs) and published in the Official Journal of 17, 18, 19 and 20 April 1951 and, therefore, incorporated since then in our State Code.
>
> Article 3, common to all agreements, prohibits in the case of "armed conflict not of an international character" - Chile was experiencing at the time of commission of the investigated crimes in the present case – any violence to life and person's integrity, "in particular murder of all kinds", "always, anywhere" and considers them "grave breach" of the treaty by Article 147 forbidding the contractors to exonerate themselves or other contracting parties based on of such violations.
> [T]he jurisprudence of the courts with supranational jurisdiction, in particular the Inter-American Court of Human Rights, considers such means of self-exoneration a figure of the statute of limitations whenever impunity on crimes such as those aforementioned in the preceding reflection might occur.

Uruguay, ***Case "Operation Condor" in Uruguay (Jose Nino Gavazzo Pereira and others)***, ruling of the Criminal Court, Turn 19, March 26th, 2009 [15]

> [T]he Non-Applicability of the statute of limitations is not preached to all international crimes as it is not an inherent element to all international crimes but only to certain international crimes such as war crimes, crimes against humanity, genocide and apartheid.
>
> Thus, traditionally, torture and forced disappearance, even international crimes, are not inalienable "per se" except when committed within a generalized or systematic operation since in that case they become legally another type, namely, a crime against humanity. They are also inalienable when committed in armed conflict, once all subsumed under the war crime figure. However, there does not exist any emerging trend in case law and international rules to extend

[14] Ibidem, pages 305-306.
[15] Ibidem, page 306.

the ban on the application of statutory limitations to serious violations of human rights or give them a character of non- application.

II. Decisions of the Inter-American Court of Human Rights

The countries of Latin America were involved over the last century in the repression of various social groups under the dictatorships in several countries. This situation gave citizens of several Latin American countries motives to come before the Inter-American Court over the last decades to seek justice for crimes committed by public authorities of their country.

The cases listed below are those in which that Court has ruled on crimes against humanity and, where appropriate, on the statute of limitations to such crimes.

Case "Barrios Altos vs. Peru".

On March 14, 2011, the Inter-American Court ruled in this case filed on June 8, 2000, for the assassination of 15 people allegedly perpetrated by the armed forces when entered a private home in the city of Lima, Peru, during a celebration and shot at the people present for two minutes. Judicial investigations and media reports revealed that those involved worked for the National Intelligence Service, members of the Peruvian Army on behalf of the "Death Squad", so-called "*Grupo Colina*", carrying out their own counterinsurgency program. Some reports indicate that the present crime was committed in retaliation against alleged members of Sendero Luminoso.

Although the events occurred in 1991, the judicial authorities opened a serious investigation on the case not before April 1995 when Public Prosecutor Ana Cecilia Magallanes accused five military officers of being responsible for the events, including several already convicted in the La Cantuta case. The five accused were Major General Julio Salazar Monroe, then Chief of the National Intelligence Service (SIN), Major Santiago Martin Rivas and the NCO Sub-officers Nelson Carbajal García, Juan Sosa Saavedra and Hugo Coral Goycochea.
The Peruvian Parliament enacted Amnesty Act. 26479 to exonerate members of the military, the police as well as civilians who have committed human rights violations between 1980 and 1995 or participated in such violations.

The Court ruled that "... **gross violations of human rights** such as **torture, extrajudicial or arbitrary group execution and forced disappearance** are prohibited all because they violate non-derogable rights recognized by the International Law of Human Rights."
With regard to statute of limitations the Court provided: **"... are inadmissible amnesty provisions, the statute of limitations provisions and the establishment of prosecution immunity** to prevent investigation and punishment of those responsible for gross violations of human rights such as torture, outside of law or arbitrary group executions and forced disappearance…".

The Inter-American Court considered the provision for amnesty, the statute of limitations and the establishment of immunity to prosecution inadmissible as they attempt to impede any investigation and punishment of those responsible for gross violations of human rights such as torture, mass or arbitrary out of law executions and forced disappearance prohibited because of their violation of non-derogable rights recognized by the International Law of Human Rights.

Self-amnesty laws lead to the indefensibility of the victims and impunity what makes it manifestly incompatible with the letter and spirit of the American Convention. This type of law prevents the identification of the responsible individuals for human rights violations,

because it obstructs the investigation and access to justice and impedes that the victims and their families know the truth and receive the corresponding reparation.

Because of the apparent inconsistency between the self-amnesty laws and the American Convention on Human Rights the said laws lack of legal effects and cannot continually obstruct the investigation of the facts of this case or the identification and punishment of the responsible persons, nor can they have the same or similar impact on other Peruvian cases of violation of the rights enshrined in the American Convention.

Therefore, Amnesty Act 26479 and 26492 were declared incompatible with the American Convention on Human Rights and, consequently, lacked legal effects, so that the statute of limitations could not operate.

Case*"Almonacid Arellano and others vs. Chile"*

On September 26, 2006, the Court ruled in this case by setting up more thoroughly the reach of the notion of crimes against humanity. The assassination of a Chilean citizen in public by the Army gave reason to the lawsuit filed by his widow with the following petition: Mrs. Elvira Gómez Olivares expects from the Court "justice to be done [...] the memory of her husband to be vindicated, a fair trial to be opened [...] and to the extend [...] for justice to be so that no one else would ever suffer again what she did". She also wanted "the repeal of Decree Act 2.191 and the acknowledgement that amnesty law was worthless."

It was issued Decree Act 2.191 to guarantee amnesty by the ruling de facto government in April 18, 1978.

In this ruling the Inter-American Court held: "... the Court finds that there is vast evidence for the conclusion that in 1973, the year of Mr. Almonacid Arellano's death, the commission of crimes against humanity, **including assassination in a context of generalized or systematic attack against civilian sectors**, constituted a violation of an imperative rule of International Law ..."

Regarding the statute of limitations to the punishment it reads: "... by means of its nature, Decree Act 2. 191 [amnesty] lacks of legal effects and cannot continue to obstruct the investigation of this case, neither the identification and punishment of the responsible nor can it have the same or similar impact on other Chilean cases of violation of the rights enshrined in the American Convention…".

In the sentence under study are noted the following arguments:

Currently, crimes against humanity may be committed in peacetime as in wartime. The Inter-American Court of Human Rights recognizes that crimes against humanity include inhumane acts, such as assassination by means of generalized or systematic attack against civilians. To commit a sole unlawful act of one of those mentioned above is enough to produce a crime against humanity. In this sense, the International Criminal Tribunal ruled on case *Prosecutor v. Dusko Tadic*, May 7, 1997.

The Inter-American Court of Human Rights finds that there is vast evidence for the conclusion that in 1973, the year of Mr. Almonacid Arellano's death, the commission of crimes against humanity, such as assassination by means of generalized or systematic attack against civilian sectors of the population constitutes a violation of an imperative rule of international law. This prohibition of crimes against humanity is a rule of *ius cogens* (*mandatory and imperative rule of international law)* and the punishment of these crimes is mandatory by under international law.

The European Court of Human Rights also spoke in the same direction in the case *Kolk and Kislyiy vs. Estonia*, solved on January 17, 2006. Mr. Kislyiy and Mr. Kolk committed crimes against humanity in 1949 and were prosecuted and sentenced by the courts of Estonia in 2003. The European Court said that even if the acts committed by these individuals may have been lawful by law of their country prevailing at the time, the Estonian courts considered them crimes against humanity under international law at the time of its commission and found no reason at all to reach a different conclusion.

As shown in the chapter of the report of the facts, a military dictatorship ruled Chile from September 11, 1973, until March 10, 1990, which through its State politics of intentionally producing fear they attacked massively and systematically some civilian sectors of the population as regarding them as dissidents of the regime. They committed a number of gross violations of human rights and international law, causing at least 3.197 victims of mass executions and forced disappearance and 33.221 prisoners, of whom a vast majority was tortured. The most violent period of this repression corresponded to the first months of the de facto government. The execution of Mr. Almonacid Arellano took place precisely at that time.

In light of the foregoing, the Inter-American Court of Human Rights considers that there is enough evidence to reasonably claim that the extrajudicial execution of Mr. Almonacid-Arellano, militant of the Communist Party, candidate for alderman of the same party, Province Secretary of the Central Confederation of Workers and Union Leader of Teachers (SUTE), which all together was regarded as a threat to their ideology, constitutes a crime against humanity committed by State agents in a systematic and pervasive pattern against civilians.

On the issue of the impossibility of amnesty for crimes against humanity, the Court stated: According to the *corpus iuris* of international law, a crime against humanity is in itself gross violation of human rights and affects all humanity. In case *Prosecutor vs. Erdemovic* the International Criminal Tribunal for the Former Yugoslavia (November 29, 1996) indicated that:

"[T]he crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that in dimension and gravity go beyond the tolerable limits of the international community who should necessarily demand punishment. But crimes against humanity also transcend the individual because when an individual is assailed it constitutes an attacks against and refuse of are against all humankind. So what essentially characterizes crimes against humanity is the concept of all humanity as victim".
Since the individual and humanity are victms of all crimes against humanity, the UN General Assembly has argued from Resolution 3 (I) of February 13 of1946 on, that the perpetrators of such acts must be punished. The resolutions 2583 (XXIV) of December 15, 1969 and 3074 (XXVIII) of December 3, 1973 are highlighted In the first, the General Assembly said that "rigorous investigation" of war crimes and crimes against humanity, and the punishment of those responsible "are an important instruments in order to prevent these crimes, safeguard the fundamental human rights, foment trust, encourage cooperation among peoples, contribute to international peace and security ".

In the second resolution, the General Assembly stated:

> "War crimes and crimes against humanity, wherever and whenever committed, will be investigated, and the persons who are evidently guilty of the commission of such crimes will be sought, arrested, prosecuted and if found guilty, punished.
> [...]

> States do not adopt legislative or other kinds of means which would impair the international obligations they have assumed in regard to the identification, arrest, extradition and punishment of persons guilty of war crimes or crimes against humanity".

Resolutions 827 for the establishment of the International Criminal Tribunal for the Former Yugoslavia from March 25, 1993, and Resolution for the establishment of the International Criminal Tribunal for Rwanda from November 8, 1994, the Security Council of the United Nations, together with the Statutes of the Tribunals for former Yugoslavia (Article 29) and Rwanda (Article 28), impose an obligation on all Member States of the United Nations to cooperate fully with the courts in the investigation and prosecution of persons accused of committing gross violations of international law, including crimes against humanity.

The Secretary General of the United Nations in his report of October 4, 2000, on the establishment of the Special Court for Sierra Leone, said that

> "…[W]hile recognizing that amnesty is an accepted legal concept and a sign of peace and reconciliation at the end of a civil war or internal armed conflict the United Nations consistently maintained the position that amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity or gross violations of international humanitarian law."

The Secretary General also reported that no legal effects to the amnesty given to Sierra Leone were accredited" because of its "illegality under international law." In fact, Article 10 of the Statute of the Special Court for Sierra Leone ruled that the amnesty granted to persons accused of crimes against humanity, violations by Article 3 common to the Geneva Conventions and Additional Protocol on the Protection of Victims of Armed Conflicts with not International Character and other serious violations of International Humanitarian Law "does not constitute an impediment to prosecution".

Thus, the obligation to sentence prevails over the will of the legislator to forget the criminal conduct (amnesty) or other authorities to forgive (pardon). The obligation under international law to prosecute and, if found guilty, punish the perpetrators of certain international crimes, including crimes against humanity, follows from the obligation to guarantee enshrined in Article 1.1 of the American Convention on Human Rights. Crimes against humanity produce the violation of a number of inalienable rights recognized in the American Convention which cannot go unpunished. The Court has determined that the investigation should be conducted by all available legal means and should be aimed at the assessment of the truth and the investigation, persecution, arrest, prosecution and punishment of all intellectual and material authors in the case, especially when State agents are or may be involved (*Case Ximenes Lopes*, Judgment of July 4, 2006, *Case Baldeón García*, Judgment of April 6, 2006, and *Massacre Case of Pueblo Bello*, Judgment of January 31, 2006). This Tribunal had already indicated in *Case Barrios Altos* (Judgment of March 14, 2001) that

> "... provisions for amnesty, statute of limitations and the establishment of immunity to prosecution that prevent from investigation and punishment of those responsible for gross violations of human rights such as torture, extrajudicial mass or arbitrary execution and forced disappearance, all of them prohibited because of their violation character of non-derogable rights recognized by the International Law of Human Rights are inadmissible."

Therefore, the Court holds that State governments cannot evade the duty to investigate, identify and punish those responsible for crimes against humanity by applying amnesty laws or other State laws. Consequently, crimes against humanity are offenses which are not granted amnesty.

The Inter-American Court established in the sentence with regard to Decree Act 2. 191, as following:

General amnesty is granted by Article 1 of Decree Act 2.191 to all those who are responsible for “criminal acts" committed from September 11, 1973 to March 10, 1978. For its part, Article 3 of the Act excludes from amnesty law a number of crimes. The Court notes that assassination as a type of crime against humanity is not listed in Article 3 of the aforementioned Decree Act. Similarly, this Court, even, when still not called to rule on this case highlighted that other types of crimes against humanity, such as forced disappearance, torture, genocide, among others, were excluded.

This Court has stated several times (Case *Garrido and Baigorria, Reparations*. Judgment of August 27, 1998. *Case Baena Ricardo and others*, Judgment of February 2, 2001) that:

> "... [u]nder the law of nations a customary law provides that a State that has signed an international agreement must introduce into their State Code the necessary modifications to ensure the enforcement of obligations. This rule is universally valid and has been qualified by the jurisprudence as an evident principle ("principe allant de soi" Echange et des Populations grecques et turques, avis consultatif, 1925, C.P.J.I., series B, no. 10, p. 20). In this order, the American Convention establishes the obligation of each Member State to adapt the State Codes to the provisions of this Convention in order to guarantee the rights enshrined therein. "

In light of Article 2 of the American Convention on Human Rights, such amendment involves action in two aspects, namely: **i)** the elimination of rules and practices of any kind involving violation of the guarantees under the Convention and **ii)** the issuance of rules and the bringing forth of practices leading to effective enforcement of such guarantees (*Case Ximenes Lopes*, Judgment of July 4, 2006, *Case Gómez Palomino*, Judgment of November 22, 2005, and *Case Mapiripán Massacre*, Judgment of September 15, 2005). The first aspect is only met when the reform is carried out effectively (Case *Raxcacó Reyes*, Judgment of September 15, 2005, Case *Indigenous Community Yakye Axa*, Judgment of June 17, 2005, and Case *Caesar*, Judgment of 11 March 2005).

Amnesty laws such as Decree Act. 2. 191 lead to the state of defenselessness of the victims and to non-punishment of crimes against humanity which manifestly constitutes them incompatible with the letter and spirit of the American Convention on Human Rights and affect rights enshrined therein. This is a *per se* violation of the Convention and generates international responsibility to the nation.

In consequence, Decree Act. 2. 191 by that nature lacks of legal effect and cannot continue to obstruct the investigation on this case, neither the identification and punishment of those responsible, nor can it have equal or a similar impact on other Chilean cases of violation of the rights enshrined in the American Convention (Case *Barrios Altos*, Judgment of March 14, 2001).

Case La Cantuta vs. Peru

On November 29, 2006, the Inter-American Court ruled on case La Cantuta vs. Peru. Some considerations of the Court were: The arbitrary executions were routine practice in the context of the counterinsurgency strategy of the Peruvian State agents, particularly, in the most intense moments of conflict (1983-1984 and 1989-1992).
The Truth and Reconciliation Commission of Peru (Final Report of 2003l) came to the conclusion that between 1989 and 1992 the practice of arbitrary execution was expanded largely in the country and that they were more selective and practiced in combination with

other forms of removal of suspects of participating, collaborating or sympathizing with counterinsurgent organizations, i.e. forced disappearance.

The complex organization and logistics associated with the practice of forced disappearance required the use of State resources and facilities such as: motor vehicles, fuel, facilities to receive the prisoner and keep them hostage and concealed to impede or hinder their location.

The methods used to destroy evidence of forced disappearance crimes were, among others, mutilation or burning of the mortal rests of the victims.

On May 22, 1991, the Army established at the University of La Cantuta a military detachment of the Special Forces Division (DIFE), called Military Action Base, and imposed at that university a curfew and military checkpoint to control entry and exit of the students.

That day, army troops took control of the Universidad Mayor de San Marcos and the "La Cantuta" University where 56 students were arrested. Among those detained there were three of the nine students who were later executed out of court [, namely, Marcelino Rosales Cárdenas, Felipe Flores Chipana and Armando Amaro Condor].

The Government legalized the Security Force presence at universities by Decree Act. 726 of November 8, 1991.

On July 18, 1992, in the early morning hours, members of the Peruvian Army and Colina Group agents, wearing dark colour trousers and black turtleneck "sweaters", entered the university campus, hooded and armed, and broke into homes of professors and students.
Once in the dorm of the students, they broke up bedroom doors and forced all students to leave their rooms and lie down on the floor face down while one of the military agents who was identified by the students as Lt. Medina, avoiding to be seen, proceeded to lift each student’s head violently and to put aside the ones whose names appeared on a list in his hands. The military agent took the students Bertila Lozano Torres, Dora Oyague Fierro, Luis Enrique Ortiz Perea, Armando Richard Amaro Condor, Robert Edgar Teodoro Espinoza, Heráclides Pablo Meza, Felipe Flores Chipana, Marcelino Rosales Cárdenas and Juan Gabriel Mariños Figueroa.

On the other hand, in the teachers’ residence, the military agents violently entered the home of Professor Hugo Muñoz Sánchez, by climbing a wall to get into the courtyard and destroying the back door. Next, Prof. Muñoz Sánchez was gagged and his head covered with a black cloth and then taken by force, while some of the soldiers checked his bedroom preventing his wife from escaping.

The soldiers left for an unknown destination taking with them Professor Hugo Muñoz Sánchez and the students. Bertila Lozano Torres and Luis Enrique Ortiz Perea remained missing until the discovery of their mortal rests in hidden mass graves in Cieneguilla and Huachipa in July and November 1993, respectively. Hugo Muñoz Sánchez, Dora Oyague Fierro, Felipe Flores Chipana, Marcelino Rosales Cárdenas, Armando Richard Amaro Cóndor, Robert Edgar Teodoro Espinoza, Heráclides Pablo Meza and Juan Gabriel Mariños Figueroa are still missing.

On April 2, 1993, Congressman Henry Pease García announced that he had received a document from a sector of the army with the name "Sleeping Lion" which reported the nine students and the professor of La Cantuta University assassinated in a military operation and claimed namely senior officers of the Army and Intelligence Service to be responsible for the crime.

On May 6, 1993, Maj. Gen. Rodolfo Robles Espinoza, third in range of command of the Peruvian Army, publicly denounced by a written document of his own handwriting the human rights violation by the National Intelligence Service and the Commander General of the Army in the criminal facts of La Cantuta. The document, dated from May 5, 1993, reads:

> "... The crime of La Canuta [...] has been committed by a special intelligence detachment operating under direct orders of President Adviser and virtually Head of the SIN, Vladimiro Montesinos whose actions are coordinated with the Intelligence Service of the Army (SIE) and the Directorate of Intelligence of EMGE (DINTE) but is approved and known by Commanding General of the Army".

On June 26, 1993, the Democratic Constituent Congress rejected by 39 to 13 votes the judgment issued by the majority of the Investigating Committee, Congressmen Roger Cáceres, Gloria Helfer and Carlos Cuaresma, which established the existence of presumption of criminal responsibility for senior Army officers. Congress approved the assessment elaborated by the, Congressmen Roger Gilberto Siura and Jaime Freundt-Thurne, which stated, among other things, that it had been proven that neither the Peruvian Army, nor the National Intelligence Service or then Intelligence Service Advisor were responsible for the events of the crime investigated.

Therefore, the Court concluded that: "The facts of this case have been classified **"international crimes "**and **"crimes against humanity"** by the Truth and Reconciliation Commission, domestic judicial bodies and by the representation of the State before this Court... **The extrajudicial execution and forced disappearance** of the alleged victims were perpetrated in a context of generalized and systematic attack against civilian sectors of the population".

As for the statute of limitations the Court ruled: "... in the Peruvian criminal jurisdiction the decision in Barrios Altos has been one of the grounds for **declaring unfounded [the]" amnesty exceptions, "[the]" statute of limitations to criminal proceedings exceptions, "[the]" judged case exception" or [to] the reopening of criminal investigations** based on the inapplicability of amnesty laws".

Case Heliodoro Portugal vs. Panama.

On August 12, 2008, the Court ruled on this determined issue in the sentence following:
According to the lawsuit of May 14, 1970, Heliodoro Portugal was sitting in a coffee shop known as "Coca-Cola" located in Panama City where he was approached by a group of individuals in civilian clothes who forced him to get into a vehicle that then left for an unknown destination. According to the lawsuit, State agents were involved in these events during a period of military regime in Panama.

It continues that "during the military dictatorship it was not possible to go to the national authorities in order to file complaints for violations of human rights or to ascertain the whereabouts of a person". That is why the daughter of the alleged victim did not report the disappearance until May of 1990 after the reinstatement of democracy.

In September 1999, the cartel known as "Los Pumas" in Tocumen the District Attorney's Office got hold of some mortal rests assumedly of a Catholic priest but after genetic tests tuned out to be identified as belonging to the alleged victim. The test results were sent to the family and published in August, 2000. The prosecution on that case has not been closed yet and the responsible for the crime not condemned.

There have been documented at least 40 cases of missing persons "apprehended by [State] agents under protection orders of Superiors, deprived of their liberty, most of them beaten and tortured before their execution." Also during this period the assassination of 70 people by State agents was reported…". In both cases, the executions took place beyond any judicial authority, thus demonstrating criminal behavior of those who were called to ensure the security and integrity of [the citizens]." (Truth Commission of Panama Final Report, April 18, 2002, created by executive order on January 18, 2001, in order to "contribute to finding the truth about the violations of fundamental human rights committed during the military regime [...] of the Republic of Panama which started in 1968)". The largest number of deaths and disappearances occurred during the first three years (1968-1971) of military dictatorship, the period in which Heliodoro Portugal was arrested.

The Supreme Court of Panama recognizes that in the period between 1968 and 1972, "at date of the forced disappearance of Heliodoro Portugal the prevailing system impeded free access to justice". In addition, Attorney General Ana Matilde Gomez said in her declaration to open court audience before this Court that during that era "there was evidently no access to justice because of the remaining fear in the population to come before the courts and prosecutors to testify". The forced disappearance of persons has the character of an ongoing and permanent violation. This permits the Court to rule on an alleged forced disappearance, even if it is initiated prior to the date of the recognition of the Court's jurisprudence by the State provided such violation is permanent or continues after that date of said recognition. Given that case, the Court would be competent to rule on forced disappearance if the violation is continious.

Since its first ruling on case *Velásquez Rodríguez*, Judgment of June 26, 1987, which preceded the international standards for the forced disappearance of persons the Court held that by investigation of an alleged forced disappearance it should be taken into account the character of continuity as well as the number of repetition of the offense. The feature of continuity and multiplicity of forced disappearance of persons is reflected in Articles II and III of the Inter-American Convention on Forced Disappearance of Persons, which provide, pertinently the following:

> "For the purposes of this Convention forced disappearance is considered the deprivation of liberty to one or more persons, in whatever way, perpetrated by State agents or by persons or groups of persons who act with the authorization, support or acquiescence of the State, followed by lack of information about that deprivation of liberty or a refusal to admit it or to give any information on the whereabouts of the person thereby impeding the exercise of legal remedies and procedural guarantees.
> [...] This offense shall be deemed of continuous or permanent character as long as the fate or whereabouts of the victim continue unknown".

The need to consider fully the forced disappearance crime in an autonomous form and of continuous and permanent character within its multiple intricately interconnected elements is deduced also from its preamble ("the forced disappearance of persons violates numerous non-derogable fundamental rights of the human being as enshrined in the American Convention on Human Rights, the Declaration of the Rights and Duties of Mankind and the Universal Declaration of Human Rights").

The National Criminal Court of Peru, for example, has stated that "the term 'forced disappearance' is not only the *nomen iuris* to the systematic violation of a multiplicity of human rights [...]. Several stages are distinguished in the crime of disappearance of people as it [may be] the selection of the victim, kidnapping of the person, keeping them hostage, possible transfer to another hiding place, interrogation, torture and processing of obtained information by force. In many cases the death of the victim occur[s] and the concealment of

the corps "(Kidnapping Case Ernesto Rafael Castillo Páez, Crime against liberty, Judgment of March 20, 2006, National Criminal Court).

In this sense, the forced disappearance consists of an affectation of several legal means which continues because of the will of the alleged perpetrators, who by refusing to provide information on the whereabouts of the victim keep the violation ongoing at all times. Therefore, when analyzing a case of forced disappearance it should be taken into account that the deprivation of liberty of an individual should be understood as only the beginning of the figure of a complex violation that is prolonged continually until the fate and the whereabouts of the alleged victim is revealed.

According to the particularity of the case, the Court has declared that the international responsibility of a State is exacerbated when forced disappearance is a systematic pattern or a used or tolerated practice of the State. To sum up, such cases constitute a violation against humanity involving a crass abandonment of the essential principles that underlie the Inter-American system.

The Inter-American Court concluded by stating that: "The Inter-American Court of Human Rights has declared that the international responsibility of a State is exacerbated when the disappearance is part of a systematic pattern or practice applied or tolerated by the State. In such cases, it is in short a violation against humanity that involves a crass abandonment of the essential principles underlying the American system. "

III. Court decisions in Mexico

In Mexico, both, the Supreme Court of the Nation as highest instance of constitutional justice and the Regional District Courts have issued rulings on acts that presumably constitute crimes against humanity.
Find the main decisions adopted on these issues below.

***Amparo* in review 968/1999 (Plaintiff: Raúl Álvarez Garín and others**)

Several plaintiffs filed for amparo trial to challenge the sentence of 10 November, 1998, issued by the Attorney General´s Office to inform that he was legally unable to prosecute crimes of genocide, illegal deprivation of freedom and abuse of authority by virtue of the events dated 2 October of 1968, (Case Tlatelolco), because the statute of limitations to the proceedings to integrate the corresponding preliminary investigation had been enforced.

The District Court issued a writ of *amparo* for the plaintiffs considering among other things that the claim lacked of proper grounds and reasoned that the complaint was against crimes of genocide, abuse of authority and illegal deprivation of liberty while the ruling was only on the first mentioned. Also, it should have been determined by first instance the existence or nonexistence of the alleged crimes, which can only be effectuated by investigation of the Police where facts are assessed upon when they started , were completed, stated the time when the crime was consummated, whether it happened instantaneously, the date of execution, whether intended conduct was omitted or attempted, the day when the last conduct to crime was done, whether the crime is ongoing or the date of completion or its continuity. Also, it had failed to give a hint about the motive not to initiate the investigation, among others, and nineteen persons the plaintiffs referred to had been assassinated an there was no mention to the Convention on the Deprivation and Punishment of the Crime of Genocide adopted by our country in 1952.

The plaintiffs filed for *amparo* trial review before the Criminal District Court which declared incompetent itself to hear the case by holding that the reason for dismissal of the trial was

based on direct interpretation of Constitution Article 21 for which reason it referred the complaint to the Supreme Court.

The Supreme Court noted that it was not competent to hear the trial since the District Court had already interpreted Constitution Article 2 in its decision. But on the other hand the omission of the study did not turn out any concept of violation leading to the interpretation of any provision of the Constitution and, consequently, who should hear the case was the District Court declared incompetent to do by its own. Notwithstanding the foregoing, the Court considered exercising the faculty of attraction motivated by interest and importance on the issue and therefore, studying the merits of the case, as it is the background of the events occurred in the Plaza of the Three Cultures in Tlatelolco on October 2, 1968, in relation to the Student Movement in our country.

According to the grounds of the case the Supreme Court´s resolved to declare ineffective the grievances and to confirm the granted amparo by the fact that in order to conclude that a statute of limitations to the sentencing actions ruled by the General Prosecutor's office failed to do so by lack of foundation and motivation infringing the guarantees of legality and judicial certainty of the complainants , in this regard the prosecutor should have determined at first hand the offenses of the alleged acts for which it necessarily had to start criminal proceedings, which was, to begin with the opening of the corresponding preliminary investigation. It was given response to the complaint by the present plaintiffs, however, in terms of Constitution Article 8, but not in terms of Constitution Article 21 and its regulations as applicable in the cases of complaint.

In conclusion, the Federal Supreme Court's Office did not decide whether prescribed or not the crimes of genocide, abuse of authority and illegal deprivation of liberty committed during the events October 2, 1968.

Request of power of attraction 8/2004-ps (Case Los Halcones)

The request was made by the Attorney General's Office in order to request the Federal Supreme Court to exercise the faculty of attraction to hear the appeal filed by the Social Representative of the Federal Special Prosecutor's Office and the Public Prosecutor attached to the Criminal District Court of Mexico City against the decision of July 24, 2004, issued by a Federal Court which declared termination of period to the prosecution on the crime of genocide by Article 149 a) of the Federal Criminal Code which was in force at the material time (1971) in favor of LUIS ECHEVERRÍA ÁLVAREZ, MARIO AUGUSTO JOSÉ MOYA Y PALENCIA, LUIS BARREDA MORENO, MIGUEL NAZAR HARO, JOSÉ ANTONIO GONZÁLEZ ALEU, MANUEL DÍAZ ESCOBAR FIGUEROA (a) "EL MAESTRO", DELGADO RAFAEL REYES (a) "EL RAFLES",SERGIO SAN MARTÍN ARRIETA (a) "EL WATUSI", ALEJANDRO ELEAZAR BARRON RIVERA (a) "EL PICHÍN", SERGIO MARIO ROMERO RAMÍREZ (a)"EL FISH" and VICTOR MANUEL FLORES REYES (a)"EL COREANO".

The Supreme Court unanimously decided to exercise its faculty of attraction because of the supposed high interest from all sectors of society, both national and international, to rule on such type of case which by nature is expected to affect profoundly the country's political life since the beginning of the investigation on the case referred to was bound to a governmental decision to create a Special Prosecutor's Office for Social and Political Movements of the Past. In addition, it considered that it was known that the said Special Prosecutor had made several inquiries to other Mexican entities for crimes committed against people linked to social and political movements of the past which obviously would lead to a large number of appropriations in which the topic of "statute of limitations to criminal prosecution" could create controversy.

It also said that the interaction between International Code and State Code transcended the internalization process on treaties which was of interest and importance according to the solution to be adopted to solve the problem of hierarchy of rules and the possibility of its modification as a consequence.

It was concluded to be necessary to define if the treaties when incorporated into the Mexican State Code were regarded as laws producing the same effects as an ordinary law and to determine levels of competence of a differentiated legal order or stratus (national law) over another distinct legal order or stratus (international law), hence, the way how a possible solution would be given to this interaction of legal systems, and undoubtedly, it was also of interest and importance, as the difficulties that could result from the legal classification of the crimes might lead to an unusual debate in the international criminal law field. In that sense, the Supreme Court's Office studied the background of the 1/2004-PS Appeal trial resulting from mentioned request by the faculty of attraction.

Appeal 1/2004-ps, derived from the power of attraction 8/2004-ps.

This appeal was promoted by the Special Prosecutor’s Office for the attention of acts that might constitute federal crimes committed directly or indirectly by public officials against people linked to social and political movements of the past in the case known as "Los Halcones".

On July 22, 2004, the Specialized Prosecutor's Office attached to the Federal Public Prosecutor for the attention of acts that might constitute federal crimes directly or indirectly committed by public officials against people linked to social and political movements in the past, once integrated into the preliminary investigation, exercised criminal prosecution against Luis Echeverría Álvarez (then President at the time of the events), José Augusto Mario Moya y Palencia (then Secretary of the Interior), Luis de la Barreda Moreno, Miguel Nazar Haro, José Antonio González Aleu, Manuel Díaz Escobar Figueroa (a) "El Maestro", Rafael Delgado Reyes (a) "El Rafles",Sergio San Martín Arrieta (a) "El Watusi", Alejandro Eleazar Barrón Rivera (a) "El Pichín", Sergio Mario Romero Ramírez (a) "El Fish" and Victor Manuel Flores Reyes (a) "El Coreano" as probably responsible for the commission of crime of genocide, under Article 149 a. Federal Criminal Code, in force since 1971.

The matter corresponded to be heard by the Federal Criminal Court of Mexico City which declared on July 24, 2004, the termination of the prosecution for the crime of genocide in favor of the accused on decree of dismissal of the criminal case.

Unsatisfied with the previous determination, the Federal Public Prosecutor’s Office and the attached to the court of reference filed an appeal. The judge ordered to send the case to the Unitarian Tribunal of the First Circuit on duty.

The appeals corresponded to the Unitary Criminal Tribunal for the First Circuit which ordered to register criminal record with number 415/2004.

Once held the open court hearing and being pending the issuance of the respective resolution the Attorney General's Office asked the Federal Supreme Court to exercise its faculty of attraction in order to know the appeal of merit. And so did the mentioned Court on October 13, 2004.

In the background statement the Supreme Court ruled on various topics, among other, see the following:

A) Application of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, July 3, 1969

The Supreme Court held that the guarantee of non-retroactivity of Constitution Article 14 also applies to international treaties and it is also referred to in various international instruments such as: the International Covenant on Civil and Political Rights (Article 15), the American Convention on Human Rights (Article 9) and the Universal Declaration of Human Rights (Article 11), among others.

On the other hand, it said that Mexico signed, ad referendum, the Convention on the Non-Applicability of Statutory limitations to War Crimes and Crimes against Humanity on 3 July, 1969, which was sent to the attention of the House of Senators of the Congress with the corresponding Interpretative Declaration where it was approved on December 10, 2001.
That court concluded that, even if the aforementioned international instrument is called a Convention it actually constitutes a treaty in terms of Article 2, Section I of the Act on the Closure of Treaties.

In that sense, it was said that if the Convention's intention is to rule on all crimes committed, regardless the date thereof, the Interpretative Declaration made by the Mexican government would actually modify the temporal scope of the Convention, and, therefore, it should be classified as a reserve. However, the above mentioned reserve only contributes to what is already established by Article 14 of the Constitution of the United Mexican States making it clear that even in this case it could not be declared invalid or unenforceable in the present case for going against the "objective and purpose of the treaty" because it would indirectly evade to apply Constitution Article 14. The aforementioned is relevant only to avoid a possible responsibility of the Mexican State in the international context.

B) Non-Applicability of Statutory Limitations to the Crime of Genocide

The Supreme Court concluded from the content of Articles 110 and 111 of the Substantive Criminal Code in force at the time of the crime that not every act of the aforementioned procedure can interrupt the statute of limitations cited. It is only for the prosecutor or the judicial authority and not for others to practice crime investigation on the probable culprit - aimed to assess the facts of the crime which the illicit attributed to the accused derives from - are apt to interrupt the statute of limitations as long as they are not made after half of the time required to operate had passed, because otherwise, the statute of limitations would not be interrupted until the arrest of the accused occurs.

Following the same line, it lined out that Luis Echeverria Álvarez and Mario Augusto José Moya y Palencia, now suspects, were in office as President of the United Mexican States, regarding to the first and Secretary of Interior, the latter during the term between from December 1, 1970, until November 30, 1976, which was the time when the crimes happened and which the appealed writ was applied on.

It was established that, according to what was set out in the third paragraph of Constitution Article 108, in force by then, the President of the Republic during his office term could only be charged with the crime of treason against the homeland and serious common crimes. It was added to that said provision that in order to prosecute the aforementioned public officer on serious common crime matters Constitution Article 109, paragraph 1, provided that it should be mediated a declaration to that effect by the Congress, built in Indictment Body, that a decision of that deliberative body should be adopted by absolute majority of its members. With regard to the Secretaries of Staff, during their term of office they were responsible for the crimes of common order but in order to prosecute those public officials for criminal charges Constitution Article 109, paragraph 1, provided that it should be mediated previous declaration to that effect by the Congress built in Grand Jury and a decision of that deliberative body should be made by absolute majority of its members. Under the mentioned conditions the Attorney General was impeded to prosecute the said

indicted, as it was necessary to remove the subjective condition of punishment consisting of the constitutional immunity to protect them.

It was established that Title IV of the Constitution of the United Mexican States on the Responsibilities of Public Officials (currently Responsibilities of Public Servers) comprising Articles 108 to 114 was fully amended by the Constitutional Reform published in Official Journal of the Federation on 28 December 1982 and established expressly in the second paragraph of Constitution Article 114 the principle that the statute of limitations is interrupted in the case of crimes committed by public servers whose offices are referred to in Article 111 for the time they continue in office. This Constitutional Reform of 1982 could have an effect on events that occurred in 1971. This, since the prohibition of retroactivity from Constitution Article 14 was not applicable to the rules of the same hierarchical level, i.e. rules incorporated into the Constitution by the procedure laid down in Article 135.

In these terms, it was concluded that when Luis Echeverría Álvarez and Luis Mario Augusto Moya y Palencia concluded their respective office term as President of the Republic and Secretary of the Interior the term of the statute of limitations were interrupted. In this sense, if the facts alleged to constitute the crime of genocide took place on June 10, 1971, precisely the time when they were in office, the term of statutory limitations to count did not start before the end of their office term.

Therefore, by a majority of three votes it was ordered to modify the first operative paragraph of the contested writ by the Second Criminal District Court of Mexico City to the point to declare that the of statutory limitations to prosecution did not operate but only with respect to Luis Echeverría Álvarez and Luis Mario Augusto Moya y Palencia referring to the term of thirty years to update by Federal Criminal Code Article 105 it should not be counted from June 11, 1971, but from December 1, 1976, date in which their respective office terms as President of the Republic and Secretary of the Interior had completed, so that to the date of June 10, 2002, which was the begin of the preliminary investigation against them on criminal charges, this term had not entirely passed since the update on the prosecution on the crime of genocide should be counted from December 1, 1976, to December 1 2006.

That is, since the date of the commission of the crime until the date of charge - 10 June, 1971, - date of completion of their office term -30 November, 1976, - at no time they missed to enjoy protection by constitutional immunity that has been mentioned in this section, i.e. if they had been temporarily removed from public office which the constitutional immunity is linked to, then during that time the term of the statute of limitations positively would have operated to interrupted again when reassuming office or taking up a new one that also is bound to constitutional immunity protection.

C) Finally, it was examined whether the Constitutional Reform of 1982 should have an effect on events that occurred in 1971 which established expressly in Constitution Article 114, Paragraph 2, that the principle of the statute of limitations is interrupted in the case of crimes committed by public servers whose office referred to in Article 111 if they continue in office.

The Supreme Court held that Constitution Article 14 provides that no law shall have retroactive effect to the detriment of any person, however, it should be understood that such provision is not mandatory for the legislator if it is decided to reform the Constitution itself. The guarantee of non-retroactivity cannot reach the extent, even enshrined in the Constitution, to prevent or limit reforming it or mauling the effects of such reforms made in exercise of national sovereignty and in view of the highest public interest, nor forcing to drag harmful effects to the social interest coming from previous legislation.

Hence, the prohibition to establish or give retroactive effect to a rule, exclusiveley corresponds to be operated by the constituted authorities, not for the Standing Legislation, because it is the supreme constitutional authority in which lies the sovereignty, expressed in the power to amend the fundamental rule itself, i.e. the supreme order of our country, a circumstance in which there does not exist any impediment.

Thus, Constitution Article 114, Paragraph 2, must be followed, even by public servers who held the office before the entry of such amendment into force without this being in violation of any constitutional guarantee on the grounds that there can be no contradiction between two constitutional provisions where only one of them determines exceptions or restrictions to the general provisions of the other.

***Amparo* in review 140/2002. Complainant: Ricardo Miguel Cavallo**

The interest of the next trial is to determine whether the Supreme Court's Office did not rule on crimes committed on national territory by Mexican authorities and did rule on crimes against humanity due to a request for extradition of an Argentinean citizen for acts performed during the dictatorship in his country. On August 25, 2000, Judge Baltasar Garzón Real of the Central Court of Instruction Number Five of the National Court in Madrid, Spain, supported by Article 19 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the United Mexican States and the Kingdom of Spain requested the Ministry of Foreign Affairs of Mexico to arrest C. Ricardo Miguel Cavallo for criminal charges of genocide, torture and terrorism committed at the Naval College of Mechanics during the military dictatorship in Argentina (1976-1983) and concede international extradition. He founds his competence on universal jurisdiction derived from the mentioned Article 23, paragraph 4, of the Organic Law of Spain effective from the date of July 3, 1985, in the sense that the courts of Spain have jurisdiction over crimes committed by Spaniards or foreigners outside the national territory, classified, according to Spanish Criminal Code among others, genocide, terrorism and any other crime according to international treaties and convention that should be prosecuted in Spain. The universal jurisdictional reasons on the assumption that certain conducts with the character and grade of gravity affect all humanity, so that any State is entitled to punish such acts through its courts without regard to nationality location of crime.

Said request for provisional arrest was referred to the Attorney General's Office to promote the corresponding before the Federal Judiciary under Article 17 of the International Extradition Law.

The Attorney General´s Office sent the petition to the Federal Criminal District Court in Mexico City in order to receive preventive arrest order for the international extradition which was granted and ordered the next day. By court order of October 10, 2000, the Federal Criminal Court of Mexico City presented, timely and in form, the official extradition request submitting the complainant to international extradition procedure.

Subsequently, the complainant filed an *amparo* trial against the creation process (conclusion and approval) of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the United States of Mexico and the Kingdom of Spain of November 21, 1978, amending protocol of 23 June, 1995, and the Covenant for the Prevention and Punishment of the Crime of Genocide of December 9, 1948, as well as its corresponding implementation act consistent with the agreement of 2 February, 2001, by which the Ministry of Foreign Affairs granted the plaintiff's extradition to Spain.

The District Judge issued his ruling in the *amparo* trial and granted the *amparo* and protection of the Federal Judiciary against acts which are claimed by the President of the Republic, Senate, Secretary of Foreign Affairs, Interior Ministry, Attorney General, Deputy

General Counsel of the Attorney General's Office and Director of the Men's Detention Center East on the agreement of February 2, 2001, attributed to Secretary of Foreign Affairs to the effect that the Secretary of State left ineffectual the indicated agreement which granted the plaintiff's extradition to Spain in order to be prosecuted for the crimes of genocide, torture and terrorism and issued another one instead where he declared the statute of limitations to prosecution in respect of the crime of torture, refusing extradition what corresponds to such illicit , implicitly denying the injunction and protection of Federal Justice requested corresponding to the other claimed offenses (crimes of genocide and terrorism), i.e. with respect to the building process (conclusion and approval) of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the United States of Mexico and the Kingdom of Spain of 21 November 1978, the protocol of June 23, 1995, for modification of indicated Extradition Treaty and the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.

Subsequently, the Supreme Court decided to exercise its faculty of attraction over the amparo trial under review filed by the complainant challenging the decision of the District Court described above, on grounds of a grievance related to an alleged procedural violation committed by the Judge of the District Court in the constitutional hearing consistent with the denial of admission of supervening evidence offered and displayed with respect to appropriately certified copies of public foreign documents, thus violating the provisions of Articles 78 and *Amparo* Act 150 and Federal Civil Code 219 considered preferential to any other study because in case of being founded it would merit reparation of the procedural violation, even to the extreme of ordering replacement of the procedure of the *amparo* trial in addition to the importance and significance of the case because its background concerned the constitutionality of several international jurisdictions as well as issues in relation to universal jurisdiction.

The Supreme Court ruled on the following topics:

As for the consistent grievance, the District Court improperly determined that the crime of genocide had no political character since even in said illicit its concept is not strictly of political nature but does have the quality of being linked to this type of illicit of terrorism and, therefore, it should not have been granted his extradition to the Kingdom of Spain. The Supreme Court ruled that the District Court was right in determining that the Convention for the Prevention and Punishment of the Crime of Genocide claimed did not contravene Constitution Article 15 as the crime of genocide, actually, is not of political nature.

The Court noted that the purpose of the crime of genocide is the protection of certain groups of people considered stable who constitute the environment where the individual is formed in practically all social and cultural aspects of their existence and where the substrate of the international community of such importance in relation to functionality for the individual that it is almost comparable to the States themselves. It was said that Article II of the Convention on the Prevention and Punishment of the Crime of Genocide describes individual acts that are only a form by which the author pursues the destruction of the group.

Therefore, it was established that the same as on the international level the legal means protected in the crime of genocide is the integrity of the peoples in national, racial, linguistic or religious terms by their own nature or character since under the said illicit it punishes the act that is intended to destroy, in whole or part, one or more national peoples of ethnic, racial or religious character, by either attacking the lives of their members, imposing mass sterilization to prevent reproduction of the group, attacking the integrity of the body or health of their members, moving under sixteen year old children from one group to another or intentionally inflicting life conditions in order to bring about their physical destruction, in whole or in part.

In this regard, it was said that should not be rejected the plaintiff's argument that the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, violated Constitution Article 15 by allowing extradition for political crimes as the motive is not an element of genocide that the Convention aforementioned provides, as the subjective element consists only by the intent to destroy the group. Furthermore, the above conclusion is also supported by the fact that it was the express decision of the countries that signed that convention by the exclusion of the reasons of the crime when considering that the motive of crime is essential and by including them they could be used to evade the charge of genocide using different motives that in limited form are provided as in the present case where the appellant pretends to use the motive for the intention to destroy a group to prove that he is accused for a political rather than for an international crime which is tried to be imputed on him, because, to reiterate, the motive is irrelevant since it is not part of the type, even more as the requested country (Mexico) decided that genocide is a crime against humanity and the legally protected interest is the existence of certain human groups considered stable.

The Court also held that if the Convention on the Prevention and Punishment of the Crime of Genocide was an instrument to seek international cooperation for the prevention and punishment of what was considered an odious scourge which has inflicted great losses on humanity, such as the international crime of genocide committed in wartimes and peacetimes, it could not build a procedure to limit the self-determination of the nations nor would it interfere in the decisions on their internal political organization, impeding their doing so freely, a preamble which by in Article V of the Convention empowered the contracting parties to adopt in accordance with their respective Constitutions the necessary legislative means to ensure the implementation of the Convention which meant that it was not imposed on our country the obligation to obey it in opposition to the Magna Charter, but to be under it, so that it was clear to have the liberty to do it just based on our Constitution and therefore it could not be contrary to it.

As relates to the crime of terrorism, which in the opinion of the complainant is of political character, the Court considered that, similar to the crime of genocide, it was not the case since under Mexican law in Federal Criminal Article 144 political crimes are rebellion, sedition, mutiny and conspiracy. Meanwhile, the crime of terrorism is provided for and punishable under the Federal Criminal Code in Book Two, Title One, Chapter Six, Article 139.

Additionally it was said that the Convention to Prevent and Punish Acts of Terrorism configured in the Form of Crimes Against Persons and Related Extortion, that when those achieve International Importance, signed in Washington on February 2, 1971, passed by the House of Senate, the contracting parties in Article 1 of the international order obliged themselves to cooperate with each other by taking all measures deemed effective in accordance with their respective laws, and, especially, with the ones that establish such a convention to prevent and punish acts of terrorism, especially kidnapping, murder and other offenses against life and integrity of the person, established in Article 2 of the Convention, that for the purpose of the same they are considered common crimes of international concern, whatever their motive is, if kidnapping, murder and other offenses against life and integrity of the person. That means that it was determined in the Convention that the conducting actions to terrorism should be considered common crimes of international concern for this Convention, whatever the motive is, so that under these conditions it is clear that the crime of terrorism cannot be of political character which the complainant attaches it to.

Also, they said that the crime of terrorism cannot be subsumed under genocide since such unlawful acts are set up with the commission of autonomous and independent acts. That means that Federal Criminal Code Article 139 expressly establishes that the penalties for the

crime of terrorism shall be applied without affecting other penalties that apply to additional crimes such as the crime of terrorism which is to punish independently as well as any other unlawful act resulting from the crime, where it is clear that it cannot be subsumed under the more serious offense.

On the issue concerning the jurisdiction of the courts of Spain in order to find out about offenses considered crimes against humanity such as genocide and terrorism and punish them, the Supreme Court held that under consideration of Federal Constitution Article 119, last paragraph, that the Supreme Court is limiting when it establishes that extradition proceedings at the request of foreign States will be processed in terms of the Constitution, international treaties signed in respect to it and the regulatory laws and as those legal systems do not expressly establish a procedure for the extradition on request of a foreign State it should be analyzed the competence of the court of the requesting country based on which the extradition of any person is requested because otherwise it would be necessary to perform an analysis or study of the internal law of the requesting country in order to determine legality or illegality of the determination of competence made by the court of issuance of the court decision with base on the extradition request in breach of the requesting State's sovereignty because it would violate the right of the said court to analyze this issue when it deemed appropriate throughout the correspondent criminal prosecution.

As said, it was clear that in such proceedings the Mexican state was impeded to analyze this case. That is so because extradition is governed by the principle of reciprocity which in turn is based on the assumption of good faith between the parties since the States undertake to cope with their obligations when they are required to do so. Mexican authorities have acknowledged that the granting of extradition must be immersed in the action of solidarity as a means of combating impunity and the principle of international reciprocity.

As to the statute of limitations to genocide and terrorism, the Court found that considerations of the District Court were correct a quo in the argument that there did not operate any statute of limitations to the sentencing as it pertains to crimes of genocide and terrorism according to the law of the requested and requesting countries.

The court was noted that in order to discuss the statute of limitation to the corresponding actions of crimes of genocide and terrorism it must necessarily taken into account the legislation in force at the time of the events or at current time if it favors the required and be aware of the guarantee of non-retroactivity of the law to the detriment of any person referred to in Constitution Article 14, on both sides, the requesting State, Spain, as well as the required State, the United States of Mexico.

In that sense, they estimated that there was no doubt that due to the nature of the acts attributed to the complainant, the temporal scope of its validity, the ways of commission and a plurality of active and passive subjects involved in the criminal acts that these crimes were of continuous nature, because they were carried out by several actions and at different times directed against a group of citizens and their families who were considered dissidents of the ruling military regime during the dictatorship era in Argentina, so that under these conditions it was irrelevant to determine exactly when each of the acts took place in the settings of genocide and terrorism which the complainant is charged for, since it would require a detailed study of each and every proof of evidence added in the orders by assessing the charges deriving from those in order to determine what actions constitute crimes of genocide and terrorism which could not be done in the extradition proceedings where the claimed acts derive from because the Treaty on Extradition and Mutual Assistance in Criminal Matters between the United States of Mexico and the Kingdom of Spain and its amending protocol the contracting parties expressly agreed in Article 15 b) of the international order itself that it was not necessary to prove the existence of crime and rationale indications of it by the claimed. Therefore, in order to determine the applicability of the statute of limitations, it is

sufficient to precise that the illicit is charged for the facts occurred during Argentina's dictatorship between March 24th, 1976 and 10 December 1983.

Additionally, it was established in the sentence by consideration of the fact that the crimes of genocide and terrorism were sanctioned at the time of the events and currently with prison terms of twenty to forty years and from two to forty years, respectively, that, clearly, their average arithmetic terms by Federal Criminal Article 118 itself were thirty and twenty years, respectively, that should elapse since the cessation of the crime in case of continuity, as in the present case, so that the statute of limitations to proceedings would prescribe by Article 102 of the said Criminal Code.

However, from December 10, 1983, when Argentina's military dictatorship ended and the last of the illicit acts was committed by the petitioner to the date on which the crime investigations of their alleged perpetrators initiated, March 25,1986, by filing the complaint before the Instructive Court of Spain only twelve years and 3 months had passed while until the date of detention of the petitioner in August of 2000 sixteen years and eight months had passed during which time clearly the statute of limitations did not operate for the crimes of genocide and terrorism under Mexican law since there were required thirty and twenty years, respectively.

It was also established that under Spanish law Article 114, in force at the time of the facts, that the term of statute of limitations began to run at the date of crime, was interrupted at beginning of prosecution against the culprit and started to run again when that ended without conviction or by paralyzing the process. In the case present, on March 25, 1996, the complaint was filed which gave rise to the examination of the extradition process, for what it was clear that from that date the term of the statute of limitations had been interrupted without adverting the records of the orders of paralyzing the process so that the said the prescriptive term would start running again. Moreover, the crime attributed to the petitioner is according to Mexican law considered as continuous for having been committed throughout several acts at different times against different people, so that the statute of limitations would run from the expiration of the offense according to Article 102 of the Criminal Code in question. Hence, it is not possible to determine the acts prior 1980 as prescribed as the complainant alleges. On the issue of statutory limitations to prosecution of torture crimes the Supreme Court held that the District Court ruled correctly on the statute of limitations in reference to the crime of torture under the laws of the United States of Mexico in force at the time of the crimes.

In order to meet the previous conclusion the Court noted that Article 108 of the Federal Criminal Code in force at the material time provided that by being accumulated offenses those resulting punishment actions would prescribe separately in the term as imposed on each of them. It was said that under these conditions even if Article 64 of the legal order itself would establish the rules on the accumulation of crimes the same would be applied to only for the effect of the enforcement of the sentences, but not for the purpose of counting the term of the statute of limitations to the sentencing, because the indicated Article 108 provided a specific rule for the effect of the statute of limitations to sentencing, meaning that in the matter of accumulated offenses consequent penal actions would prescribe separately in the term as imposed on each of them.

The Court considered that it was not adverted that the rules of the statute of limitations established in the Criminal Code Articles 107 to 109 and in force at the time of the acts did not turn out applicable to offenses which were pursued on routine office duty in turn at the time of criminal acts as claimed by the appellants because there was no legal ordainment in those terms and in addition to the fact that the indicated Criminal Code Article 108 of that time was clear when it established that by being a case of accumulated offenses the resulting sentencing actions would prescribe separately in the period set up for each without

establishing in the legal order itself that the statute of limitations was applicable only to offenses pursuable by complaint or on request of the offended party, and not pursuable on office duty by turn as incorrectly alleged by the appellant.

Finally, the issue related to the determination of whether the crimes of genocide and terrorism extradition is requested for were of military in nature. The Supreme Court held that the facts constituting the crime of genocide and terrorism attributed to the petitioner could not be considered violators of order and military discipline and, therefore, they could not have be of character of offenses with immunity treatment since his behavior did not affect or threaten a military legal right, because by serving he would have affected all humanity.

And it was also mentioned that the claim of the plaintiff was no impediment in the sense that as a member of the Army he obeyed orders because under the American Convention to Prevent and Punish Torture and the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatments and Punishments he was not excluded from liability for acting under superiors or for the existence of special circumstances such as a state of war, internal political instability or any other political emergencies and the international orders cited on their parts with the only objective to establish that the international law and doctrine had considered that when it came to crimes against humanity it does not exempt a person from liability for acting on orders of superiors what they were invoked for, even if there had been considered the statute of limitations to punishing actions for the crime of torture and that there was no intention to prosecute the complainant based on provisions of the Military Court or by any special tribunal of this kind, but by the Civil Code regulating the existence of crimes attributed to him and by courts of the same jurisdiction.

Based on the foregoing, the Supreme Court's Office, determined to deny the amparo requested by Ricardo Miguel Cavallo in relation to international orders the extradition to the Kingdom of Spain was based conceding him the amparo and protection of the Federal Judiciary, also by unanimity vote, which was given and protection under the Federal Court, also by unanimous vote corresponding to the agreement of February 2, 2001, on the crime of torture for being under operation of the statute of limitations.

Moreover, by majority vote it was determined that the requested amparo should be denied as it pertains to the agreement of February 2, 2001 issued by the Ministry of Foreign Affairs for which extradition was granted with respect to crimes of genocide and terrorism because in the concept of to the majority it was not feasible to analyze the internal competence in the extradition proceedings in terms of the reason of the matter, territory, grade or number of courts because this issue is not specifically regulated under the Treaty of Extradition and Mutual Assistance in Criminal Matters between Mexico and Spain and amending protocol or the International Extradition Law.

Consultation on process. Several 912/2010

On August 25, 1974, Mr. Rosendo Radilla Pacheco was an alleged victim of forced disappearance committed by the Mexican Army stationed in the municipality of Atoyac de Álvarez, Guerrero. After several complaints filed to State and federal instances by family members of Mr. Rosendo Radilla Paheco on November 15, 2001, the Mexican Commission for the Defense and Promotion of Human Rights and the Association of Relatives of the Disappeared and Victims of Violations against Human Rights in Mexico filed a complaint against the Mexican Government before the Inter-American Human Rights Commission.

Given the failure of the Mexican State to assume the recommendations made by the Inter-American Commission on March 15, 2008, the mentioned international body brought the case before the Inter-American Human Rights Court. On November 23, 2009, the Court handed down a conviction sentence and notified the Mexican State on February 9, 2010. On

the same date, an excerpt of the case Radilla Pacheco was published in the Official Journal of the Federation.

Given that fact, on May 26, 2006, the then President of the Supreme Court called the Plenary of the Supreme Court for Consultation, so that the file 489/2010 “several” was formed. On September 7, 2010, the Plenary resolved the mentioned Consultation under process by ordering to determinate what should be the involvement of the federal judiciary by implementing the decision in case Radilla Pacheco, so it would be necessary to do the following:

a) Analyze if any of the exceptions is set that conditioned the recognition of the jurisdiction of the Inter-American Court of Human Rights on behalf of Mexico. The exceptions referred to are two: The first had to do with the previous text of Constitution Article 33 (which has been renovated recently) establishing the exclusive authority of the President to expel - immediately and without prior trial - any foreigner whose presence is deemed inadvisable, and the prohibition on foreigners to intervene in political affairs which has not been modified. The second exception was to the effect that acceptance of the jurisdiction of the Inter-American Court only would operate in relation to the facts or the legal acts posterior to the date of recognition, that is, that the acceptance would have no effect on past issues.
b) Interpreting the scope of reservations or interpretative declarations made by the Mexican government by adhering to the American Convention on Human Rights and the Inter-American Convention on Forced Disappearance of Persons. On this point, reservations and interpretative declarations made by Mexico were as in the following:

> 1. Recognize the right to vote of religious ministers (Reservation to the Convention);
> 2. Recognize the right of association for political purposes of the religious ministers (Reservation to the Convention);
> 3. Appear before the Inter-American Court for a process and if applicable, comply with the ruling issued by the Commission if the matter has to do with the application of Constitution Article 33 (Reserve of the American Convention);
> 4. Comply with a ruling of the Inter-American Court to determine violations of the American Convention and the Inter-American Convention on Forced Disappearance of Persons by facts and events previous to the recognition of its jurisdiction**, except in cases of continuous or permanent violations such as forced disappearance of people;**
> 5. Recognizing the lack of jurisdiction of military tribunals to hear the facts constituting the forced disappearance of persons committed by military officials in office and consider them as special courts to these jurisdictional bodies **(reservation to Article IX of the Convention on Forced Disappearance of People).**

c) Define what specific obligations would result to the Judiciary of the Federation and how they implement them.

In the resolution it was determined by majority vote that the Federal Judiciary has the obligation to analyze the sentence in its total and that it can manifest motu proprio in reference to their compliance without the need for coordination with any of the other two branches of government.

The Inter-American Commission of the Human Rights at this time has issued three judgments related to forced disappearance as in the case Fernández Ortega, Rosendo Cantú and Cabrera García, all together of 2010. On the other hand, Mexico was also notified to the resolution of monitoring compliance with the Inter-American Court of Human Rights related to compliances for the Mexican State, it has done it somehow. An initiative to reform

Article 57 of the Military has been presented, however, in this resolution of supervision of the Inter-American Court of Human Rights, is already assessing the initiative which has not even been discussed yet in Congress but somehow it has already been determined that it would not make it up to execute the issued sentence.

During the debates the following conclusions were reached:

- Determined that in reference to the convictions of the Inter-American Court of Human Rights it is not possible to review the exceptions, reservations and interpretations made by the Mexican State,

- That the sentences of the Inter-American Court of Human Rights positively are binding for the Federal Judiciary in its terms,

- That the interpretative criteria contained in the jurisprudence of the Inter-American Court of Human Rights are guiding for the Federal Judiciary;

- That in accordance with paragraph 339 of the ruling of the Inter-American Court of Human Rights in the case Radilla Pacheco the Judiciary must exercise control of conventionality and that this said control must be exercised by all courts of the United States of Mexico,

- That judges of the Mexican State must replicate the approach in future cases of restriction on military jurisdiction in compliance with the decision from case Radilla Pacheco and under Constitution Article 1,

- That the Supreme Court's Office for the effectiveness of compliance and by implementation of Constitution Article 1 should reassume its original jurisdiction to hear disputes on competence between the military and civil jurisdiction,

- That the interpretative criteria contained in the jurisprudence of the Inter-American Court of Human Rights should be guidelines for the Federal judiciary;

Thus, the Supreme Court determined that the convictions of the Inter-American Court of Human Rights are binding for the Federal Judiciary in its terms, except for those cases where enforcement violates the Constitution of the United States of Mexico.

I. CONCLUSIONS

From the above, it can be seen that in Latin America crimes against humanity are directed towards the protection of fundamental rights such as life, liberty and physical integrity, among others. Among the characteristics of these crimes there are the severity of damage suffered and the consequences for victims and society. These crimes must be committed in a systematic or generalized manner. That way the punishment of perpetrators of crimes against humanity has become a universal imperative.

The Latin-American jurisprudence has defined the elements of crimes against humanity. There must be a generalized or systematic attack against civilian population and a general knowledge of the attack by being this a subjective element.

As for the definition of generalized seizure Latin-American courts have applied the definition of the Rome Statute. It is to highlight in this category that the Panamanian law (Case Cruz Mojica Flores) which was characterized by a precise interpretation of the concepts of systematic and generalized. Also Peruvian jurisprudence on acts of individuals (cases of

Barrios Altos and La Cantuta) makes a big difference, even those acts committed on large-scale they are not supported or coordinated by a State politics or a system of organized power.

To meet the element of general knowledge of the attack it is necessary to prove that the defendant intended to commit the criminal act, knew the attack was generalized and was aware that his conduct was part of the attack. The crimes against humanity have been classified as forced disappearance, torture and other cruel, inhumane or degrading treatment as well as the mass execution of people without previous trial.