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Apitz v. Venezuela Case: The Ramifications of the Sentence in International Law

Part I. Background

Thirty years have passed since the American Convention on Human Rights went into effect. More than two decades have also passed since the renowned sentences of the Inter-American Court of Human Rights on the Cases against Honduras were handed down. In the interim a few very particular situations have arisen in which some States – very few – have manifested their intention not to comply with the resolutions of this high tribunal. (Trinidad and Tobago and Peru). In these cases, the Inter-American Court has made clear resolutions about its jurisdiction and the obligation of compliance with its decisions. Peru, which withdrew its acceptance of the competence of the court during the government of Alberto Fujimori, not only re-accepted it after its return to democracy, but also adopted clear judicial dispositions regarding the obligatory nature of the sentences of that tribunal starting with the sentence in the *Barrios Altos* case.

In *Apitz* and other recent cases, the Inter-American Court condemned the State of Venezuela for the violation of various rights contained in the Inter-American Convention. The same decision ruled out the violation of other rights contained in the initial suit. That sentence has generated a reaction on the part of judicial authorities in that country that could have counterproductive effects if the Executive Power takes the position of the Constitutional Court that declared it "un-executable," as well as recommending that the Executive denounce the Inter-American Convention on Human Rights, a decision that is political and within the exclusive jurisdiction of the Executive, not the Judicial Power.

The Inter-American Court decided *Apitz Barbera et al v. Venezuela* on August 5, 2008. The facts of the case are related to

> the removal from office of former judges of the *Corte Primera de lo Contencioso Administrativo* [First Court of Administrative Disputes] (hereinafter "the First Court") Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz Barbera on October 30, 2003, on the grounds that they had committed an inexcusable judicial error when they granted an *amparo* [protection of constitutional guarantees and rights] against an administrative act that had denied a request for protocolization of a land sale. The Commission asserted that the removal based on this error "is contrary to the principle of judicial independence and undermines the right of judges to decide freely in accordance with the law" and that they were removed "on the grounds that they had committed an alleged inexcusable judicial error when what existed was a reasonable and reasoned difference of possible legal interpretations concerning a particular procedural feature. This was a serious violation of their right to due process because of the lack of justification of the decision to remove them and their lack of access to any simple, swift, and effective recourse for obtaining a determination on the disciplinary

> measure to which they had been subjected." Moreover, the Commission stated that the First Court had adopted decisions "that had generated adverse reactions among senior officials of the executive branch" and that "the indicia as a whole" supported the inference that the body that ordered the removal was not independent and impartial and that such removal resulted from a "misuse of power" originating in the "cause-and-effect relationship between the statements of the President of the Republic and senior government officials concerning the decisions that went against government interests and the disciplinary investigation that was initiated and that culminated in the victims' removal."

In regard to this, the sentence of the Inter-American Court declared, among other things, the following:

> Unanimously that:
>
> 3. The State has not secured the right of Juan Carlos Apitz Barbera, Perkins Rocha Contreras and Ana María Ruggeri Cova to have a hearing by an impartial court, which is in violation of Article 8(1) of the American Convention on Human Rights, in relation to the general obligations set forth in Articles 1(1) and 2 thereof…
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> 5. The State has failed to comply with the duty to state grounds arising from the guarantees of Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Apitz Barbera, Perkins Rocha Contreras and Ana María Ruggeri Cova...
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> 6. It has not been established that the Judiciary, in general, is not independent…
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> 7. The State has violated the right of Juan Carlos Apitz Barbera, Perkins Rocha Contreras and Ana María Ruggeri Cova to a fair trial by an independent court, under the provisions of Article 8(1) of the American Convention on Human Rights, in relation to the general duties established in Articles 1(1) and 2 thereof...
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> 8. The State has violated the right to be heard within a reasonable time, as enshrined in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Apitz Barbera and Perkins Rocha Contreras...
>
> 9. The State has violated the right to simple, prompt, and effective recourse to a competent court for the protection of one's rights as enshrined in Article 25(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Juan Carlos Apitz Barbera and Perkins Rocha Contreras...

With respect to these violations of the Inter-American Convention, the sentence of the Inter-American Court determined the following forms of reparations:

> 16. The State must pay the amounts set in this Judgment as pecuniary and non-pecuniary damages, and as reimbursement of costs and expenses within the term

of one year as from notice of this Judgment, under the terms of paragraphs 236, 242, and 260 thereof.

17. The State must reinstate Juan Carlos Apitz Barbera, Perkins Rocha Contreras, and Ana María Ruggeri Cova, if they so desire, in a position in the Judiciary in which they have the same salaries, related benefits, and equivalent rank as they had prior to their removal from office. If, due to legitimate reasons that are beyond the will of the victims, the State could not reinstate them in the Judiciary within the term of six months as from notice of this Judgment, it shall pay each of the victims the amount set in paragraph 246 of this Judgment.

18. The State must publish the sections established in paragraph 249 of this Judgment, within the term of six months as from notice thereof.

19. The State must adopt the measures required to pass the Venezuelan Code of Judicial Ethics, within the term of one year as from notice thereof, in accordance with the provisions of paragraph 253 of this Judgment.

20. The Court will monitor full compliance with this Judgment and deem the instant case closed once the State has fully complied with the provisions set herein. Within six months from the date of notice of this Judgment, the State shall furnish the Court with a report on the measures taken in compliance herewith.

After the publication of this decision, various public officials in Venezuela, in their roles as representatives of the State, filed an "action of control of constitutionality" to determine the constitutionality of the sentence of the Inter-American Court (File No. 08-1572). On December 18, 2008, the Supreme Court of Justice of Venezuela, in the Constitutional Court administering justice in the name of the Republic, declared the unconstitutionality petition valid as follows:

Declares:

1. Unenforceable the decision of the Inter-American Court of Human Rights dated August 5th, 2008, in that it ordered the reinstatement of the ex-magistrates of the First Court of Contentious Administrative Cases Ana María Ruggeri Cova, Perkins Rocha Contreras y Juan Carlos Apitz B. to their functions, it sentenced the Bolivarian Republic of Venezuela to the payment of money and to the publication of the disciplinary system of judges.
2. Based on the principle of cooperation of powers (article 136 of the Constitution of the Bolivarian Republic of Venezuela), and in conformity with the principles set out by article 78 of the American Convention on Human Rights, the National Executive is requested to denounce this Treaty or Convention, in light of the evident usurpation of functions by the Inter-American Court of Human Rights, with its sentence that is the object of this decision. (*emphasis added*).

On various occasions CEJIL has emphasized that one of the commitments and goals of regional protection of human rights is the effective implementation of the decisions of the bodies charged with advocating for the full compliance with everything established in the Inter-American treaties. This last point cannot be left to the arbitration of the

States, since that would break with the order established by international human rights law in the last half century.

Classic international law, like the Inter-American system of human rights, bases its functionality on a framework of customary and normative law that defines rules, procedures, and institutions through which the international obligations assumed by the State at the moment of ratification of a human rights treaty must be complied with. One of these principles is the application of good faith in contractual obligations and the impossibility of invoking dispositions of internal law as a justification for noncompliance with a treaty. Unlike a commercial or cooperation treaty, in which there is reciprocity between the signing States, human rights treaties create ties and commitments between States and their citizens, granting them rights and in some cases obligations.

Because of this, CEJIL would like to make clear its legal analysis of the referenced sentence of the Supreme Court of Justice of Venezuela taking as a parameter the following: the American Convention clearly establishes the contractual obligations assumed by Venezuela at the moment of its ratification of the instrument (Venezuela ratified the American Convention on August 9, 1977 and accepted the contentious competence of the Court on June 24, 1981). The Convention expressly establishes their "definitive," "un-appealable" (article 67) and binding (article 68) character of the sentences of the Inter-American Court. The Inter-American Court of Human Rights itself has signaled that the principle of effectiveness of international protection demands that the States ensure compliance with its decisions. CEJIL believes that the contrary, the lack of a normative, judicial, or administrative response that entails noncompliance with a decision of the system implies a new violation of the conventional obligations acquired by the State of Venezuela.

CEJIL would like to make clear its position with regard to the possible effects of declaring the "unenforceability" of a sentence of the Court and the denunciation of the American Convention for supposed "usurpation of functions," which are the principle themes in support of the resolution of the Supreme Court of Justice of Venezuela in Constitutional Court. The State of Venezuela, with sound judgment, has not carried out any international acts tending to assume the decree of the Constitutional Court. Even so, the situation requires readdressing the debate about the strengthening of the Inter-American System beginning with compliance with the sentences of the Inter-American Court and the resolutions of the Inter-American Commission.

II. Effects and compliance with the sentences of the Inter-American Court of Human Rights. Legal nature and competence of this regional tribunal.

The American Convention on Human Rights established in Articles 63, 67, and 68, the framework for compliance with the decisions of the Inter-American Court.

The first part of Article 63 establishes that:

> When it is decided that there was a violation of a right or a liberty protected in this Convention, the Court will order that the injured party be guaranteed the enjoyment of the right or liberty infringed upon. Likewise, the Court will order if necessary the repair of the consequences of the measure or situation that has

> created the violation of these rights and the payment of a just indemnity to the injured party. (*emphasis added*)

Article 67 stipulates:

> The decision of the Court will be definite and cannot be appeal. If there is disagreement about the meaning or scope of the decision, the Court will interpret it at the request of any of the parties as long as the request is submitted within 90 days of the date of notification of the decision. (*emphasis added*).

Article 68 establishes that:

1. The States Party to the Convention are obligated to comply with the decision of the Court in every case in which they are parties.
2. The part of the sentence that requires compensatory indemnity can be carried out in the respective country according to the applicable internal laws regarding the execution of sentences against the State. (*emphasis added*).

The duty of States Party to the American Convention to comply with the sentences of the Inter-American Court goes back to the historic duty established under the concept of *pacta sunt servanda* and later codified in the modern world in 1969 under the Vienna Convention on the Law of Treaties that went into effect in 1980. The expression *Pacta sunt servanda* translates to the concept of the obligation of a State to honor its promises. Under the Vienna Convention, the concept is codified in Article 26, which declares that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." (*emphasis added*).

In addition to the importance of Article 26 of the Vienna Convention, Articles 27 and 46 of the Convention are intimately related to the obligations of the Venezuelan State.

Articles 27 and 46 of the Vienna convention concern the supremacy of treaty obligations over internal law. Article 27 states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Thus, Venezuela cannot invoke provisions of its domestic Constitution to avoid compliance with its obligations under the American Convention on Human Rights.

Article 46 provides that a State cannot claim that its ratification of the treaty is nullified by provisions of the State's Constitution.[1] A State may only invoke Article 46 if its constitutional provisions precluding the validity of the treaty are "notorious," or well-known to the other member-state(s).[2] Whether a provision is "notorious" is subject to debate.[3] Article 46, however, is a moot issue in this case, because it concerns the conflict of internal law and the original enactment of the treaty, not the conflict between internal law and the provisions of the treaty. Venezuela's argument does not go to the creation of the treaty, but rather to its provisions, namely the necessity of compliance with the rulings of the IACHR.

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1 Vienna Convention, *supra* note 16, art. 46.

2 Vienna Convention, *supra* note 16, art. 46, commentary to ¶ 4 ("On this view, a State contesting the validity of a treaty on constitutional grounds may invoke only those provisions of the constitution which are notorious.").

3 *See* Draft Articles on the Law of Treaties, *supra*, note 17, art. 43, commentary to ¶ 4, 1966.

3. Article 42, Article 54, & the methods of termination

Article 39 of the Draft Articles on the Law of Treaties later became Article 42 in the Vienna Convention on the Law of Treaties. [4] There was a disagreement in the Commission as to whether Part V of the Convention lessened the significance of a ban on termination of treaties. The commentary to Article 39 of the Draft Articles states that the Commission "considered it as desirable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of [Part V] that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles."[5] In other words, the articles in Part V of the Vienna Convention are a near-exhaustive list of acceptable means and reasons for the termination of treaties. Article 39's commentary also states that the Article provides that "a treaty may be terminated or denounced or withdrawn from or its operation suspended only as a result of the application *of the terms of the treaty or of the present articles*" (emphasis in original).[6]

This is echoed in Article 54, which states that "[t]he termination of a treaty or the withdrawal of a party may take place . . . in conformity with the provisions of the treaty . . . ."[7] In the Draft Articles on the Law of Treaties, this was Article 51, which held the same two "clear and simple rules," that a treaty may be terminated either by the provisions of the treaty itself, or by the consent of all the parties.[8]

Because the treaty in question is the American Convention on Human Rights, the provisions for termination of the treaty given therein shall be examined in Part III of this essay; and because the ACHR does indeed contain provisions for termination of the treaty, Article 56 of the Vienna Convention is inapplicable.[9]

B. Draft Articles on State Responsibility for Internationally Wrongful Acts

The Draft Articles on State Responsibility for Internationally Wrongful Acts (hereinafter "Draft Articles on State Responsibility") were adopted by the International Law Commission in August 2001 and have already been cited in a ruling by the International Court of Justice.[10] [11] The Draft Articles on State Responsibility were also commended

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4 Vienna Convention, *supra* note 16, art. 42.

5 Draft Articles on the Law of Treaties, *supra* note 17, commentary to art. 39, at ¶ 1 ("The Commission accordingly considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles.").

6 Draft Articles on the Law of Treaties, *supra* note 17, commentary to art. 39, at ¶ 3 ("*Paragraph 2* is necessarily a little different in its wording since a treaty not infrequently contains specific provisions regarding its termination or denunciation, the withdrawal of parties or the suspension of the operation of its provisions. This paragraph consequently provides that a treaty may be terminated or denounced or withdrawn from or its operation suspended only as a result of the application *of the terms of the treaty or of the present articles*.").

7 Vienna Convention, *supra* note 16, art. 54.

8 Vienna Convention, *supra* note 16, art. 51.

9 Vienna Convention, *supra* note 16, art. 56.

10 *See Gabčíkovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

11 Draft Articles on State Responsibility, *supra* note 18.

in a Resolution by the General Assembly of the United Nations.[12] It can be argued, then, that the Draft Articles have attained the status of customary international law.[13]

1. *Article 12*

Article 12 of the Draft Articles on State Responsibility provide that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[14] The phrase "regardless of its origin and character" refers to the obligation, not to the breach of the obligation. In this case, the origin of Venezuela's obligation to abide by the ruling of the IACHR is in the American Convention of Human Rights. The origin of its obligation to perform its other obligations under the ACHR is the subject of the current essay. Because "[o]bligations may arise for a state by a treaty and a rule of customary or international law or by a treaty and by a rule of customary international law or by a treaty and a unilateral act,"[15] the Vienna Convention and its Draft Articles, the ACHR, and the Draft Articles on State Responsibility are all applicable.

The Commentary to Chapter III of the Draft Articles (which includes Article 12) states that the "essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation."[16] Venezuela's non-conformance is with the ruling of the IACHR, which ordered the reinstatement and reimbursement of the dismissed justices. The Commentary to Article 12 states that "in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case."[17] In this case, because Venezuela has refused to reinstate and reimburse the justices as ordered by the IACHR, there is no question that Venezuela has breached its obligation, as it is obliged to comply with the rulings of the IACHR and with the provisions of the ACHR.

2. *Article 13*

Article 13 is best summarized in the commentary, which explains that "Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation." [18] In other words, an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs. This essentially protects the States from

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12 G.A. Res. 56/83, U.N. Doc. A/56/589 (Jan. 28, 2002).

13 *See* Statute of the Court, 6 I.C.J. Acts & Docs. 38(1)(b). *See also* Mark Weston Janis, INTERNATIONAL LAW 43-86 (5th ed. 2008).

14 Draft Articles on Responsibility of States, *supra* note 18, art. 12 ("*Existence of a breach of an international obligation*: There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.").

15 Draft Articles on Responsibility of States, *supra* note 18, commentary to art. 12, ¶ 4.

16 Draft Articles on Responsibility of States, *supra* note 18, commentary to Chapter III, ¶ 3 ("The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation.").

17 Draft Articles on Responsibility of States, *supra* note 18, commentary to art. 12, at ¶ 1.

18 Draft Articles on Responsibility of States, *supra* note 18, commentary to art. 13, at ¶ 1.

being subject to *ex post facto* international law.[19] The commentary notes that this principle has been applied in many cases.[20]

The commentary also makes clear that, while a state's responsibility does not begin until the state has assumed the obligation, the obligation does not end simply because the state has unilaterally abdicated its responsibility. The commentary quotes an ICJ case to illustrate this principle:

> [If] during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to none of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[21]

It similarly alludes to the "*Rainbow Warrior*"[22] arbitration and the *Certain Phosphate Lands in Nauru* case.[23]

In the present case, this would likely mean that Venezuela would still be held to its obligations to reinstate and reimburse the dismissed justices, even were it to denounce the American Convention on Human Rights.

4. *Article 32*

This Article is modeled on Article 27 of the Vienna Convention on the Law of Treaties, discussed above.[24] It provides that "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations..."[25] The commentary states that this Article "makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation."[26] Three specific examples are cited of internal law being amended to comply with an international obligation: an amendment of Californian law for a U.S. obligation to Japan

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19 *Id.* ("Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute..unless…") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.").

20 *Id.* at ¶ 2 nn. 220-24 (referencing the following: Albert G. Lapradelle & Nicolas Politis, *Enterprize*, 1 RECUEIL DES ARBITRAGES INTERNATIONAUX 703 (1855); Albert G. Lapradelle & Nicolas Politis, *Hermosa*, 1 RECUEIL DES ARBITRAGES INTERNATIONAUX 704 (1855); Albert G. Lapradelle & Nicolas Politis, *Créole*, 1 RECUEIL DES ARBITRAGES INTERNATIONAUX 704 (1855); Albert G. Lapradelle & Nicolas Politis, *Lawrence*, 1 RECUEIL DES ARBITRAGES INTERNATIONAUX 741 (1855); Albert G. Lapradelle & Nicolas Politis, *Volusia*, 1 RECUEIL DES ARBITRAGES INTERNATIONAUX 741 (1855); 4 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE ARBITRATIONS TO WHICH THE UNITED STATES HAVE BEEN A PARTY 4349, 4373-75 (1906); 3 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE ARBITRATIONS TO WHICH THE UNITED STATES HAVE BEEN A PARTY 2824 (1906); *Affaire des Navires Cape Horn Pigeon, James Hamilton Lewis; C.H. White et Kate and Anna*, [1902] 9 U.N.R.I.A.A. 51, U.N. Sales No. 59.V.5; *S.S. "Lisman". Disposal of Pecuniary Claims Arising out of the Recent War (1914-1918) (United States, Great Britain)*, [1937] 3 U.N.R.I.A.A. 1767, U.N. Sales No. 1949.V.2; X. v. Germany, App. No. 1151/61, 7 Eur. Comm'n H.R. Dec. & Rep. 119 (1961).).

21 Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 35 (Dec. 2).

22 *Rainbow Warrior*, [1990] 20 U.N.R.I.A.A. 215, U.N. Sales No. E/F.93.V3.

23 Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. Reports 240, 253-55, ¶¶ 31-36 (June 26).

24 Draft Articles on Responsibility of States, *supra* note 18, commentary to art. 32, at ¶ 2 ("Article 32 is modeled on Article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

25 Draft Articles on Responsibility of States, *supra* note 18, art. 32.

26 Draft Articles on Responsibility of States, *supra* note 18 commentary to art. 32, at ¶ 1.

in 1906,[27] a constitutional amendment for the Weimar Republic in accordance with the Treaty of Versailles in 1919,[28] and a PCIJ case in 1933.[29] The ruling by the *Tribunal Supremo de Justicia* calling the sentence of the IACHR "impossible to execute" according to Venezuelan constitutional law is, then, inexcusable.

Articles 26, 27, 46, 42, and 54 of the Vienna Convention make it clear that Venezuela has an obligation to fulfill its obligations under the American Convention on Human Rights in good faith, that its internal law cannot be invoked as an excuse to dodge these obligations, and that its attempted withdrawal from the Convention must conform to the provisions of the Convention itself.

Articles 12, 13, and 32 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, as applied to the present case, demand that Venezuela has breached its international obligations as set out in the American Convention on Human Rights, that Venezuela has a responsibility to fulfill these obligations whether it attempts to withdraw from the Convention or not, and that the Venezuela's internal law is irrelevant to Venezuela's mandatory fulfillment of these obligations.

Articles 75 and 78 of the American Convention on Human Rights declare that the provisions of the Vienna Convention are fully applicable to the Convention and that Venezuela cannot denounce the Convention simply because it was ruled against in the IACHR.

Two very important cases in international jurisprudence on the issue of treaties are the *La Grand* and *Avena* cases.

In the *LaGrand case* (*Germany v. United States),* the issue of contention arose over the fact that the United States had not followed the procedure laid out by the Vienna Convention on Consular Relations, which provides that foreign nationals accused in another nation are to be told that they have the right to communicate with the consulate of their home country in order to receive aid in combating their charge.[30] In this case, two brothers, both German nationals, were arrested for their connection to a murder which had been committed in Arizona.[31] The brothers were tried in an Arizona court, where they were found guilty and sentenced to death.[32] The United States did not follow this procedure and the German government was not informed in a timely enough manner, which allowed for one of the brothers to be executed.[33] The United States asserted that the Vienna Convention does not require States to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings and, so, if such an obligation does not exist, the domestic rule of procedural default cannot violate the Convention.[34] The Court held that that the United States, by applying these rules of its domestic law, violated its international legal obligation to

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27 *See* R. L. Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 620 (1922).

28 *See* 112 FOREIGN OFFICE, BRITISH AND FOREIGN STATE PAPERS, 1919 1094 (HM Stationery Office 1922).

29 *See* Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány Univ. v. Czechoslovakia), Judgment, 1933 P.C.I.J. (ser. A/B) No. 61, at 249 (Dec. 15).

30 *Id.* at 515.

31 *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 475 (June 27).

32 *Id.*

33 *Id.*

34 Id. at 485

Germany under the Vienna Convention on Consular Relations. [35] The Court stressed, however, that it was not the use of domestic laws itself that caused the breach, but it was the way in which the domestic laws were applied, as they directly violated the duties to which the United States had obligated itself in signing on to the Vienna Convention on Consular Relations. [36] Thus, the ICJ makes clear that a state's responsibility towards its obligations under an international treaty trump domestic laws that prove to interfere with the implementation of these obligations and duties.

Another case which reiterates the principle of treaty obligations is the *Avena* case *(Mexico v. United States)*.[37] This case is similar to that of the *LaGrand* case, in that it involves a claim of U.S. violation of duties and obligations under the Vienna Convention on Consular Relations.[38] This case revolves around the arrests and convictions of fifty-two Mexican nationals by the United States.[39] These fifty-two individuals were tried and sentenced to death without being timely informed of their right to receive consular protection over the detrimental actions brought against them by the United States.[40] Similar to the *LaGrand* case, the Court held that the United States had breached its obligations under the Vienna Convention on Consular Relations.[41]

The *LaGrand* y *Avena* cases are examples of how international bodies were unable to pressure member States with greater power.

The Inter-American Court, for example, cannot do more than hand down more sentences against a State or denounce the noncompliance of the State before the General Assembly of the OAS, under Article 65, which establishes that:

> The Court will submit for the consideration of the General Assembly of the Organization in each ordinary period of sessions a report on its work of the previous year. The Court will signal especially and with relevant recommendations the cases in which a State has not complied with its decisions.

It is the Assembly of the OAS, but above all the collective guarantee of the protection of human rights by the member States of that organization, that can warn the States to comply with the decisions of the Inter-American Court or initiate some type of diplomatic or other sanction.

In international law, treaties are a particular category of sources of international obligations assumed by the States at the moment of their ratification, which comes from the nature and goals defined by the specific instrument but that in general, have also been demarcated by the Vienna Convention on the law of Treaties and by custom.

Thus, independently of the text of the treaty, it comes from the fact that all international treaties are voluntarily created by the States themselves, who participate in their drafting or adhere to it, and from that process they have acted and commit themselves to comply

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35 *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 515 (June 27)
36 Id. at 513
37 CITE.
38 *Avena and Other Mexican Nations (Mex. v. U.S.)*, 2004 I.C.J. 12, 19 (March 31).
39 Id.
40 Id. at 17
41 Id. at 70

in good faith with the obligations derived from the text (the *pacta sunt servanda* principle). Additionally, as part of the reason for the existence of international law, States cannot invoke norms from their internal law in order to avoid compliance with their validly assumed international obligations. Both principles are clearly contemplated in the Vienna Convention on the Law of Treaties in Articles 26 and 27, respectively.

Venezuela is closely tied to these principles, which have also been accepted as a source of legal rights since they are recognized international rights; moreover, they international customary law. There is no discussion when it comes to international rights with respect to the international obligations under articles 26 and 27 of the Vienna Convention on the Law of Treaties. Those States that do not abide by their international obligation under the good faith principle, are placing themselves under a situation of international delay, which would be expressively declared so by one of the international organs that are competent according to the subject of the obligation.

In concrete cases in which the obligations of the international treaties are discussed, there must be an analysis from the general to the particular that considers the following:

- The binding character of the generic international obligations;
- The specific obligations described in the international treaty being discussed;
- The judicial nature and competency of the international organ that has declared the corresponding international sanction;
- The executability of the international resolution in internal law, in conformance with “national margin of appreciation”;
- The supervision and effective abidance of the international resolution in debate.

From the first publications of the decisions of the Inter-American Court of Human Rights, the topic of compliance and effectiveness has been present as one of the principle debates in the Inter-American System of Protection of Human Rights.

From the reading of the American Convention on Human Rights and the study of preparatory work, there is no doubt of the immediate obligations that a State assumes when it has ratified the American Convention.

Aside from the obligations, the other related topic is of the effectiveness of those decisions and the difficulties that are presented in each of the States, including the ability to execute the decision and allow supervision of its compliance.

In the case of the Inter-American Court, the judicial basis for the international obligations in its decisions is found in the general dispositions of the Vienna Convention on the Rights of Treaties and in the principles under articles 26 and 27 before mentioned, but also, and specifically, in article 68 of the American Convention *supra* transcribed.

The content of the International obligations that the States have assumed when they ratified the American Convention are based on article 68, and are clearly defined in article 63 of the same treaty, which is the one that establishes the judicial nature of the Inter-American Court of Human Rights, its competency and its reach and judicial efficiency of its resolutions.

Article 63.1 states that:

> "When it is decided that there was a violation of law or liberty protected under the Convention, the Court will order that the harmed party be guaranteed his or her rights or liberty that have been infringed. It will order moreover, if such was appropriate, that there be a remedy of the consequences of the manner or situation that has infringed these rights and the just payment of a compensation for the harmed party" (*emphasis* added).

In regards to that article it is established that the Inter-American Court will be an inter-American tribunal that will declare the violations of Rights established in the Convention and immediately after determine the consequences that follow: A. reinstate the violated right (guarantee the enjoyment of the right that has been infringed) and; B. repair the consequences of the rights that have been violated including a just compensation.

A complex topic in practice—not so in the legal framework which is clear—it is how the States assume as binding dispositions and how they will abide by them and implement them in their internal law. In the first place, it is up to the States to accept out of good faith the international resolutions that have been issued by the supervisory and protective organs—even if there are disagreements of the reach of the corresponding resolutions. Secondly, they must inform of the respective compliance in the terms that were established by the international resolution.

In the case of the Inter-American Court, its decisions are definitive and cannot be appealed, pursuant to article 67 of the American Convention. In this sense, the States shall assume that it is a final decision that must be complied with in accordance with what is stated following article 68 of the treaty. If the States comply, they should be assured that there will not be a international process that will further question their actions.

In the same manner, the States cannot reopen the debate or question the validity of the international decisions in their internal judicial systems, or control the decisions or declare them non executable or unconstitutional. Article 27 of the Vienna Convention on the law of treaties is the angular rock that gives validity to the efficiency of the internal law when it clearly indicates the invocation of internal law when abiding an international obligation.

It will be the responsibility of the State to abide by the decisions of the Inter-American Court as they are stated, through the adoption of judicial or administrative modifications. The manner in which they are implemented can be left to the sovereign decisions of the national instruments.

"Whichever mechanism that attempts to reevaluate the materiality of the decisions of the Inter-American Court lacks validity as a decision making instrument. In such effect, it is important to note the lack of competency of the *exequatur* institution, that independently of the advantages that are offered because it is a sacred and safe procedural figure—it comes from a contradictory basis which we have just discussed, maintaining as a basic procedure the material control and adequate internal ordinance of the decisions that are

being executed, especially in the public order."[42]

As a process of the execution of the decisions of the Inter-American Court, the Inter-American Convention distinguishes between the executions of the pecuniary obligations, those that are delegated to the national mechanism of execution of decisions against the State, and the execution of other forms of reparations. In one or another case, it is the States the ones that determine the procedural instruments for their compliance, meanwhile the decision of the Court is limited to declare the specific substantive violations that need to be repaired.

That executory delegation that is given to the States of the declaratory decisions of the Inter-American Court, is what is know as the "national margin of appreciation," a well-known doctrine in the jurisprudence of the European Tribunal of Human Rights (Matter "Scozzari and Giunta against Italy", date 13 of July 2000.) It is a matter, as it has been stated in doctrine, of a safeguard, that allows the States to abide by their international obligation following the norms and structures of their own internal ordinances.[43]

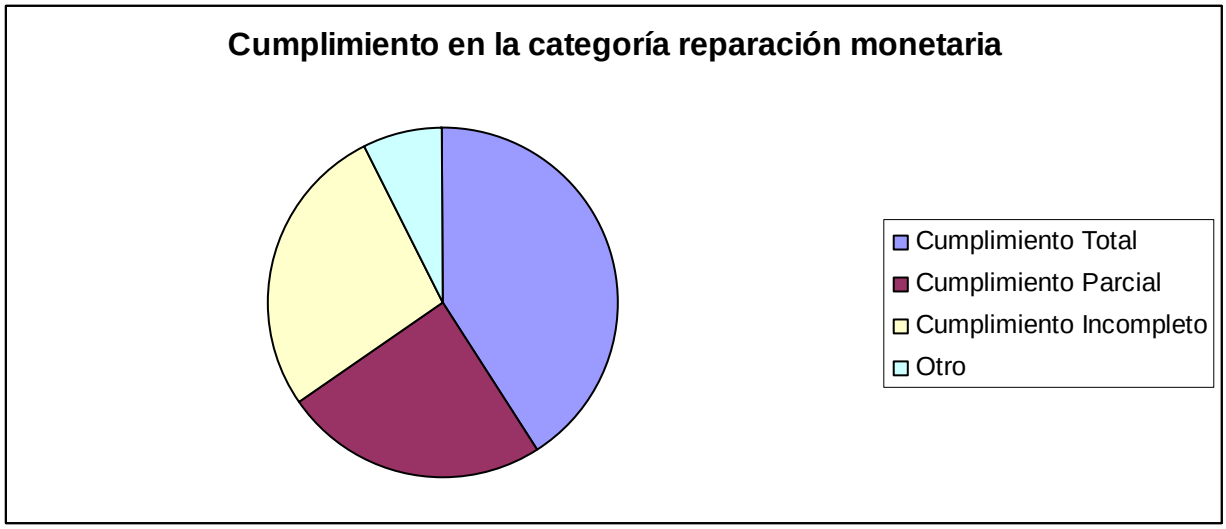
Nonetheless, the States that have ratified the American Convention on Human Rights in exercise of their sovereignty and that have recognized as binding the competency of the Court in cases that related to the interpretation or application of the treaty and which those are opposing parties, cannot forgo the obligations of the treaty nor supersede the international jurisdiction of the dispositions with internal law or in accordance to local judiciaries, as was indicated in the decisions on preliminary exceptions in the cases of "*Hilaire, Constantine and Benjamin and others* (Trinidad and Tobago) of 2001.

Difficulties in the execution of the decision of the Inter-American Court

It is recognized that the execution of the pertinent part of the decisions of the Inter-American Court that established a specific amount of compensation has no difficulty in being complied with by the States. In fact, it is those kinds of reparations that the States are more willing to abide by as is demonstrated by the statistics of compliance of this regional tribunal that have been published from 2002 to 2009. The categories were determined by the type of reparation. The categories chosen were: monetary, investigation/justice, and moral. This was so given that most of the reparations ordered by the Court can be classified in one of these categories.

[42] *See* Obligatoriedad y Cumplimiento de las Sentencias de la Corte Interamericana de Derechos Humanos *available at* http://www.institutolibertad.cl/i_17.htm

[43] *See* Obligatoriedad y Cumplimiento de las Sentencias de la Corte Interamericana de Derechos Humanos *available at* http://www.institutolibertad.cl/i_17.htm



*Translation of title in image: Compliance in the monetary category form of reparation.

Of the analysis of the supervisions of the decisions that have been published it is noted that the majority of compliances have been the monetary reparations (a 40.9% of the decisions that involve monetary reparations have been abide by). The statistic indicate that the monetary reparations are complied with more easily that for example the reparations of investigations and justice which only have a 9.09% compliance rate. Under the concept of subsidiarity, this indicates that the States give more value and importance to the monetary reparations that are distributed to the victims and not necessarily to the common good that could follow from the investigatory and judicial reparations which should have higher compliance rates.

This focus on the monetary compliance, is parallel to the focus of the European Tribunal of Human Rights, whose published statistic only determine the payments made on monetary reparations. According to the statistic of this European Tribunal in 2007, 59% of the monetary reparations were complied with.[44]

In the Inter-American system there is no Counsel of Ministry equivalence like there is for the European System that functions to control the compliance of the decisions of the European Tribunal. The control of the OAS is more than anything of a political character, as stipulated in the American Convention saying that the Court can submit for consideration to the General Assembly of the Organization of American States, in each period of sessions, a report on the work of the previous year, noting in that report the pertinent recommendations in which States have not complied with.

But independently of the existence in the American Convention of a mechanism that is more direct for the compliance of the pecuniary indemnizations via the execution of the decisions against the State, that is not an obstacle not to abide by other types of pecuniary reparations, which are more expansive as forms of dictated reparations by an international tribunal of human rights.

[44] *See "* Supervision of the execution of judgments of the European Court of Human Rights: 1st annual report, 2007," *available at* http://www.echr.coe.int/library/DIGDOC/DG2/AUTRES/COE-2008-EN-CM-Annual%20report%20exec%20judgments.pdf

In this sense, it is worth noting the good attitude of many States that have accepted and complied with the decision of the Inter-American Court that has determined all types of integral reparations, including constitutional reform (Case of "*The Last Temptation of Christ" v. Chile*); legal reform (Case *Loayza Tamayo v Perú*, Case *Suárez Rosero v. Ecuador*, Case *Mauricio Herrera v. Costa Rica*); restitution of rights and freedom for those illegally detained (Case *Loayza Tamayo*), the elimination of bad practices, elaborations of capacity building programs as a way to prevent future violations, restitution of the historic memory, etc.

The Venezuelan case and Comparative Law

Though article 31 in the Venezuelan Constitution establishes that the State shall adopt all necessary means to give compliance to the decisions of international organisms, the maximum interpretation of the *Magna Carta*, the Constitutional assembly declared the decision of the Inter-American Court of Human Rights in favor of the ex judges of the First Contentious Administrative Court as "not executable"

It is not the concern of International law to "constitutionalize" the debate over the compliance of resolutions of International organisms, but it is paradoxical that the judicial resolution of the Constitutional Assembly has been encased in an improper exercise that is not only against that normative, but also towards article 31 of the Constitution.

The declaration of non-executability of the decision of the Inter-American Court is not an anticipated mechanism in the American Convention, nor in the Convention of Vienna on the Rights of Treaties, nor in the practice of international doctrine.

The only valid process that exists in the American Convention is the interpretation of the noncompliance with the decisions of the Inter-American Court with the goal of clarifying the meaning and reach of some of the aspects that may not have been clear, but this cannot be extended to the point of filing an appeal of the decision. To challenge the content and reach of the decision of the Inter-American Court, not only would it be inappropriate, it is even more questionable if it is done through the request to review and interpret the decision in domestic judiciaries that do not have the recognized international competency for such actions. The fundamental principle that has been violated in the resolution of the Venezuelan Constitutional Assembly, and eventually a violation by the State of Venezuela in the event that they abide by the decision is the obligation of the States to invoke the internal law so as not to abide by the international obligations validly contracted.

CEJIL applauds the attitude of the State of Venezuela for not having complied with the resolution of the Constitutional Assembly that had declared the non executability of the Inter-American Court. But it also values very positively that it did not make use of the option of denouncing the American Convention on Human Rights, an option that though it is possible in accordance with the treaty, it is not a decision that resonates with the margins of prevention and protection of human rights.

In that framework and with an emphasis on the prevention, promotion and protection of Human Rights, the States should along with international organisms that focus on human rights, consolidate a culture of human rights according to the principle of pro humanity,

which is a collective responsibility of all the actors. In that same line, it is worth noting some of the experiences of comparative law which highlight these types of attitudes. The *Bulacio* case against Argentina or the *Barrios Altos* case against Peru are examples of how an international tribunal has confronted its compliance with clarity and competency in its executability and has not question the declarative sentence of the Inter-American Court. In the *Bulacio* case, when the Supreme Court of Argentina had to analyze the compliance with the sentence issued by the Inter-American Court it stated in its decision that the sentence issued by the Inter-American Court was of an obligatory compliance because "in principle, one must subordinate the content of ones decisions to the ones that the international tribunal has made."

The *Barrios Altos* case against Peru, was an important precedent for the elimination of the amnesty laws in that country, but also in Argentina, whose most supreme tribunal used as precedent this sentence to declare inapplicable its own amnesty law. In addition to this important law that was establish in these decisions, it is commendable the reaction that the judicial authorities of these countries assumed. The Constitutional Tribunal of Peru, who before this sentence had declared its amnesty laws valid, after the decision in *Barrios Altos*, not only did it modify that criteria but it also recognize the right of finding the truth through the judicial process.[45] This precedent of *Barrios Altos*, goes beyond Peru, because it has generated an impact on other countries, like Argentina, who took in this decision and strengthen its decision in the *Poblete* case opening the procedural process to investigating crimes against human rights violations during the dictatorship.

In Argentina, the debate over the value of the Human Rights treaties as internal law has been clearly defined in *Ekmekdjián v. Sofovich and others*. In this decision, the highest tribunal in Argentina made the following findings:

> ...
> 18) That the Vienna Convention on the Right of Treaties…confers supremacy of International Rights over internal Rights. Now this priority of rank integrates the judicial order in Argentina…
>
> 19) It is necessary to apply article 27 of the Vienna Convention which imposes the organs of the Argentinean State to give priority to the treaty when there is a conflict with internal law that contradicts, or with the omission of dictating positions that in its effect result in the non compliance of the international treaty in the terms that are cited by article 27. What is stated in precedent results in accordance with the exigencies of cooperation, harmony and international integration that the Argentinean Republic recognizes, and prevents the eventual responsibility of the State for its acts of its internal organs…In this sense, the Tribunal must protect the international relations of the nation so that they are not affected by the causes of omissions of internal law, which if they produce such effect, question the federal transcendency.[46]

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[45] Cf. Tribunal Constitucional del Perú. Sentencia en el caso de Genaro Villegas Namuche, Mar. 18 2004. Exp. No. 2488-2002-HC.

[46] cf. http://www.institutolibertad.cl/i_17.htm

To conclude, from both a judicial stand and a political one, the obligatory sense of the decision of the Inter-American Court has been reinforced by the OEA. During the meeting of Foreign representatives celebrated in Costa Rica in 1999, a working group was created *ad hoc* to study and suggest means to perfect and strengthen the Inter-American systems protection of human rights. Following that, the Permanent Council in the framework of the Committee on Judicial and Political Aspects, took among other, two important decisions in this respect. The first, would reiterate that the decisions of the Court are definite and cannot be appealed and that the States members to the Convention are committed to abiding by the decisions of the Court in all cases in which they are part. Moreover, the member States were advised to make all effort to abide by the recommendation of the CIDH. That is why, as was expressed by the Commission before the General Assembly in the month of June in 1999, that compliance is fundamental for the vitality and integrity of the system of human rights of the organization.[47]

In that manner, the American Convention on Human Rights establishes in article 25.2 section c) that the member States bind themselves to guarantee compliance, by the competent authorities, in all the decisions in which is it has been determined proceed from establish norms. In its part, article 63 of the Inter-American Court mentions that it will make decisions that guarantee victims the enjoyment of the rights and liberties that had been taken from them, by ordering the payment for damages. In this case, the compensation would be executed by the procedural execution of the decision that corresponds to the processes of the countries system. Given what has been said, "supranational decisions"—as they are called by Gozaíni—enjoy *executo* but need auxiliaries of the collaboration of the participating State to abide by its resolutions. The judicial condition of the power of the execution is not subject then, to the control or *autorictas* of the decision, but instead to the internal mechanism that allow the realization of the discharges established."[48]

Thus, in accordance with the normative framework that establishes the Inter-American Court, the States that recognize as obligatory the judgments of the court abide by the following:

a) Abide by the decisions of the Court in all the cases in which the interested State is a party (American Convention, article 68.1)

b) If the Court decides that there was a violation of rights or liberties protected in the American Convention, guarantee the victim the enjoyment of his or her rights and liberties that have been abridged, repair the consequences of the violation in a manner in which it guarantees no future damage of those rights and pay the damages incurred by the victim as is indicated by the Court (Convention, article 63.1).

CEJIL as a non governmental organization that represents thousands of victims of violations of human rights has tried to make effective contributions to the development

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[47] *See* Bicudo, Helio, "Cumplimiento de las sentencias de la Corte Interamericana de Derechos Humanos y de las recomendaciones de la Comisión Interamericana de Derechos Humanos", en Corte Interamericana de Derechos Humanos, *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI*, Corte Interamericana de Derechos Humanos, tomo I, Costa Rica, 2001, pp. 229-234.

[48] Cfr. Gozaíni, Osvaldo Alfredo, *El Proceso Transnacional, Particularidades Procesales de la Corte Interamericana de Derechos Humanos,* EDIAR, Argentina, 1992p. 98

of these topic in the academic, judicial and political spheres. In this sense since the 90s we have done studies, promoting legislative reforms, and we have accomplished numerous actions aimed at obtaining an effective implementation of the decisions of the system. From our experience in the region we can attest that there have been significant steps furthering the protection of human rights articulated in internal mechanism that were guided by international mechanisms in a way that guaranteed the principles of subsidiarity and effectiveness. Nonetheless, there is still more to do.

To begin, consequences of not abiding by the decisions of the Inter-American Court must be made explicitly. For the victims, the Inter-American system represents a last hope for justice, if it is not executed it perpetuates the hopelessness and adds to the torment that they have already suffered. Moreover, if the decisions are not executed it implies a challenge not only to the international obligations of the State but the laws within the State itself which appear to be abridging important rights. That is why the Court has affirmed that by not abiding by the decisions implies a new violation of international law. The Inter-American Democratic Letter, recognizes the interdependency of human rights and democracy, and commits member States to "strengthen the Inter-American system to protect the human rights and consolidate democracy in this hemisphere" (Art. 8).

Not abiding by the decision occurs due to a series of factors, the State has the most responsibility. Nonetheless, the indifference of the central actors in the collective guarantee of the rights does not contribute to the respect of those rights, for which serious tragic consequences result on individuals and communities.

That is why, CEJIL appeals to the moral integrity and politics so that the States abide by their role that has been given to them by the system, so that the decisions can be executed and in that way the promises made by the Inter-American system complied by and a continent free of fear and misery would result.

It is Venezuela's responsibility to assume its historic duties to strengthen the Inter-American system demonstrating its willingness to accept the reaches of the decisions of the Inter-American Court in the *Apitz* case.