The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice
The University of Texas at Austin
School of Law

# AMICUS CURIAE

## Interest of Amicus Curiae

The people who submit this amicus brief are students and professors form the University of Texas of Austin in the United States interested in the promotion and protection of human rights from the perspective of international law and comparative law. The students involved in the preparation of this brief include: Alice Dolson, a third-year law student; Nathaniel Baca, a second-year law student; Andrea Guttin, a third-year law student and Latin American Studies Master's student; Matthew Wooten, a first-year Latin American Studies Master's student. Ruth Matamoros, Sandra Botero, and Gabriela Zegarra all University of Texas Latin American Studies Master's students, prepared the translation of this brief. The students all worked together with and under the supervision of Ariel Dulitzky, currently a law professor at the University of Texas School of Law and Associate Director of the Bernard and Audre Rapoport Center for Human Rights and Justice. The amicus is presented under the auspices of the Bernard and Audre Rapoport Center for Human Rights. The central mission of the Rapoport Center is to create an interdisciplinary community dedicated to the study and defense of human rights in order to promote the political and economic capabilities of groups and peoples throughout the world. In this sense, the Center has a special interest in the advancement of transitional justice.

This amicus will analyze why the crimes committed at Barrios Altos and La Cantuta qualify as crimes against humanity according to international standards and n relation to the way the notion of crimes against humanity has been utilized by national tribunals. It will also outline the consequences of defining such crimes as crimes against humanity.

## Introduction

In considering the prosecution of Alberto Ken'ya Fujimori under domestic Peruvian law, the Court should take note that the acts in question qualify as crimes against humanity in international law, and therefore apply the procedural and doctrinal framework described in this brief. The requirement to punish those who commit crimes against humanity has long been recognized as law by the international community, and the definition—crimes that are committed as part of a widespread or systematic attack against a civilian population—is clearly defined in customary international law.

"International criminal law is reserved for the very worst abuses of power—for crimes which are 'against humanity' because the very fact that fellow human beings conceive and commit them diminishes all members of the human race and not merely the nationals of the state where they are directed or permitted."[1] Due to the special nature of such crimes, the international community has adopted a number of procedural measures that reflect the international importance of seeking justice.[2] To ensure that justice is met, safeguards to prosecution have been adopted by the international community; in particular, amnesties and statutes of limitation generally do not apply due to the grievous nature of crimes against humanity. In addition, courts have developed the doctrines of superior responsibility and joint criminal enterprise in order to hold superior actors such as military commanders and heads of state accountable based on their relative culpability in the commission of the crimes.

[1] *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, ¶ 34 (May 31, 2004). All translations are the authors own.
[2] *Id.*

Not only have international tribunals developed these theories, but many domestic tribunals have applied international law, or interpreted their internal laws in accordance with international law, when they have tried cases of crimes against humanity. The experience of several Latin American and European tribunals is particularly relevant because the majority of the acts tried had occurred in Latin America, often in contexts similar to that of Peru. These courts have not hesitated to look to international legal instruments to decide domestic issues. The jurisprudence from these countries clearly shows that crimes against humanity existed in international law by the time the acts in question were committed. Murder has always been considered a crime that, other factors present, is a crime against humanity. After the systematic use of forced disappearances by Latin American governments in the 1970s and 1980s, forced disappearance has also come to be classified as a crime against humanity. This was clearly established in international law by the times the acts in question were committed.

**The Crimes at Barrios Altos and La Cantuta Qualified as Crimes Against Humanity Under International Law at the Time They Were Committed**

By 1991, treaties and customary international law had established that crimes against humanity were acts that give rise to individual criminal liability. International tribunals and domestic courts had found numerous individuals guilty of crimes against humanity.[3] In addition, both treaties and U.N. General Assembly resolutions had declared these crimes to be violations of international law.[4] Crimes against humanity are crimes of international concern because all of mankind is hurt by a widespread and systematic attack against a civilian population, and as a result, customary international law has long condemned the acts and demanded their prosecution.[5]

In 1991, though the definition of crimes against humanity was not codified in one place and there was no single enforcement body, a consistent body of customary international law had formed, defining the crimes and demanding their prosecution.[6]

Throughout the 1960s and 1970s, the U.N. General Assembly repeatedly affirmed that the duty of a state to arrest, try, and punish people guilty of international crimes is a "recognized principle of international law."[7] As early as 1967, it said that "states shall not grant asylum to any person with respect to whom there are serious reasons for consider that he committee a

[3] See e.g. *Trial of the Major War Criminals Before the International Military Tribunal*, International Military Tribunal, 1946; International Military Tribunal for the Far East, 1946-1948; *Attorney General of Israel v. Eichmann*, Israel Supreme Court, 1962, ¶ 1-2.

[4] Confirmation of the Principles of International Law recognized by the Charter of the Nuremberg Court, G.A. Res. 95 (I), (Dec. 11, 1946); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the U.N. International Law Commission, U.N. Doc. A/CN.4/34 (1950); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), adopted and opened for ratification on Dec. 9, 1948; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), adopted and opened for ratification on Nov. 26, 1968.

[5] See e.g. *Prosecutor v. Erdemovic*, Case No. IT-96-22, Sentencing Judgment, 29 November 1996, ¶ 27-28; *Almonacid-Arellano Case*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, at ¶ 99, 106 (Sept. 26, 2006); Extradition and Punishment of War Criminals, G.A. Res. 3(I), (Feb. 13, 1946).

[6] *Almonacid-Arellano Case*, *supra* note 5, at ¶ 99; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 4; Question of the Punishment of War Criminals and of Persons who Have Committed Crimes Against Humanity, G.A. Res. 2712 (XXV), (Dec. 14, 1970); Principles of International Co-operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3020 (XXVII), (Dec. 18, 1972).

of the Punishment of War Criminals and of Persons who Have Committed Crimes Against Humanity, *supra* note 6. [7] Question See also Principles of International Co-Operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res 3074 (XXVIII), (Dec. 3, 1973).

. . . crime against humanity." [8] In 1973, the U.N. General Assembly said crimes against humanity:

> shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial, and if found guilty, to punishment. . .States shall assist each other in detecting, arresting, and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them…[9]

Courts have also acknowledged states' duties regarding punishment of crimes against humanity. For example, the Belgian Tribunal of First Instance, in the *Ex part Pinochet* case, found that crimes against humanity were part of "international *jus cogens*, and . . .imports the necessity of combating impunity of crimes under international law and the responsibility of state authorities to ensure punishment of such crimes. . ."[10]

Crimes against humanity were first recognized more than a century ago in the Hague Convention Respecting the Laws and Customs of War on Land. [11] In the Nuremberg *Trial of the Major War Criminals Before the International Military Tribunal*, international prosecutors first successfully argued for the conviction of individuals charged with crimes against humanity. The Nuremberg Charter, which courts often use as the starting point for modern international criminal law, considers crimes against humanity to be:

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[12]
>
> Aquellos que lideren, organicen, inciten a la formulación de un plan común o conspiración para la ejecución de los delitos anteriormente mencionados, así como los cómplices que participen en dicha formulación o ejecución, serán responsables de todos los actos realizados por las personas que sea en ejecución de dicho plan.

The first Nuremberg judgment confirmed that the Charter was a current statement of international law and asserted that customary law could form the basis for defining crimes against humanity.[13] In 1946, as an expression of customary law, the U.N. General Assembly

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[8] Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), (Dec. 14, 1967).

[9] Principles of International Co-Operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, *supra* note 7.

[10] *Ex parte Pinochet*, Belgian Tribunal of the First Instance, (Nov. 8, 1998).

[11] The Hague Convention of October 18, 1907 on Laws and Customs of War on Land (Hague IV), known as the Martens Clause, states,

> inhabitants and belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized people, from the laws of humanity, and from the dictates of the public conscience.

[12] Nuremberg Charter, Article 6(c), (Aug. 8, 1945).

[13] The judgment of *The Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, Germany (1946) at ¶ 218 stated that the Nuremberg Charter "is the expression of International Law existing at the moment of its creation, and to such extent, is in itself a contribution to International Law." The Nuremberg Charter "provided recognition to the existence of an international custom, as an expression of international law, which prohibited such crimes." *Almonacid-Arellano Case*, *supra* note 5, at ¶ 97.

adopted the Nuremberg Principles, including the Charter's definition, and, in 1950, the International Law Commission did the same.[14] Since then, customary international law has evolved from the Nuremberg definition, dropping its requirement of a nexus between crimes against humanity and an armed conflict but otherwise remaining largely the same.[15] The armed conflict requirement was first abandoned by Control Council Law No. 10 of 1945, which served as the statutory basis for trials of lower-level German war criminals tried in Germany.[16]

Following the Nuremberg trials, national jurisdictions took the lead in prosecuting crimes against humanity. Between 1948 and 1991, numerous domestic courts tried individuals for crimes against humanity, including Adolf Eichmann, convicted in 1962, in Israel; Klaus Barbie, convicted in 1988, in France; Paul Touvier, (charged in 1973, convicted in 1994), in France; Imre Finta, (charged in 1988, convicted in 1994) in Canada.[17] In *Eichmann*, the Supreme Court of Israel found Eichmann guilty of crimes against humanity, defining the crimes using the Nuremberg Charter and Control Council Law No. 10 but acknowledging that crimes against humanity "must be seen today as acts that have always been forbidden by customary international law—acts which are of a 'universal' criminal character and entail individual criminal responsibility."[18] Additionally, the Supreme Court of Argentina—in a trial of high-level military leaders charged with widespread torture, murder, and unlawful deprivation of freedom—interpreted and applied international legal standards as binding.[19]

After World War II, the international community continued creating treaties and resolutions that reaffirmed its dedication to punishing those responsible for crimes against humanity, whether committed in war or peacetime. In 1968, the U.N. General Assembly adopted and opened for ratification the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which declared crimes against humanity "among the gravest crimes in international law."[20] Genocide and apartheid were classified as crimes against humanity by widely-ratified conventions, demonstrating that the Nuremberg Charter's list of acts constituting crimes was not exclusive.[21]

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[14] Confirmation of the Principles of International Law recognized by the Charter of the Nuremberg Court, G.A. Res. 95(I), (Dec. 11, 1946); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the U.N. International Law Commission, U.N. Doc. A/CN.4/34 (1950).

[15] "It is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict," *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Oct. 2, 1995); *Almonacid-Arellano Case*, *supra* note 5, at ¶ 99.

[16] Council Law No. 10 defines crimes against humanity as, "Atrocities and [o]ffenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial, or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated."

[17] *Attorney General of Israel v. Eichmann*, *supra* note 3; *Matter of Barbie*, Cour d'Assises du Rhône (France), 1988; *Matter of Touvier*, Court d'Assises de Versailles (France), 1994. *R. v. Finta*, Supreme Court of Canada, [1994] 1 SCR 701, (Mar. 3, 1994).

[18] *Attorney General of Israel v. Eichmann*, *supra* note 3. See also, *Attorney General v. Eichmann*, District Court of Israel, 1961.

[19] *Judgment on Human Rights Violations by Former Military Leaders*, National Appeals Court of Argentina, (Court of Appeal), 1985, Section VI, 4b-5. 26 I.L.M. 317.

[20] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 4. Article 1 of the Convention also reaffirms that crimes against humanity can be committed "in times of peace." Peru ratified on Aug. 11, 2003.

[21] Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 4, currently ratified by 133 countries, including Peru, as of Feb. 24, 1960; International Convention on the Suppression and Punishment of the Crimes of Apartheid, G.A. Res. 3068 (XXVIII), adopted and opened for ratification on Nov. 30, 1973 and currently ratified by 101 countries. The genocide convention states that genocide, "whether committed in time of peace or in

An example of this evolution and expansion of the crimes considered as crimes against humanity is the crime of forced disappearance. While the crime of forced disappearance was not included in early sources defining crimes against humanity, it has since become such a crime in customary international law. In 1988, the Inter-American Court of Human Rights, in the *Case of Velásquez Rodríguez v. Honduras* unanimously declared that, "International practice and doctrine have often categorized disappearances as a crime against humanity. . ." [22] The Court stated that disappearances are not a new violation in the history of human rights, but that the "phenomenon of forced disappearances constitutes a complex form of human rights violation." [23] The Court also emphasized that the General Assembly of the Organization of American States had repeatedly affirmed that disappearances are crimes against humanity.[24] In 1992, the U.N. General Assembly stated that forced disappearances are "punishable by appropriate penalties which shall take into account their extreme seriousness."[25] The International Convention for the Protection of all Persons from Enforced Disappearance states, "The extended or systematic practice of force disappearances constitutes a crime against humanity as defined within the applicable international law and entails consequences foreseen by the applicable international law."[26]

The fact that the definition of crimes against humanity differed slightly and evolved between 1945 and 1991 does not lessen their validity because it is based on "the values that are known to all people and shared by all."[27] In *R. v. Finta*, a Canadian trial of a Nazi leader, the Supreme Court of Canada said:

> [The law defining crimes against humanity] is not made uncertain merely because the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it. . . .It is the court that must ultimately interpret them.[28]

The Inter-American Court has repeatedly interpreted customary international law defining crimes against humanity and acknowledged its long history. In *Almonacid-Arellano v. Chile*, the Court emphasized the importance of Nuremberg's recognition of customary international law as a basis for individual criminal liability and concluded that punishment under that law is mandatory.[29] It said:

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time of war, is a crime under international law." The apartheid convention considers apartheid a "crime against humanity and . . . a serious threat to international peace."

[22] *Velásquez-Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶ 153 (July 29, 1988).

[23] *Id*. at ¶ 149-150

[24] *Id*. at ¶ 153

[25] Declaration on the Protection of All Persons from Enforced Disappearances, A/RES/47/133, Article 4(1), (Dec. 18, 1992). Further, the Inter-American Convention on Forced Disappearance of Persons, adopted and opened for ratification by the General Assembly of the OAS on June 9, 1994, and ratified by Peru on Feb. 13, 2002, in its preamble, reaffirms that forced disappearance, when carried out in a systematic way, is a crime against humanity.

[26] *Id*. at Art. 5.

[27] *R. v. Finta*, *supra* note 17. The court said:

> These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations and are so repulsive, reprehensible and well understood that the argument that their definition is vague or uncertain does not arise. Similarly, the definitions of "war crimes" and "crimes against humanity" do not constitute a standardless sweep authorizing imprisonment. The standards which guide the determination and definition of crimes against humanity are the values that are known to all people and shared by all.

[28] *R. v. Finta*, *supra* note 17.

[29] *Almonacid-Arellano Case*, *supra* note 5, at ¶ 96-97.

> [T]here is sufficient evidence to conclude that, in 1973, the year in which Mr. Almonacid-Arellano died, the commission of crimes against humanity, including murder committed in the course of a generalized or systematic attack against certain sectors of the civil population, was in violation of a binding rule of international law. Said prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.[30]

The trial chamber of the International Criminal Tribunal for the former Yugoslavia, in *Prosecutor v. Tadic*, agreed, stating, "Since the [London] Charter [in 1943], the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."[31]

Therefore, the cumulative body of international law strongly confirms that crimes against humanity were clearly established in international law at the time the crimes at the Barrios Altos and La Cantuta were committed.

**The Elements of Crimes Against Humanity are Clearly Defined in Current Law**

The Rome Statute of the International Criminal Court is the world's most recent and widely-ratified treaty defining crimes against humanity and is generally a codification of existing customary international law.[32] One hundred and five countries have ratified the treaty, and Peru ratified the treaty on November 10, 2001. The Rome Statute and customary law define four essential elements of a crime against humanity: 1) an act, 2) committed as part of a widespread or systematic, 3) attack directed against any civilian population, 4) with knowledge of the attack.[33]

*1. Acts (Murder and Forced Disappearance)*

Murder—the intentional killing of a human being—and forced disappearance are enumerated in the Rome Statute's list of acts that constitute crimes against humanity and have long been held to be crimes against humanity in customary law.[34] To constitute a murder: a) the victim must have died, b) the death must have been caused by an act or omission of the accused or his subordinate, c) with the intention to kill or inflict serious injury with reckless disregard of human life.[35] Extrajudicial killings—"unlawful and deliberate killings carried out with the order of a Government or with its complicity"—also constitute murder.[36]

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[30] *Almonacid-Arellano Case*, *supra* note 5, at ¶ 99.
[31] *Prosecutor v. Tadic*, *supra* note 15, Trial Judgment, ¶ 623.
[32] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, dated July 17, 1998, 37 I.L.M 999 (1998). In its Appeal Judgment in *Prosecutor v. Tadic*, *supra* note 15, ¶ 223, (July 15, 1999), the ICTY Appeal Chamber said, "[The Rome Statute] is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States." Article 7(1) of the Rome Statute states: "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder. . . (i) Enforced disappearance of persons. . ."
[33] *Id.*at Art. 7(1).
[34] *Id.*at Art. 7(1)(a), (i).
[35] *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgment, ¶ 217 (Mar. 3, 2000).
[36] *Prosecutor v. Kayishema and Ruzidana*, Case No. IT-94-1, Trial Judgment, ¶ 140 (Oct. 2, 1995).

To constitute a forced disappearance in the context of the Inter-American system: a) the victim must be deprived of his or her freedom, b) by agents of the state, or with the authorization, support, or acquiescence of the state, c) followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, d) thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[37]

*2. Committed as Part of a Widespread or Systematic Attack*

International jurisprudence clarifies that only the attack[38]—not the specific acts that an accused is charged with—must be either widespread or systematic.[39] The Inter-American Court of Human Rights has stated that even a single act committed within the context of a widespread or systematic attack is sufficient to produce a crime against humanity.[40]

In determining whether an attack was widespread, courts look at the scale of the attacks, particularly the number of victims, but have never set a minimum number as a requirement.[41] The ICTY's *Blaskic* Trial Chamber explained that the "widespread" can be satisfied by either the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[42]

In considering whether an attack was systematic, courts look for evidence of "the [organized] nature of the acts of violence and the improbability of their random occurrence."[43] In *Blaskic*, the Trial Chamber also highlighted the following factors, which were not mandatory but would tend to demonstrate that an attack was systematic: a) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology designed to destroy, persecute, or weaken the community; b) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; c) the preparation and use of significant public or private resources, whether military or other; d) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[44]

*3. Attack Directed Against any Civilian Population*

The meaning of an attack is elaborated upon in customary law and the Rome Statute, which defines an attack as:

> A course of conduct involving the multiple commission of acts referred to in paragraph 1 [the enumerated prohibited acts] against any civilian population,

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[37] Inter-American Convention on Forced Disappearance of Persons, Article 2, adopted and opened for ratification by the General Assembly of the OAS on June 9, 1994, and ratified by Peru on Feb. 13, 2002.
[38] Rome Statute, *supra* note 32, Article 7(2)(a), defines the "attack" as the course of conduct involving the commission of multiple acts.
[39] *Prosecutor v. Blaskic*, *supra* note 35, Appeal Judgment, ¶ 101 (July 29, 2004); see also, *Tadic*, *supra* note 15, Trial Judgment, ¶ 649.
[40] *Almonacid-Arellano Case*, *supra* note 5, at ¶ 96, "A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise.
[41] *Prosecutor v. Blaskic*, *supra* note 35, ¶ 203; *Prosecutor v. Kayishema and Ruzindana*, *supra* note 36, Trial Judgment, ¶ 123.
[42] *Prosecutor v. Blaskic*, *supra* note 35, ¶ 206; also adopted in *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Trial Judgment, ¶ 179 (Feb. 26, 2001).
[43] *Prosecutor v. Kunarac*, Case No. IT-96-23/1, Appeal Judgment, ¶ 94 (June 12, 2002).
[44] *Prosecutor v. Blaskic*, *supra* note 35, Trial Judgment, ¶ 203.

> pursuant to or in furtherance of a State or organizational policy to commit such attack.[45]

"Directed against" specifies that the civilian population must be the primary object of the attack.[46] However, the population need only be predominantly civilian in nature; the presence of certain non-civilians in their midst does not change the character of the population.[47] "Civilian" excludes combatants but is otherwise given a broad definition, including, for example, hospital patients and combatants and resistance fighter who have laid down their arms.[48] The *Blaskic* Trial Chamber clarified, "It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his status as a civilian."[49] The ICTY's *Kordic* Trial Chamber followed the same flexible reasoning, concluding, "The elimination of barbarism, not legal formalism should be touchstone" to analyze the civilian nature of the population.[50]

*4. Knowledge of the attack*

Since the actual physical perpetrator of the crime need only commit specific acts, not the entire attack, knowledge of the details of the attack is not necessary, and it is not required that the perpetrator shares the purpose or goal behind the attack.[51] The only requirement is the knowledge that the act will fit in the broader context of the attack; the crime can be committed for any motive whatsoever.[52] However, an individual in a leadership position in the military need not have the *mens rea* described above to be punished for the crime against humanity because a superior has the duty to prevent or punish such action by a subordinate.[53] If the superior does neither, he can be found criminally responsible for the acts of the subordinate.[54]

## Consequences for Accountability in Defining an Act a Crime Against Humanity

Due to the special nature of crimes against humanity, the international community has adopted a number of procedural measures that reflect the international importance of seeking justice and the elevated nature of crimes against humanity.[55]

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[45] Rome Statute, *supra* note 32, Article 7(2)(a).
[46] *Prosecutor v. Kunarac*, *supra* note 43, Trial Judgment, ¶ 421, endorsed by Appeal Judgment, ¶ 91. Further, in order to determine whether the attack may be said to have been so directed, the Court considers the following: the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time, and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirement of the laws of war.
[47] *Prosecutor v. Tadic*, *supra* note 15, Trial Judgment, ¶ 638; *Prosecutor v. Kordic and Cerkez*, *supra* note 42, Trial Judgment, ¶ 180.
[48] *Prosecutor v. Tadic*, *supra* note 15, Trial Judgment, ¶ 639-643.
[49] *Prosecutor v. Blaskic*, *supra* note 35, Trial Judgment, ¶ 214.
[50] *Prosecutor v. Kordic and Cerkez*, *supra* note 42, Trial Judgment, ¶ 180.
[51] *Prosecutor v. Kunarac*, *supra* note 43, Appeal Judgment, ¶ 102-103.
[52] *Prosecutor v. Tadic*, *supra* note 15, Appeal Judgment, ¶ 255 (July 15, 1999); *Prosecutor v. Kunarac*, *supra* note 43, Trial Judgment, ¶ 433; *Prosecutor v. Blaskic*, *supra* note 35, Trial Judgment, ¶ 261; see also *Prosecutor v. Kupreskic*, Case No.IT-95-16Trial Judgment, ¶ 558 (Jan. 14, 2000), "[C]rimes against humanity need be committed with a discriminatory intent only with regard to the category of persecutions."
[53] *Prosecutor v. Blaskic supra* note 35, Trial Judgment, ¶ 300.
[54] *Id.* See "Superior Responsibility", *infra* p.9.
[55] *Prosecutor v. Sam Hinga Norman*, *supra* note 1, ¶ 34.

*Consequences of defining Crimes against Humanity with respect to State Amnesty:*
Despite the passage of *Amnesty Law No. 26479*, which exonerated members of the army, police force, and also civilians who had violated human rights or taken part in such violations from 1980 to 1995, is not valid as a general principle of International Criminal Law. As such, international law does not recognize amnesty as extending to crimes against humanity due to the grievous and elevated nature of those crimes.

Most notably, the Inter-American Court of Human Rights has addressed the issue of amnesty for crimes against humanity in the case of *Barrios Altos*. One of the primary issues before the court could proceed in that case was to determine the legitimacy of amnesty laws in cases concerning Crimes against Humanity. In accord with customary international law[56], the court stated,

> All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violated non-derogable rights recognized by international human rights law.[57]

The Inter-American Court has further stated that not only does amnesty violate customary international law but also that it would result in violations of the American Convention.

> Amnesty laws adopted by Peru prevented the victim's relatives and the surviving victims that were parties to the case, from being heard by a judge, as set forth in Section 8.1 of the Convention. They violated the right to judicial protection provided for in Section 25 of the Convention by hampering the investigation, persecution, capture, prosecution and punishment of those responsible for the events that took place in Barrios Altos, in open opposition to the provisions of Section 1.1 of the Convention. They also obstructed the clarification of the facts of the case.[58]

Though the legislature has passed legislation granting amnesty on two separate occasions, both of the amnesty provisions have been interpreted as violating both the principles of customary international law and the American Convention, according to the Inter-American Court of Human Rights.

*Inapplicability of Statutes of Limitation in Cases involving Crimes against Humanity:*
There is a long precedent set that in cases involving the worst violations of international human rights, statutes of limitation are not applicable. This general principle was highlighted

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[56] The General Assembly of the United Nations has clarified its position on the inapplicability of immunity in Resolution 3074, *supra* note 7, in stating that, "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."
*Case of Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (March 14, 2001).
[57] *Id.*
[58] *Id. at ¶ 42.*

recently in the *Decision of the Supreme Court concerning the Guatemala Genocide Case*, where the Spanish Supreme Court reflected upon the history of statutes of limitations with respect to crimes against humanity.[59]

Further, in the case of *Bulacio*, the Inter-American Court stated that no domestic provision can oppose compliance with the judgments of the Court. It emphasized,

> In accordance with the obligations undertaken by the States pursuant to the [American] Convention, no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations. If that were not the case, the rights enshrined in the American Convention would be devoid of effective protection. This understanding of the Court is in accordance with the language and the spirit of the Convention, as well as the general principles of law; one of these principles is that of *pacta sunt servanda*, which requires ensuring *effective application* of the provisions of a treaty in the domestic legal system of the States Party.
>
> Pursuant to the general principles of law and as follows from Article 27 of the 1969 Vienna Convention on the Law of Treaties, domestic legal rules or institutions can in no way hinder full application of decisions by international bodies for protection of human rights.[60]

Accordingly, a domestic limitation such as a statute of limitation that did not allow for the full application of the Inter-American Court's previous decisions with regard to *Barrios Altos* and *La Cantuta* would be foreign to the precedent set by the Inter-American Court and would stand in stark contrast to previous judicial interpretations of customary international law, the Vienna Convention, and the American Convention.

*Applying Superior Responsibility and Joint Criminal Enterprise to Crimes against Humanity:* There are two distinct but closely related types of responsibility that are particularly relevant in situations where the official does not directly take part in the commission of the crime. These forms of responsibility are joint criminal enterprise and superior responsibility. En el derecho nacional comparado y peruano por lo general se ha recurrido a la teoría de la autoría mediata que guarda aspectos similares pero que no será objeto de análisis en el presente amicus.

*I) Superior Responsibility:*

The doctrine of Superior Responsibility--that superiors may be prosecuted for the offenses committed by their subordinates, provided that certain preconditions are met-- became solidified as a doctrine of international law through its use in the ICTY and ICTR for cases occurring in the early 1990s.[61]

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[59] *See Spanish Supreme Court: Guatemala Genocide Case*, 42 I.L.M. 686 (February 25, 2003).
[60] *Case of Bulacio v. Argentina*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 100, at ¶ 117-118 (September 18, 2003).
[61] Though the doctrine has seen its greatest use in the ICTY, the doctrine has existed since at least World War I. *See* "The Commission on the Responsibility of the Authors of the War and Enforcement of Penalties" which proposed that a tribunal be established to prosecute those who ordered or abstained from either preventing or repressing violations of the laws or customs of war to be committed, reprinted in 14 AJIL 95 (1920).

The ICTY has applied the concept of superior responsibility to military commanders who failed to prevent their subordinates from committing crimes against humanity or who failed to punish or seek punishment for their subordinates who committed crimes against humanity. In the case of the *Prosecutor v. Tihomir Blaskic*, the court clarified the minimum sufficient standards for a person to be considered a superior and the minimum obligations of a superior when it stated:

> A person may be a "superior" for the purpose of Article 7(3) on the basis of effective influence that person exercises which amounts to forms of control giving to him the ability to intervene to prevent a crime. The fact that the commander had *de jure* authority to take *all* the necessary measures to punish the subordinates in question is also not a necessary prerequisite to entail the commander's responsibility. It suffices that he could have taken some measures. The fact that the commander is the *only one* who can take all the necessary measures to punish the subordinates in question is also not a necessary prerequisite incurring the commander's responsibility.[62]

In so stating, the court emphasizes that a superior is merely a person who has the ability to intervene to prevent the criminal actions or who could have taken some measures to punish those responsible. As a result of this interpretation, military commanders in superior positions can be held accountable even when they either do not seek to prevent criminal actions, fail to attempt to punish those who are responsible for the action, or for not pursuing punishments, even when separate forums exist for holding the actors accountable.

*a) The Chain of Command and Effective Control in establishing Superior Responsibility as applied to Executive Commanders:*

In addition to the superior having information available to him, superior responsibility additionally requires that there be a chain of command established between the Superior and the Subordinate.[63] In determining whether there is an adequate chain of command, it is important to note that operational and executive commanders have different obligations to civilians with regard to their formal positions. The difference between operational and executive commanders is that while the former are responsible for the acts of people under their command or control, the latter are accountable to assure that the rights of civilians and prisoners of war within the territory they occupy are fully protected. In the case of executive commanders, historically, subordination has been unimportant.[64] Their responsibility is coextensive with their appointed command structure.[65] As such, the executive has an inherent responsibility to punish those who have taken part in actions considered to be crimes against humanity.

*b) Knowledge of the Actions:*

In addition to the duty to prevent or punish, one of the primary concerns in Article 28 of the Rome Statute and in the case law is the knowledge requirement. The knowledge requirement has been separated into three categories in order to address the varying situations in which

[62] *Prosecutor v. Blaskic*, *supra* note 35, ¶ 296.
[63] Rome Statute of the International Criminal Court, *supra* note 32, art. 28, 2187 U.N.T.S. 3, 105 (entered into force July 1, 2002).
[64] *See United States v. Von Leeb*, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1, 462 (1950).
[65] *Id.*

superior responsibility has been found to exist: (i) actual knowledge; (ii) presumed knowledge; (iii) "should have known."[66] Extending superior responsibility to situations where such knowledge does not exist would result in an unfair and overly broad application of the doctrine.[67] What the doctrine seeks to do is impose "upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them."[68]

The standard that has been used repeatedly by the ICTY and the ICTR is the "should have known" standard. This standard was primarily defined in the *Celebici* case[69] when the court held that "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates."[70]

*II) Joint Criminal Enterprise*

The concept[71] of joint criminal enterprise[72] has been frequently used in cases where the Superior did not aid and abet or otherwise assist in the commission of the crime but contributed, in any other way, to the commission of the crime.[73]

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[66] *Prosecutor v. Delalic No. IT-96-21-T,* ¶ 516 *(Nov. 16, 1998)*.

[67] Timothy Wu & Yong-Sung Kang, *Recent Development: Criminal Liability for the Actions of Subordinates The Doctrine of Command Responsibility and Its Analogues In United States Law*, 273, Harv. Int'l L. J., Vol. 38 (Winter 1997), note 17 at 275.

[68] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeal Chamber Judgment, ¶ 35 (July 3, 2002).

[69] *See Prosecutor v. Mucic*, Case No. IT-96-21-T, Trial Chamber Judgment, (November 16, 1998).

[70] *Prosecutor v. Blaskic*, *supra* note 35, ¶ 62.

[71] Though joint criminal enterprise is not included in the text of the Statute of the International Criminal Tribunal for the Former Yugoslavia, joint criminal enterprise was recognized by the ICTY as customary international law in the first case decided by the ICTY Appeals Chamber and as been frequently used in subsequent cases. *see Prosecutor v. Tadic*, *supra* note 15, Appeals Chamber Judgment, ¶ 220-232 (July 15, 1999).

[72] The ICTY cites Article 25 of the Rome Statute as being substantially similar to its interpretation of Joint Criminal Enterprise:

> [In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person …]
> (d) In any other way [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime ] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> ii. Be made in the knowledge of the intention of the group to commit the crime.

*Prosecutor v. Tadic*, *supra* note 15, Appeals Chamber Judgment, ¶ 222 (quoting Rome Statute of the International Criminal Court, July 17, 1998, art. 25, 2187 U.N.T.S. 3, 105 (entered into force July 1, 2002)).

[73] As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war

The primary purpose of joint criminal enterprise is to extend liability to all members of the joint criminal enterprise not only for criminal acts that the joint criminal enterprise is directly engaged in but also to crimes that might be perpetrated by any member of the joint criminal enterprise provided that such actions are foreseeable and that the individual was aware that such a crime was a possible consequence of engaging in the activities of the criminal enterprise.[74] In the landmark case for joint criminal enterprise of the *Prosecutor v. Tadic* before the ICTY, the purpose of the joint criminal enterprise was to commit inhumane acts against the non-Serbian civilian population. The common purpose was not to kill civilians but as a result of the appellant's knowledge that killing was likely to occur and his continued commission of the common purpose, the appellant was found to have met the requirements of joint criminal enterprise and hence was found to be liable for the killings as well.[75]

This concept of joint criminal enterprise is also firmly established to create liability for high officials in cases where civilians have been detained and were eventually killed. In these types of cases, "the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organizational hierarchy."[76] Generally, "what is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called 'advertent recklessness' in some national legal systems)."[77]

The concept of joint criminal enterprise has been codified in Article 25 of the Rome Statute and was firmly established in customary international law by the time the Barrios Altos incident occurred. Its use is essential in holding high officials responsible for foreseeable events that occur in carrying out inherently criminal policies such as the unlawful detainment or treatment of civilians resulting in civilian deaths.

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(even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result.

*Prosecutor v. Tadic*, *supra* note 15, Appeals Chamber Judgment, ¶ 220.

There are three categories of joint criminal responsibility as noted in the previous note. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*. *Id.*, at ¶ 228.

[74] *Id*., at ¶ 228. Responsibility for a crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*" – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

[75] *Id*., at ¶ 233-237.

[76] *Id*., at ¶ 220.

[77] *Id*., at ¶ 219.

## The Application of Crimes Against Humanity in Domestic Courts and the Inter-American System

Domestic tribunals have drawn upon and expanded international law in many contexts. Courts have used international law to define the elements of crimes against humanity and to find jurisdiction to prosecute for such crimes. The procedural measures implemented by the international community to ensure that justice is served, such as the elimination of statutes of limitation for crimes against humanity and well as the non-application of amnesty laws, have also been applied at the domestic level. International law has also played an important role in domestic court prosecutions, in helping to define which crimes are considered crimes against humanity, for instance murder and forced disappearances. Domestic courts have relied especially on the jurisprudence of the Inter-American Court of Human Rights, and therefore some mention of such cases is made in this section.

*Domestic Court Reliance on Customary International Law*

The jurisprudence of domestic courts and the Inter-American system tracks the emergence of crimes against humanity as beginning in the early twentieth century, and evolving through the Nuremburg Tribunals.[78] In the United Kingdom, the Private Counsel, in the *Pinochet Extradition Case*, tracked the emergence of crimes against humanity as customary law as beginning after World War II, stating that the "international community came to recognize that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity."[79] The Argentine Supreme Court also saw this period as the inception of customary international law on crimes against humanity, and highlighted the importance of the UN Charter in creating a new system of international law, which imposed a supra-state model, whereby individuals are also international actors.[80] In this sense, an individual can be held responsible for crimes against humanity.

As customary law has developed, courts have accepted the principles that international cases and instruments have declared. [81] The Argentine Supreme Court has stated that it will apply international conventions and customary law, and it has stressed the importance of the principles of *jus cogens* when it comes to crimes against humanity.[82] The Colombian Constitutional Court has followed the development of the elements of crimes against humanity as listed in the previous section and has adopted the international legal definitions domestically.[83] The Spanish *Audiencia Nacional* in *Scilingo* looks to several international agreements and cases, including the International Covenant on Civil and Political Rights,

[78] Supreme Court of Justice of the Nation (CSJN), June 14, 2005, "Julio Hector Simon" Cause No 17.768C (Arg.). ¶ 52-53, pag. 104; and Supreme Court of Justice of the Nation (CSJN) August 24, 2004, "Enrique Lautaro Arancibia Clavel" Cause No 259 C A.533. XXXVIII (Arg.) Voting Minister Dr. Don Juan Carlos Maqueda ¶ 36-37; and *Almonacid-Arellano Case*, *supra* note 5, at ¶ 94-95; and *Scilingo Case*, Audiencia Nacional, Apr. 19, 2005, (Sentence No. 16/2005) (Sp.)

[79] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet. Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, Lords of Appeal (Appeal taken from Q.B.D)(U.K.). Opinion of Lord Browne-Wilkinson.

[80] *Arancibia Clavel*, *supra* note 78, Vote of the Minister Doctor Don Juan Carlos Maqueda. ¶ 40.

[81] *Id.* at ¶ 41-42:

[82] *Id.* at ¶ 35, 42.

[83] Judgment T-558/03, Ninth Chamber of Review of the Constitutional Court of Colombia, Jul. 10, 2003 (Col.). (Part VI (4)( ¶7). The Constitutional Court reiterates the definition of crimes against humanity given by the Magistrate Clara Inés Vargas Hernández in the case C-1076 de 2002.

various United Nations General Assembly resolutions, the Nuremburg Statute, the Rome Statute, as well as cases under the ICTY and the ICTR to develop the elements of the crime.[84]

The Mexican Supreme Court has also relied on international instruments to find jurisdiction to resolve cases of crimes against humanity. In the *Cavallo* case, the Court decided to extradite Miguel Cavallo to Spain on the grounds that universal jurisdiction exists for crimes against humanity. The Court stated that the alleged acts committed by Cavallo during the Dirty War in Argentina could constitute crimes against humanity; relying on the Convención Americana para Prevenir y Sancionar la Tortura and the Convention on the Prevention and Punishment of the Crime of Genocide, the Court stated that all of humanity had been affected by the acts committed.[85]

*Accountability for Crimes Against Humanity*

Like international tribunals, domestic courts have also found that crimes against humanity must be prosecuted, and that shields against prosecution must be dismantled. For example, some Latin American domestic courts have held that military courts do not have jurisdiction over crimes against humanity and that statutes of limitations do not apply.

For example, in Colombia both the Constitutional Court of Colombia and Supreme Court of Colombia have nullified military decisions regarding the military cover-up of a massacre, holding that the military courts did not have jurisdiction.[86] The Supreme Court relied, in part, on international principles that do not allow impunity for crimes against humanity.[87]

Several courts have found that statutes of limitations are inapplicable in the face of crimes against humanity. The Supreme Court of Argentina, in its judgment in the case of *Enrique Lautaro Arancibia Clavel*, held that crimes against humanity, including acts such as murder and forced disappearances, are imprescriptible.[88] The Court relied on international instruments and held that the imprescriptibility of crimes against humanity applied not only to those who committed the acts, but also to the intellectual authors of the crime.[89] In the *Julio Hector Simon* case, the Argentine Supreme Court ruled on the inapplicability of amnesty laws, and reiterated its earlier judgment on the imprescriptibility of crimes against

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[84] *Scilingo Case*, *supra* note 78 ¶ I.B.2.

[85] QUEJOSO. RICARDO MIGUEL CAVALLO. Plenary Supreme Court of Justice of the Nation (SCJN), June 10, 2003, Appeal for Review 140/2002 (Mex) tenth fourth pag. 970 y pag. 965.

> "That in a particular case, the facts that stipulates genocide and terrorism as offenses, as well as adscribed by the applicant, would not be considered a breaking of the order and military discipline. Therefore, it would not have the nature of a crime within the military jurisdiction, since his behavior did not affected or put in danger a military legal good. If so, it would have affected the entire human race."

[86] Judgment C-358/97, Colombian Constitutional Court, August 5th, 1997 (Col.); and "Case Massacre of Riofrio", Trial No 17550, Supreme Court of Justice, Chamber Criminal Appeal, third section, March 6 2003 (Col.).

[87] *Massacre of Riofrio* Case", *supra* note 86 at ¶19

> His activity … [was] incompatible with the international commitments ascribed to the Republic of Colombia. In addition, to the principles under which the knowledge for International Justice operated and still operates with topics that might be ascribed within those that, due to its unusual seriousness, the international community considers imprescriptibly and persecuted everywhere, since constitutes, or might constitute a crime against humanity. As soon it is identified, among other causes, that the State with jurisdiction does not want or cannot be in charge of the subject matter, or, on the other hand, a benign judgment is the way to ensure impunity to serious crimes.

[88] *Arancibia Clavel. supra* note 78.

[89] *Id*. at Voto del Señor Presidente Doctor Don Enrique Santiago Petracchi, ¶ 13-14.

humanity as they obstruct the judgment of those responsible for crimes against humanity.[90]

The Supreme Court of Chile has similarly concluded that statutes of limitations do not apply to forced disappearances. In the case of *Juan Contreras Sepúlveda y Otros*, the Supreme Court declared that forced disappearances were a crime against humanity, and because of this they are not subject to statute of limitations. The Court additionally pointed out that it would be impossible to calculate when to start running the statute of limitations, as forced disappearances constitute a continuing, or permanent, crime.[91]

*Domestic and Regional Courts Consider Extrajudicial Killing and Forced Disappearances as Crimes Against Humanity*

International law has played an integral part in the prosecutions of persons who have committed crimes against humanity. For example, the Argentine and Chilean courts have tried cases based on similar facts to those at issue in the present case. The events in both countries occurred in the 1970s and 1980s, and case law has established that crimes against humanity existed at that time. Other Latin American domestic courts, the Inter-American Court of Human Rights and European courts deciding cases that involved acts occurring in Latin America have all considered that crimes against humanity existed in international law by the 1990s. These courts have held that extrajudicial killings and forced disappearances constitute crimes against humanity, and were considered part of customary international law at the time of the La Cantuta disappearances and the Massacre at Barrios Altos.

In the Latin American context, extrajudicial killings have for a long time been considered a crime against humanity. In the case of *Almonacid-Arellano*, the Inter-American Court held that the murder of Mr. Almonacid-Arellano in 1973 was a crime against humanity. The Court analyzed whether, and under what circumstances, extralegal assassinations are considered a crime against humanity at the time the acts were committed.[92] The Court found that in 1973, extrajudicial murder in the context of a widespread and systematic attack did constitute a crime against humanity.[93]

The court relied in part on the case of *Kolk y Kislyiy v. Estonia*, where the European Court found that the acts committed in 1949 constituted crimes against humanity in international law at that time, even if the crime did not exist domestically at the time.[94] The Court further found that the acts constituted crimes against humanity given the context of widespread crimes that were occurring in Chile at the time: there were over 3,000 summary executions and over 33,000 detained persons. [95] Further, over half of these violations occurred in the first

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[90] *Simon*, *supra* note 78, at ¶ 34.
[91] "Juan Contreras Sepúlveda and Others", Case n° 517/2004 Sentence No. 10137, Supreme Court , Nov, 17, 2004 (Ch.) a twentieth seventh, ¶ 6.
[92] *Almonacid-Arellano Case*, *supra* note 5, at ¶ 93.
[93] *Id.* at ¶ 96-97.
[94] *Id.* at ¶100.
[95] *Id.* at ¶103.

> [S]ince September 11, 1973 until March 10, 1990 a military dictatorship prevailed in Chile. The State policy aimed to bring fear, massively and systematically attacked sectors of the civil population. People who were considered opponenents to the regime suffiered a series of grave human rights violations and violations of international law. Among these there were at least 3.197 victims of arbirary executions and forced disappearances, and 33,221 were detained, of whom a majority were victims of torture.

few months of the dictatorship. [96] Since this early period was when the victim was murdered, the Court found the act was situated in the context of widespread and systematic crimes against a civilian population. [97]

The Argentine Supreme Court in *Arancibia Clavel* found that homicide was a crime against humanity in 1974.[98] The Spanish Court has also found that extrajudicial killings are crimes against humanity. In the case of *Scilingo*, the Court determined that the thirty murders committed beginning in 1977 were considered a crime against humanity at the time they were committed. [99] The Court stated, "La conducta enjuiciada también está incursa en normas de derecho penal internacional, en concreto, constituye, o está incursa, como hemos visto, un crimen contra la humanidad (lesa humanidad)."[100]

Similarly, forced disappearances, when systematic and widespread, are also a crime against humanity. International law recognizes it as such in case law and conventions, and many Latin American countries recognize forced disappearances as a crime against humanity as well.[101] The Organization of American States has enacted The Inter-American Convention on the Forced Disappearance of Persons, which "[reaffirms] that the systematic practice of the forced disappearance of persons constitutes a crime against humanity," and has been signed by nearly all Latin American countries.[102]

Domestic tribunals have adopted a similar perspective of forced disappearances. The Chilean Supreme Court has acknowledged the existence of forced disappearances as a crime against humanity. In *Sandoval Rodriguez*, the Chilean Supreme Court assessed the crime of forced disappearances by looking to the definition of the Inter-American Convention against Forced Disappearances, and found that forced disappearances are catalogued as a crime against humanity.[103]

Argentina has understood that forced disappearances have been considered a crime against humanity since the middle of the twentieth century. The Argentine Supreme Court has ruled that forced disappearances are a crime against humanity in international law, and such an understanding has been in existence, while continuing to develop, since World War II. The court states that even though at the time an act was committed there was no domestic or international agreement on a particular crime, "la doctrina y la práctica internacionales han calificado muchas veces las desapariciones como un delito contra la humanidad."[104]

The Court further establishes that Argentina's recent ratification of the Inter-American Convention on Forced Disappearance of Persons can be seen as:

> la reafirmación por vía convencional del carácter de lesa humanidad postulado desde antes para esa práctica estatal, puesto que la evolución del

[96] *Id*.
[97] *Id*.
[98] *Arancibia Clavel*, *supra* note 78.
[99] *Scilingo* Case, *supra* note 78, at IV.1
[100] *Id*. at III. Primero B.1
[101] *Supra* at pages 4-5.
[102] Inter-American Convention on the Forced Disappearance of Persons, *supra* note 37. Signed by Brazil, Chile, Nicaragua. Signed and Ratified by Argentina, Colombia, Mexico, Ecuador, Guatemala, Honduras, Costa Rica, Panama, Paraguay, Uruguay, Venezuela.
[103] *Juan Contreras Sepúlveda y Otros*, *supra* note 91.
[104] *Arancibia Clavel*, *supra* note 78, at ¶13.

> derecho internacional a partir de la segunda guerra mundial permite afirmar que para la época de los hechos imputados el derecho internacional de los derechos humanos condenaba ya la desaparición forzada de personas como crimen de lesa humanidad.[105]

One of the judges in the Argentine tribunal emphasized that the crime has always existed: "cabe reiterar que para esta Corte tal conflicto es solo aparente pues las normas de *ius cogens* que castigan el delito de lesa humanidad han estado vigentes desde tiempo inmemorial."[106]

The Argentine Supreme Court, in *Julio Héctor Simon*, ruled on whether the 1978 disappearances of two people and the kidnapping of their daughter constituted crimes against humanity. The court stated that "para la época de los hechos imputados el derecho internacional de los derechos humanos condenaba ya la desaparición forzada de personas como crimen de lesa humanidad."[107]

This trend in comparative law to apply international law domestically and to treat crimes against humanity as a grave crime with distinct procedure has also been followed by Peru. The Peruvian government signed on to the Inter-American Convention on the Forced Disappearance of Persons on January 8, 2001, and the Convention was ratified on February 8, 2002. [108] The Peruvian Tribunal Constitucional, in the case of *Gabriel Orlando Vera Navarrete*, states that the crime of forced disappearance has always been considered a crime against humanity.[109] The Court states that the Peruvian criminal code promulgated in 1991 defined forced disappearance, and that the 1998 legislation squarely placed forced disappearance in the chapter on crimes against humanity.[110] The Court discusses how human

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[105] *Id*.

[106] *Id*., Vote of the Minister Dr Don Antonio Boggiano, at ¶ 30.

[107] Simon, *supra* note 78, at ¶ 31 (vote from the Minister Highton de Nolasco, citing Arancibia Clavel)

> the evolution of the internacional law since World War II allows us to affirm that by the time the crimes were committed the internacional law condenmed forced disappearence of people as a crime against humanity. This follows that "the expression that forced disappearence of people is just a *nomen iuris* to the systematic violation against multiple human rights. The Argentine State compromised to protect those rights since the beginning of the development of those rights within the community once the war was ended."

See also *Simon supra* note 78, at ¶ 38

> The forced disappearence of people constitutes, not only an attempt against the right to life, but also a crime against humanity. Such behavior has as the Basic presumption the characteristic of directing intself against the individual or his or herd dignioty, in Duch a way that the individual does not count unless he or she becomes a member of collective victimization to the offense is aimed.
>
> La desaparición forzada de personas constituye, no solo un atentado contra el derecho a la vida, sino también un crimen contra la humanidad. Tales conductas tienen como presupuesto básico la característica de dirigirse contra la persona o su dignidad, en las que el individuo ya no cuenta, sino en la medida en que sea miembro de una víctima colectiva a la que va dirigida el delito.

[108] Inter-American Convention on the Forced Disappearance of Persons, *supra* note 37.

[109] "Gabriel Orlando Vera Navarrete", Sentence 2798-04-HC/TC, Constitucional Tribunal (February 10, 2005) (Pe).

[110] *Id*. at ¶ 21-22.

> One of the offenses that are a matter of accusation within the referred criminal prosecution, is forced disappearence. The Criminal Code promulgated in 1991 through the Legislative Decree No 635 in the Second Book, Chapter II Title XIV, related to the terrorist offense, article 323 categorized with accuracy the offense of forced disappearence of people. Later on, this chapter was revoked through the Decree Law No 25474, which was promulgated on May 6, 1992. The original idea of forced disappearence was reintroduced through the Decree Law 25992. This decree was published in the oficial newspaper El Peruano on July 2nd 1992, description that later on was regulated through the article 6 Law No 26926 on February 21st 1998, placing the concept under the chapter of Offenses against humanity.

rights law considers forced disappearances a grave crime because of the nature of the offense: its effect on physical liberty, personal integrity and the uncertainty for family members.[111] The Court declared that "[e]l delito de desaparición forzada ha sido desde siempre considerado como un delito de lesa humanidad."[112] The Court explains the gravity of the crime by pointing to several international regional agreements, such as the Convención Interamericana sobre Desaparición Forzada de Personas, whose preamble states that systematic forced disappearances constitute a crime against humanity.[113]

As we have shown, forced disappearances as a crime against humanity is clearly entrenched in international law. Several conventions exist on the subject, the Inter-American Court, and many Latin American domestic courts have ruled that forced disappearances are a crime against humanity. Several of these courts have ruled that there was an international consensus on forced disappearances so that acts committed in the 1970s were considered crimes against humanity. With respect to extrajudicial killings, since the 1940s there has been an international consensus that, in certain contexts, such acts constitute a crime against humanity. By the time the acts at La Cantuta and Barrios Altos were committed, there existed customary international, an in some aspects international treaty law, that considered forced disappearances and extrajudicial killings to be crimes against humanity.

**The Acts Committed at La Cantuta and Barrios Altos Constitute Crimes Against Humanity**

Having established the definition of crimes against humanity as provided by international and comparative human rights law, jurisprudence, and norms, the section at hand will proceed to establish that the massacre of Barrios Altos and the forced disappearances and extrajudicial killings at La Cantuta indeed constitute crimes against humanity. Given the context within which these crimes took place and the facts regarding the crimes, it is clear that La Cantuta and Barrios Altos should be recognized as such, given that both represent grave crimes carried out against a civilian population in a widespread and systematic manner, with prior knowledge of the attack.

*Context*

The crimes committed at Barrios Altos and La Cantuta took place within a broader context of conflict and political violence in Peru. From the early 1980s through the early 1990s, there existed an ongoing armed conflict between the Peruvian State and groups known as the *Partido Comunista del Perú-Sendero Luminoso* (PCP-SL) and the *Movimiento Revolucionario Túpac Amaru* (MRTA). In general, the severity of the conflict is indicated by the position of the *Comisión de la Verdad y Reconciliación* (Truth and Reconciliation

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Although there was not a definition of crimes against humanity from May 7 to July 1 1992, the court goes on to say:

> It does not violate the guarantee of previous law that comes from the Principle of Criminal Law if the case applies as a permanent offense within a penal code that has not being in forced before the beginning of its execution. However, it is applicable while that law remains active. In that sense, the fact that the original idea of forced disappearence of people has not being always in forced, it does not prevent to carry out the said criminal trial for the offense and therefore, penalize whoever is liable for it.

[111] *Id*. at ¶ 23-24.
[112] *Id*. at ¶ 26.
[113] *Id*. at ¶ 27.

Commission, CVR), which holds that the acts committed during the conflict by both the PCP-SL and Peruvian State constituted violations of the Geneva Conventions.[114]

*The Crimes were part of a Systematic Attack*

The massacre committed at Barrios Altos and the forced disappearances and extrajudicial killings carried out at La Cantuta are representative of a number of human rights violations carried out in a systematic fashion by the Peruvian State. Starting in 1991, shortly after Alberto Fujimori assumed the office of the President, the Peruvian State advanced a series of *mano dura* and "anti-terrorist" policies aimed to combat the spread of the PCP-SL.[115] Regarding the establishment of these new policies by Fujimori's government, the CVR notes how, "en noviembre de 1991, el ex presidente Fujimori, presentó al Congreso, para su aprobación, un conjunto de leyes "antiterroristas," que fueron posteriormente observadas y recortadas en el Parlamento por considerarlas que eran inconstitucionales al transferir mayores atribuciones y poderes a las Fuerzas Armadas y Policiales."[116]

Although the adoption of these laws did not directly lead to the crimes committed at Barrios Altos and La Cantututa, they established a context within which State actors were directed to carry out human rights violations in a systematic fashion. The implementation of these new laws was also central in helping the Fujimori government set forth a policy that would provide a blanket of impunity for acts carried out by members of the military, police, and national intelligence, specifically the organs of the *Fuerzas Armadas* (FFAA), the *Dirección Contra el Terrorismo* (DIRCOTE), the *Servicio de Inteligencia del Ejercito* (SIE), and the *Servicio de Inteligencia Nacional* (SIN). [117] With respect to the organization of parties involved in "anti-subversive" tactics, the CVR has documented that "se encuentra una relación funcional entre poder político y conducta criminal. Desde el gobierno, intencional y progresivamente, se organiza una estructura estatal que controla los poderes del Estado, así como otras dependencias claves, y utiliza procedimientos formales/legales para asegurar impunidad para actos violatorios de los derechos humanos…"[118] Operating under the aegis of

[114] Truth and Reconciliation Commission. Final Report. Lima: CVR, 2003, at section 2. "Similarly, these behaviours constitute, from the point of view of the CVR, serious ofenses to the Geneve agreements., which all parties in any hostility are bound to respect."

[115] *Id*., at Section 2.45, p. 475:

> In 1991, political violence was deeply stressed on urban centers of the country, particularly in Lima. The Peruvian Communist Party-Shining Path (PCP-SL) withdraw (se replegaba) from rural zones and looking for proper conditons to break up the state of law increased the amount and categories of their subversive actions through political murders of local leaders or through urban attacks with cars fully load with explosives, as well as through "armed strikes". The administration of the expresident Alberto Fujimori slip into public opinion the need of "mano diura" (iron fist) policie against subersive actions as a prelude to a coup d'etat on April 5, 1992. Similarly, in November 1991, the expresident Fujimori presented to Congress, for approval, a series of anti-terrorist laws, which later were noted and cut out in the Parliament for being considered inconstitutional since transfered major attributions and powers to the Armed Forces and Police.
>
> El Gobierno del ex presidente Alberto Fujimori deslizaba en la opinión pública la necesidad de una "mano dura" contra la subversión como preludio al golpe de estado que dio el 5 de abril de 1992. Asimismo, en noviembre de 1991, el ex presidente Fujimori, presentó al Congreso, para su aprobación, un conjunto de leyes "antiterroristas", que fueron posteriormente observadas y recortadas en el Parlamento por considerarlas que eran inconstitucionales al transferir mayores atribuciones y poderes a las Fuerzas Armadas y Policiales.

[116] *Id*., at Section 2.45, at 475.

[117] *Id*., at Tomo III, Section 2.3, at 59.

[118] *Id*., at Tomo III, Section 2.3, at 59.

the federal government, "los agentes del Estado utilizaron la práctica de la desaparición forzada de personas de manera generalizada y sistemática como parte de los mecanismos de lucha contrasubversiva."[119] State actors thus systematically carried out human rights violations as part of official policy.

The La Cantuta ruling by the Inter-American Court of Human Rights documents the fact that the Grupo Colina "carried out a State policy consisting in the identification, control and elimination of those persons suspected of belonging to insurgent groups or who opposed to the government of former President Alberto Fujimori. It operated through the implementation of systematic indiscriminate extra-legal executions, selective killings, forced disappearances and tortures."[120] As indicated by the words of Judge Cancado Trindade in his separate opinion in the La Cantuta case, "[i]t is notorious and public that the illegal detention, followed by extra-legal execution of the victims of cases of both *Barrios Altos* and *La Cantuta*, were perpetrated by the 'death squad' called '*Grupo Colina*.'[121]

As testimony to the Grupo Colina's systematic, integrated role within the operations of the military and the SIN, the CVR has noted that "the so called Colina Group did not keep out of the military institution instead. It was an organic and functional detachment from the structure of the Army since during this administration it was able to use human resources and logistics from the Dirección de Inteligencia del Ejército (DINTE), the Servicio de Inteligencia del Ejército (SIE) and of the Servicio de Inteligencia Nacional (SIN)"[122] The Inter-American Court has also emphasized the integrated role of the Grupo Colina, which it characterizes as a group not only with close ties to the SIN, but "whose operations were known by the President of the Republic and the Commander General of the Army." The Court clearly states that it maintained a "hierarchical structure and its personnel received, besides their compensations as officials and sub-officials of the Army, money to cover their operative expenses and personal pecuniary compensations under the form of bonuses."[123]

Regarding extrajudicial killings and arbitrary executions committed under the Fujimori regime, the CVR has stated that, "[l]o sistemático emana no tanto de la existencia de una puesta en práctica de una política de Estado formalmente adoptada o de un denominado plan oficial"; instead, for crimes to have been carried out in a systematic matter, one need only revel a pattern of "hechos reiterados, concurrentes y en cierto momento, formalizados en un manual operativo determinado…"[124] In accordance with this interpretation, the CVR has considered that:

> The dimension and extension of the practice described in this section implies the ethic and political responsibility of the administrations that tolerate it. In general, those administrations did not enforce efficient measures in order to prevent, control or denounced before the competent jurisdictional offices. This responsibility is serious especially within the

[119] *Id*., at Tomo VI; CVR, 1.2.10 Conclusiones, ¶ 1, at 112.
[120] *La Cantuta Case*, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 80(18) (Nov. 29, 2006).
[121] *Id*., at Separate opinion of Judge A.A. Cançado Trindade, ¶ 11.
[122] Commission of the Truth and Reconciliation, Comisión de la Verdad y Reconciliación, *supra* note 114, at Tomo III, Section 2.3, at 130.
[123] *La Cantuta Case*, *supra* note 119, at ¶ 80(18).
[124] Commission for the Truth and Reconciliation, *supra* note 114, at Tomo VI, 1.3.6. Conclusions, at ¶ 11.
Comisión de la Verdad y Reconciliación, *supra* note 114, at Tomo VI. 1.3.6 *Conclusiones*, at ¶ 11.

> context and time in which practice of the arbitrary execution was extended and systematic.[125]

The CVR has stated that it considers forced disappearances to also have taken on a systematic character, especially between the years of 1983-1984 and 1989-1993, which the crimes at Barrios Altos and La Cantuta were committed.[126] It reminds us that:

> the steps that shaped forced disappearances supposed a complex organization, a structure and delegation of functions to different groups of agents responsible of some stages in the circuit of the forced disappearance. Those were members of several military or police institutions or civil individuals who had links with those said institutions. It implied a necessary coordination to intervene over other bodies of security, diverse in command but all under supervision of the Military and Political leadership of the area."[127]

These facts led the CVR to declare that forced disappearances were planned, realized, or supervised by State agents.[128] Importantly, the CVR concluded that between the years of 1989 and 1992, that "the forced disappearance of people by State agents had an *extended and systematic character*. This practice acquires the characteristic of *crime against humanity*. It constitutes as well a serious breaking within the norms of International Humanitarian Law.[129]

Thus, with respect to Barrios Altos, it is clear that the crime was committed within a general policy of monitoring and anti-subversive actions. According to the CVR, "desde 1989, el Servicio Nacional de Inteligencia (SIN) y el Servicio de Inteligencia del Ejercito (SIE) ejecutaban en Lima el seguimiento de activistas del PCP-SL, y según un documento dado a conocer en el Congreso el 11 de noviembre de 1991, el SIE implementó un plan denominado "Ambulante" que tenía como objetivo vigilar activistas pro subversivos e inmuebles en la zona de Barrios Altos, en el centro de Lima. Entre estos, un solar ubicado en el Jirón Huanta Nº 840," where the crime at Barrios Altos was carried out.[130]

The same is true with respect to La Cantuta, given that university surveillance was part of the state strategy to combat the PCP-SL under Fujimori's rule. The Peruvian CVR notes that,

> During 1991 the Armed Forces entered the National Universities, setting up bases of militar control. First the bases were de facto, though later they were amparados up under a modification of a Universtiy Law carried out by the administration of the ex president Alberto Fujimori. In this context of military intervention and control, grave human rights violations were committed against hundreds of university students...[131]

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[125] *Id*., at Volume VI. 1.3.6 Conclusions, at ¶ 13.
[126] Final Report of the Truth and Reconciliation Commission, 2003, Volume VI, *Patterns of Crimes and Violations of Human Rights*, at ¶ 7, p.114.
[127] Truth and Reconciliation Commission, *supra* note 114, at Volume VI, Final Report, CVR, 1.2.10. *Conclusions*, at ¶ 8.
[128] *Id.*, at Volume VI, Final Report, CVR, *1.2.10. Conclusions*, at ¶11.
[129] *Id.*, at Volume VI, Final Report, CVR, *1.2.10. Conclusions*, at ¶13.
[130] *Id.*, at at Section 2.45, p. 475.
[131] *Id.*, at Volume VII, Section 2.22 at 233, citing the CVR Final Report of the Truth and Reconciliation Commission, 2003, Volume VI at pp. 79 to 81.

The crimes committed at Barrios Altos and La Cantuta can be considered to have taken place within a systematic pattern of violence carried out by the Peruvian state. The Grupo Colina is the culprit in these two cases, although it is clear that their actions were directed by higher state powers to carry out the crimes at both Barrios Altos and La Cantuta. That is to say, the acts of the Grupo Colina in these two cases form part of a systematic policy carried out by the Peruvian State.

*The Crimes Took Place in the Context of a Widespread Attack*

Within the context of these systematic violations, and in part as a result of their being systematic, Barrios Altos and La Cantuta are also are representative of the fact that the crimes were carried out in a widespread manner. Between the years of 1989 an 1992, the Grupo Colina had active operations in both urban areas of Peru as well as within the university system.

The Peruvian CVR has established the widespread nature of attacks carried out against civilian populations, concluding that between the years of 1989 and 1992, " the practice of arbitrary executions was widespread throughout the country..."[132] Cases of forced disappearances were documented in at least 18 of the 24 Peruvian provinces (*departamentos*).[133]

The acts carried out by the Grupo Colina and other State actors were also carried out in a widespread manner. The Peruvian CVR has written that many people lost their lives at the hands of State actors, who perpetrated a number of human rights violations under the direction of the SIN.[134] The crimes committed at Barrios Altos and La Cantuta were two of the many crimes carried out by the Grupo Colina under the direction of the SIN, including extrajudicial killings and forced disappearances, both near Metropolitan Lima and in areas far from the capital.[135] The CVR states clearly:

> In addition to the massacre of Barrios Altos and the disappearences of university students and a professor from La Cantuta University, there is a high probability of his participation as the one responsible for the violations of human rights related to the disappearances of 9 *campesinos*, leaders of asentamientos humanos, La Dacha, San Carlos, and Javier Heraud of El Santa (May 2, 1992), and the disappearence of the journalist Pedro Yauri in Huara, Lima (June 24, 1992).[136]

*The Crimes were Carried Out Against a Civilian Population*

It is also clear that the crimes committed at both Barrios Altos and La Cantuta were carried out against a civilian population. As discussed in the first section of this amicus, for a group to be considered a civilian population, International Human Rights law has established that "the civilian population must be the primary object." That is, it need only be predominantly

[132] *Id*., at Chapter 1.3, Arbitrary Executions, 1.3.6 *Conclusions*, at section 2, p. 179.
[133] *Id*., at Volume VI, Final Report, Forced Disappearence, CVR, 1.2.10 Conclusions, ¶3, at p. 113.
[134] *Id*., at Volume III, Section 2.3, at 60.
[135] *Id*., at Volume III, Section 2.3, at 130.
[136] *Id*., at Tomo III, Section 2.3, at 130.

civilian in nature; the presence of certain non-civilians in their midst does not change the character of the population.[137] The term civilian also includes former combatants no longer taking part in the hostilities.[138] That is, those who at one time performed acts of resistance may be victims of a crime against humanity.

The crime committed at Barrios Altos fulfills these requirements. In fact, within the context of the armed conflict in Peru, the Inter-American Court of Human Rights recognizes the massacre at Barrios Altos as "el primer homicidio múltiple en la capital contra ciudadanos civiles en el contexto de acentuación de la violencia política en los centros urbanos."[139]

The Inter-American Court on Human Rights affirms that the same was true in the case of La Cantuta. It writes: "Thus, as regards the requests of the representatives and the State, it must be noted that the events have been described before this court by the Commission for Truth and Reconciliation, domestic judicial organs and the State's representatives as crimes against humanity, and it has been established that these were perpetrated in the context of a generalized and systematic attack against sectors of the civilian population."[140]

*The Crimes were Committed with Knowledge of the Attack*

The crimes at both Barrios Altos and La Cantuta were carried out by state actors who were an arm of the "integral" anti-terrorist operations carried out by the Peruvian State. In both instances, either the entirety or majority of the perpetrators were members of the abovementioned "military death squadron," known as the *Grupo Colina*, which carried out operations as part of its "anti-terrorism" program and "which operated with the approval and assistance from the highest levels of the military and the SIN."[141]

The Inter American Court also held that, regarding the violation of the right to life – acknowledged by the respondent Government - of the professor and the nine students kidnapped at the University of La Cantuta, "the case facts were the result of an operation executed, coordinated and concealed by the *Grupo Colina*, with the knowledge and superior orders of the intelligence services and of the then President of the Republic himself" (para. 114).[142]

The Inter American Court further asserts that it would have been impossible for crimes such as those committed at Barrios Altos and La Cantuta to have been carried out without the knowledge of their operations, considering it "acknowledged and proven that the planning and execution of detention and subsequent cruel, inhumane and degrading treatment, extra-legal execution and forced disappearance of alleged victims, carried out in a coordinated and

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[137] *Prosecutor v.Tadic*, *supra* note 15,Trial Judgment, ¶ 638; also *Prosecutor v. Kordic and Cerkez*, *supra* note 42, Trial Judgment, ¶ 180.
[138] *Id*., ¶.643; *Prosecutor v. Kordic and Cerkez*, *supra* note 42, ¶ 180, but *note*: A current member of an armed force organization remains a combatant even in moments when he or she in not armed or in combat, and thus may be lawfully attacked by an enemy party to the conflict. *Prosecutor v. Blaskic*, *supra* note 35, ¶ 114.
[139] Comisión de la Verdad y Reconciliación *supra* note 114 at Section 2.45, pg 480.
[140] *La Cantuta Case*, *supra* note 120, at Section 157.
[141] Truth and Reconciliation Commision, *supra* note 114, at Volume III, Section 2.3, at 98, citing Coletta Youngers, " Political Violence and Civil Society in Peru: History of the National Coordination of Human Rights." Lima: Institute of peruvian studies. IEP, 2003, at 257-258. " … military death command, the group "Colina" that operated with the approval and support of the high levels of the army and the SIN (Youngers 2003: 257-258)."
[142] *La Cantuta Case*, *supra* note 120, Separate opinion of Judge A.A. Cançado Trindade, Section 17.

concealed way by the members of military forces and the Colina Group, could not have passed unnoticed to or have occurred without the orders of the superior ranks of the Executive Power and the then military forces and intelligence bodies, especially the chiefs of intelligence and the same President of the Republic himself."[143]

Thus, it is widely recognized and documented that the crimes at Barrios Altos and La Cantuta were carried out with the highest levels of the government having knowledge of the attack.

[143] *Id*., at ¶ 96.