DOUBLE JEOPARDY IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: BALANCING THE RIGHT AND THE REMEDY

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I. Introduction

On December 11, 2009, the Guatemalan Supreme Court ordered the re-opening of four cases involving murders committed toward the end of the country's civil war.[1] The concise sentences were nearly identical in their summary determinations to vacate all earlier sentences – some of which were acquittals of the accused – and to resume criminal proceedings "against all those that might be responsible" for the crimes.[2] The Guatemalan Supreme Court acknowledged that it was complying with judgments of the Inter-American Court of Human Rights (IACtHR), which had determined the international responsibility of Guatemala for failing to investigate the killings with due diligence and sanction the perpetrators. Yet, it offered no explanation for its decision to reexamine the sentences of acquittal.

These and similar orders in Peru, Colombia, and Argentina were motivated by the IACtHR's jurisprudence on the principle of

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[1] Press Release, Inter-Am. C.H.R., IACHR Welcomes Decision of Guatemala's Supreme Court of Justice (Feb. 3, 2010), http://www.cidh.org/Comunicados/English/2010/15-10eng.htm.

[2] Instituto de Investigaciones Jurídicas de la UNAM, *Autoejecutabilidad de las Sentencias de la Corte Interamericana de Derechos Humanos en el Marco de Procesos Penales Internos: Cuatro sentencias de la Corte Suprema de Justicia, Guatemala* (December 11, 2009) at 131, http://www.juridicas.unam.mx/publica/librev/rev/dialjur/cont/7/cnt/cnt9.pdf [hereinafter *Cuatro sentencias de la Corte*].

non bis in idem, or double jeopardy.[3] The Court has interpreted this principle when analyzing violations of the American Convention on Human Rights (the Convention) and when granting reparations for such violations. These interpretations have not always been consistent, creating a difficult task for domestic courts that seek to apply a coherent rule that balances the rights of victims with those of the accused. The IACtHR's jurisprudence has also failed to provide guidance to states in an area in which it is most needed: when existing law is insufficient to impel the prosecution of those responsible for serious human rights violations.

This article opens in Part II by presenting a background of the Inter-American system of human rights and the principle of *non bis in idem*. Part III explores how the IACtHR has interpreted this principle, both as a right and in the context of reparations. Part IV presents a critique of the manner in which the principle was adopted and its content. Part V examines how state parties have applied the principle in seeking to make reparations for human rights violations and questions whether they have placed the rights of the accused in peril in so doing.

II. Background

A. An Overview of the Inter-American Human Rights System

The Inter-American Commission (the Commission) and the IACtHR are the treaty bodies of the Organization of American States (OAS) charged with monitoring the human rights situations of its member states. The Commission has a broad role in protecting human rights and promoting their observance among all member states and Cuba,[4] while the IACtHR issues rulings on the obligations

[3] The principle, which means "not twice for the same," establishes that no one may be subjected to a second criminal prosecution for acts that have already been adjudicated in a final sentence. *See* BLACK'S LAW DICTIONARY 440 (5th ed. 1979).

[4] Charter of the Organization of American States, arts. 53, 106, Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 48; Statute of the Inter-Am. C.H.R., arts. 1, 18-20,

of those states that have accepted its jurisdiction to interpret the Convention.[5]

Both the Commission and the IACtHR have played significant roles in ending impunity for human rights violations in the Americas.[6] Through its reports on countries and systematic problems in the Americas, as well as through the recommendations that it issues on the merits of contentious cases, the Commission has stressed the duty of states to investigate, prosecute, and punish all persons responsible for committing violations of human rights enshrined in the American Declaration on the Rights and Duties of Man[7] and the Convention.[8] Similarly, the IACtHR's orders of

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Oct. 1, 1979, O.A.S.T.S. Res. 447 (IX-0/79), *both reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American Systems, OAS/Ser.L/V/I.4 rev. 13 (Jun. 30, 2010), *available at* http://www.cidh.org/basicos/english/Basic.TOC.htm (last visited Oct. 9, 2011).

[5] *See* Inter-Am. Ct. H.R., Res. 448, Statute of the Inter-American Court of Human Rights, 9th Sess., arts. 1-2, Oct. 1979; *see* Organization of American States, American Convention on Human Rights, arts. 62, 64, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. At present, there are twenty-four states parties to the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. *See* American Convention on Human Rights, *available at* http://www.oas.org/juridico/english/sigs/b-32.html. All of these states with the exception of Dominica, Grenada, and Jamaica, have accepted the jurisdiction of the Inter-American Court. *See* IACHR, *Basic Documents Pertaining to Human Rights in the Inter-American System*, http://www.cidh.oas.org/basicos/english/Basic1.%20Intro.htm#_ftn5; INTER-AMERICAN COMM'N ON HUMAN RIGHTS, http://www.cidh.oas.org (last visited Oct. 14, 2011) (providing more information on the jurisdiction of the Inter-American Court). While Trinidad and Tobago signed the American Convention and accepted the Court's jurisdiction, it renounced these commitments in 1998 and its renunciation took effect one year later. *See* IACHR, *American Convention on Human Rights*, *available at* http://www.oas.org/juridico/english/sigs/b-32.html.

[6] For a good discussion of the system's impact on human rights in the region, *see* Brian D. Tittemore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J.L. & TRADE AM. 429 (2006).

[7] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted on* May 30, 1948, *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949).

reparations, made in the context of its judgments, have prompted states to take a panoply of measures to ensure that victims learn the truth about the acts that have transpired and to provide them with mechanisms to prevent the recurrence of similar acts.[9]

In its initial judgments, the IACtHR's orders of reparations were generally limited to the payment of economic compensation to the immediate victims and their families.[10] Gradually, it began to interpret its power to order reparations more broadly, and its contemporary orders require the state concerned to adopt measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as reparations.[11] These orders reflect the international legal principle that a state's duty to ensure respect for human rights requires it to investigate, prosecute, and punish violations of those rights and to ensure effective remedies for victims.[12]

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[8] *See* American Convention on Human Rights, *supra* note 5, art. 41.

[9] *See id.*, art. 63(1). *See also, e.g.*, Myrna Mack Chang v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. C.H.R. (ser. C) No. 101, ¶ 273 (Nov. 25, 2003).

[10] Velasquez Rodriguez v. Honduras Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8, ¶¶ 32-36 (Jul. 21, 1989); Godinez Cruz v. Honduras Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8 (Jul. 21, 1989). In both cases, the Court affirmed that the State's duty to investigate the disappearance of the victims was ongoing, but it did not order the State to conduct investigations as a form of reparations. Velasquez Rodriguez, at ¶¶ 34-35; Godinez Cruz, at ¶¶ 30-33. *See also* Aloeboetoe et al. v. Suriname Case, 1993 Inter-Am. C. H.R (ser. C) No. 1 (Sept. 10, 1993); El Amparo v. Venezuela Case, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 61, operative ¶¶ 4-5 (Sept. 14, 1996).

[11] *See, e.g.*, Cantoral Benavides v. Peru Case, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 80 (Dec. 3, 2001) (ordering state to pay for the victim's advanced studies); Moiwana Village v. Suriname Case, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 218 (Jun. 15, 2005) (ordering state to build a monument to the victims of a massacre).

[12] *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 3, U.N. Doc. A/Res/60/147 (March 21, 2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement [hereinafter "Basic Principles and Guidelines on the Right to a Remedy"]; *see also* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 293-304 (Oxford University Press eds. 1999).

B. Non Bis in Idem

The principle of *non bis in idem* is considered a general principle of law that is shared by the community of nations.[13] In civil law countries, it bars a second trial based on a set of facts that has already been adjudicated in a final sentence when no further appeals are possible.[14] In their common law counterparts, the principle generally prohibits a second trial after the fact finder (the judge or the jury) renders a judgment of conviction or acquittal.[15]

The *non bis in idem* principle protects the dual interests of individual rights and the need for legal certainty in a society governed by the rule of law. In terms of the former interest, the principle appears in the constitutions of many OAS member states,[16] and its eloquent articulation by the United States Supreme Court has been echoed by countries throughout the Americas:

> [T]he State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

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[13] M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, *in* INT'L CRIM. LAW, 1 CRIMES 4, 35 (M. Cherif Bassiouni ed., 2d ed. 1999).

[14] ALBERTO SUAREZ SANCHEZ, EL DEBIDO PROCESO PENAL, 283-84 (2nd ed. 2001); *Polak, Federico Gabriel s/ violación de los deberes de funcionario público s/ casación*, causa N° 174 - 4/95, Supreme Court of Justice (Arg.), Oct. 15, 1998, *available at* http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=452214 [hereinafter "*Polak, Federico Gabriel*"]. Nevertheless, the Argentine Supreme Court has interpreted the principle to bar a trial *de novo* when the sentence of first instance has been vacated on appeal. *Id.* The Supreme Court of Canada has taken the same approach. *Corporation Professionnelle des Medecins (Quebec) v. Thibault*, [1988] 1 S.C.R. 1033 (Can.).

[15] *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Jenkins, 420 U.S. 358 (1975).

[16] *See, e.g.* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, §11(h), 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.); U.S. Const. amend, V; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 29.

> anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.[17]

In terms of the second interest, *non bis in idem* is almost universally linked with the concept of *res judicata*, which establishes that once a competent court has issued a ruling on a matter, re-litigation of the same matter is prohibited.[18] Consequently, proceedings that are found to lack the *res judicata* effect have not put the accused in jeopardy in the first place and do not preclude a second trial. If the foundation of a final judgment is challenged by the emergence of new evidence— generally proof of the defendant's innocence or indications that a key piece of evidence was fraudulent— there is no bar to a second trial.[19] Similarly, a retrial may take place if the first court lacked jurisdiction over the proceedings[20] or if evidence suggests that the first judgment was the product of judicial misconduct, threats, or undue influence.[21]

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[17] *Green v. United States, 355 U.S. 184, 187-88 (1957); see also, SUAREZ SANCHEZ, supra* note 14, at 286 (interpreting Colombian law); *Polak, Federico Gabriel*, *supra* note 14, at ¶ 17; The State v. Brad Boyce, Cr.A. Crim. 89/1998 (2001), at 14 [Trinidad & Tobago], *available at* http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2002/jones/BRAD%20BOYCE.pdf.

[18] *See, e.g.* SUAREZ SANCHEZ, *supra* note 14, at 288-289 (interpreting Colombian law); Ashe v. Swenson, 397 U.S. 436, 445 (1970); *Polak, Federico Gabriel*, *supra* note 14, at ¶¶ 11-12; Kineapple v. The Queen, [1975] 1 S.C.R. 729 (Can.).

[19] Código de Procedimiento Penal [C.P.P] [Criminal Procedure Code]. art. 439 (Peru); Código de Procedimiento Penal [C.P.P.] [Criminal Procedure Code] arts. 21, 192 (Colom.); *see also* L. 906, Agosto 31, 2004, Diario Oficial [D.O.] (Colom.); Código Procesal Penal de la Nacion [COD. PROC. PEN.] [Criminal Procedure Code] art. 479, Law No. 23984, Aug. 21, 1991, [27215] B.O. 2 (Arg.); Código Procesal Penal [C.P.P] [Criminal Procedure Code] art. 455, EL GUATEMALTECO (1993) (Guat.); *see also* Decreto 51-92, 28 Sept. 1992 (Guat.). *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 7, Nov. 1, 1998, 5 E.T.S. 117.

[20] Código de Procedimiento Penal [C.P.P.] [Criminal Procedure Code] art. 455, EL GUATEMALTECO (1993) (Guat.).

[21] Código de Procedimiento Penal [C.P.P.][Criminal Procedure Code] art. 439 (Peru); Código de Procedimiento Penal [C.P.P.] [Crimal Procedure Code] art.192 (Colom.); Código Procesal Penal [C.P.P.] [Code of Criminal Procedure] art. 455,

In certain federal states such as the United States, the rule governing double jeopardy permits successive trials for the same acts in different jurisdictions, as each sovereign has the prerogative to enforce its laws when it has jurisdiction over acts that offend it.[22] While this rule has been recognized at the international level as well, it is not universally accepted.[23]

C. The Practices of OAS Member States

The laws and practices of OAS member states demonstrate the contours of the *non bis in idem* principle and its flexibility in light of society's conceptions of justice. In Colombia, the Constitutional Court carved out an exception to double jeopardy when a defendant has been acquitted for crimes that constitute human rights violations or grave breaches of international humanitarian law.[24] Prior to re-examining criminal proceedings that

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EL GUATEMALTECO (1993) (Guat.); Código Procesal Penal de la Nacion [COD. PROC. PEN.] [Criminal Procedure Code] art. 479, Law No. 23984, Aug. 21, 1991, [27215] B.O. 2 (Arg.).

[22] Heath v. Alabama, 474 U.S. 82 (1985).

[23] *See Report of the International Law Commission to the General Assembly on the Work of its Forty-Sixth Session,* U.N. Doc. A/49/10, *reprinted in* 2 Y.B. Intl'l L. Comm'n 56, 56-57 U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) [hereinafter *Report of the International Law Commission*]*; see also* U.N. Human Rights Comm., *Decision on Admissibility: A.P. v. Italy, Commmc'n No. 204/1986*, ¶ 7.3, U.N. Doc. CCPR/C/OP/2 (Nov. 2, 1986)*;* Anthony Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 817-19 (2009). For example, the U.N. Model Treaty on Extradition also gives states the option to refuse to extradite a person who has already been tried in that state for the offense for which extradition is sought. Model Treaty on Extradition arts. 3-4, G.A. Res. 45/116, Annex, 45 U.N. GAOR Supp. No. 49A, at 212, U.N. Doc. A/45/49 (1990); *see also* U.N. Off. On Drugs and Crime, *Rev. Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Crim. Matters*, ¶¶ 50-80, Intergovernmental Expert Group Meeting [IEGM] (Dec. 6-8, 2002).

[24] Corte Constitucional [C.C.] [Constitutional Court], Jan. 20, 2003, Sentencia C-004/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [hereinafter Sentence C-004/03]. Grave breaches are defined in Articles 49-50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Convention for the Amelioration of the Condition of

have culminated in a final judgment, the Court requires that a domestic court or competent international body has ruled that the state was negligent in investigating the crimes, resulting in impunity.[25] The Court emphasizes that in these situations, the rights of victims and the state's duty to investigate and sanction are directly proportionate to the gravity of the underlying offense.[26] Because these violations are deemed the most offensive to human dignity and legal order, the Court determined that the interests served by *non bis in idem* must give way to the interests of society when they occur.[27]

According to the Peruvian Code of Criminal Procedure, a sentence may be vacated and a new trial ordered when the law applied during the first trial is later declared unconstitutional.[28] Additionally, if a defendant's fundamental rights were violated during the first trial and a second proceeding will correct the flaws, a final judgment may be revisited.[29] Guatemala also recognizes the latter exception.[30] These provisions have allowed the retrials of thousands of people who were convicted of acts of terrorism in Peru under a legal regime that was later held to be unconstitutional.[31]

In the United States,[32] the intricate set of rules governing

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the Wounded and Sick in Armed Forces in the Field arts. 49-50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *see* Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea arts. 50-51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

[25] Sentence C-004/03, *supra* note 24, ¶ 35.

[26] *Id.* ¶ 24.

[27] *Id.* ¶¶ 24-27.

[28] C.P.P. (Peru), *supra* note 19, art. 3; *Luis Guillermo Bedoya de Vivanco*, Constitutional Tribunal (Peru), Exp. No. 3360-2004-AA/TC, Nov. 30, 2005, para. 4, *available at* http://www.tc.gob.pe/jurisprudencia/2006/03360-2004-AA.html.

[29] *Id.*

[30] C.P.P. (Guat.), *supra* note 19, art. 453.

[31] *Marcelino Tineo Silva y mas de 5,000 ciudadanos*, Constitutional Tribunal (Peru), Exp. No. 010-2002-AI/TC, Jan. 3, 2003 (*see, e.g.* paras. 39, 98-102, 129), *available at* http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html; *Walter Humala y mas de 5,000 ciudadanos*, Constitutional Tribunal (Peru), Exp. No. 003-2005-PI/TC, Aug. 9, 2006, *available at* http://www.tc.gob.pe/jurisprudencia/2006/00003-2005-AI.html

[32] It should be noted that while the United States is a member of the OAS, it has neither accepted the jurisdiction of the Inter-American Court, nor is it a party

double jeopardy largely derives from English common law and its reliance on juries to serve as fact finders in criminal proceedings. If a jury is prevented from reaching a decision due to unforeseeable circumstances (e.g. in the case of deadlock or a "hung jury"), the merits of the case were not reached, and a new trial based on the same facts may take place.[33] This rule has allowed United States courts to hold new trials for several men accused of killing leaders of the African American community during the Civil Rights movement of the 1960s.[34] The most prominent example is *Byron de la Beckwith*, whose two trials for the 1963 murder of civil rights leader Medgar Evers concluded with hung juries.[35] Over the years, the political and social climate in Mississippi changed, and evidence of jury tampering in the Beckwith trials emerged.[36] In 1990,

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to the American Convention. The Inter-American Commission considers petitions and cases alleging the responsibility of the United States for practices that are inconsistent with the American Declaration on the Rights and Duties of Man. Inter-American Comm'n on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*, CIDH.OAS.ORG, http://www.cidh.oas.org/basicos/english/Basic1.%20Intro.htm (last visited Oct. 14, 2011); Roach and Pinkerton v. United States, Case 9647, Inter-Am. C.H.R., Resolution No. 3/87, paras. 46-49, OEA/Ser. L/V/II.71 Doc. 9 rev. 1 (1987).

[33] Richardson v. United States, 468 U.S. 317, 324-25 (1984); *see also*, R. v. Pan, R. v. Sawyer, [2001] 2 S.C.R. 344, 2001 S.C.R. 42 (Can.), ¶¶ 114-16. No retrial is permitted, unless the jury's failure to reach a verdict is due to misconduct attributable to the judge or the prosecution. United States v. Jorn, 400 U.S. 470 (1971); R. v. Pan, R. v. Sawyer, *supra.* If a defendant moves for a mistrial before a jury has reached its verdict, there is no bar on a new prosecution. Jorn, 400 U.S. at 484-85. Similarly, a defendant's motion for a new trial after a jury verdict does not bar a second prosecution. Burks v. United States, 437 U.S. 1, 10 (1978).

[34] Killen v. State, 958 So. 2d 172, 174-82 (Miss. 2007). Edgar Ray Killen was retried in 2005 for the murder of three civil rights workers in 1964; CNN.com, *Former KKK Leader Convicted of 1966 Murder*, (August 21, 1998, 3:21pm) http://www.cnn.com/US/9808/21/klan. Sam Bowers was convicted in 1998 after his fourth trial for the murder of Vernon Dahmer in 1966. *Id.*

[35] 21 AM JUR 2D *Criminal Law* § 299 (2008). The indictment was eventually dismissed when the district attorney filed a *nolle prosequi*, a formal entry on the record that the case will not be prosecuted further. *Id.* This does not preclude a future prosecution for the same acts. *Id.*

[36] MARYANNE VOLLERS, GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH (1995).

Mississippi re-indicted Beckwith, and in 1994, he was convicted of murdering Evers.[37]

In Peru and the United States, no change to the existing legal regime governing double jeopardy was needed in order to hold new trials for those who committed aberrant crimes. Instead, changes in the political climate prompted the application of the law to crimes that had disrupted the social fabric. When a change in existing norms is required, courts or legislators must balance the rights of the accused with the need to prevent the repetition of serious crimes and provide reparations to their victims, as the Colombian Constitutional Court has done.

III. Double Jeopardy in the Inter-American System

The right not to be tried twice for the same acts is also protected at the international level, and it is contained in the major human rights treaties.[38] It is enshrined in Article 8(4) of the Convention, and the organs of the Inter-American system have interpreted its scope in the context of both victims' claims and orders of reparations.

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[37] Beckwith v. State, 615 So. 2d 1134, 1147-48 (Miss. 1992). Beckwith's other constitutional claims, including the alleged violation of his right to a speedy trial, were also dismissed by the court. *Id.*

[38] *See* International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; American Convention, *supra* note 5, at art. 8(4); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19; African Charter on Human and Peoples' Rights art. 7, *adopted* June 27, 1981, 1520 U.N.T.S. 26363. Article 7 of the African Charter on Human and Peoples' Rights does not contain a provision on *non bis in idem*. Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, art. 7, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *available at* http://www.africa-union.org/official_documents/treaties_%20 conventions_%20protocols/banjul%20charter.pdf.

A. Interpretations of Non Bis in Idem as a Right

Article 8(4) of the Convention establishes the right of a person who has been acquitted by a final judgment not to be tried again for the same acts.[39] By focusing only on judgments of acquittal, the right is narrower than that which generally appears in the laws of OAS member states and in other international instruments.[40] The preparatory works of the Convention do not clarify this discrepancy. While the Commission has stated that Article 8(4) "implicitly includes those cases in which reopening a case has the effect of reviewing questions of fact and of law that have come to have the authority of *res judicata*,"[41] it has not been applied to cases involving a sentence of conviction in the first instance in light of its plain language. Taking into account Peruvian and Guatemalan laws permitting the retrial of a person who has been convicted in order to remedy unconstitutional defects in the original proceedings, one might consider that the narrower scope of Article 8(4) does not prejudice protection of the right.

According to the IACtHR, the protection against double jeopardy is broader than that contained in the International Covenant on Civil and Political Rights, as it prohibits a second trial based on the same facts rather than the same offense.[42] In cases interpreting Article 8(4) of the Convention as a right, the organs of the Inter-

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[39] American Convention on Human Rights, *supra* note 5, at art. 8(4). The provision reads "[a]n accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause." The Spanish text provides that a second trial will not occur "por los mismos hechos" (for the same facts). *Id. available at* http://www.oas.org/juridico/spanish/tratados/b-32.html (providing the Spanish version of the text).

[40] Article 14(7) of the International Covenant on Civil and Political Rights reads "[n]o one shall be liable to be tried or punished again for an offense [sic] for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." International Covenant on Civil and Political Rights, *supra* note 38.

[41] Garcia v. Peru, Case 11.006, Inter-Am. C.H.R., Report No. 1/95, OEA/Ser.L/V/II.88, Doc. 9 rev (1995).

[42] Loayza-Tamayo v. Peru Case, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 66 (Sep. 17, 1997).

American system have focused on whether the first judgment examined the facts of the case and issued a ruling on the merits.[43]

The organs of the Inter-American system have had few opportunities to explore the scope of the right contained in Article 8(4), and the IACtHR's conflicting interpretations in two separate cases place it in greater ambiguity. The victims in *Loayza Tamayo* (1997) and *Cantoral Benavides* (2000) were accused of committing terrorist acts in Peru and tried by military courts that severely curtailed their rights to defense, to confront witnesses against them, and to be tried by an impartial and independent judge.[44] Both were acquitted of treason in proceedings before military courts that were found to violate the right to a fair trial contained in Article 8(1) and (2) of the Convention.[45] They were each subsequently convicted of terrorism by courts of ordinary jurisdiction based on the tainted evidence used in the first proceedings, and these trials were also found to violate Article 8(2).[46]

As a result of these defects, the IACtHR in *Loayza Tamayo* found a clear violation of Article 8(4) and ordered the state to release the victim by way of reparations.[47] Yet, in *Cantoral Benavides*, the IACtHR equivocated over whether a violation of Article 8(4) had occurred, finally concluding that the defects in the first proceedings deprived them of *res judicata* effect.[48] As a result, the IACtHR

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[43] Garcia v. Peru, Case 11.006, Inter-Am. C.H.R., Report No. 1/95, OEA/Ser.L/V/II.88, Doc. 9 rev (1995); Berenson Mejia v. Peru, Sentence, Inter-Am. Ct. H.R. (ser. C) No. 119, ¶¶ 208-210 (Nov. 25, 2004)(finding that dismissal for lack of jurisdiction does not constitute a final judgment for the purposes of Article 8(4)). This case can be contrasted with Loayza-Tamayo, in which there was a question as to whether the first proceedings terminated in an acquittal or a dismissal for lack of jurisdiction. Loazya-Tamayo, *supra* note 42, ¶¶ 70-76.

[44] Loayza-Tamayo, *supra* note 42, ¶¶ 70-76; Cantoral Benavides v. Peru Case, Inter-Am. Ct. H.R. (ser. C) No. 69 (Aug. 18, 2000).

[45] Loayza-Tamayo, *supra* note 42, ¶¶ 61-63; Cantoral Benavides *supra* note 45, ¶ 115.

[46] Loayza-Tamayo *supra* note 42, ¶ 62; Cantoral Benavides *supra* note 44, ¶¶ 122, 128.

[47] Loayza-Tamayo *supra* note 42, ¶¶ 77, 84.

[48] The Court at one point concluded in a summary manner that Article 8(4) had been violated, *Case of Cantoral Benavides, supra* note 44, ¶¶ 115, 140. Later, it resolved that the fact that the military tribunal lacked jurisdiction and

appears to have concluded that no violation of the double jeopardy principle had occurred.[49]

An explanation for the conflicting results in *Loayza Tamayo* and *Cantoral Benavides* likely lies in the *Castillo Petruzzi* case, which preceded *Cantoral Benavides* by one year. In *Castillo Petruzzi*, the IACtHR concluded that military trials leading to the victims' convictions were marred by due process violations that deprived them of *res judicata* value, and it ordered the state to hold new trials.[50] In light of these and other rulings by the IACtHR, Peru vacated many of the convictions of alleged terrorists by military courts and arranged for new trials before courts of ordinary jurisdiction.[51] Because the proceedings in *Castillo Petruzzi* ended in convictions, Article 8(4) did not apply. Nonetheless, the analysis in *Cantoral Benavides* was likely crafted in harmony with *Castillo Petruzzi*, and it obscures the scope of Article 8(4) when read in conjunction with *Loayza Tamayo*.

B. Interpretations of Non Bis in Idem as a Remedy

In subsequent judgments, the IACtHR further developed its "fraudulent *res judicata*" doctrine in the context of its orders of reparations to victims. In 2004, the IACtHR began to cite the statutes of the international criminal tribunals in support of the principle that irregularities, such as a lack of judicial impartiality or

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impartiality in the first proceeding deprived the ruling of *res judicata* effect in terms of Article 8(4). *Id.* ¶ 138. Finally, the operative paragraphs make no mention of a violation of Article 8(4). *Id.*

[49] *Case of Cantoral Benavides*, *supra* note 44, ¶ 138, operative ¶¶. It should be noted that release of the victim in *Cantoral Benavides* was not an issue in terms of reparations, as he had been pardoned prior to the Inter-American Court's judgment. *Id*. ¶ 63(r)-(s).

[50] Castillo Petruzzi et al. v. Peru Case, Inter-Am. Ct. H.R., (ser. C) No. 52, ¶¶ 219-21, operative ¶ 13 (May 30, 1999).

[51] *Marcelino Tineo Silva y mas de 5,000 ciudadanos*, Constitutional Tribunal (Peru), Exp. No. 010-2002-AI/TC, January 3, 2003, *available at* http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html. Legislative Decrees No. 921, 922, 923, 924, 925, 926, and 927 were issued in 2003 to implement the Constitutional Tribunal's ruling.

independence, automatically invalidate sentences acquitting suspected perpetrators of human rights abuses, as first articulated in the Peruvian cases.[52] In 2006, it directly adopted the rule created by these tribunals.

In two cases dealing with crimes against humanity, the IACtHR elucidated its guidelines regarding the balance between *res judicata* and the need for states to remedy past human rights violations. Citing Article 20 of the Rome Statute of the International Criminal Court (Rome Statute) and similar provisions in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), it concluded,

> With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an "apparent" or "fraudulent" res judicata case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment,

[52] *See, e.g.*, Carpio-Nicolle v. Guatamala Case, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 131 (Nov. 22, 2004). In supporting its conclusions, the Court cited Article 20 of the Rome Statute of the International Criminal Court and similar provisions of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). *Id.*

> since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.[53]

According to the IACtHR, when human rights violations are met with impunity, either the lack of a genuine prosecution or the emergence of new evidence justifies the retrials of the responsible parties. By expressing that the right enshrined in Article 8(4) is not applicable in these situations, the IACtHR frames the rule as a set of exceptions to *non bis in idem.* However, the rule is consistent with the principle that fraudulent proceedings, or those founded on false evidence, do not constitute *res judicata,* meaning that the accused did not face jeopardy in the first place. This principle was first enunciated by the IACtHR in *Loayza Tamayo*, *Cantoral Benavides,* and *Castillo Petruzzi*; and the second part of the IACtHR's rule reflects domestic practice in OAS member states such as Colombia, Peru, Argentina, and Guatemala.[54]

IV. A Critique of the Inter-American Court's Approach to Double Jeopardy

The content of the rule enunciated by the IACtHR in 2006 is consistent with international standards, but the process by which it was adopted arguably deprived the rule of some of its legitimacy. Instead of examining how the rule fit into its existing body of jurisprudence or citing consistent practices in its states parties, the IACtHR imported the text of Article 20(3) of the Rome Statute

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[53] Almonacid-Arellano v. Chile Case, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 154 (Sept. 26, 2006); *see* La Cantuta v. Peru Case, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 153 (Nov. 29, 2006).

[54] *See, e.g.,* Código de Procedimiento Penal [C.P.P] [Criminal Procedure Code]. art. 439 (Peru); Código de Procedimiento Penal [C.P.P.] [Criminal Procedure Code] arts. 21, 192 (Colom.); *see also* L. 906, Agosto 31, 2004, Diario Oficial [D.O.] (Colom.); Código Procesal Penal de la Nación [Cod. Proc. Pen.] [Criminal Procedure Code] art. 479, Law No. 23984, Aug. 21, 1991, [27215] B.O. 2 (Arg.); Código Procesal Penal[C.P.P] [Criminal Procedure Code] art. 455, EL GUATEMALTECO (1993) (Guat.).

almost verbatim.[55] It did so without apparent reflection that the provision is the product of a body of law that is governed by different interests and principles.

By echoing the existing law regarding double jeopardy, the IACtHR also missed an opportunity to address the point on which its jurisprudence might have been most relevant: situations in which domestic law is insufficient to bring about the retrial of those responsible for human rights violations. This may occur where evidence of tampering with the trial has been masked, leaving nothing to trigger a reopening of the proceedings, as the case of *Byron de la Beckwith* in the United States illustrates.[56] Similarly, it may occur when political will to revisit a sham trial is absent. Finally, where attorneys or civil society do not view the crime as part of a larger problem or pattern, proponents may be unable to mobilize the type of pressure that generates momentum for reopening fraudulent proceedings.

In order to prevent impunity from prevailing in these situations, the IACtHR should have formulated its rule along the lines of the exception created by the Colombian Constitutional Court. It could have specified that where human rights violations reaching a certain level of gravity have resulted in impunity, states parties

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[55] Rome Statute of the International Criminal Court art. 20(3), July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90 [hereinafter Rome Statute], a*vailable at* http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf. Article 20(3) reads:

> No person who has been tried by another court for [crimes within the ICC's jurisdiction] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Id.

It is unclear why the Inter-American Court used a disjunctive, as the first and third points are redundant.

[56] *See* Part II C, *supra*.

should reexamine proceedings that led to the acquittal of persons who may be responsible for committing them. International standards suggest that gross human rights violations reach this level of gravity. In the course of this revision, indications that the original proceedings were marred by fraud should then justify a retrial of the accused. This approach achieves a sufficient balance between the states' duties to respect the rights of the accused and to remedy the effects of aberrant acts that undermine the rule of law.

In its application, the IACtHR's rule regarding double jeopardy in the context of remedies does not always appear to have satisfied this criterion or those that the IACtHR elucidated in 2006. The resulting ambiguity creates the danger that domestic courts will violate the rights of the accused in the name of victims if it is politically expedient to do so. It also means that courts in Guatemala and other states parties may be mechanically implementing a policy whose scope and intricacies they do not understand.

A. The Decision to Transplant the Norm from International Criminal Law

Scholars have generally described the reception and export of norms among courts throughout the world as part of a rich transnational judicial dialogue that is producing a global convergence of legal norms, and they have also emphasized that courts should not be passive receptors of norms imported from other systems.[57] Instead, the legitimacy of a decision importing a norm is thought to depend on the judge's consideration of the culture and context of the receiving society and an assessment of whether the reception of the

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[57] *See, e.g.*, Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685 (2007); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983).

particular legal standard is appropriate.[58] Gerald Neuman has noted that the IACtHR tends to import norms from the European and universal systems of human rights, rarely looking to the laws and practices of its member states.[59] Neuman writes that in so doing, the IACtHR undercuts the legitimacy of its decisions and "discounts the will of OAS member states as a factor relevant to the interpretation of their obligations."[60]

By simply incorporating the rule on double jeopardy from the statutes of the international criminal tribunals, the IACtHR omitted reflection on the differences between international criminal law and international human rights law. First, the rules of procedure governing the international criminal tribunals strike a balance of power that respects the rights of two sovereigns with competing claims to jurisdiction over the pertinent crimes. While the ICTY and ICTR have concurrent jurisdiction with domestic courts in their respective states, they also have primacy over these courts, as they are vindicating the interests of the international community.[61] The rule was written to reflect this balance: the domestic courts may not later try individuals for the same international crimes for which they have come before the tribunals, but the converse is not true if a domestic trial fails to enforce the international legal principles at stake.[62] As a permanent tribunal governed by the principle of

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[58] *E.g.*, Waters, *supra* note 57, at 559-68; Watson, *supra* note 57, at 1146-47, 1153; Borgen, *supra* note 57, at 752-54.

[59] Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 109-11 (2008).

[60] *Id.* at 114-16.

[61] ICTY Statute, *infra* note 66, art. 9.

[62] Article 10(2) of the ICTY Statute reads:

> A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Article 10(1) deals with subsequent national prosecutions. *See also*, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808

complementarity, the International Criminal Court employs a slightly different version of the rule, focusing on whether a prior prosecution at the national level was genuine.[63] In general, Article 20 of the International Criminal Court did not garner much attention during the Rome Conference, as the majority of participating states accepted the *non bis in idem* provision as an expression of an established principle of criminal law.[64] Nonetheless, discussions of Article 20 were permeated by concerns of dual sovereignty, and the drafters sought to retain the same level of protection for the accused as that which was reflected in the statutes of the ICTY and ICTR.[65]

In contrast to the international criminal tribunals, the IACtHR establishes state responsibility for human rights violations, and its decisions are implemented by the state with primary jurisdiction over the matter. Because domestic prosecutions in these states will cover a wide range of acts that do not necessarily have international implications, there is a more acute need for rules regarding double jeopardy to protect the rights of the accused.

A second consideration in transplanting the international criminal norm on double jeopardy is that unlike the IACtHR, the international criminal tribunals were created to try individuals for a

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(1993), S/25704, ¶¶ 35-66.

[63] Report of the International Law Comm'n, *supra* note 23, at 58. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Rome, Italy, June 15–July 17, 1998, art. 18, U.N. Doc. A/CONF.183/13(Vol. Ill) (1998). An earlier version of Article 20 contained a provision on "ordinary crimes" similar to that of the other tribunals, but this provision was ultimately rejected. *Id.* This was in part due to the lack of consensus among the participating states on the provision on "ordinary crimes." John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE at 57-58 (Lee ed.1999).

[64] Holmes, *supra* note 63, at 56, 59. Notably, a small minority of states reported that their domestic jurisprudence recognized no exceptions to *non bis in idem*. *Id.* at 59. *See, e.g.*, Bassiouni, *supra* note 13, at 35.

[65] Report of the International Law Comm'n, *supra* note 23, at 57-58. During the Rome Conference, it was alternatively proposed that any investigation or prosecution at the national level should completely bar the exercise of jurisdiction by the ICC, and this approach garnered the support of a handful of states. Report of the International Law Commission, vol. IIII, pp. 217-221, 341-47.

discrete set of international crimes that are deemed to threaten international peace and security.[66] These have been identified as genocide, crimes against humanity, war crimes, and with regard to the International Criminal Court, aggression;[67] they are the only acts to be considered true international crimes.[68]

Rather than limiting its exceptions to *non bis in idem* to international crimes, the IACtHR specified that they should apply to "those responsible for human rights violations or for crimes against humanity."[69] Yet, a wide range of human rights violations fall within the Court's jurisdiction. Given the importance of the interests that the *non bis in idem* principle protects, a rule that potentially requires the principle to yield in the face of a violation such as arbitrary detention may be too broad. At the same time, in light of the IACtHR's mandate and power to order reparations, an interpretation that only allows international crimes to trigger exceptions to *non bis in idem* would be inappropriately narrow. Because gross human rights violations fall under the IACtHR's mandate and offend the international community in a manner that is

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[66] Security Council Resolution 808 (1993), 22 February 1993 (creating the ICTY to prosecute "serious crimes of international humanitarian law"); *see also* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1, SC Res. 827; 32 ILM 1159 (1993) [hereinafter ICTY Statute]; Security Council Resolution 955 (1994) 8 November 1994 (creating the ICTR); *see also* Statute of the International Criminal Tribunal for Rwanda art. 1, SC Res. 955, 33 ILM 1598 (1994) [hereinafter ICTR Statute]; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15 – July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (Vol. III), (April 14, 1998), *available at* http://www.un.org/icc/prepcom.htm [hereinafter *Report of the Preparatory Committee*]. The Rome Statute affirms that the Court will have jurisdiction over "the most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 55, art. 5(1) (affirming that the Court will have jurisdiction over "the most serious crimes of concern to the international community as a whole").

[67] Rome Statute, *supra* note 55, art. 5; ICTY Statute, *supra* note 66, at arts. 2-5; ICTR Statute, *supra* note 66, at arts. 2-4.

[68] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 11-12 (2d ed. 2008); Bassiouni, *supra* note 13, at 33, 58.

[69] Almonacid Arellano, *supra* note 53, at 63.

similar to international crimes, the IACtHR should have specified that the principle of *non bis in idem* must be flexible when these acts occur.

B. Focusing on Gross Human Rights Violations

A rule that allows the re-examination of criminal proceedings in light of gross human rights violations would be consistent with international standards regarding reparations. International law requires that all human rights violations be investigated and their victims ensured access to justice and means of restitution.[70] At the same time, ordinary means of reparation are considered to be insufficient in cases of gross human rights violations.[71] When these violations occur, the state has a special obligation to investigate the acts and prosecute and punish the perpetrators.[72] Appropriate remedies for victims include measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[73]

Gross human rights violations do not share all of the qualities of international crimes, but their clear definition in international instruments and their destabilizing effects in the societies they affect mean that they offend the international community. The types of acts that have been classified as gross human rights violations include international crimes, such as torture, enforced disappearances, extrajudicial execution, and slavery.[74] Even though

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[70] Basic Principles and Guidelines on the Right to a Remedy, *supra* note 13, ¶ 3; International Covenant on Civil and Political Rights art. 2, 999 UNTS 171; 6 ILM 368 (1967); SHELTON, *supra* note 12, at 17-37.

[71] *See* Basic Principles and Guidelines on the Right to a Remedy, *supra* note 12, ¶¶ 4-13; *see also* SHELTON, *supra* note 12, at 320-27.

[72] *Id.*

[73] Basic Principles and Guidelines on the Right to a Remedy, *supra* note 12, principles 18-23.

[74] U.N. Comm'n on Human Rights, *Promotion and Protection of Human Rights, Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, 6-7, U.N. Doc. E/CN.4/2005/102 (Feb. 8, 2005); *see also Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001) (identifying torture, extrajudicial execution, and forced

these violations are often characterized by their widespread nature,[75] isolated acts may also constitute gross human rights violations if they claim a large number of victims.[76] Similarly, a pattern of violent and oppressive acts that are directed at a minority group or at critics of the government may also fall into this category, even when the acts do not reach a widespread and systematic level.[77]

According to Dinah Shelton, it is because gross human rights violations often cause suffering in the affected society as a whole that non-monetary reparations are the only true means of remedying their effects by ending the existing state of conflict, preventing recurrence of similar acts, and achieving reconciliation among the different groups affected.[78] As a means of satisfaction, prosecution of the responsible parties is closely linked with the victims' right to truth in that they often "establish an authoritative record of abuses that will withstand later revisionist efforts."[79] Where abuses do not reach the level of gross and systematic human rights violations,

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disappearance as "serious human rights violations" to which amnesty provisions are inapplicable).

[75] SHELTON, *supra* note 12, at 320-21.

[76] *See, e.g*., Conclusions and Recommendations of the Committee against Torture, Indonesia, U.N. Doc. CAT/C/IDN/CO/2 (2008), ¶ 23; Inter-Am. Comm'n H.R., *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II.Doc 34 (2007); U.N. Comm'n on Human Rights, *Promotion and Protection of Human Rights, Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, U.N. Doc. E/CN.4/2005/102, *supra* note 73, ¶ 8.

[77] *See, e.g., A v. The Netherlands*, Commc'n No. 91.1997, Comm. Against Torture, ¶ 6.3-4, U.N. Doc. CAT/C/21/D/91/1997 (Nov. 13, 1998)(referring to "a pattern of detention, imprisonment, torture and ill-treatment of persons accused of political opposition activities [in Tunisia]"); Concluding Observations of the H. R. Comm., Brazil, ¶ 12, U.N. Doc. CCPR/C/BRA/CO/2 (Dec. 1, 2005) (referring to widespread acts of torture and extrajudicial execution); Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, ¶133, Sept. 15, 1995, A/CONF.177/20 (referring to "all forms of racism, racial discrimination, xenophobia, denial of economic, social and cultural rights and religious intolerance").

[78] *See* SHELTON, *supra* note 12, at 320-21.

[79] *Id*. at 325; *see also* Basic Principles and Guidelines on the Right to a Remedy, *supra* note 12, ¶¶ 7(11), 9(22), 10(24).

Shelton points out that non-monetary reparations may also be justified when the injury is irreparable (such as a violation of the right to life) or when an award of damages may not convince the government to cease the illicit conduct.[80]

Earlier drafts of the United Nations (U.N.) Basic Principles and Guidelines on the Right to a Remedy, specified that states should not avoid the duty to make reparations by invoking amnesty laws and *non bis in idem*.[81] This draft principle echoed Article 20(3) of the Rome Statute,[82] but it did not appear in the final version. While the parties to the Rome Statute were able to agree on the flexibility of *non bis in idem* when prosecuting crimes at the international level, a similar consensus was apparently not reached regarding the prosecution of gross human rights violations at the national level.

In light of the right enshrined in Article 8(4) of the Convention and the aforementioned principles on reparations, the IACtHR should have specified that *non bis in idem* must be flexible where gross human rights violations are concerned. These events should justify the re-examination of the record of suspected perpetrators' trials when there are indications that the first trials may not have been genuine. These indications could include hints of a lack of judicial independence or tampering with the proceedings that are not sufficiently well documented or convincing to justify a

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[80] *See* SHELTON, *supra* note 12, at 293, 305.

[81] U.N. Comm'n on Human Rights, *Promotion and Protection of Human Rights, Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, U.N. Doc. E/CN.4/2005/102, *supra* note 73, at 15.

[82] *Id.* at 15. Draft principle 26(b) reads:

> The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Id.

reopening of the proceedings under normal circumstances. The record must demonstrate that the appeals process did not remedy these defects. When evidence of these defects appears, a retrial of the perpetrators is proper. In contrast, where gross human rights violations are not concerned and no evidence of irregular proceedings is present, a state fulfills its duty to repair victims by investigating those parties who have not been acquitted and by providing compensation to the victims.

A recent decision by the IACtHR affirms the more delicate balance that must be reached between the rights of victims and the accused when the pertinent crimes do not reach the level of gross human rights violations. The victim in *Vera Vera v. Ecuador* died in state custody due to lack of medical attention, and the IACtHR declined to order the state to prosecute the responsible parties because the statute of limitations had expired.[83] In doing so, it emphasized the difference between ordinary human rights violations and those that reach a widespread and systematic level. This judgment may signal a shift in the Court's approach to future cases involving *non bis in idem* in the context of reparations.

V. *Applications of the Inter-American Court's Jurisprudence on Non Bis in Idem*

In a series of judgments issued prior to, and including, 2006, the IACtHR's orders prompted the re-opening of criminal proceedings against individuals who had been acquitted of human rights violations. Most of these cases involved gross human rights violations and criminal proceedings that were replete with irregularities, but it is not clear that all the cases fulfilled these standards. These factual questions must be answered by the domestic courts implementing the judgment rather than by the IACtHR; however, the results of the judgments raise questions as to whether the states parties may have violated the rights of the accused in an attempt to apply the IACtHR's jurisprudence regarding

[83] Vera Vera v. Ecuador Case, Inter-Am. Ct. H.R. (ser. C) No. 224, ¶¶ 117-22 (May 19, 2011).

reparations for victims. Four of these judgments are examined below.

A. La Cantuta*: The Elimination of Suspected Terrorists in Peru*

One of the two cases in which the IACtHR chose to expand its jurisprudence on *non bis in idem* was *La Cantuta*,[84] which dealt with the executions of suspected terrorists by Peruvian counterterrorism forces. The events occurred during one of the most intense periods of the armed conflict, when more than half of the country lived under a state of emergency.[85] The Truth and Reconciliation Commission later characterized the killings in *La Cantuta* and *Barrios Altos*[86] as crimes against humanity, finding that they were part of a systematic practice of forced disappearances and arbitrary executions of civilians by state agents at the height of the conflict.[87]

Investigations into the events were politicized from the beginning: a Senate inquiry was frustrated by President Alberto Fujimori's decision to dissolve the Congress in April of 1992.[88] When prosecutors began to investigate the disappearances, the Ministry of Defense arranged for jurisdiction to be ceded to the military courts.[89] Although a handful of military officers were convicted, the higher-ranking officials, including director of

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[84] La Cantuta Case, Inter-Am. Ct. H.R. (ser. C) No. 162. The judgment is a reaffirmation of *Almonacid Arellano*, which preceded it by two months and dealt with crimes against humanity committed during the Pinochet regime in Chile. *Cf. Almonacid-Arellano*, Concurring Opinion of Judge Cançado-Trindade, Inter-Am. Ct. H.R. (Ser. C) No. 154 ¶ 12.

[85] Comisión de la Verdad y Reconciliación del Perú: Informe Final (2003) vol. I pp. 60-73 [hereinafter CVR Informe Final].

[86] Barrios Altos Case, Inter-Am. Ct. H.R. (ser. C) No. 75.

[87] *See, e.g.*, CVR Informe Final vol. VI, p. 60-73, 181. While the CVR suggested that the acts could be termed war crimes, it refrained from embracing this definition. *See, e.g.*, *id.*, vol. VI, p. p. 61, 115, 131, 180.

[88] Barrios Altos Case, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(f).

[89] La Cantuta Case, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 80(23), (30), (31), (44)-(53).

intelligence Vladimiro Montesinos, received either minor sentences for negligence or had charges against them dismissed for lack of evidence.[90] The passage of an amnesty law in June of 1995 brought criminal proceedings to an end.[91] Years later, several of the judges who had presided over the cases were convicted of corruption and conspiracy.[92]

After the IACtHR's sentence in *La Cantuta*, criminal proceedings against the responsible parties were re-opened, leading to the conviction of Fujimori, Montesinos, and others in 2009. Yet, although existing Peruvian law allowed for a final sentence to be revisited in light of proof of judicial misconduct,[93] it was not until the IACtHR's judgments that a serious attempt to retry the perpetrators was made.

The *La Cantuta* case is an archetype of when the principle of *non bis in idem* must be flexible. The IACtHR's description of the first set of proceedings reveals that they were not genuine, and thus lacked, *res judicata* effect. Even if the irregularities had not been patent, a state practice of exterminating suspected terrorists clearly constitutes gross human rights violations (if not crimes against humanity in the context described); as such, the state would have been justified in reexamining the proceedings in light of the gravity of the acts alone.

B. Carpio Nicolle*: Extrajudicial Execution in Guatemala*

In 1993, Guatemala was approaching the end of a thirty-year civil war and was engaged in a process of democratic transition.[94]

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[90] La Cantuta Case, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 80(54), (57).

[91] *Id.* ¶¶ 80(58)-(60); *Barrios Altos*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 2(i), (j).

[92] *Id.* ¶ 80(71).

[93] *See* C.P.P. (Peru), *supra* note 19, art. 439(5).

[94] Comisión de Esclarecimiento Historico, Guatemala: Memoria del Silencio, vol. II, 49, 96; *see also* Report on the Situation of Human Rights in the Republic of Guatemala, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II/61, doc. 47 rev. 1 ch. I-II (1983). The armed conflict primarily took place in the countryside between State forces, supported by government-created paramilitary groups, and a guerrilla

The Commission reported that the violence no longer consisted of traditional armed conflict at that point, but rather of systematic attacks on critics of the government attributable to state actors or the paramilitary groups that they had created.[95] Jorge Carpio Nicolle was the leader of an opposition party in Congress, a well-known journalist, and a former presidential candidate. In July of 1993, while touring the country to muster support for his plan to restore the constitutional order, Carpio Nicolle and three members of his delegation were shot and killed by members of the paramilitary group that controlled the region.[96]

The judicial proceedings that followed the murders embodied the type of sham trial that the drafters of the Rome Statute must have envisioned when crafting Article 20. During the investigation, the ballistics and autopsy reports were lost, one of the key murder weapons was removed from the country, and the court office housing the case file was burned down.[97] Members of the paramilitary group implicated in the killings threatened judges, attorneys, and witnesses, and the Police Commissioner who ordered the initial arrests was murdered.[98] During the six years of criminal proceedings, jurisdiction was passed back and forth between three different courts.[99] Although police identified eleven members of paramilitary groups and government officials as possible perpetrators, only one of the suspects – the presumed paramilitary commander – was tried and acquitted in 1999.[100]

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movement, but the majority of its 200,000 casualties belonged to the indigenous population. *See, e.g.*, Carpio-Nicolle, *supra* note 52, ¶ 131 (Nov. 22, 2004); *see also* Fourth Report on the Situation of Human Rights in the Republic of Guatemala, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.83, doc. 16 rev. ch. VI (1993).

[95] Fourth Report on the Situation of Human Rights in the Republic of Guatemala, Inter-Am. Comm'n H.R, *supra* note 94, at ch. IV.

[96] *See* Carpio-Nicolle v. Guatamala Case, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 76(21-22) (Nov. 22, 2004).

[97] *Id.* ¶ 76(54-59).

[98] *Id.* ¶ 76(62),(65).

[99] *Id.* ¶ 76(35). The facts surrounding the court proceedings appear in the case. *Id*.

[100] *Id.* ¶ 76(40), (54).

The IACtHR found that the presiding judges did not consider any of the aforementioned irregularities when issuing their rulings, demonstrating "negligence and lack of independence and impartiality."[101] The IACtHR ordered the state to conduct a full investigation of the events and to identify and punish those responsible, observing that the "systematic obstruction of the administration of justice and due process" had led to "fraudulent *res judicata*."[102]

In terms of Guatemalan law, the paramilitary commander could have been retried in light of the numerous threats, manipulation of evidence, and alleged judicial misconduct that took place during the first set of proceedings.[103] Yet, no such revision was forthcoming until five years after the IACtHR's judgment, when a five-page order of the Guatemalan Supreme Court vacated all prior sentences in the *Carpio Nicolle* case.[104] The summary order contained no mention of domestic or international rules regarding *non bis in idem*, but merely observed that Guatemala is bound to honor its international human rights obligations, including orders of the IACtHR.[105]

Based on the IACtHR's description of the criminal proceedings, a retrial of the paramilitary commander is consistent with the IACtHR's 2006 rule. Had the irregularities been less evident, it seems clear that the extrajudicial execution of a prominent political leader, in a context of the systematic elimination of critics of the government, should qualify as a gross human rights violation. As such, the state would have been justified in reexamining the proceedings to determine whether a retrial of the acquitted individual was warranted.

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[101] Carpio-Nicolle v. Guatamala Case, *supra* note 96, ¶ 76(54).

[102] *Id.* ¶¶ 125, 129-31.

[103] *See* C.P.P (Guat.), *supra* note 19, art. 455.

[104] *Cuatro sentencias de la Corte*, *supra* note 2, at 131.

[105] *Id.* at 130. The Guatemalan Supreme Court also cited the *pro hominis* principle and the necessity to safeguard the honor of the country in light of the Inter-American Court's declaration that impunity violated "universal legal principles of justice" were also cited in support of the ruling. *Id.*

C. Gutiérrez-Soler*: Torture in Colombia*

The IACtHR and the Commission have considered numerous cases dealing with crimes connected to the armed conflict in Colombia, but the *Gutiérrez-Soler* case was not among them.[106] Rather, the case dealt with the torture and arbitrary detention of the victim by two police officers in 1994.[107] After a few hours, Mr. Gutiérrez-Soler was released and his confession served as the basis for a prosecution against him.[108] Although criminal proceedings were initiated against the two policemen, they were acquitted when the courts disregarded the victim's testimony, concluding that it was "specious, biased, malicious, slanderous, and base, conceived by his sick mind, arising from his characteristic mythomania. Witnesses of this kind must necessarily be suspect . . . since they are tainted with immorality."[109]

The IACtHR devoted only a few sentences to the domestic criminal proceedings, and perhaps because the Colombian government conceded that there were "shortcomings in judicial guarantees of due process of law," the IACtHR summarily concluded that the proceedings constituted "sham double jeopardy."[110] In its determination of reparations, it ordered Colombia to reopen the proceedings against the two police officers.[111]

Based on the facts described in the judgment, the original trials of the police officers appear to have been vitiated by a lack of impartiality that was not corrected on appeal. At the same time, the judge's statements alone are not convincing proof that they were subjected to a sham trial that lacked *res judicata* effect. It is also unclear that the gravity of the crime should have justified a reexamination of the proceedings against the two police officers.

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[106] Gutiérrez-Soler v. Colombia Case, Inter-Am. Ct. H.R. (ser. C) No. 132 (Sept. 12, 2005).

[107] *Id.* ¶ 48(1)-(4).

[108] *Id.* at ¶ 48(3), (11).

[109] *Id.* ¶ 48(7).

[110] *Id.* ¶ 54, 98.

[111] *Id.* ¶ 99.

The prohibition of torture has risen to the level of *jus cogens*,[112] and the crime is included among the category of gross human rights violations that are deemed to require a broader set of remedies under international law.[113] International human rights law establishes that every act of torture must be subject to a prompt investigation[114] that is thorough, effective, and "capable of leading to the identification and punishment of those responsible."[115] At the same time, while single acts of torture may fall into the category of gross human rights violations, it is unclear that they always reach this level of gravity. Cassese writes that when torture is committed as a discrete crime (rather than as a war crime or part of crimes against humanity), it does not necessarily have international implications.[116]

In *Gutiérrez-Soler*, there were no indications that the act of torture was part of a context of widespread or systematic human rights abuses.[117] While torture is a serious violation of international law, the victim was not deprived of the right to life, causing irreparable harm.[118] In light of these considerations, the State's

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[112] U.N. Committee Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan 25, 2008); Bayarri v. Argentina Case, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 81 (Oct. 30, 2008); *see* Prosecutor v. Delalic, Case No. IT-96-21-T. Trial Chamber, ¶ 454 (ICTY Nov. 16, 1998).

[113] U.N. Comm'n on Human Rights, *Promotion and Protection of Human Rights, Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, U.N. Doc. E/CN.4/2005/102, *supra* note 74, at 6-7.

[114] Convention Against Torture, G.A. Res. 39/46, arts. 12-13, U.N. Doc. A/RES/47/1 (Dec. 10, 1984). *See also, General Comment No.2*, *supra* note 109, ¶¶ 15, 18; U.N. Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 14, *available at* http://www.unhcr.org/refworld/docid/453883fb0.html (last visited Oct. 9, 2011).

[115] Assenov v. Bulgaria, Eur. Ct. H.R. (1998); Aksoy v. Turkey, Eur. Ct. H.R. (1996); Bayarri v. Argentina Case, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 92 (Oct. 30, 2008).

[116] CASSESE, *supra* note 68, at 148. For example, he notes that while torture is almost universally criminalized in domestic law, states are often reluctant to exercise universal jurisdiction to prosecute torturers.

[117] *See* Gutiérrez-Soler v. Colombia Case, Inter-Am. Ct. H.R. (ser. C) No. 132 (Sept. 12, 2005).

[118] *Id.*

decision to provide monetary compensation for Mr. Gutiérrez-Soler and to order the investigation of any other parties who shared responsibility may have been an appropriate remedy.

Ultimately, the fact that the case involved torture makes the decision to retry the two police officers fairly uncontroversial. The flexibility of *non bis in idem* in a particular case will always depend on the judge's analysis of the facts. Nevertheless, the *Gutiérrez-Soler* case illustrates some of the ambiguities that states parties to the Inter-American Court will face as they balance the rights of victims against those of the accused.

D. Bulacio*: Arbitrary Detention and Extrajudicial Execution in Argentina*

The *Bulacio* case presents further ambiguities that may arise as states apply the IACtHR's jurisprudence on *non bis in idem*, even though the case precluded adoption of the rule. Walter Bulacio was seventeen years old when he was picked up during a police raid targeted at identifying juvenile delinquents.[119] While in detention, the authorities beat him; he died a week later as a result of the injuries.[120] The IACtHR placed the events in the context of a practice of indiscriminate detention of poor adolescents in Argentina, which was purportedly aimed at protecting citizen security.[121] Judicial control of such raids was found to be belated or non-existent, with "high levels of impunity" accompanying the practice.[122]

In its findings, the Court neither identified the killing of adolescents as part of the practice of arbitrary detention in Argentina, nor did it indicate the scale on which these acts occurred.[123] It noted that after six years of criminal proceedings, the case against the police captain who was implicated in Mr. Bulacio's death was

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[119] Bulacio v. Argentina Case, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 1, 5, 6, 9, 10, 13, 53, 56, 69, 162 (Sept. 18, 2003).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

dismissed, but it omitted to identify a single irregularity that may have occurred during the proceedings.[124] As a form of reparations, the IACtHR ordered the state to conduct a full investigation of the facts and to punish those responsible for violating the victim's rights.[125] As a result, criminal proceedings against the police captain were reopened.[126]

The Inter-American Court did not explain that the police captain's acquittal was the product of a sham trial, nor did it mention that new evidence had emerged to prompt the re-opening of proceedings against him. In compliance with the Court's judgment, the Argentinean courts may have independently reached this conclusion, or they may have deemed it most expedient to retry the only alleged perpetrator named in the *Bulacio* judgment. Regardless, it is not clear that such a retrial is consistent with the Court's rule on double jeopardy.

It is equally dubious that the death of Walter Bulacio rises to the level of a gross human rights violation. The facts described by the Inter-American Court suggest that it occurred as part of a common practice of arbitrary detention based on profiling, which led to the abuse and eventual death of the detainee. While this constitutes multiple human rights violations, it is not unique to any society. Unlike the systematic elimination of suspected terrorists or political opponents, the killing of Mr. Bulacio does not engender the type of social trauma that demands remedies promoting deterrence and reconciliation. The harm to the victim was irreparable, but there was no basis to conclude that non-monetary reparations were necessary to prompt the state to amend its conduct. Instead, the situation may be more akin to the recent *Vera Vera* case, in which the Court concluded that the interests protected by statutory limitations precluded a more extensive set of remedies for the victim's death.[127]

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[124] Bulacio v. Argentina Case , *supra* note 119.

[125] *Id.*

[126] Bulacio v. Argentina, Monitoring Compliance with Judgment, Order of the President of the Court, "Declares," ¶ 1(a) (Inter-Am. Ct. H.R. Nov. 26, 2008), *available at* scm.oas.org/pdfs/2009/CORTE/ANEXOS/ENG/Appendix73.doc.

[127] *See* Vera Vera v. Ecuador Case, Inter-Am. Ct. H.R. (ser. C) No. 224, ¶¶ 117-22 (May 19, 2011).

VI. Conclusion

The IACtHR's jurisprudence on *non bis in idem* presents inconsistencies in its interpretations of the right not to be tried twice for the same acts, as well as in the IACtHR's adoption and application of the 2006 rule on the flexibility of the principle. While the Court in *Loayza Tamayo* determined that two sets of flawed proceedings violated Article 8(4), the identical circumstances of *Cantoral Benavides* produced a different conclusion three years later.[128] Rather than taking the opportunity to reconcile these cases and create a solid foundation for its jurisprudence in 2006, the IACtHR transplanted a norm on *non bis in idem* from international criminal procedure, a body of law governed by different interests and principles. By neglecting to cite the *corpus juris* of the Inter-American system and the laws and practices of OAS member states in support of its rule, the IACtHR also deprived the rule of greater legitimacy.

In adopting a rule based on *non bis in idem* that largely restates the domestic legal framework in many countries, the IACtHR did not address situations in which domestic norms are ineffective in bringing about the retrial of those responsible for committing acts that destabilize society. Previous cases before the IACtHR have illustrated that at times evidence of tampering with the original trials has been masked, leaving nothing to trigger a reopening of the proceedings. Rather than focusing on the presence of irregularities in the first trial of the suspected perpetrator, the IACtHR should have framed its decisions around the gravity of the human rights violations at issue.

A more pertinent rule on *non bis in idem* would state that where gross human rights violations are met with impunity (complete or partial), the interests protected by *non bis in idem* shall yield to those of the victims and the collective society. A re-examination of the original proceedings in such cases does not violate the rights of the persons who have been acquitted. Thus, if evidence of irregularities in those proceedings emerges, a retrial of

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[128] *See* Part III A, *supra.*

the acquitted individuals is proper.

As *Gutiérrez-Soler* and *Bulacio* illustrate, domestic courts in states parties to the OAS will apply the Court's rule to complex situations in which the correct balance between the rights of victims and the accused is not always apparent. When a re-examination of crimes that have disrupted the social fabric does occur, the law must protect the accused from being targeted at a politically opportune moment. States parties to the OAS will benefit from a clear, coherent rule as they seek to balance the rights and the interests contained in the *non bis in idem* principle as they arise in future cases.