INTER-AMERICAN COURT OF HUMAN RIGHTS:

AMICUS CURIAE BRIEF ON The RADILLA PACHECO CASE

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Amnesty International is a global movement of 2.2 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations

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"The Government of Mexico believes that the reservation made by the United States Government to article IX of the aforesaid Convention should be considered invalid because it is not in keeping with the object and purpose of the Convention, nor with the principle governing the interpretation of treaties whereby no State can invoke provisions of its domestic law as a reason for not complying with a treaty"

Objection made by Mexico on 4 June 1990 to the reservation lodged by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide.[1]

[1] Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=318&chapter=4&lang=en.

I. INTRODUCTION

Amnesty International has the honour of submitting to the Honourable Inter-American Court of Human Rights (Court) this a*micus curiae* brief in the case of *Rosendo Radilla Pacheco v. United Mexican States*.[2]

In this case the Inter-American Commission on Human Rights (Inter-American Commission) has brought proceedings based on the forced disappearance of Rosendo Radilla Pacheco, who was detained by military forces in the State of Guerrero, Mexico, on 25 August 1974.[3] In its claim, the Inter-American Commission has concluded that Mexico has not adequately investigated the events which gave rise to the enforced disappearance of Rosendo Radilla – despite the extensive period of time that has passed since then – and that as a result individual criminal responsibility has not been established, nor have reparations been made to his family members. In short, the Inter-American Commission has requested that the international responsibility of Mexico be established for the violation of several rights recognized in the American Convention on Human Rights (American Convention) such as the right to personal liberty, the right to humane treatment, the right to life and the right to a fair trial, among other relevant rights.

For their part, the claimants (the family of Rosendo Radilla Pacheco, the Association of Relatives of Disappeared Detainees and Victims of Human Rights Violations in Mexico and the Mexican Commission for the Defence and Promotion of Human Rights) have maintained in their document of requests, arguments and evidence that Mexico violated various obligations enshrined in the American Convention, read in conjunction with the Inter-American Convention on Forced Disappearance of Persons (Forced Disappearances Convention). In this regard, the petitioners requested, among other claims, that the Court find invalid the reservation made by Mexico to article IX of this treaty.

For its part, Mexico, in its response to the claim, has submitted several preliminary objections and contested the main point of the matter, requesting that the Court abstain – for various reasons – from ruling on the merits of the Radilla Pacheco case and reject the claims made for reparations.

The purpose of this brief by Amnesty International is to present some considerations of legal nature regarding interpretative declarations and reservations made by Mexico to two human rights treaties which are under consideration, including the American Convention and the Forced Disappearances Convention, on which Mexico

[2] Claim submitted by the Inter-American Commission on Human Rights on 15 March 2008 in case 12.511.

[3] In this brief Amnesty International uses the term "forced disappearance", the term used in the Inter-American Convention on Forced Disappearance of Persons, rather than the more common term, "enforced disappearance", used in the UN Declaration on the Protection of All Persons from Enforced Disappearance, the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance. For the purposes of this brief, there is no difference between the two terms.

based its preliminary objections.[4]

With a view to understanding the conclusions reached by Amnesty International, the organization demonstrates the precedence of international law over states' domestic laws; clarifies the distinction between interpretative declarations and reservations to treaties, showing the effects of both; defines the objections to the reservations and, in particular, their effects when set against human rights protection treaties, using as examples objections made by Mexico to reservations put forward by other states. Finally, the organization explains the reasons why the interpretative declaration and reservation made by Mexico to regional instruments for the protection of human rights which are applicable to the Radilla Pacheco case and on which Mexico is basing some of its preliminary objections are invalid.

For the reasons explained in detail below, this Court has temporal jurisdiction to declare the violation of provisions contained in the American Convention, for events or acts of a continuous nature committed before that Convention came into effect for Mexico, when such continuous events or acts bring about legal consequences which continue after the Convention entered into force. Both the interpretative declaration on the temporal applicability of the Forced Disappearances Convention and the reservation to Article IX of the latter constitute reservations which defeat the object and purpose of these treaties, and are thus invalid, which should be so stated by the Court.

Amnesty International trusts that these considerations, presented below, will assist the Court's arrival at a decision which is consistent with the international law applicable to the case.

II. INTERNATIONAL CONVENTIONAL LAW AND ITS LEGAL HIERARCHY

The Vienna Convention on the Law of Treaties (Vienna Convention), to which Mexico is a state party, and which reflects in many of its provisions customary international law, establishes the correct order of precedence, within the legal system, between national law and international law.[5]

Article 26 of the Vienna Convention recalls the *pacta sunt servanda* principle, according to which:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[4] Article 2 (3) and Article 41 of the Rules of Procedure of the Inter-American Court of Human Rights.

[5] Adopted in Vienna on 23 May 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331. Entered into force 27 January 1980. Mexico signed the Convention on 23 May 1969 and ratified it on 25 September 1974, without adding any interpretative declaration or reservation. Currently the Convention has 109 states parties.

Article 27, a corollary of the previous article, and which codifies a customary rule,[6] adds that:

> [a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The provision contained in Article 27 implies the duty of states to adjust their national legislation, if necessary, to the provisions contained in the treaty. And as Mexico stated in the *Avena* case, a State's internal legislation must not be permitted to impair or diminish the rights enshrined in a convention, as this goes against its object and purpose and constitutes a violation of the fundamental principle of international law according to which no State may invoke its national law or structure in order to excuse itself from, or justify a failure to comply with international law.[7]

It should be noted, by way of example, that one state – Guatemala – when becoming party to the Vienna Convention put forward several reservations, including one relating to Article 27.[8] In that reservation, that state contended that it only recognized the primacy of international law over its secondary or ordinary legislation, expressly excluding its Constitution, which would thus maintain primacy over the former. This reservation has come to the attention of various states, which have objected to it and have considered it not to be legally valid, on the ground that it does not constitute an impediment to the Convention's entry into force for them as the state which presented the reservation is unable to benefit from the reservation.[9]

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[6] Annemie Schaus, Les Conventions *de Vienne sur le droit des traités. Commentaire article par article*, Olivier Corten & Pierre Klein (dir.), Bruxelles, Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006, article 27, p.1124 («*Le principe d'impuissance du droit interne à justifier la non exécution d'un traité, telle que contenue á l'article 27, reflète en tout état de cause le droit international coutumier* »).

[7] ICJ, *Avena and other Mexican Nationals*, Memorial for Mexico (20 June 2003), p. 88, para.213 ("It was an essential task for the drafters to accommodate the myriad legal systems among the States party to the Convention, while at the same time protecting against States using their municipal laws to undermine the rights established in Article 36. To permit a State's laws and regulations to impair or diminish rights conferred by the Convention would defeat the object and purpose of Article 36(2) and violate the fundamental principle of international law that no state may invoke its municipal law or internal structure to excuse or justify failure to obey international law"); see also: PCIJ, Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, Series A, n° 24, p.12: A State "cannot rely on [its] own legislation to limit the scope of [its] international obligations."

[8] The reservation made by Guatemala, which in essence follows the same lines as that formulated by Costa Rica when signing the Vienna Convention, states: "A reservation is hereby formulated with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty".

[9] Finland, for example, maintained that: "These reservations which consist of general references to national law and which do not clearly specify the extent of the derogation from the provisions of the Convention, may create serious doubts about the commitment of the reserving State as to the object and purpose of the Convention and may contribute to undermining the basis of international treaty law. In addition, the Government of Finland considers the reservation to article 27 of the Convention particularly

In the past, the non-observance of Article 27 of the Vienna Convention had also brought that state to the attention of the UN Human Rights Committee. On the claimed precedence of the Constitution, the Committee declared:

> The Committee is concerned about the State party's claim that the principles of the Constitution prevent it from giving effect to the provisions of the Covenant and, for example, about the fact that personal jurisdiction has been maintained for members of the military and some rights of members of indigenous communities are not being recognized.
>
> The State party should not put forward the limitations of its Constitution as a reason for non-compliance with the Covenant, but should draw up the necessary reforms to achieve such compliance.[10]

Many years previously, the Permanent Court of International Justice, in the *Traitement des nationaux polonais à Dantzig* case, had concluded that:

> "…a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".[11]

In 1988, in its Advisory Opinion relating to the Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, the International Court of Justice stated that:

> [i]t is a generally recognized principle of international law that, in relations between a treaty's contracting Powers, the provisions of a domestic law may not take precedence over those of the treaty.[12]

It may be concluded from the above that any international treaty, covenant,

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problematic as it is a well-established rule of customary international law. The Government of Finland would like to recall that according to article 19 c of the [said] Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Finland therefore objects to these reservations made by the Government of Guatemala to the [said] Convention. This objection does not preclude the entry into force of the Convention between Guatemala and Finland. The Convention will thus become operative between the two States without Guatemala benefitting from these reservations." See also the objections made by Austria, Belgium, Denmark, Sweden and the United Kingdom. All of these objections are available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en.

[10] CCPR/CO/72/GTM, 27 August 2001. Consideration of reports submitted by states parties under article 40 of the International Covenant on Civil and Political Rights. Concluding observations of the Human Rights Committee, Republic of Guatemala, para.10.

[11] Advisory Opinion of 4 February 1932, Series A/B.n°44, p.24 "…un État ne saurait invoquer vis-à-vis d'un autre État sa propre constitution pour se soustraire aux obligations que lui imposent le droit international ou les traités en vigueur"

[12] P.C.I.J., Series B, No. 17, p.32 - International Court of Justice, Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters, Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, para.57.

convention, pact or agreement held in writing between states and governed by international law, whatever its legal form or name may be, if duly ratified or approved by a state, constitutes a legal standard which takes precedence over any law in the domestic legal framework, including the Political Constitution itself.[13] This obligation is imposed on the states parties by the Vienna Convention, reflecting a rule of customary international law.

III. RESERVATIONS AND DECLARATIONS

When manifesting their consent to be bound by a treaty states can – depending on the treaty - present two main types of unilateral expressions of will: reservations and interpretative declarations.[14] As explained below, both kinds of expressions of will have differing intentions and consequences. Furthermore, the name which states may give to such expressions does not necessarily determine the type of expression it is, but rather an objective test must be applied and the declaration interpreted in the light of its meaning.[15]

a) Reservations

According to treaty law, "'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of

[13] Annemie Schaus, *Les Conventions de Vienne sur le droit des traités…*, p.1137 (« *L'article 27 de la Convention de Vienne, quant à lui, prescrit certainement, dans l'ordre juridique international, la primauté du droit international sur le droit interne* »). Similarly, Pastor Ridruejo, José A., Curso de Derecho Internacional Público y Organizaciones Internacionales, Tecnos, 1994, p.135 ("On the other hand, treaties must be observed even if they are contrary to the national law of any of the States parties" – translation by Amnesty International). In addition, Principle II, para. 102, of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission at its second session, in 1950, states: "The principle that a person who has committed an international crime is responsible therefore and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the 'supremacy' of international law over national law. The Tribunal considered that international law can bind individuals even if national law does not direct them to observe the rules of international law, as shown by the following statement of the judgment: '... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State'". Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

[14] Amnesty International, "International Criminal Court: Declarations amounting to prohibited reservations to the Rome Statute", November 2005 (AI Index: 40/032/2005), available at: www.amnesty.org/en/library/info/IOR40/032/2005/en. Translations in French and Spanish are also available.

[15] Jennings, R. & Watts A., Oppenheim's International Law, 9th ed., vol.1, p.1241 ("First, the words 'however phrased or named': a state cannot, therefore, avoid its unilateral statement constituting a reservation just by calling it something else. It is the substance of the statement that matters").

the treaty in their application to that State or to that international organization".[16]

When the United Nations Charter was adopted in 1945 the idea of not allowing any reservations to multilateral treaties without the unanimous consent of the other states parties had considerable support, even though it was far from unanimous.[17] This strict approach was encouraged by the International Law Commission (ILC) in its 1951 report on reservations to multilateral treaties. This protected the integrity of the treaties but often went against the aim of achieving broad participation by States which, due to constitutional or other restrictions, were unable to become states parties if certain reservations were not allowed. For this reason and due to the actions of a growing number of states which wanted broader participation in the treaties, the standard of unanimity gradually diminished.[18]

In its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, issued in 1951, the International Court of Justice held that, as the reservations were not prohibited in a multilateral treaty, it followed that they were allowed, as long as they were not contrary to the object and purpose of the treaty.[19] The International Court of Justice concluded:

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[16] International Law Commission, *Text of the draft guidelines on reservations to treaties, Guide to practice*, Directive 1.1. "Definition of reservations", provisionally approved by the Commission. Report of the International Law Commission 60th session (5 May-6 June and 7 July-8 August 2008), supplement No.10 (A/63/10). The Vienna Convention on the Law of Treaties gives a very similar definition in article 2(d) ("'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"). Mexico's Law on the Signing of Treaties contains a similar definition (article 2, VII. "'Reservation': the declaration formulated when signing, ratifying, accepting or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to the United Mexican States" – translation by Amnesty International). Available in Spanish at www.sre.gob.mx/tratados/leytratados.pdf. In the sphere of the OAS see the Standards on reservations to Inter-American multilateral treaties and Rules for the General Secretariat as depositary of treaties (Resolution adopted at the tenth plenary session, held on November 14, 1987), AG/RES.888 (XVII-O/87) (available at: http://www.oas.org/dil/resolutionsgeneralassembly_AG-RES888.htm).

[17] Egon Schwelb, *The Amending Procedure of Constitutionalizations of International Organizations*, 31 Brit. Y.B. Int'l L. 94 (1954) ("It is submitted that the Charter, although it contains no express provision to this effect, does not admit of reservations by unilateral declaration. No reservation was made on signature or ratification of the Charter by any Government…"). Although the Charter of the UN is an exclusive constitutional instrument by an inter-governmental organization, many scholars of the time were of the opinion that, without an express provision to allow them, reservations to multilateral treaties were prohibited.

[18] Catherine Redgwell, "The Law of Reservations in Respect of Multilateral Conventions", in Chinkin eds., Human Rights as General Norms and State's Right to Opt Out (London, J.P. Gardner, B.I.I.C.L. 1997). Antonio Cassese, International Law 173 (Oxford, Oxford University Press 2ª ed. 2004). On the Latin American system, which in 1928 had already adopted a flexible approach at the expense of the degree of obligation required, see L.A. Podestá Costa y José María Ruda, *Derecho Internacional Público* (Buenos Aires, TEA, 1985).

[19] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951. Various human rights treaties, for example, apply the same approach: article 51.2 of the Convention on the Rights of the Child states: "A reservation incompatible with the object and purpose of the present Convention shall not be permitted". Article 120 of the Rome Statute of the International Criminal Court prohibits reservations outright: "No reservations may be made to this

> The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.[20]

However, this conclusion was not unanimous and the judges who voted against – four out of twelve – pointed out that the new rule relating to compatibility with the aim and purpose of the treaty was not coherent and contained some problems of interpretation.[21]

Months later, the view of the majority of the judges was upheld by the General Assembly, which encouraged all states to follow the Advisory Opinion of the International Court of Justice with respect to the Convention on the Prevention and Punishment of the Crime of Genocide.[22]

In 1969 the Vienna Convention on the Law of Treaties codified the structure of modern law on reservations on the basis of the flexible approach taken in the judgment of the International Court of Justice, indicating that:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
>
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

Statute". See also article 28.2 of the Convention on the Elimination of All Forms of Discrimination Against Women. At the regional level, see article 21 of the Inter-American Convention to Prevent and Punish Torture and article 18 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

[20] International Court of Justice, *Reservations to the Convention,* p.24. Jennings and Watts explain that, although the opinion was restricted to the case of the Convention against Genocide and was based on the special characteristics of this treaty, it must be understood that it clearly affects the general provisions of international customary law relating to reservations. Robert Jennings & Arthur Watts, 1 *Oppenheim´s International Law* 1245, Longman, 9th ed., 1997.

[21] Dissident opinion of the Guerrero Judges, Mcnair, Read and Hsu Mmo, p.44 *("Au surplus, nous avons peine à entrevoir comment la nouvelle règle pourra fonctionner. Quand une règle est proposée aux fins de régler un litige, elle doit être d'une application aisée et doit aboutir à des résultats définitifs et cohérents. Nous ne pensons pas que la règle dont il s'agit remplisse l'une ou l'autre de ces conditions. i) La règle s'articule autour de la phrase : « si la réserve est compatible avec l'objet et le but de la Convention ». Quels sont « l'objet et le but » de la Convention sur le génocide ? La répression du génocide ? Cela va de soi, mais n'y a-t-il rien de plus ? Englobent-ils certains articles ou bien tous les articles relatifs à la mise en oeuvre de la Convention ? Tel est le noeud de la question. Un coup d'oeil à ces articles suffit à en faire comprendre l'importance. Ainsi que nous l'avons montré au début du présent avis, il s'agit là des articles qui ont soulevé des difficultés.*") Available at: www.icj-cij.org/docket/files/12/4287.pdf.

[22] Res.598 (VI) (1952) of the General Assembly.

> (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[23]

b) Interpretative declarations

In contrast, if a unilateral declaration makes an interpretation of a provision without altering or modifying it, it is, in reality, not a reservation, but rather what is known as an "interpretative declaration" (or simply a "declaration").[24] The Vienna Convention does not define interpretative declarations in its text.

However, the ILC – which prepared the draft of the Vienna Convention - determined that an "interpretative declaration" is understood to mean:

> [a] unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[25]

In this sense, it is worth noting that an interpretative declaration can be a useful tool for interpreting the provisions of a treaty, and as long as it does not constitute a disguised reservation, it is governed by the rules of interpretation contained in articles 31 (General rule of interpretation) and 32 (Supplementary means of interpretation) of the Vienna Convention. However, given that states frequently use interpretative declarations in order to introduce disguised reservations, as discussed below, there are several factors that must be taken into account in order to ascertain whether the expression of will is a reservation or an interpretative declaration.[26] The ILC has, therefore, stated:

> The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports

[23] Vienna Convention on the Law of Treaties, article 19.

[24] In the document "Report of the International Law Commission on the work of its fifty-first session, 3 May -23 July 1999, Official Records of the General Assembly, Fifty-fourth session, Supplement No.10", Document A/54/10, in footnotes 317 and 318 and the corresponding text, there is an explanation of the differences between the various terms used in English (understanding, statement, declaration, etc.) which in Spanish and other Romance languages are called simply "declaración" or "declaración interpretativa". Available at: http://untreaty.un.org/ilc/documentation/english/A_54_10.pdf See also Richard Gardiner, Treaty Interpretation, Oxford, 2008, p.86-99.

[25] Directive 1.2., *supra,* no.16.

[26] Anthony Aust, *Modern Treaty Law and Practice* 101 (Cambridge: Cambridge University Press 2004). Leila Lankarani, *La Lutte contre la Corruption*, in Hervé Ascencio, Emmanuel Decaux et Alain Pellet, *Droit International Pénal* 608, París,: Pedone, 2000 *(«L' effectivité des moyens prévus par les textes conventionnels dépendra, d' un part, de l' abstention ou de l'usage modéré des États en matière de réserves –dont le principe est admis pour la plupart des incriminations - du fonctionnement, d'autre part, des organes de suivi ou de monitoring envisagés par la plupart des textes et, enfin, de la participation large des Etats à ces instruments qui sont des traités ouverts »*).

to produce.[27]

The ILC has identified two types of statements as reservations. First, "statements purporting to limit the obligations of their author", indicating that:

> A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.[28]

Furthermore, the ILC has defined as reservations "statements purporting to discharge an obligation by equivalent means", stating:

> A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.[29]

In spite of these definitions, it is not always easy to distinguish reservations from interpretative declarations, given that the difference between the two lies in their judicial effects and not in the names ascribed to them by States or international organizations when formulating them.[30]

Thus, for example, the fact that a state or international organization, when stating its consent to be bound by a treaty, calls a unilateral expression of will an "interpretative declaration", is not conclusive *per se*. If the true meaning of the declaration is to alter, limit or modify the scope of the obligations set out in the treaty concerned or fulfil an obligation of the treaty in a different way, it must be considered as a reservation, not an interpretative declaration, and ruled consequently by the regulating legal system.[31] In the same way, if a state or international organization describes its unilateral expression of will as a reservation, but it does not modify, limit or alter in any way the scope of any of the treaty's provisions it will merely constitute a declaration and not a reservation.[32]

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[27] International Law Commission, *Text of the draft guidelines on reservations to treaties, Guide to practice*, Directive 1.3., *supra,* n.16.

[28] Directive 1.1.5, *supra,* no.16.

[29] Directive 1.1.6., *supra,* n.16.

[30] L.A. Podestá Costa and José María Ruda, op. cit.,, p.47.

[31] D.W. Bowett, *Reservations to Non Restricted Multilateral Treaties*, 48 Brit. Y.B. Int'l L. 68 (1976-1977) ("Thus, the test is not the nomenclature but the effect the statement purports to have. The test is whether the statement seeks to exclude or modify the legal effect of the provisions of the treaty").

[32] See, for example, the statement submitted by France on 16 April 2009 with relation to the

As the ILC has observed on this matter:

> The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.[33]

IV. OBJECTIONS TO RESERVATIONS

a) Definition of objection

The ILC has defined objections as "a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization proposes to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization".[34]

b) Objections by Mexico to reservations to human rights treaties

Mexico has objected with some frequency to reservations presented by other states with relation to treaties on the protection of human rights. For example, Mexico made an objection to the reservation made by the United States of America when expressing its consent to be bound by the Convention on the Prevention and Punishment of the Crime of Genocide.[35] That reservation required the prior consent of the United States of America to submit to the International Court of Justice controversies between the states parties relating to the interpretation, application or execution of the Convention, including those relating to the responsibility of a state regarding genocide or regarding any of the other acts listed in article III of that

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reservation made by Pakistan to the International Covenant on Economic, Social and Cultural Rights, in which it concluded that this reservation in reality constitutes a declaration ("Although this declaration has been referred to as a "reservation", it simply reformulates the content of article 2, paragraph 1, of the Covenant. Furthermore, it cannot have the effect of modifying the other provisions of the Covenant without constituting a reservation of general scope that is incompatible with the object and purpose of the Covenant. The Government of the French Republic therefore considers the "reservation" by Pakistan to be a mere declaration that is devoid of legal effect"). For its part, Amnesty International has agreed with the principle stated by France, but the organization is not convinced that the Pakistan statement is a mere declaration.

[33] Directive 1.3.2., *supra*, n.16.

[34] Directive 2.6.1., *supra*, n.16.

[35] Adopted and opened for signature and ratification, or accession, by the General Assembly in resolution 260 A (III), 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII. 141 States are currently parties to this instrument.

conventional instrument. Mexico maintained on that occasion that:

> The Government of Mexico believes that the reservation made by the United States Government to article IX of the aforesaid Convention should be considered invalid because it is not in keeping with the object and purpose of the Convention, nor with the principle governing the interpretation of treaties whereby no State can invoke provisions of its domestic law as a reason for not complying with a treaty.
>
> If the aforementioned reservation were applied, it would give rise to a situation of uncertainty as to the scope of the obligations which the United States Government would assume with respect to the Convention.
>
> Mexico's objection to the reservation in question should not be interpreted as preventing the entry into force of the 1948 Convention between the [Mexican] Government and the United States Government.[36]

In addition, with relation to the International Convention on the Elimination of All Forms of Racial Discrimination,[37] Mexico objected to the reservation made by Yemen, which sought to limit the enjoyment of the right to marriage and choice of spouse, the right to inherit and the right to freedom of thought, conscience and religion, among other rights. On this occasion, Mexico declared:

> The Government of the United Mexican States has concluded that, in view of article 20 of the Convention, the reservation must be deemed invalid, as it is incompatible with the object and purpose of the Convention.
>
> Said reservation, if implemented would result in discrimination to the detriment of a certain sector of the population and, at the same time, would violate the rights established in articles 2, 16 and 18 of the Universal Declaration of Human Rights of 1948.
>
> The objection of the United Mexican States to the reservation in question should not be interpreted as an impediment to the entry into force of the Convention of 1966 between the United States of Mexico and the Government of Yemen.[38]

[36] Objection formulated on 4 June 1990. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=318&chapter=4&lang=en.

[37] Adopted and opened for signature and ratification by the General Assembly in resolution 2106 A (XX), 21 December 1965. Entry into force: 4 January 1969, 173 states are parties to this treaty.

[38] Objection formulated on 11 August 1989 with regard to reservation made by Yemen concerning article 5 (c) and article 5 (d) (iv), (vi) and (vii). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en.

Mexico also objected to the reservation presented by Bahrain to the International Covenant on Civil and Political Rights (ICCPR)[39] with regard to the primacy of *Shari'a* law, in the following terms:

> In that regard, the Permanent Mission of Mexico would like to state that the Government of Mexico has studied the content of Bahrain's reservation and is of the view that it should be considered invalid because it is incompatible with the object and purpose of the Covenant.
>
> The reserve formulated, if applied, would have the unavoidable result of making implementation of the articles mentioned subject to the provisions of Islamic Shariah, which would constitute discrimination in the enjoyment and exercise of the rights enshrined in the Covenant; this is contrary to all the articles of this international instrument. The principles of the equality of men and women and non-discrimination are enshrined in the preamble and article 2, paragraph 1 of the Covenant and in the preamble and Article 1, paragraph 3 of the Charter of the United Nations.
>
> The objection of the Government of Mexico to the reservation in question should not be interpreted as an impediment to the entry into force of the Covenant between Mexico and the Kingdom of Bahrain.[40]

Furthermore, with relation to the Convention on the Elimination of All Forms of Discrimination against Women,[41] Mexico objected to the reservation presented by Mauritius, in the following terms:

> The Government of the United Mexican States has studied the content of the reservations made by Mauritius to article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g), of the Convention and has concluded that they should be considered invalid in the light of article 28, paragraph 2, of the Convention, because they are incompatible with its object and purpose.
>
> Indeed, these reservations, if implemented, would inevitably result in discrimination against women on the basis of sex, which is contrary to all the articles of the Convention. The principles of equal rights of men and women and non-discrimination on the basis of sex, which are

[39] Adopted and opened for signature, ratification and accession by the General Assembly in resolution 2200 A (XXI), 16 December 1966. Entry into force: 23 March 1976. As of 26 June 2009, 164 states were parties to this treaty.

[40] Objection presented on 13 December 2007. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[41] Adopted and opened for signature and ratification, or accession, by the General Assembly in resolution 34/180, 18 December 1979. Entry into force: 3 September 1981. As of 26 June 2009, 185 states were parties.

> embodied in the second preambular paragraph and Article 1, paragraph 3, of the Charter of the United Nations, to which Mauritius is a signatory, and in articles 2 and 16 of the Universal Declaration of Human Rights of 1948, were previously accepted by the Government of Mauritius when it acceded, on 12 December 1973, to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The above principles were stated in article 2, paragraph 1, and article 3 of the former Covenant and in article 2, paragraph 2, and article 3 of the latter. Consequently, it is inconsistent with these contractual obligations previously assumed by Mauritius for its Government now to claim that it has reservations, on the same subject, about the 1979 Convention.
>
> The objection of the Government of the United Mexican States to the reservations in question should not be interpreted as an impediment to the entry into force of the 1979 Convention between the United Mexican States and Mauritius.[42]

This objection was also in essence repeated with relation to the reservations presented by Bangladesh, Jamaica, New Zealand (later withdrawn), the Republic of Korea, Cyprus, Turkey, Egypt, Thailand, Iraq and Libya.

As can be seen, it has been Mexico's repeated position, that whenever a reservation defeats the object and purpose of a treaty, it follows as a consequence that this reservation is invalid. Mexico has also indicated that a reservation made to one conventional instrument can affect the enjoyment of rights enshrined in other conventional or non-binding instruments. As can be observed in Mexico's own objections, the invalidity of a reservation made to a treaty on the protection of human rights does not constitute an obstacle to the entry into force of the treaty among the parties.

In conclusion, according to Mexico, as has been shown in practice, reservations to treaties on human rights protection, when they are invalid, may not benefit the state which has presented them. However, according to Mexico, this does not prevent the treaty's entry into force among the states parties.

V. RESERVATIONS TO TREATIES ON THE PROTECTION OF HUMAN RIGHTS

[42] Objection presented on 11 January 1985. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

a) On the compatibility of reservations with the aim and purpose of human rights treaties

In this regard the ILC has formulated a directive which adds some specific elements to the general rule established in Article 19 of the Vienna Convention on the Law of Treaties. The directive states the following:

> To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.[43]

For its part, this Court has already had the opportunity to express its position in this regard. In its Advisory Opinion, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, it has also clarified the general scope of the Vienna Convention with relation to human rights instruments, indicating that:

> The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[44]

For its part, the International Court of Justice in the above mentioned *Advisory Opinion on the Reservations to the Convention for the Prevention of the Crime of Genocide*, in relation to the specific character of the obligations deriving from instruments such as the Convention, maintained that:

> In such a convention the contracting States do not have interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of

[43] Directive 3.1.12., *supra* no.16.

[44] Inter-American Court of Human Rights, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*. Advisory Opinion OC-2/82, 24 September 1982. Series A No.2, para.29.

> individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[45]

The Human Rights Committee, has for its part explained that:

> [t]he provisions [of the Vienna Convention on the Law of Treaties] on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the [International] Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights.[46]

The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, called on states:

> to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.[47]

Professor Rosalyn Higgins, then member of the Human Rights Committee, stated in the same vein:

> A second and possibly more important, issue was the enormous, looming, general problem of reservations to the Covenant. Many recent ratifications had been accompanied by substantial reservations virtually restricting the scope of the Covenant to the country's domestic legislation. The classic position that reservations to treaties were a matter of State sovereignty did not work for human rights treaties, in which States mutually agree to give certain rights to individuals. The reality was that, for the most part, States did not recognize their mutuality of interests in the field of human rights and failed to monitor reservations. The Committee should surely not take the conservative view that a State party could make whatever reservations it chose and that the Committee should do nothing. If the Committee did not take up the general question of reservations to the Covenant, no one else would do so.[48]

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[45] International Court of Justice, Reservations to the Convention, p.23.

[46] General comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. HRI/GEN/1/Rev.7 (1994), para.17. See also Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 Am. J. Int'l L. 531, p.533 (2002).

[47] A/CONF.157/23, 12 July 1993, Chapter II, para.5; see also Chapter II, para.26.

b) The irrelevance of the lack of objections to reservations to human rights treaties

As explained above, the mechanism for making objections of the Vienna Convention on the Law of Treaties is not appropriate in the case of human rights treaties for the following reason:

> [b]ecause the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party none the less does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se.[49]

The Committee added:

> It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions.[50]

Similarly, the European Court ruled in the case of *Belilos* that the lack of objections to a reservation to a human rights treaty by other states does not take away the Court's power to reach its own conclusions. The Court expressed that:

> As to the States Parties, they did not deem it necessary to ask Switzerland for explanations regarding the declaration in question and had therefore considered it acceptable as a reservation under Article 64 (art. 64) or under general international law. The Swiss

[48] Human Rights Committee, 45th session, summary of session 1167, CCPR/C/SR.1167, 21 December 1992, para.67_

[49] General Comment No.24, op. cit., para.17. See also Ian Brownlie, *Principles of Public International Law* 612 (Oxford: Oxford University Press 5th ed., 1998) and Antonio Cassese, *International Law*, 2nd ed., Oxford, 2005, p.175.

[50] General Comment No.24, para.18.

> Government inferred that it could in good faith take the declaration as having been tacitly accepted for the purposes of Article 64 (art.64). The Court does not agree with that analysis. The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.[51]

Several scholars have also made the same point that the legal effects of a reservation are not dependent on the response of the other states.[52]

In this case specifically, the fact that the states parties or signatories to the American Convention or the Forced Disappearance Convention have not presented objections to the reservations or *interpretative declarations* which exclude or modify the legal effects of certain provisions of these treaties must in no way be seen as proof that those reservations or *interpretative declarations* are compatible with the aim and purpose of those instruments or that the other states consent to the changes of the State formulating the reservation. Much less does this lack of objections preclude the Court from asserting the illegality of such reservations or interpretative declarations, as well as their incompatibility with the aim and purpose of the treaties in question.

In conclusion, the lack of objections to a reservation or interpretative declaration (when it constitutes a disguised reservation) made to a human rights treaty must not be interpreted as consent to the intended restriction or alteration to the scope of conventional obligations. The Inter-American Court, as the organ charged with ensuring compliance with treaty obligations of the American Convention and the Forced Disappearances Convention, should make a statement to this effect.[53]

VI. Interpretative declarations and reservation made by Mexico

a) On the non-retroactivity of treaties

Article 28 of the Vienna Convention on the Law of Treaties states that:

> Non-retroactivity of treaties. Unless a different intention appears

[51] *Belilos v. Switzerland* (Application no. 10328/83), European Court of Human Rights, Judgment, 29 April 1988, para.47.

[52] See, for example, D.W. Bowett, *supra*, no. 31, 48 Brit. Y.B. Int'l L. 80 ("It is, however, clear that the effect of an impermissible reservation should not depend upon the reactions of the other Parties to the reservation in the same way as with a permissible reservation").

[53] See *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845, U.N. Doc. CCPR/C/67/D/845/1999,Jurisprudence, 23 March 1995 y (31 December 1999), para.6.4. Also the cases of *Belilos v. Switzerland*, *(Application no. 10328/83), Judgment,* 29 April 1988 and *Loizidou v. Turkey* (Preliminary Objections) *(Application no. 15318), Judgment,* 23 March 1995.

> from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Statutory Limitations Convention) states in its first article, with relation to such categories of crimes including genocide, that:

> No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (…)

The Statutory Limitations Convention cited is one of the few examples of a conventional instrument with *ex professo* (express) retrospective effect and it was in this spirit that it was adopted.[54] This explains to a large extent the limited number of states parties to it – currently 53.

Mexico has been a state party to the Statutory Limitations Convention since 2002. When Mexico deposited its instrument of ratification, it added an *interpretative declaration*, which reads:

> In accordance with article 14 of the Constitution of the United Mexican States, the Government of Mexico, when ratifying the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the General Assembly of the United Nations on 26 November 1968, will do so on the understanding that it will consider statutory limitations non-applicable only to crimes dealt with in the Convention which are committed after the entry into effect of the Convention with respect to Mexico.

This *interpretative declaration* in reality constitutes a disguised reservation, since its purpose – as may clearly be seen – is to exclude or modify the retrospective legal effect of that specific provision in the treaty.[55]

[54] Robert H. Miller, "The Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity", Am. J. Intl. L., 1971, Vol.65, p.470. Antonio Cassese and Mireille Delmas-Marty, *Crimes Internationaux et Juridiction Internationales*, Presses Universitaires de France, p.237. *Oppenheim's International Law*, 9th ed., Volume I, Parts 2-4, Jennings and Watts, ed., 1997, p.997 ("The Convention defines war crimes and crimes against humanity primarily by reference to the Charter of the International Military Tribunal, but irrespective of the date of their commission"). Institut du Droit International, Christian Tomuschat, Rapporteur, Universal Jurisdiction with respect to the crime of Genocide, Crimes against Humanity and War Crimes, para.66 ("One of the main grounds for the widespread opposition against the instrument was its retroactive character".). Matthew Lippman, Crimes against Humanity, 17 B. C. Third World L. J., p.236.

[55] Similarly, see the dissenting vote of Judge Silva Meza in appeal case no. 1/2004-ps. arising from *facultad de atracción* 8/2004-PS, in which he stated: "That the Interpretative Declaration made by the Government of Mexico to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which is a human rights treaty, is not valid as its scope is so broad as to contradict the object and purpose of the Convention, as is that of the non-applicability of statutory

In the *Jueves de Corpus* case, the Mexican Supreme Court of Justice, in a split decision, recognized that although the *interpretative declaration* made by Mexico on the temporal scope of the Convention could constitute a reservation which in turn could be contrary to the object and purpose of that treaty, the contents of the declaration were found to be in keeping with Article 14 of the Mexican Constitution, in which the non-retroactivity of criminal law provisions is enshrined as a basic principle.[56] The Supreme Court – after analyzing the provisions of the Vienna Convention on the Law of Treaties – concluded, surprisingly, that under Mexican law the Mexican Constitution held primacy over the obligations of international law taken on by Mexico.

The example of Mexico was followed shortly after by Peru. When Peru acceded to the Statutory Limitations Convention in 2003, it made a similar *interpretative declaration*, expressing that the non-applicability of statutory limitations to war crimes and crimes against humanity was understood to apply to crimes committed after the treaty came into force in Peru.[57]

However, in contrast with Mexico, this interpretative declaration was rejected outright by Peru's National Criminal Chamber (*Sala Penal Nacional*) which, in the *Cayara* case, declared the reliance on the statute of limitations by the accused to be unfounded, on the ground that it contravened the provisions of the Vienna Convention on the Law of Treaties and stated unequivocally:

> No reservation or interpretation which contravenes its application may be made as article 27 of the Vienna Convention on the Law of Treaties states that: "a party may not invoke the provisions of its internal law as justification for its failure to comply with a treaty". In accordance with the *pacta sunt servanda* principle contained in article 26 of the aforementioned Covenant, every treaty in force is binding upon the parties to it and must be performed by them in good faith (translation by Amnesty International).[58]

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limitations to the crime of genocide for which legal action has been taken against the current accused." (translation by Amnesty International).

[56] The Supreme Court said: "Nevertheless, if it is true that in the case in point we find ourselves to be faced with a reservation, it is also true that this reservation will have a bearing on what has already been established by article 14 of the Political Constitution of the United Mexican States. Therefore it is clear that in this case the reservation could not be declared invalid or prevented from being applied in the case in point for going against the "object and purpose of the treaty", as we would indirectly be failing to apply article 14 of the Federal Constitution" (Ruling of 15 June 2005 in Appeal no. 1/2004-ps. arising from *facultad de atracción* 8/2004-PS.) (translation by Amnesty International).

[57] This interpretative declaration states: "In conformity with article 103 of its Political Constitution, the Peruvian State accedes to the 'Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity', adopted by the General Assembly of the United Nations on 26 November 1968, with respect to crimes covered by the Convention that are committed after its entry into force for Peru." See:
www.rree.gob.pe/portal/pexterior.nsf/vwSeguridad/BE6638D57AF499C705256E4C005F842A

[58] *Sala Penal Nacional, Inc.46-05 "U" (caso "Cayara"), Lima, 6 de Junio de 2006, considerando séptimo.*

b) On the jurisdiction of the Inter American Court over the claim in relation to the date of deposit of Mexico's instrument of accession to the American Convention.

In Mexico's response to the claim submitted in this case by the Inter-American Human Rights Commission it is alleged – as a preliminary objection – that the Inter-American Court of Human Rights is unable to render, *ratione temporis*, a decision on the merits of the claim based on the date of deposit of Mexico's instrument of accession to the American Convention on Human Rights. Mexico deposited the instrument of accession to the Convention on 24 March 1981 and the enforced disappearance of Rosendo Radilla Pacheco took place on 25 August 1974.

Mexico states – and reiterates on more than one occasion – that at the time of the enforced disappearance of Rosendo Radilla Pacheco "there was no instrument under which international responsibility could be attributed to it for said acts" and that "international legal obligations begin when a State joins an international instrument."[59]

At the time the enforced disappearance of Rosendo Radilla Pacheco was committed there was no binding conventional instrument in existence which expressly defined such conduct as a crime under international law. However, Mexico's obligations under international law to guarantee the right to life (and a range of other rights which enforced disappearances violate) have a basis in customary rather than conventional law. Similarly, for example, the obligation to suppress acts which constitute the most serious crimes under international law generally has its origins in customary international law, which has subsequently been recognised in conventional instruments.[60]

In support of its contention that the temporal jurisdiction of this Court is restricted

[59] See, contrary to this, Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, with commentaries, adopted by the International Law Commission in 1950 (Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law"). Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

[60] See in this respect, regarding the crime of genocide, the previously cited Advisory Opinion of the International Court of Justice in the case, *Reservations to the Convention…*, in which it stated that "The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (p.23). See also Trial Chamber, ICTY, Case No. IT-98-33-T, *Prosecutor v. Radislav Krstic*, Judgement, 2 August 2001, para.541 ("The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "the Convention"), adopted on 9 December 1948, whose provisions Article 4 adopts *verbatim*, constitutes the main reference source in this respect. Although the Convention was adopted during the same period that the term "genocide" itself was coined, the Convention has been viewed as codifying a norm of international law long recognized and which case-law would soon elevate to the level of a peremptory norm of general international law (*jus cogens*)").

to enforced disappearances that commenced after its ratification, Mexico quotes a section of the judgment from the *Almonacid Arellano v. Chile* case, where this Court stated:

> "[t]he Court is not competent to declare that an alleged violation of Article 2 of the Convention was committed at the moment such decree-law was enacted (1978), nor as regards the effectiveness and enforcement thereof up to August 21, 1990, for until such date the State did not have the duty to adapt its domestic legislation to the standards of the American Convention"

and Mexico infers from this certain legal consequences, including the Court's lack of temporal jurisdiction. However, the quotation of the paragraph omits its final sentence, which states: "Notwithstanding, since that date the Chilean State has had the duty to do so and the Court is competent to declare whether it has complied with it or not".[61]

It should be noted in this regard that the preliminary contention made by Chile in the *Almonacid Arellano* case is similar to that which Mexico raises in this case today. However, it differs from this case in that in its terms of ratification Chile made the following statement – in contrast with that of Mexico – regarding the Court's jurisdiction: "upon making the aforementioned declarations, the Chilean State declares that its recognition of the jurisdiction of the Court refers to the events subsequent to the date on which such instrument of ratification was deposited, or in any case, to events which took place after March 11, 1990".[62]

Therefore, the Inter-American Court has temporal jurisdiction to declare the violation of articles contained in the American Convention by events or acts of a continuous nature – such as the enforced disappearance of persons – committed previous to its entry into force in Mexico, as long as they bring about legal consequences which continue to a time beyond this entry into force. At any rate, the obligation to investigate and, if necessary, sanction those responsible for the crime, is absolute for Mexico, independently from the Court's temporal jurisdiction.

c) On the jurisdiction of the Inter-American Court ratione temporis *to apply the Inter-American Convention on Forced Disappearance of Persons*

Mexico also asserted the lack of temporal jurisdiction of this Court based on the date of the deposit of the instrument of ratification of the Forced Disappearance Convention (para. IV.2 of the plea). Indeed, at the time of the deposit of the instrument of ratification of the Convention – 9 April 2002 – Mexico made the

[61] Inter-American Court of Human Rights, *Almonacid-Arellano et al v. Chile* case, Judgment, September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs), para.50.

[62] Mexico asserted: "The acceptance of the contentious competence of the Inter-American Court of Human Rights will only be applicable to acts or legal actions taking place after the date of deposit of this declaration, therefore it will not have retroactive effect." (translation by Amnesty International).

following *interpretative declaration*:

> "Based on Article 14 of the Political Constitution of the United Mexican States, the Government of Mexico declares, upon ratifying the Inter-American Convention on the Forced Disappearance of Persons adopted in Belem, Brazil on June 9, 1994, that it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention."

This *interpretative declaration*, despite its title, in reality constitutes a disguised reservation and must be governed by the rules which are applicable to these. The *interpretative declaration* made by Mexico does not constitute a unilateral expression of will which seeks to interpret the sense of a conventional clause, clarifying its meaning. On the contrary, it is an expression of will which seeks to modify or alter the legal effects of the treaty in its application to Mexico, with reference to its temporal scope. Otherwise, without the reservation, it would extend to events which – though committed previous to the Treaty's entry into force for Mexico – would bring about legal effects or consequences subsequent to this entry into force. For this reason, it is not an interpretative declaration, as Mexico has labelled it, but rather a disguised reservation.

The Convention, for its part, contains a specific rule on reservations to its text. Article XIX states that:

> The states may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions.

It follows that the Convention does not prohibit reservations to its text but imposes two conditions which must be satisfied jointly in order for these to be valid: that they are not incompatible with the object and purpose of the Convention and that they concern one or more specific provisions.

First, it must be noted that the reservation made by Mexico is not made with relation to any specific provision in the Treaty, but rather to all of them. The reservation declares that: "it shall be understood that *the provisions of said Convention* shall apply to acts constituting the forced disappearance of persons...". The reservation refers to "*the provisions*" in general, which is prohibited by Article XIX, which states unequivocally that reservations must "refer to one or more specific provisions". This fact alone renders Mexico's expression of will a prohibited reservation.

Second, with regard to the substantive content of the reservation, the Government of Mexico says in its response that "Mexico's temporal limitation to the Inter-American Convention on Forced Disappearance of Persons is admissible, since it is not general, as the Court is able to rule on forced disappearances carried out after 9

April 2002". This assertion, in the opinion of Amnesty International, is incorrect. Although there is no doubt that the Court has temporal jurisdiction to pronounce on forced disappearances committed after the Treaty's entry into force in Mexico, it is also true that the Court has the authority to pronounce on an act of forced disappearance of persons committed before the entry into force of the instrument, as we are dealing with a crime that is permanent and continuous in nature. These are the acts which the Mexican Government intends to exclude from the Court's competence thanks to the *interpretative declaration* which has been added to the instrument of ratification.

By way of this declaration Mexico seeks not only to exclude the retroactive application of the rules contained in the Treaty, but also to limit – improperly – in a general way, the temporal scope from now on of the Convention on certain legal effects which occur in the case of the forced disappearance of persons subsequent to its entry into force.

Note in this regard that the Mexican Supreme Court of Justice, when interpreting the scope of the Inter American Convention, explicitly recognized its applicability with regard to the effects of a forced disappearance, which continue to take place after this instrument entered into force. This Court stated that:

> [i]n the aforementioned interpretative declaration, which indicates that the provisions of that international instrument will apply to acts which constitute the crime of forced disappearance of persons, the Government of Mexico meant it to be understood that these provisions may not apply to acts constituting that crime which had been completed before the new norm became binding, but it should not be interpreted in the sense of not applying to acts constituting that crime which, having started before its entry into force, continue to take place during such time, since, the crime of disappearance of persons being of a permanent or continuous nature, it can happen that conduct constituting the perpetration of the crime continues taking place while the Convention is in force.[63]

In conclusion, Amnesty International is of the view that the *interpretative declaration* made by Mexico at the time of depositing the instrument of ratification for the Inter-American Convention on Forced Disappearance of Persons essentially constitutes a disguised reservation. Such a reservation is invalid since, as has been explained, it does not refer to one or several specific reservations – a requirement set out in Article XIX of the Convention – but rather to each and every provision in the Treaty, as stated in its very text. In addition, the reservation made by Mexico, in intending to restrict the temporal jurisdiction of the Court to such acts of forced disappearance of persons as have been ordered, carried out or committed after the Convention's entry into force, substantially affects the object and purpose of the Convention, and is invalid since it excludes from the Court's jurisdiction acts which

[63] *No. Registro: 181,148, Jurisprudencia, Materia(s): Constitucional, Novena Época, Instancia: Pleno. Fuente: Semanario Judicial de la Federación y su Gaceta, Tomo: XX, Julio de 2004, Tesis: P./J. 49/2004, Página 967* (Translation by Amnesty International).

should otherwise be placed under the authority of the Court.

Mexico should not be able to benefit from such a reservation and the Inter-American Court should make this point in its judgment on the case, confirming the invalidity of the reservation.

d) The reservation to article IX of the Inter American Convention on Forced Disappearance of Persons

i) The jurisdiction of military courts in Mexico from the viewpoint of some international bodies.

The jurisdiction of military courts in Mexico has been a source of concern for Amnesty International for many years, as it considers this to be excessively broad and in clear violation of due process.[64] This concern has been shared by several international bodies for the protection of human rights, as discussed below, long before Mexico made the reservation.

In 1998 the UN Special Rapporteur on torture, Sir Nigel Rodley, had already observed that military personnel were protected by military courts[65] and recommended that serious crimes committed by military personnel be placed under the jurisdiction of civil courts.[66]

In 1999 the UN Special Rapporteur on extrajudicial executions recommended that Mexico "end the impunity enjoyed by certain privileged categories and classes of people" and "[i]nitiate reforms aimed at ensuring that all persons accused of human rights violations, regardless of their profession, are tried in ordinary courts".[67]

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[64] Mexico: Laws without justice: Human rights violations and impunity in the public security and criminal justice system (AMR 41/002/2007), Mexico: Indigenous women and military injustice (AMR 41/033/2004), Unfair trials: unsafe convictions (AI index: AMR 41/007/2003); "Disappearances": an ongoing crime (AMR 41/020/2002); Torture cases - calling out for justice (AI index: AMR 41/008/2001); Justice Betrayed – Torture in the judicial system (AMR41/021/2001); "Disappearances": a black hole in the protection of human rights (AMR 41/005/1998); Silencing dissent: The imprisonment of Brigadier General Francisco Gallardo Rodríguez (AMR 41/031/1997); Members of the Mexican Army rape three Tzeltal women (AMR 41/012/1994).

[65] E/CN.4/1998/38/Add.2, 14 January 1998, para.86 ("Military personnel appear to be immune from civilian justice and generally protected by military justice. Neither the CNDH nor the Military Prosecutor General informed the Special Rapporteur of any prosecution of named military personnel for torture").

[66] E/CN.4/1998/38/Add.2, 14 January 1998, para.88(j) ("Cases of serious crimes committed by military personnel against civilians, in particular torture and other cruel, inhuman or degrading treatment or punishment, should, regardless of whether they took place in the course of service, be subject to civilian justice").

[67] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1999/35, E/CN.4/2000/3/Add.3, 25 November 1999, para.107(e) and (f).

In 1999 the Human Rights Committee told Mexico that: "The Committee is deeply concerned by the fact that no institutionalized procedures exist for the investigation of allegations of violations of human rights presumed to have been committed by members of the armed forces and by the security forces, and that as a consequence those allegations are frequently not investigated".[68]

Within the sphere of the Inter-American system, in 2001 the Inter-American Commission asserted in a case concerning Mexico, that: "when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised", and also that it "has a corrosive effect on the rule of law and violates the principles of the American Convention". It also remarked that: "In particular, the IACHR has determined that, as a result of its nature and structure, military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the American Convention".[69]

In January 2002 the Special Rapporteur on the Independence of Lawyers and Judges, Dato 'Param Cumaraswami, having observed that "[m]ilitary tribunals are part of the executive and come under the responsibility of the Minister of Defence", made the following recommendation to Mexico: "Crimes alleged to be committed by the military against civilians should be investigated by civilian authorities to allay suspicions of bias. In any event current legislation should be amended to provide for the civil judiciary to try cases of specific crimes of a serious nature, such as torture and killings, alleged to have been committed by the military against civilians outside the line of duty".[70]

ii) Mexico's reservation to Article IX of the Forced Disappearances Convention

Despite the repeated observations on the jurisdiction of military courts discussed above, at the time of depositing the instrument of ratification for the Forced Disappearance of Persons – 9 April 2002 – Mexico made the following reservation to Article IX of this Convention, as follows:

> "The Government of the United Mexican States, upon ratifying the Inter-American Convention on the Forced Disappearance of Persons adopted in Belem, Brazil on June 9, 1994 makes express reservation to Article IX, inasmuch as the Political Constitution recognizes military jurisdiction when a member of the armed forces commits an illicit act while on duty. Military jurisdiction does not constitute a special jurisdiction in the sense of the Convention given that according to Article 14 of the Mexican Constitution nobody may be deprived of his

[68] Human Rights Committee, CCPR/C/79/Add.109, 27 July 1999.

[69] Report Nº 53/01, Case 11.565, Ana, Beatriz and Celia González Pérez, Mexico, April 4 2001.

[70] Conclusions of the Report of the Special Rapporteur on the independence of judges and lawyers, Dato 'Param Cumaraswamy. E/CN.4/2002/72/Add.1, paras. 78 and 192(d), 24 January 2002.

> life, liberty, property, possessions, or rights except as a result of a trial before previously established courts in which due process is observed in accordance with laws promulgated prior to the fact".

Article IX of the Forced Disappearance Convention states that:

> Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.
>
> The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.[71]

In 2003, after the above reservation had been made, the Committee against Torture made the following recommendation to Mexico: "The application of military law should be restricted only to offences of official misconduct and the necessary legal arrangements should be made to empower the civil courts to try offences against human rights, in particular torture and cruel, inhuman or degrading treatment, committed by military personnel, even when it is claimed that they were service-related".[72]

In 2006 the UN Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, recommended to Mexico that "[a]ll cases of violence against civilians committed by military personnel are investigated by civilian authorities, prosecuted by civilian authorities and adjudicated by independent and impartial civilian courts".[73]

From the above one may reasonably conclude that the legality of the scope of the jurisdiction of military courts in Mexico under international law has been repeatedly questioned in the universal and regional spheres of protection of human rights.

As far as the reservation itself is concerned, it may be noted that Article IX of the Convention establishes a prohibition. It is a substantial prohibition, essential to the Convention, comparable to that which states that the excuse of obedience to orders or instructions from superiors which authorize or encourage the forced disappearance of persons will not be permitted (Article VIII), or to that which states that in no case may exceptional circumstances be invoked such as a state of war or the threat of war, internal political instability or any other public emergency, as justification for the forced disappearance of persons (Article X). Within the general structure of the Convention, Article IX exhibits a principal hierarchy which is closely linked to the way in which states must carry out their obligation to investigate and,

[71] Article IX, para.1 and 2.

[72] Report on Mexico produced by the Committee under article 20 of the Convention, and reply from the Government of Mexico, CAT/C/75, May 25 2003, para.220(g).

[73] E/CN.4/2006/61/Add.4, 13 January 2006, para.69(a)(vi).

where necessary, punish persons responsible for the crime suppressed by the Treaty.

From a formal point of view, the reservation made by Mexico clearly refers to a specific provision, Article IX. Therefore, it satisfies one of the two conditions which Article XIX of the Convention sets in order for reservations to be valid. However, the same cannot be said of the substance or content with regard to its compatibility with the object and purpose of the treaty, which is the remaining condition which the Convention sets for its validity.

As the ILC has explained, a reservation by which a state proposes to exclude or modify the legal effects of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of certain norms of the domestic law of that state, may be made only if it is compatible with the object and purpose of the treaty.[74] As noted above, the Commission has concluded that in order to tell whether a reservation is compatible with the object and purpose of a general treaty for the protection of human rights, one must take into account the indivisible, interdependent and related nature of the laws set out in it, as well as the importance the law or provision which is the object of the reservation may have within the structure of the treaty, and the severity of the impingement caused by the reservation.[75]

The Forced Disappearances Convention states that "the forced disappearance of persons is an affront to the conscience of the hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States". It also states that "the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights". It would be inconsistent with the object and purpose of the Convention, which is designed not only to prevent enforced disappearances but also to punish those responsible, if states could exempt themselves freely, with no more requirement than a simple unilateral expression of will, from the obligation to make those allegedly responsible for the crime suppressed by the treaty appear before independent and impartial courts of justice.

Following the reasoning of the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case, if international law recognises in the prohibition of forced disappearance of persons the hierarchy of peremptory norms of international law or *jus cogens*, even restricting treaty- making power of sovereign states', it would be incongruous with this to tolerate states' being able to consent to the impunity for such acts, whether through amnesty laws, or statute of limitations or permitting investigations and prosecutions before courts which are known to be

[74] Directive 3.1.11, supra no. 16.

[75] Directive 3.1.12, supra no. 16.

doomed to failure from the outset.[76]

In the case with which we are concerned it is not enough that Mexico proclaim unilaterally in its reservation that its military courts have been previously established, conform to laws passed before the events and fulfil the essential procedural formalities. In addition, it must be noted that Mexico's reservation is not only in contradiction with the aim and purpose of the treaty, but it also obstructs *l'effet utile* of its provisions, which are to prevent and, if necessary, to punish acts of forced disappearance of people.

Amnesty International considers that, given the record of military courts in Mexico, it may not reasonably be argued that they – like the military courts of the region in general – observe legal due process according to the terms set out in the American Convention.[77]

This Court has delivered several judgments concluding that military courts for trials of civilians or, as in this case, for trials of military personnel charged with enforced disappearance allegedly committed by military personnel is not in compliance with the obligations under the American Convention. In their arguments the petitioners detail the vicissitudes of the legal process in the case of Rosendo Radilla Pacheco before the military courts and rightly recall the Court's jurisprudence on the matter.

For example, a previous ruling summarizes perfectly the view of the Court on the subject. In a case against Peru – but equally applicable to Mexico – the Court concluded that:

> In a democratic State the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.[78]

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[76] International Criminal Tribunal for the Former Yugoslavia, Court of First Instance, *Prosecutor v. Anto Furundzija, judgement of 10 December 1998*, para.155. Available at: http://www.un.org/icty/furundzija/trialc2/judgement/index.htm ("The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter- state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law").

[77] For a thorough analysis of military jurisdiction see: Federico Andreu-Guzmán, *Military Jurisdiction and International Law*, International Commission of Jurists and Colombian Commission of Jurists, 2003. On military tribunals in Mexico see especially Human Rights Watch, *Uniform Impunity. Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations*, 2009.

[78] Inter-American Court of Human Rights, *Durand and Ugarte v. Peru* case, Judgment, August 16, 2000 (Merits), para.117.

For its part, the ILC stated in its 2008 Directives that:

> A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.[79]

VII. CONCLUSIONS

For all of the reasons outlined above, Amnesty International believes that, in the Court's decision on the matter, it should reach four main conclusions, which are as follows:

- The Inter-American Court of Human Rights has temporal jurisdiction to declare the violation of legal provisions contained in the American Convention by continuous or permanent crimes which, having been committed before it entered into force for Mexico, have legal consequences which extend to a time subsequent to such entry into force. The obligation to suppress the forced disappearance of people is an absolute obligation for Mexico, independently from the jurisdiction of the Court over the case.

- The *interpretative declaration* made by Mexico at the time of ratifying the Inter-American Convention on Forced Disappearance of Persons, relating to its temporal scope, in reality constitutes a disguised reservation which violates Article XIX of that Treaty and negates the object and purpose of the Treaty. It follows that this *interpretative declaration* is invalid and should be declared so by the Court.

- The reservation made by Mexico to Article IX of the Convention defeats the object and purpose of the treaty, since it is not in accordance with its Article XIX – which sets out the conditions for a reservation to be valid – and the Vienna Convention on the Law of Treaties. Therefore, this unilateral expression of will is invalid and should be declared so by the Court.

- Mexico may not benefit from the aforementioned *interpretative declarations* (which constitute disguised reservations) or reservation and is therefore bound to fulfil all its obligations under the two treaties, and the Inter-American Court should so declare in its ruling on the merits of the case.

[79] Directive 3.1.5., *supra,* no.16.